Fraudulent Evidence: ***The Ugly Face of International Law in Practice.***[1]

Allan Mukuki & Beatrice Kioko[2]

Abstract

A purely theoretical understanding of International Law may preclude one from seeing the manner in which its practice is being abused. This paper examines the dark side of international legal practice, viz, when the practitioners have attempted to present the probative value of their claims by relying on false witness testimonies and documents. Further, it argues that the absence of a prescribed code of conduct complete with sanctions on counsels who do not honour it, have a negative impact on the procedural integrity and legitimacy of international courts. It examines the cases in which this has occurred and the consequences arising therefrom. Finally, this paper assesses the various approaches taken by the International Courts in relation to the presentation of fraudulent evidence by practitioners and offers suggestions on how better this could be handled.

***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.* – J Austen**[3]

1. Introduction

Justice Schwebel in his dissenting opinion in the Nicaragua case encapsulated the very essence of justice in law where he stated;

The foundation of judicial decision is the establishment of the truth. 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.[4]

As the aphorism by Lord Herbert of the English High Court elucidates, "**Not only must Justice** be **done**; it must also be **seen to be done**"[5]

Good decision making in international law presupposes accurate information during legal

---

[1] Most of the case laws have been borrowed from W. Michael Reisman, Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law,* Cambridge University Press, Cambridge, 2014. However, all the analysis herein and conclusions therein are entirely the author's. Credit is given to Abdullahi Ali and Ryan Mwaniki for their insight and editing assistance throughout the writing of this paper.

[2] Allan Mukuki is a PhD Candidate at Leiden University, he is the holder of an LLM in Public International Law from the University of Groningen, LL.B (Hons) from the University of Nairobi, School of Law as well as an Associate of the Chartered Institute of Arbitrators (ACIArb). He is also a holder of a post-graduate diploma in law from the Kenya School of Law. Presently, he is an Advocate of the High Court of Kenya as well as a lecturer of international law and the Director of International Partnerships in Strathmore Law School; Beatrice Kioko holds an LLM in Transnational Dispute Resolution from the University of Manchester, LL.B (Hons) from Africa Nazarene University, School of Law and a Post Graduate Diploma (PG.Dip) in Law from the Kenya School of Law. Presently, she is the Legal Advisor on transition and change at the Square Kilometre Array Organisation.

[3] J. Austen, Emma, *reissue edn*. (New York, NY: Bantam Classics, 1984), p. 374.

[4] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986, Diss. Op. Schwebel, p. 277 [27]. (hereinafter *Nicaragua* Case).

[5] *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233) [22] Lord Herbert, CJ for the High Court

processes more so in a legal dispute, be it in litigation or documentary submission.[6] Indeed, legal practitioners are the custodians of justice and as officers of the court they are meant to uphold a very high threshold of integrity in their work.[7]

In as much as the rules and practice provide and advocate for a seamless and truthful judicial system, the reality is that , this does not always happen.. With litigation being a competition of high stakes, there are practitioners who are undeterred in their quest for personal success judicially such that they would employ any means necessary to achieve that feat. This is notwithstanding the possibility, for instance, of an accused being found guilty of the very crime that he/she did not commit. But because the systems of justice in International Law do not have the appropriate mechanisms to prevent such, the fraud, lies or misrepresentation of facts, carries the day in some instances.[8] This paper highlights such instances in international law justice systems where fraudulent misrepresentation has been a cause for concern.

Further, in a bid to understand the determinatives within which cases may turn on and in borrowing from Reisman's and Skinner's analyses of fraudulent evidence before public international tribunals, this paper uses the evaluative versus existential natures of evidence in a bid to understand the undertone of the forms of evidences produced in courts of States. As regards evaluative evidence, this paper explores its link to the credibility and the legal (probative) value of evidence presented in court. On the other hand, existential evidence alludes to the aspect of asking the questions 'does it exist? Did it exist?' did it ever happen?' These determinatives of the nature of analysis of the evidence are closely intertwined and, in most cases, both forms of determinatives would be present and ideally, considered before a judicial decision is entered.[9]

Article 53 of the Statute of the ICJ provides that:

1. Whenever one of the parties does not appear before the Court, or fails ***to defend its case****, the other party may call upon the Court to decide in favour of its claim. (emphasis added)*
*2. The Court must, before doing so****, satisfy itself****, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.*[10]*(emphasis added)*

The emphasis on this provision is wired towards the Court reaching a decision that is not only equitable but just and truthful. It is through this that the court 'satisfies itself' of the truthfulness or lack of it of both parties before it.[11] Presentation of fraudulent evidence to the court denies the court the opportunity to exercise their mandate as provided for under Article 53 of the Statute of the International Court of Justice.

