

Recent Publications

Empire by Treaty: Negotiating European Expansion, 1600-1900. Edited by Saliha Belmessous. New York, NY: Oxford University Press, 2015. Pp. v, 269. Price: \$74.00 (Hardcover). Reviewed by Claire Y. Kim.

When thinking about European expansion into the New World during the period of 1600-1900, most scholars imagine military conquest and coercion as the primary means through which European empires sought footholds in the Americas, South and Southeast Asia, and Africa. *Empire by Treaty*, edited by Saliha Belmessous, seeks to reframe and challenge the prevalent military conquest-dominant narratives. It emphasizes the importance of treaties as a legitimizing tool to many European imperial powers and as an empowering tool for the indigenous populations. The book argues that European leaders had a widespread practice of establishing treaties as moral and political justification for appropriation of native lands and property (Belmessous, p. 1). Such moral and political justification was necessary to appease citizens and political opponents, who relied on evolving theoretical discourse to assert that treaties with non-Christian people were lawful and even morally necessary for empire expansion (Belmessous, p. 1). The book further argues that indigenous peoples, for their part, engaged in treaty-making to further their own financial, political, and military interests (Belmessous, pp. 10-11). These treaty agreements in some cases had surprising legal weight and influence, such as posing additional practical requirements for land acquisition in colonial America and forcing European powers to protect populations against local enemies in Africa (Belmessous, p. 11).

Empire by Treaty consists of ten essays by various authors. The essays are arranged in roughly chronological order canvassing the years 1600 through 1900, and covering extensive geographic area and substantive content. The book's diverse analysis of treaties made in various geographic locations at different time periods bolsters the book's central argument and offers the reader a comprehensive view of European empires' treaty-making processes.

The earlier essays in *Empire by Treaty* explore the seventeenth century's theoretical discourse on European treaty-making with foreign entities, explaining how Erasmian, Machiavellian, and Grotian views of treaties, coupled with the concept of "just war," eventually shaped European leaders' beliefs that treaties with non-Christian peoples were permissible and even legitimizing (Weststeijn, pp. 20-21). Later essays examine how the European theoretical views were translated into real-life practice with varying degrees of adherence. In the case of the Dutch, the professed goal of friendship and peace with native peoples in Southeast Asia through treaty-making was undermined by the eventual use of intimidation and violence to enforce these treaties, exposing a fundamental paradox of international treaty-making in forceful

European expansion (Weststeijn, p. 41). Similarly, an essay on the British East India Company's interaction with India in the eighteenth century traces the Company's tendency of making treaties with local princes in order to legitimize the Company's exploitative actions, even though such treaties were to be enforced by military intimidation or even deliberately ignored (Travers, p. 137). The essay argues that although the Company's practices were later condemned by the British government itself, which more heavily relied on reciprocal agreements as a means of justifying its presence in India, the Company's earlier practices ultimately left a lasting presumption of unequal status between the native populations and the British government (Travers, pp. 156-57).

However, other essays in the book provide intriguing contrast by assessing the degree to which local indigenous populations were treated as equals. For example, Shumway's essay on the case of small British settlements on the Gold Coast of Western Africa in the mid-nineteenth century rejects the traditional narrative of European dominance; instead, it asserts that treaty negotiations, called *palavers*, flourished between the British and the Fante people of the Gold Coast (Shumway, pp. 162-63). The essay argues that although the local population was allegedly under British protection, the Fante saw themselves as equals due to the British inhabitants' dependence on local resources. The Fante deliberately entered into treaties to improve their own political and military position vis-à-vis their local enemies (Shumway, pp. 169, 174). In contrast, an essay focusing on the colonial United States in the seventeenth century concludes that treaties with indigenous populations were ineffectual or negligible (Richter, p. 74). The essay asserts that although the English claimed the King's grant conferred absolute power over native lands, in practice such a grant was useless unless paired with land grants negotiated or bought from Native Americans (Richter, p. 74). This was due to a combination of factors such as the native populations' own push for indigenous land titles, jockeying between European imperial powers for American land, and the English Crown's issuing of overlapping land grants (Richter, p. 74).