---

[6] W. Michael Reisman, Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law,* Cambridge University Press, Cambridge, 2014, p. 1-14.
[7] IBA International Principles on Conduct for the Legal Profession, Adopted on 28th May, 2011, by the International Bar Association, Chapter 2, pg. 16-17.
[8] W. Michael Reisman, Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law,* Cambridge University Press, Cambridge, 2014, p. 1-14.
[9] W. Michael Reisman, Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law,* Cambridge University Press, Cambridge, 2014, p. 1-14.
[10] United Nations, *Statute of the International Court of Justice*, 18 April 1946.
[11] W. Michael Reisman, Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law,* Cambridge University Press, Cambridge, 2014, p. 1-14.

Lastly, this paper explores the ability of international courts to prevent and/or punish fraudulent conduct before them. The difficulty in this is hinged on the fact that international legal systems lack the legal framework to mete out punitive measures, which would be administered by an international body for legal practitioners against those that engage in fraudulent conduct in legal proceedings. This is in stark contrast to national courts which are guided by national bodies for practitioners that establish the code of conduct for legal practitioners and punitive measures for those 'stepping out of the set line'.[12] This is done through tribunals or disciplinary committees creating firm controls of what legal practitioners can and cannot do, a control measure that international courts lack and instead are guided by the principle of *pact sunt savanda* which is not enough in and of itself.[13]

2. *Evaluative* versus *Existential* Evidence: Case Studies where Fraud has been uncovered

Rules of evidence date back to the Middle Ages; however, their development really begun with the decisions of the Common Law judges in the 17th and 18th Centuries.[14] Curiously, the Common Law developed rules of evidence whose purpose is not to enable a party to bring before the Court evidence which might help his case, but to **prohibit** a party from bringing some kinds of evidence if his opponent objects, or even if the Court itself refuses to permit it. The reality of legal practice demands familiarity with the rules behind this ***exclusionary character of the law of evidence***. That is, rules declaring what is not judicial evidence. *'[T]he presumption… is, that no man would declare anything against himself, unless it were true, but that every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself.'*[15]

---

[12] For instance in Kenya where the author is an Advocate, the codes of conduct are stipulated in the Law Society of Kenya Code of Ethics an Conduct for Advocates, January 2016, available at http://www.lsk.or.ke/Downloads/Code_of_Ethics_and_Conduct_for_Advocates.pdf , the Advocates Act, CAP 16, available at http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2016 and the Law Society of Kenya Act, CAP 18, available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LawSocietyofKenyaActCap18.pdf. This shows the firm control over what legal practitioners in Kenya can do and cannot do.

[13] In Kenya for instance if a legal practitioner engages in fraudulent activities in Court, complaints about such an Advocate's conduct are lodged with the disciplinary committee. The complaint is made by affidavit by the complainant setting out the allegations of professional misconduct. If an advocate Is found to be guilty of the offence he/she may be punished in the following ways (Section 60 (4) of the Advocates Act, CAP 16 of the Laws of Kenya):

1. Advocate may be admonished.
2. Advocate may be suspended from practice for a specified period not exceeding 5 years.
3. Name of the advocate may be struck off the Roll of Advocates
4. May pay a fine not exceeding one million shillings (USD 10,000) or a combination of the above orders as the committee deems fit.
5. That such an advocates pays to the aggrieved person compensation or reimbursement not exceeding Five million shillings. (USD 50,000)

As for international law, the principle of *pacta sunt savanda* found in Article 2 (2) of the United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI as well as in Article 26 of the United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, is the ultimate reliance implored by States to uphold their end of the bargain. Hence, in the author's opinion, no punitive measures exist for failure to uphold ethics in international disputes and not engage in production of fraudulent evidence.

[14] Langbein, John H., "The Historical Foundations of the Law of Evidence: A View from the Ryder Sources" (1996). Faculty Scholarship Series

[15] *R v. Hardy* (1794), p.2. Cross and Tapper on Evidence (12th Ed).

Key Factors that have contributed to the largely **exclusionary** character of the law of evidence such as:

a) The Jury ;
b) The oath;
c) The Common Law's adversarial system of procedure (which includes cost especially as regards rules of disclosure); and
d) Fear that **evidence will be manufactured by persons under trial or in a dispute [A natural instinct in self-preservation]**. (emphasis added)

In this regard, evidence law in the common law system has adopted a more exclusionary approach than an inclusionary one.[16] This is more so on the aspect of the nature of **evidence that should not be produced** in court more than what **should be produced** (emphasis added). There exist many rules of evidence but that is not the focus of this paper hence the same will not be canvassed herein. Instead, in using the logic of Achinstein, this paper analyses the evaluative versus existential determinants of evidence through the exclusionary rule of the common law system to analyse the cases which are mediums through which the ugliness has shown its face.

2.1.Evaluative Evidence

This form of evidence relates to the question of credibility of evidence vis-à-vis the value and impact the evidence has once adduced. In this form of evidence, the contention is not the existence of the evidence itself, it is instead on its legal viability. For instance, two disputing parties A and B agree that an accident happened, this is termed as a conceded fact. However, they disagree as to the valueof damage caused as a result of the accident. Party A says it is 5,000 Euros while party B says the damage costs 2,000 Euros. In this regard, the court will have to analyse the two sides and come up with a determinant verdict as to the correct legal value of the damages caused by the accident. If the court finds that party B is correct and that the damage is of 2,000 Euros, this does not in and of itself mean that there was fraud on party A's assertion, it is more so hinged on the proven value of damage done before the court. Hence in legal disputes before, the court must analyse both sets of evidence and come up with a determinative verdict based on their persuasion. The value of correct information presented by counsel can therefore not be overstated as it is the difference between justice being served and justice being denied in these cases. If both or either parties, through their Counsel, who are officers of the Court present information that is fraudulent, then regardless of the best efforts employed by the learned judges to issue a meaningful decision, the battle is already lost as the premise is false at best and fraudulent at worst.

2.2.Existential Evidence

This form of evidence relates to the existence of an alleged fact in court. The question that the court has to grapple with, and the parties have to answer is 'did it exist? Did it happen?' In this form of evidence, both parties are pitted against each other. For instance, in using the example earlier alluded to, say party A alleges that an accident happened, and party B denies that the accident happened. Both parties then present evidence to support their assertion before the court, then the court is left to decide which party has presented the most persuasive argument backed by both law and fact. In the event that one of the parties has presented fraudulent evidence, the starting point of the court is compromised and the considerations they make to arrive at a decision, are

16

based on fraudulent information presented to them.[17] Therefore, regardless of the best intentions of the judges to deliver a just judgment as required by law, this has effectively been rendered impossible by the presentation of fraudulent evidence by Counsel.

2.3.Case studies where fraud has been uncovered

2.3.1. Claim of Benjamin Weil No. 47 vs Mexico

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. To support this claim, he only produced affidavits between 1869 and 1872 which stated that the receipts for the cotton and travel expense vouchers had been lost!

The American Commissioner in the hearing, disappointed by the inadequacy of the evidence asked Mexico to conduct research to ascertain the claim, but Mexico refused. The Mexican Commissioner on the other hand not only complained about the wispiness of evidence but also of the obligation placed upon Mexico **to prove a negative!** (emphasis added) The Umpire ruled in favour of Weil because an international arbitrator assumes the credibility of the evidence.[18] In his opinion, the claimant's version was "sufficiently proved" and "not disproved by evidence on the part of the defence

.

The dispute in this case was as to the number of bales of cotton that were owned by Benjamin Weil. Further, the claim was hinged on the fact that Weil did not have the receipts of the cotton and the travel expense vouchers. Questions asked in this regard were:

1. How and from whom did Weil acquire the cotton?
2. Who were the owners and conductors of the wagons employed in the transportation?
3. What and at what date did those wagons cross Rio Bravo to enter on Mexican territory?
4. At what custom house, if any, were the duties paid and the permit to introduce into the country or the corresponding *guia* obtained?
5. What is the name of the Commander or officer who ordered or even witnessed the seizure of the cotton?
6. What steps, if any, did the interested party take in order to prove at the time of such seizure, to obtain a voucher for it and to request an indemnification?

---

[17] Common law countries use an adversarial system to determine facts in the adjudication process. The prosecution and defence compete against each other, and the judge serves as a referee to ensure fairness

[18] Weil B., ***Claim of Benjamin Weil no. 447 vs: Mexico*** *award by the umpire of the United States & Mexican Claims Commission. Motion for rehearing, showing the fraudulent character of the claim, and declaration of the umpire in regard to it. An appeal to the sentiments of justice and equity of the United States.*
Published **1877** by Govt. Print. Off. in Mexico. Written in English p. 83-94; See also, Moore, History and Digest, vol. II, p. 1324-27; See also, W. Michael Reisman, Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law,* Cambridge University Press, Cambridge, 2014, p. 1-14. It must be noted that the decision reached in this case was different from similar cases of *John Mc. Mathi v Mexico* No. 995, 1876, *Hugh Lewis v. Mexico* No. 653,1876 and *William F. Laird v. Mexico* no 994, 1876. The Umpire's justification was in relation to the credibility of the evidence before him as seen in p. 83-94 of the ***Claim of Benjamin Weil no. 447 vs: Mexico*** in his analysis and reasons for the decision in the *Weil* case.

In response to the above questions, the Umpire was of the opinion that the evidence had to be looked at in totality and more so in relation to its credibility. The question that the umpire had to ask was, 'Is the evidence tendered credible?' If so, then the case tilts towards the side of the claimant as happened in the *Weil* case. This is in line with the existential evidence rule. The claim was found to be legitimate, hence the bales existed, they were seized and as a regard of that, Weil had to be compensated.