Altogether, these varied essays provide a novel and refreshing way to understand European expansion during the period of 1600-1900. The essays emphasize the salience of treaties and agreements with indigenous populations. They also provide compelling evidence that some indigenous populations were treated as equals by taking advantage of factors such as competing imperial interests and resource scarcity, and by leveraging treaties that conferred military, political, and financial benefits. The book, however, has several weaknesses. The first is that the essays included are not tightly drawn to the central thesis of the book. For example, the chapter on the acquisition of aboriginal land in Canada reads more like a chapter of a history textbook. It expounds on the effects of land appropriation in great detail rather than exploring how such treaties served to legitimate imperial powers or benefit the indigenous populations (Beaulieu, pp. 101-31). The essay on Māori enfranchisement in New Zealand has a similarly tenuous connection to the central "empire by treaty" concept. Instead of focusing on treaties themselves,

most of the essay is dedicated to describing how local officials denied that the Māori met property-holder qualifications for enfranchisement (Ward, pp. 214-40).

Another weakness is the book's incomplete acknowledgment of the issue of consent. The issue is briefly mentioned in the introductory essay and refreshingly used as a focus of one of the essays (Belmessous, pp. 12-14). However, other essays largely elude the issue of consent in the European-indigenous treaty making process. Thus, the question arises whether these treaties—formed on the basis of misunderstanding and coercion—can be called agreements at all, even before the authors assert the supposed importance of these treaties. In the introductory chapter, Belmessous acknowledges the lack of real consent in many of these treaties, but argues that the concept of consent “continued to matter for European as well as indigenous peoples” (Belmessous, p. 14). Other chapters would benefit from a more robust and open discussion of Belmessous's initial assertion.

Finally, there is a thematic tension between an emphasis on Europeans' reliance on treaties versus the Europeans' frequent use of force to violate or enforce the treaties. Referred to many times as the “paradox” of empire by treaty, the question arises whether treaties had any independent effect at all. Belmessous herself says, “Europeans engaged in treaty making when the balance of power was favorable to indigenous peoples and they ignored native claims when natives got the upper hand” (Belmessous, p. 9). Belmessous's statement implies that European expansion during 1600-1900 was ultimately dominated by coercion and military violence and treaties were simply a means to that end (Belmessous, p. 15). This would seem to be in subtle conflict with the assertion that treaties were considered theoretically and practically important on their own. Thus, *Empire by Treaty* walks an intriguing tightrope of acknowledging the limited consent and agency involved in European-indigenous treaties on the one hand, and asserting that they constituted an essential part of European expansion separate from military conquests on the other.

Despite these issues and unexplored tensions, *Empire by Treaty* is a thought-provoking read. Its suggestion to reframe the historical period from 1600-1900 as a time of European expansion through treaty-making with indigenous peoples, with Europeans using treaties to legitimize their expansion and indigenous peoples using treaties to leverage their own interests wherever possible, is compelling. The book could be especially useful for rethinking and reorienting contemporary discourse on indigenous land rights. It would also assist practitioners in considering more fully the impact of colonial international treaties that continue to negatively affect indigenous peoples' rights in the New World.

Public Participation and Legitimacy in the WTO. By Yves Bonzon. Cambridge, UK: Cambridge University Press, 2014. Pp. ix, 313. Price: \$125 (Hardcover). Reviewed by Paul Joo.

In *Public Participation and Legitimacy in the WTO*, Yves Bonzon considers whether public participation mechanisms can improve the World Trade Organization's (WTO) legitimacy. Bonzon shows that the institutional structure of the WTO and the contractual nature of its negotiations result in a lack of meaningful participatory opportunities for non-state actors (p. 4). This is particularly problematic in terms of legitimacy when WTO decisions impact member states' domestic regulations, including those that pursue non-economic objectives (p. 8). The key to resolving this growing issue, according to the author, lies in increased formal engagement with non-state actors (p. 16). Bonzon examines recent WTO developments that have begun to address the legitimacy issue, identifies obstacles to increased civil society engagement, and then provides a list of specific proposals for realizing the full potential of public participation mechanisms (p. 243-50).

Bonzon builds on the work of scholars such as Alain Pellet, who has noted that the legitimacy of institutions such as the WTO is considered exclusively through the lens of state sovereignty.¹ In addition to the problematic focus on the contractual nature of WTO agreements, agent cost theory and the legitimacy chain concept have also been used to highlight the legitimacy deficit of the WTO.² Bonzon's analysis forms a valuable contribution to this literature by insightfully tracing the current lack of public participation mechanisms back to the history of the multilateral trade regime, starting with the signing of the General Agreement on Tariffs and Trade (GATT) in the aftermath of World War II (p. 100).