2.3.2. Claim of La Abra mining co. No 489 vs Mexico

Here the Claimant claimed dispossession of mine and seizure of ores. 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 claimant argued that the worth of the mine was $2.500.000 in 1868, whereas in 1865 (when it was sold) it was worth $50.000. He further explained that the, the mine had a difficult history and no record whatsoever of being economically successful. In the view of the Mexican Commissioner, much of the evidence had been obtained by fraud. However, the Umpire decided in favour of the owner because Mexico had behaved in a hostile manner in an effort to drive the claimants out. Eventually when Mexico requested another hearing based on new evidence, the Umpire rejected this argument and his reasoning was:

> [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 defence 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 favour 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.**[19]

In the *La Abra* case, while the Umpire took a similar approach to the *Weil* case, he was careful enough to note that not enough documentary evidence had been adduced in the case by the company. He noted that "Neither books nor reports have been produced, Nor has any reason been

[19] Claim of ***La Abra silver mining co No. 489. vs Mexico,*** Published **1877** by Govt. Print. Off. in Mexico. Written in English; See also, Moore, History and Digest, vol. II 1326 – 1330; See also, . Michael Reisman, Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law,* Cambridge University Press, Cambridge, 2014, p. 13-14.

given For Their Non-Production. […] Still the Umpire is strongly of the opinion that the claimants *are entitled to an award upon this portion of the claim.* He will put it at $ 100,000."

Hence, to the Umpire, the totality of the evidence did not matter, credibility is what mattered. And in borrowing from Indiana poet James Whitcomb Riley (1849–1916), the Umpires in the *Weil* and *La Abra* cases abided by the saying that:

"When I see a bird ***(read 'credible evidence')*** *that walks like a duck* ***('credible evidence')*** *and swims like a duck* ***('credible evidence')*** *and quacks like a duck* ***('credible evidence'),*** *I call that bird a duck* ***('credible evidence')." (Addition and emphasis added)***

Hence the Umpires conclusion in the *Weil* and *La Abra* cases was that fraud does not render judgment null and void however, the matter was to be resolved diplomatically, and through discretionary non-enforcement of judicial award.

2.3.3. The Corfu Channel Case[20]

On May 15, 1946 Albania fired against UK's ships *Orion* and Superb while crossing the *Corfu* straits.[21] On October 22, 1946, UK's ships *Saumarez* and *Volage* struck mines while on Albanian territory and this resulted to serious damage including the loss of life.[22]in the aftermath of this, the United Nations through a resolution of the security Council on the 9th April 1947 recommended that the two governments submit the dispute to the ICJ.[23] In the wake of the case, the United Kingdom conducted a mine-sweeping operation in the Corfu channel against the will of the Albanian government. In the process of this sweep, the United Kingdom obtained evidence that they used against the Albanian government at the case before the ICJ, whilst the court addressed itself to the question of sovereignty of the state of Albania against the unpermitted sweep by the United Kingdom, the court fell short in addressing itself on the admissibility of the fraudulently obtained evidence.[24] In response to the claim by the UK, Albania claimed that the mines were either German from WWII or that UK had laid the mines and this is due to the fact that the mines were fresh (newly painted, no marine growth on them).[25] In Albania's response to UK's claim, it

[20] *Corfu Channel Case (United Kingdom v. Albania); Merits*, International Court of Justice (ICJ), 9 April 1949.
[21] *Corfu Channel Case (United Kingdom v. Albania); Merits*, International Court of Justice (ICJ), 9 April 1949, p. 18-19.
[22] *Corfu Channel Case (United Kingdom v. Albania); Merits*, International Court of Justice (ICJ), 9 April 1949, p. 12.
[23] https://www.un.org/en/sc/repertoire/46-51/Chapter%208/46-51_08-11-The%20Corfu%20Channel%20question.pdf ((resolution on the *Corfu Channel Case*)
[24] The only reference the Court made on the admissibility of the evidence in passing was that the Statute of the International Court of Justice obligates the court to "consider the submissions of the party which appears, it does not compel the court to examine their accuracy in all their details; for this might…prove impossible in practice" Corfu Channel Case, id. At 248
[25] *Corfu Channel Case (United Kingdom v. Albania); Merits*, International Court of Justice (ICJ), 9 April 1949, p. 15, 146, 154 and 155.

emerged that the UK had not revealed all information to its lawyers . This was more so in relation to 'Exercise Corfu' (October crossing of the straits) was meant to test Albania's response.[26]

Since the delivery of the judgment on Corfu channel, legal scholars have written to a large extent on the conduct of the court on the admissibility of the evidence gathered during the unpermitted sweep by the United Kingdom. Whilst the court acknowledged and paid close attention to the question of the lawfulness of the sweep by the United Kingdom and its impact on state sovereignty, the only logical interpretation to the failure by the court to pronounce itself on the question of the legality of the evidence adduced was that they had no avenue under law, to sanction the United Kingdom or indeed, any other party in the court presenting evidence.

As can be deduced from the allegations against each other, both States were accused of fraud bringing back to light the evaluative versus existential evidence derivative in this case. The evaluative determinant is deduced from the fact that Albania indicated that the UK was conducting an illegal passage in its waters and more in a bid to 'test its resolve'. On the other hand, the UK alleged innocent passage and in the circumstances. Further, in relations to existential evidence, it can be deduced that the concealment of the document labelled XCU and the changed mine-charts by Albania bring to the fore-front this nature of evidence.

However, despite both determinants of evidence being brought before the ICJ in the *Corfu Channel* case, the court chose to distance its legal analysis from these facts adduced by fraud, arguably as a method of preventing the fraud from contaminating the decision.

Hence, the ICJ in this regard chose the 'avoidance path' and avoided analysis of issues that were contaminated with fraud, arguably to avoid its decision from being questioned in future or to avoid loss of credibility of the court and its processes in the international arena.

2.3.4. *Continental Shelf, Tunisia v Libyan Arab Jamahiriya*, Merits, Judgment, [1982] ICJ Rep 18, ICGJ 126 (ICJ 1982), 24th February 1982, International Court of Justice [ICJ]

Unlike all our other cases, which give vivid examples of fraud, part of the intellectual and ethical challenge is giving content to the term "fraud." The selective presentation of facts or the failure to disclose evidence helpful to one's adversary is apparently not deemed by tribunals as clearly fraudulent behaviour, as the case of Tunisia/Libya and the Taba arbitration show.[27] Tunisia had an existing concession line. In 1974, Libya granted a concession to the boundary of which was a line

[26] ADM 1/22504, Minute from Hartley Shawcross, Attorney General, to Clement R. Attlee, Prime Minister (6 Nov. 1948); PREM 8/1312, Telegram from Foreign Office to Permanent United Kingdom Representative to the United Nations (11 Jan. 1947).

[27] W. Michael Reisman, Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law,* Cambridge University Press, Cambridge, 2014, pg.198

drawn from Ras Ajdir at some 26° to the meridian, further west than the equidistance line, so the result was an overlapping of claims in an area some 50 miles from the coast.

Following protests in 1976 by each Government at the activities of the other, the Parties signed a Special Agreement in 1977 by which the matter was brought before the International Court of Justice. The main dispute was on the misrepresentation of the boundary line in Libyan Concession Agreement No. 137 which the court accepted When Tunisia later applied to the Court for revision because of the inaccuracy of the 26^0 line, the Court rejected the application in part because Tunisia had failed to discover for itself the relevant coordinates during the litigation. The Court's interpretation of Article 61 of the ICJ Statute and its application to the case seems to leave little or no room for consideration of whether the injured party's failure to timeously discover the relevant facts is attributable to the other party's fraud or concealment.[28]

The Court concluded there was no way to arbitrate this dispute using only the natural prolongations of the states' natural territory based on the natural baseline of the two states because of the position of the two baselines. Therefore, the Court decided that because it was one continental shelf, the only equitable solution was to divide the zone into two sectors and then divide those sectors in different way. The first zone was decided on based on a historical boundary of Libyan petroleum concessions. Thus, from Ras Ajdir to the point 33 degrees 55' N, 12 Degrees E the line of delimitation will be marked by a 26-degree angle. The second sector uses the Kerkennah Islands as a marking point to divide this sector.[29]

In this case, the court in arriving at its decision undertook the cumulative materiality approach. This is where the court weighed the fraud in term of factors such as the extent of its effects on the award, the claimant's diligence, and third-party reliance before deciding whether to vacate the award.

2.3.5. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986

Nicaragua brought a suit to the International Court of Justice (ICJ) against the United States on the ground that the United States was responsible for illegal military and paramilitary activities in and against Nicaragua. The jurisdiction of the (ICJ) in this case as well as the admissibility of Nicaragua's application to the Court was challenged by the United States.[30]

---

[28] W. Michael Reisman, Christina Skinner, Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law, Cambridge University Press, Cambridge, 2014, pg. 198

[29] *Continental Shelf, Tunisia v Libyan Arab Jamahiriya*, Merits, Judgment, [1982] ICJ Rep 18, ICGJ 126 (ICJ 1982), 24th February 1982, International Court of Justice [ICJ], p. 93, para. 133.