Contrary to the WTO's statement in *US—Clove Cigarettes* that its decisions are subject to "clearly articulated and strict decision-making procedures,"³ Bonzon argues that procedures at the WTO are often opaque and unpredictable and, as a result, lack opportunities for public legitimation. The problem, according to Bonzon, is a lack of sufficient institutional differentiation: "[T]here is no clear distribution of competences vertically, so that no clear patterns of decisions are formalized" (p. 127). To support his case, Bonzon details the three tracks of political organs in the current WTO

1. Alain Pellet, *Legitimacy of Legislative and Executive Actions of International Institutions*, in *LEGITIMACY IN INTERNATIONAL LAW* 63, 70 (Rüdiger Wolfrum & Volker Röben eds., 2008).

2. Agent cost theory frames the problem of democratic deficit as a problem of agent costs reflecting differences of interests and information asymmetries between legitimized legislative organs and their agents who negotiate international commitments behind closed doors at the WTO. See Robert Howse, *How to Begin to Think about the "Democratic Deficit" at the WTO*, in *INTERNATIONAL GOVERNANCE AND NON-ECONOMIC CONCERNS: NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER* 79, 83-84 (Stefan Griller ed., 2003). The legitimacy chain concept refers to the formal connection between negotiators through their superiors to national organs and popular elections and argues for the necessity for increased transparency as the chain grows. See Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 *J. WORLD TRADE* 167, 175 (2001).

3. Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 250, WT/DS406/AB/R (Apr. 4, 2012).

structure—the negotiating bodies, the regular bodies, and the Secretariat—and their complex, often informal, interactions. Institutional features of the WTO such as its preference for the single undertaking approach, which aggregates items of a negotiation into an indivisible package to prevent members from cherry-picking reforms, further obscure the negotiation process and exacerbate the legitimacy deficit of the organization (p. 127).

While Bonzon's ultimate recommendations are specific to the WTO, the conceptual framework he advances for evaluating organizational mechanisms is broadly constructed and could serve as a model in a variety of contexts. Bonzon meticulously disaggregates the concept of formalizing public participation into four distinct "implementation parameters": the goal, the object, the modalities, and the actors (p. 14). He first analyzes public participation in domestic systems, focusing on the U.S. Federal Administrative Procedure Act. By also drawing extensively from examples of formalized mechanisms in his native Switzerland's Federal Act on Consultation, as well as the Treaty of the Functioning of the European Union, Bonzon builds an extensive menu of options for each of the implementation parameters based on both existing and proposed mechanisms (pp. 25-41).

In Chapter Three, Bonzon touches on interesting normative questions of legitimacy and the constitutionalization of international law with respect to WTO decisions (pp. 42-95). This discussion, however, appeals to a different audience than the rest of the work and ultimately interrupts the otherwise logical flow of the book. Bonzon cites the emergence of a general international principle of democracy: a "global trend towards democratization and good governance, as well as the intensified monitoring activity of international institutions" (p. 53). While the instinct to provide this context is understandable, most of the chapter is too curtailed to provide sufficient historical analysis and not fully relevant to Bonzon's overall thesis. More critically, after framing the section to assess the extent to which democracy should be a principle relevant to the WTO, the chapter fails to mount a coherent normative argument, merely noting that there exist two competing principles: a utilitarian "effectiveness thesis," according to which democratic principles are relevant insofar as they promote member states' compliance, and a democracy-promoting "good governance thesis," which views the WTO as a platform for promoting a principle of "cosmopolitan democracy" (pp. 43, 75-79).⁴ The chapter then shifts awkwardly to a positive description of recent developments in the WTO regime that indicate cautious promotion of the values of good governance (p. 93).

While ineffective as part of the chapter's normative argument, Bonzon's analysis of some of these developments may be of special interest to nongovernmental organizations and other legal practitioners. In particular,

4. See generally Armin von Bogdandy, *Lawmaking by International Organizations: Some Thoughts on Non-Binding Instruments and Democratic Legitimacy*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 171, 173 (Rüdiger Wolfrum & Volker Röben eds., 2005) (describing "cosmopolitan law" as law not based solely on agreements between sovereign nation-states, but rather as law that has transcended nation states due to its status as a set of globally recognized principles and practices).

Bonzon presents the acceptance of amicus curiae briefs in WTO proceedings as both a reflection of good governance principles as well as a potential vehicle for improved engagement with civil society actors in the future. As Bonzon notes, the WTO's Appellate Body stated for the first time in *US—Shrimp* that panels are entitled to accept amicus curiae briefs from non-state actors as part of their right to seek information.⁵ Although this practice has generated opposition among member states, a panel in the recent *US—Tuna II (Mexico)* case referred to information in an unsolicited brief.⁶ Bonzon argues that this decision reflects the “more proactive stance” of the Secretariat and dispute settlement organs in “promoting values of good governance beyond what is necessary to ensure compliance with WTO law” (p. 93).

Much of the book is devoted to specific, thoughtfully reasoned recommendations for improving the transparency of the trade regime and providing expanded opportunities for public participation in its procedures. Bonzon convincingly argues that formalizing public participation in the WTO would first require institutional reforms to clarify and streamline its decision-making process. He proposes establishing a body of limited composition, deemed an Executive Committee, which could be modeled after the former GATT Consultative Group of Eighteen, first established in 1975.⁷ Bonzon emphasizes that a mixed body of permanent and rotating members would help reform the state-driven character of the WTO and address the current lack of institutional differentiation (p. 125). Bonzon also recommends granting more power to the Secretariat, which would complement its existing autonomy in the administration of the Trade Policy Review Mechanism (TPRM) and its efforts to promote values of good governance.⁸ This would “institutionaliz[e] chains of decisions and provide more clarity and predictability as to the attribution of powers of each organ and the timing of the process” (p. 127). Bonzon's analysis culminates in a concrete list of proposed amendments to existing regulations governing relations with non-state actors, principally the WTO's “Guidelines for Arrangements on Relations with Non-Governmental Organizations” (p. 273).

Overall, *Public Participation and Legitimacy in the WTO* speaks to audiences interested in the legitimacy deficit of the WTO as well as those interested in organizational design. Bonzon's disaggregation of relevant institutional features, compilation of design options based on relevant peer sets, and conversion of his findings into practical recommendations are meticulous and convincingly reasoned. While the input settings in this context are the

5. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 105, WT/DS58/AB/R (Oct. 12, 1998).

6. Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.182, WT/DS381/R, (Sept. 15, 2011).

7. See GATT Secretariat, *The History of the Consultative Group of Eighteen*, ¶ 2, MTN.GNG/NG14/W/5 (June 9, 1987).

8. In addition to evaluating member states' compliance with their WTO obligations, the TPRM reports periodically assess members' political regimes more generally. See Trade Policy Review Mechanism, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, 1869 U.N.T.S. 480.

WTO with the underlying assumption of increased public participation as a primary objective, Bonzon's analytical rigor serves as a model for organizational design across different institutional contexts.

Comparative Matters: The Renaissance of Comparative Constitutional Law.
By Ran Hirschl. Oxford, UK: Oxford University Press, 2014. Pp. xi, 304.
Price: \$45.00 (Hardcover). Reviewed by Raffael Nicolas Fasel.

More than six hundred years ago, the picturesque Tuscan city of Florence, Italy, became the birthplace of the Renaissance⁹—a cultural movement that bridged the Middle Ages and the modern era by reviving ancient Greek and Roman sources of knowledge. With the aid of Classical wisdom and an investigative spirit, Renaissance thinkers achieved major breakthroughs in a wide range of fields, including science, the arts, and philosophy.¹⁰

In *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Ran Hirschl suggests that since the mid-1980s, there has been a new type of renaissance: the renaissance of comparative constitutional inquiry (p. 151). Triggered by the global “spread of constitutionalism and judicial review,” this recent comparative turn is manifested in a fast-growing interest in comparative study among academics, courts, practitioners, and decision-makers (p. 2). However, in Hirschl's view, this surge in comparative constitutional law has, until now, failed to provide the methodological and epistemological foundations of its “comparative” component (p. 278). Most comparative scholarship, Hirschl points out, does not pay sufficient attention to the methodological challenges of comparative inquiry. As a consequence, the findings of many comparative constitutional studies are biased and hardly generalizable. Hirschl sets out to fill this theoretical gap. Based on his exploration of the variations, rationales, and methods of how comparative constitutional inquiry was practiced in the past, Hirschl presents his case for an interdisciplinary framework that facilitates epistemologically and methodologically meaningful comparativism in the future.