[30] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986. (hereinafter, '*Nicaragua* case')

In this case El Salvador submitted an intervention request as per Rule 83 of the Rules of the Court.[31] This submission for Declaration of Intervention was rejected as the United States claimed collective self- defence more so in support of El Salvador.[32]

The main issue in the intervention request was whether the Sandinista Government of Nicaragua was supplying arms to insurgents in El Salvador.[33] The Court however side-stepped this issue and based their decision on the doctrine of armed attack and self-defence and just like in the *Corfu Channel* case it distanced itself from undertaking a legal analysis from the facts adduced by fraud or uncertainty thereof and this was arguably as a method of preventing the fraud from contaminating the decision yet again.

However, in his dissenting opinion, Justice Schwebel argued that the Court should have examined the issue of the supplying of arms by the Nicaraguan government to the insurgents in El Salvador instead of relying only on the evidence of one party and 'rejecting' or 'avoiding' the evidence of another, the El Salvador intervention in this case.[34]

2.3.6. *Case concerning the location of boundary markers in Taba between Egypt and Israel*, Decision of 29 September 1988, 20 R.I.A.A.

Taba was located on the Egyptian side of the armistice line agreed to in 1949. During the Suez Crisis in 1956 it was briefly occupied but returned to Egypt when Israel withdrew in 1957. Israel reoccupied the Sinai Peninsula after the Six -Day War in 1967.
An Israeli businessman received in 1967 permission to build a 400-room luxury hotel in the region. Following the 1973 Yom-Kippur War ,when Egypt and Israel were negotiating the exact position of the border in preparation for the 1979 peace treaty, Israel claimed that Taba had been on the Ottoman side of a border agreed between the Ottomans and British Egypt in 1906 and had, therefore, been in error in its two previous agreements.
Although most of Sinai was returned to Egypt in 1982, Taba was the last portion to be returned. After a long dispute, the issue was submitted to an international commission composed of one Israeli, one Egyptian, and three neutral arbiters. In 1988, the commission ruled in Egypt's favour, and Israel returned Taba to Egypt in February 1989.

[31] Rules of Court, http://www.icj-cij.org/documents/index.php?pl=4&p2=38rp3=0 (accessed on 16th May, 2018); See *Nicaragua* case p. 17, para 7; p.22, para. 24.
[32] See *Nicaragua* case, p. 17, para 7; p.22, para. 24.
[33] *Nicaragua* case, p. 61, para. 106; p 76-77, para 137 and p. 82, para.150.
[34] Nicaragua case, Justice Schwebel Diss. Op. p. 276-277, para. 24-27 & p. 277-278, para. 28-32.

The **Parker photos fiasco** more so in relation as to what was the actual 'Parker Pillar location' arose in this dispute due to the different approaches between Egypt and Israel. This was even complicated further by allegations of bad faith and fraud on both sides to the dispute. Israel had violated a duty of good faith in failing to disclose to Egypt that it had removed the site on which the final pillar –the "Parker Pillar" – had stood, as well as the fact that it knew that Egypt was mistaking and conflating the final pillar and the penultimate pillar.

The Tribunal rejected Israel's strictly textual approach (i.e. the focus would be on the boundaries as had been demarcated with the pillars, **not how they should have been demarcated based on the agreement**).

In this matter, it is evident that the approach preferred was an active tribunal's competence to redress an imbalance between the parties without regard to the possibility of fraud.

2.3.7. *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* International Court of Justice, 1994, ICJ, 112

This was a claim to settle a dispute involving sovereignty over certain islands, sovereign rights over certain shoals and delimitation of a maritime boundary was filed by Qatar in the International Court of Justice against Bahrain. The Court's jurisdiction was however disputed by Bahrain.
In this case, an interesting twist of events took place. Qatar submitted a total of 82 documents to support their case, documents which were subsequently disputed by Bahrain and their authenticity questioned.[35]
Examples of fraud questioned and exposed by Bahrain by their chosen historic and forensic experts:[36]

- Some of the documents presented by Qatar in Court only existed in Diwan Amiri Archives in Doha;
- The documents presented by Qatar were riddled with historical anachronisms;
- The documents were written to and from persons dead at the time of supposed document;
- The documents were written in Arabic, when authors were both English;
- There were Irregularities in stamps and seals;
- There were Irregularities in kind of paper used;
- There was Cross-referencing in the handwriting.

[35] *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* International Court of Justice, 1994, ICJ, 112, Judgement, Merits, para. 18. (hereinafter *Qatar v. Bahrain*)
[36] *Qatar v. Bahrain,* para. 19.

Due to the questions raised, Qatar responded denying that they had committed any fraud and in the same breath Qatar withdrew all the 82 documents thereafter and did not rely on them.[37]

What is even more interesting is that the Court in its judgement, not even once did it refer to the 82 documents nor analysed their authenticity therein. They took the approach of the Japanese saying of the three mystic monkeys "*mizaru, kikazaru, iwazaru* (見ざる, 聞かざる, 言わざる) "see no evil, hear no evil, speak no evil."