Hirschl divides his most recent “constitutional journey” (p. 6) into two parts. The first three chapters uncover the history and motives of comparative constitutional study, while the later three chapters contain Hirschl's normative argument for “relaxing the sharp divide between constitutional law and the social sciences” (p. 6).

Refreshingly, rather than start his first chapter by wading through the historical origins of comparative legal study, Hirschl jumps right into the fray by analyzing one of today's most controversial topics in the field: the practice of foreign citations by constitutional courts (p. 20). Hirschl finds that formerly oft-cited British and American cases have suffered from a decline in voluntary reference, while new “peak courts”—such as the Supreme Court of Canada, the

9. FREDERICK HARTT, *HISTORY OF ITALIAN RENAISSANCE ART: PAINTING, SCULPTURE, ARCHITECTURE* 145 (2d ed. 1979).

10. See generally PETER BURKE, *THE ITALIAN RENAISSANCE: CULTURE AND SOCIETY IN ITALY* (1986) (discussing the social and cultural context of the Italian Renaissance).

German Federal Constitutional Court, and the European Court of Human Rights—have emerged as key players in the “global constitutional dialogue” (p. 21). Previous explanations of this phenomenon, Hirschl argues, have neglected the sociopolitical context in which constitutional courts function and the fact that reference to foreign case law can serve as an identity-constructing factor (pp. 21-22).

In the second and third chapters of *Comparative Matters*, Hirschl sheds light on past endeavors in comparative constitutional law and shows that the current renaissance is not without instructive precedent. Despite the novelty of certain elements of contemporary comparative constitutionalism, Hirschl argues that previous legal systems, and especially systems of religious law, were confronted with the same challenge as comparative constitutionalists are today: “the challenge of when and how to engage with the laws of others” (p. 110). Starting his historical excavation—similar to a Renaissance scholar—in ancient Greece, Hirschl presents a range of other (mostly religious) orders. In his ensuing analysis of comparative works by scholars like Grotius, Selden, Bodin, Montesquieu, and Bolívar, Hirschl argues that, unlike many comparative constitutionalists today, the pre-nineteenth-century founding fathers of comparative constitutionalism understood the necessity of studying law in its broader sociopolitical context (p. 133). Concluding his overview, Hirschl identifies the threefold motivational factors that have led scholars—both in the past and today—to engage in comparative analysis: situational necessity, intellectual curiosity, and political agenda (p. 148).

The fourth chapter of the book is dedicated to spelling out Hirschl’s argument that comparative constitutionalism should overcome the divide between law and social sciences—and move from comparative constitutional *law* to comparative constitutional *studies* (p. 191). Comparative constitutional inquiry, Hirschl elucidates, is today characterized by a heavy legalistic bias, which “artificially limits the scope, depth, and breadth of the questions we can address, the choice of methods we make, and the kind of accounts we can offer” (p. 190). Because “constitutions neither originate nor operate in a vacuum” (p. 152), it is necessary to study the social, political, and economic context in which they are embedded (p. 111).

In Chapter Five, Hirschl addresses tensions, such as the tension between universalism and particularism, which have affected comparative constitutional studies ever since (p. 192). While universalism underlines the universality of common values that allow for comparison, particularism highlights the idiosyncratic character of a particular legal order, thus forbidding the borrowing of foreign legal concepts (p. 197). Hirschl argues that although neither camp is right, transnational convergence processes have increased the ability of comparative constitutional inquiry, resulting in what Hirschl terms “difference in similarity” (p. 204). The second part of the chapter analyzes the “World Series” syndrome or—what amounts to the same thing—the “global south” critique (p. 206). Like the North American baseball final, which is called the *World Series* despite the fact that it is the championship for a league consisting of only U.S. and Canadian teams, most of the current comparative

literature concentrates on a handful of liberal democratic (and mostly northern) states while neglecting the multifaceted constitutional experiences of other (mostly southern) states. According to Hirschl, this “one-way traffic of constitutional ideas” (p. 214) is detrimental to the generalizability of the findings made in many comparative works (p. 206).