It is in the separate opinion of Judge Fortier, that he brings to light the issue of the fraud by Qatar. In his own words, he indicates that the 82 Qatar documents even though withdrawn, they had "polluted" and "infected" the whole of Qatar's case.[38] He even further goes on to regret the decision of the court to fully ignore the case for the nature of these documents as it would lead to the questioning of the integrity of the Court more so since facets of the 82 documents lingered within the case and within Qatar's submissions.[39]

3. Conclusion

As demonstrated in the course of this paper, international law tribunals and courts have undertaken various approaches to reach to conclusion of various matters before them. A summary of these approaches is given herein below:

i. *Weil/LaAbra* Cases -These cases showed a systemic flaw of international adjudication. However, it was determined in these cases that fraud, even if blatantly found, does not render judgment null and void. However, the matter was to be resolved diplomatically, and through discretionary non-enforcement of judicial award.
ii. *Tunisia/Libya* Case– The Court here took a cumulative materiality approach where it weighed the fraud in term of factors such as the extent of its effects on the award, the claimant's diligence, and third-party reliance before deciding whether to vacate the award.
iii. *Taba* decision – Here, an active tribunal competence to redress an imbalance between the parties without regard to the possibility of fraud.
iv. *Nicaragua; Corfu Channel; Qatar v. Bahrain* cases – Here the ICJ distanced its legal analysis from the facts adduced by fraud, arguably as a method of preventing the fraud from contaminating the final decision.

[37] *Qatar v. Bahrain*, para. 20.
[38] *Qatar v. Bahrain*, Sep.Op. Judge Fortier, para. 1-11.
[39] *Qatar v. Bahrain*, Sep.Op. Judge Fortier, para. 1-11.

As can be deduced from the above analyses, under international law there is no single approach as to how international tribunals and courts handle fraud when they are accosted with it. As this paper extrapolated in the beginning, international courts have not adopted a single standard as to how to deal with fraud committed by counsel in international law matters, unlike in domestic matters where bar associations have well laid systems on how to handle fraudulent acts committed by counsel This in and of itself creates a quagmire that makes it difficult to deal with such eventualities when they occur. International practice will eventually have to be regulated as domestic practice is. Failure to do this in the long run will see fraud thrive or get ignored internationally as has been deduced and it will continue to perpetuate the ugly face of international law in practice.

4. Plausible recommendations

4.1. Engagement of international courts and national bar associations

In implementing measures to curb commission of fraud by counsel in international courts, as with many other aspects of international law, the challenge lies on the methods of enforcement that do not interfere with state sovereignty. The ILA Hague principles are the first attempt at the harmonising ethical standards of counsel appearing before all international courts.[40] Common regulations on counsel are important in ensuring that the procedural integrity of the courts, acting as a deterrent measure on counsels tempted to commit fraud to get ahead as well as imposing punitive measures on counsel who commit fraud in the course of performing their duties as officers of the court. In acknowledging the limitations of international law and its agents on enforcement of its decisions within domestic jurisdictions, international courts may consider partnering with national bar organisations to ensure punitive measures are meted on any counsels found to have presented fraudulent information before the international courts. The obvious benefit to this, is that counsels will be less likely to engage in fraudulent behaviour if they were aware that their conduct at the international courts potentially affects their domestic standing and ability to in their respective countries. The idea of engaging with national bar organisations regarding the conducts of their members in international courts will serve not only to solve existing problems but also to preclude occurrence of future problems.

The text of the agreement concluded between international courts and these national bar organisations would be best developed by way of extensive consultation between all stakeholders to ensure the interests and peculiarities of the various jurisdictions have been captured. In addition to this, the importance of the national bar organisations owning the process from the onset cannot be understated in its direct bearing to the success of the entire process. If the national bar

[40] The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals; The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, 2011.

associations agree with the procedures and have participated inclusively from the start, then there is a less likelihood of problems during enforcement domestically.

4.2 **Lessons from the ICC Code of Professional Conduct for Counsel**

The International Criminal Court (ICC) through its Code of Professional Conduct for Counsel (ICC Code of Conduct), provides insight as to what a code of conduct for counsel practising in international organisations would look like. In addition to detailing the expectations on counsel while appearing before the ICC, the conduct further provides for the convening of a disciplinary board to hear matters where counsel is said to have acted against the spirit of the professional code of conduct. The ICC Code of Conduct provides for its primacy in the event of inconsistencies between itself and any other code of conducts that a counsel appearing before the ICC is bound by.[41] The clarity offered by this section ensures that Counsel working at the ICC are well apprised as to which code of professional conduct is applicable within their course of their operations at the ICC. What this does is ensuring lack of ambiguity and creating procedural integrity for the work of the ICC. Further, the ICC Code of Conduct clearly outlines duties of Counsel both to their client and to the court. The detail both clauses are written in leaves very little room for mis interpretation as to which actions of counsel, both omission and commission, may be regarded as having been against the ICC Code of Conduct. [42]

The enforcement of any instruments of international law is always a challenge, an places heavy reliance domestic jurisdiction to enforce. The ICC Code of Conduct mitigates this by imposing sanctions that are all within the remit of the court to enforce on counsel appearing before the court.[43] Other courts such as the ICJ, whose decisions have mostly been discussed in this paper could emulate what the ICC has done, by creating a code of conduct with sanctions that all within their power to enforce, by way of appearance and participation before the court. The ILA Hague principles provide a starting point where all international courts would begin from as they draft their own code of conduct for counsel appearing before the respective courts. The regulation on a case on a case by case basis for each court will be possibly easier to put in place and to enforce as opposed to attempting to harmonise code of conduct of counsel in all international courts by way of an international bar association or a standard set of terms. This is because the international bar association may struggle with enforcement of its disciplinary action, whilst the court will simply use its jurisdiction to deal with counsel who have not towed the line. In the end, the integrity of the international justice system and the decisions of the courts will be preserved.

---

[41] Article 4 of the ICC Code of Professional Conduct for Counsel; 'Where there is any inconsistency between this Code and any other code of ethics or professional responsibility which counsel are bound to honor, the terms of this Code shall prevail in respect of the practice and professional ethics of counsel when practicing before the Court.

[42] See article 9 and 24 of the ICC Code of Professional Conduct for Counsel

[43] Article 42 provides for admonishment; public reprimand with an entry in counsel's personal file; payment of a fine of up to 30,000euros, suspension of the right to practice before the Court for a period not exceeding two years; and permanent ban on practicing before the Court and striking off the list of Counsel.

WORKS CITED

Articles

1. Langbein, John H., "The Historical Foundations of the Law of Evidence: A View from the Ryder Sources" (1996). Faculty Scholarship Series
2. Moore, History and Digest, vol. II.
3. Weil B., ***Claim of Benjamin Weil no. 447 vs: Mexico*** *award by the umpire of the United States & Mexican Claims Commission. Motion for rehearing, showing the fraudulent character of the claim, and declaration of the umpire in regard to it. An appeal to the sentiments of justice and equity of the United States.* Published **1877** by Govt. Print. Off. in Mexico. Written in English p. 83-94

Books

1. J. Austen, Emma, *reissue edn*. (New York, NY: Bantam Classics, 1984),
2. W. Michael Reisman, Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law,* Cambridge University Press, Cambridge, 2014.

Case Law

1. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986, Diss. Op. Schwebel, p. 277.
2. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986.
3. *Claim of Benjamin Weil no. 447 vs: Mexico*.
4. Claim of *La Abra silver mining co No. 489. vs Mexico,* Published 1877 by Govt. Print. Off. in Mexico. Written in English.
5. *Continental Shelf, Tunisia v Libyan Arab Jamahiriya*, Merits, Judgment, [1982] ICJ Rep 18, ICGJ 126 (ICJ 1982), 24th February 1982, International Court of Justice [ICJ], p. 93.
6. *Corfu Channel Case (United Kingdom v. Albania); Merits*, International Court of Justice (ICJ), 9 April 1949.
7. *Hugh Lewis v. Mexico* No. 653,1876.
8. *John Mc. Mathi v Mexico* No. 995, 1876.
9. *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* International Court of Justice, 1994, ICJ, 112, Judgement, Merits.
10. *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233) [22] Lord Herbert, CJ for the High Court.
11. *R v. Hardy* (1794), p.2. Cross and Tapper on Evidence (12th Ed).
12. *William F. Laird v. Mexico* no 994, 1876.

International Documents

1. Code of Professional Conduct for counsel, ICC-ASP/4/Res.1.
2. IBA International Principles on Conduct for the Legal Profession, Adopted on 28th May 2011, by the International Bar Association.
3. Rules of the International Court of Justice, http://www.icj-cij.org/documents/index.php?pl=4&p2=38rp3=0
4. The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals; The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, 2011.

National Documents

1. Advocates Act, CAP 16, available at http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2016 and the Law Society of Kenya Act, CAP 18, available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LawSocietyofKenyaActCap18.pdf.
2. Law Society of Kenya Code of Ethics an Conduct for Advocates, January 2016, available at http://www.lsk.or.ke/Downloads/Code_of_Ethics_and_Conduct_for_Advocates.pdf

Other

1. ADM 1/22504, Minute from Hartley Shawcross, Attorney General, to Clement R. Attlee, Prime Minister (6 Nov. 1948); PREM 8/1312, Telegram from Foreign Office to Permanent United Kingdom Representative to the United Nations (11 Jan. 1947).

Treaties

1. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI
2. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331