In the last and longest chapter of *Comparative Matters*, Hirschl makes good on his earlier promise to provide a methodological and theoretical foundation for the “comparative” element in comparative constitutional law (p. 278). Presenting an analysis of the different methods of current comparative constitutional inquiry, Hirschl argues that contemporary studies are overly descriptive and taxonomic and fail to explicate constitutional phenomena with the aid of causal inference (p. 224). Despite the fact that there is no “one-size-fits-all research design ‘formula’” (p. 225), Hirschl argues that scholars who try to draw causal conclusions from comparative inquiry will have to consider the core principles of case selection and research design that he identifies in the chapter (p. 228). By opting for more rigorous methodologies, comparative constitutional studies can avoid biases such as the problem of cherry-picking cases (p. 279). In order to facilitate valid and generalizable case selection and research designs, Hirschl emphasizes the need for small-N (systematic studies of a small number of cases) and large-N (multivariate statistical analyses of a large number of cases) models. These approaches will make it necessary to overcome the divide between law and social sciences. Although this might be met with skepticism in some scholarly communities, for Hirschl, “it is the call of the hour” (p. 284).

With *Comparative Matters*, Hirschl concludes his “tri-partite expedition” (p. v) into comparative constitutionalism, which he began with the widely-read *Towards Juristocracy* (2004),¹¹ followed by *Constitutional Theocracy* (2010).¹² His most recent project is largely successful in arguing for a more solid methodological and epistemological foundation of the “comparative” aspect of comparative constitutional law. In fact, Hirschl’s own work is a good example for how comparative constitutional scholars can learn from mistakes such as the practice of cherry-picking cases: one of Hirschl’s former books, *Towards Juristocracy*, was itself only concerned with studying “usual suspect” states.¹³

While the historical examples Hirschl provides are fascinating, the reader might be left wondering how exactly these illustrations tie in with Hirschl’s case for bridging the gap between law and social science when it comes to modern-day comparative constitutionalism. To take one example, Hirschl argues that Maimonides’s arguments for allowing non-Jewish philosophical inquiry as a way of interpreting the Torah make us think “of similar claims made in the very different context discussed in the next chapter, of contemporary debates in the United States” (p. 104). Yet, in his section on the United States, Hirschl fails to take up this thread and leaves it to the reader to speculate about the supposed similarities. It would have been illuminating if

11. RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004).

12. RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010).

13. See HIRSCHL, *supra* note 11, at 4.

Hirschl demonstrated how exactly Maimonides's claims resemble the arguments of contemporary American liberals in support of the citation of foreign rulings by U.S. courts, as well as the similarity in fears, shared both by Maimonides's orthodox opponents and American conservatives, of the subverting effects such citations allegedly have on the sacred texts. More generally, instead of dwelling on certain historical examples, such as the intricacies of Jewish law, the reader might have wished that Hirschl unearthed more clearly the existing connections between past and contemporary comparative constitutionalism. By doing so, Hirschl could also have created a more seamless transition from the first to the second part of his book.

Filippo Brunelleschi, the Florentine Renaissance architect attributed with developing the theory of perspective in painting, is said to have wanted to prevent spectators from deceiving themselves "by choosing a wrong point of view."¹⁴ In a similar way, *Comparative Matters* is concerned with providing the theoretical framework that prevents comparative constitutional scholars from conducting methodologically and epistemologically deficient studies. Hirschl's attempt to sharpen the perspectives of comparative constitutionalism is a welcome change to the oftentimes insufficiently self-critical comparative literature. Indeed, it lays the foundation for a better understanding of comparative study, a foundation that may prove "essential for the field's renaissance to persist" (p. 284).

The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950. By Mark Lewis. New York, NY: Oxford University Press, 2014. Pp. v, 346. Price: \$110 (Hardcover). Reviewed by Joshua Handelsman.

The International Criminal Court (ICC) is barely ten years old, but in that time it has become a mainstay of the world order. In the last few months alone, a rebel commander testified in The Hague,¹⁵ Israel accused the Court of bias,¹⁶ and the ICC decried Sudan's failure to arrest its president for atrocities in Darfur.¹⁷ This ubiquity makes it easy to forget how improbable an institution the ICC is: sovereign nations have willingly empowered an international tribunal to prosecute individuals, including their own heads of state. In *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950*, Mark Lewis chronicles the many attempts to reform international law after each of the World Wars. He argues that these mostly failed efforts

14. Richard Krautheimer, *Brunelleschi and Linear Perspective*, in BRUNELLESCHI IN PERSPECTIVE 130 (Isabelle Hyman ed., 1974).

15. Rick Gladstone, *Former Lord's Resistance Army Commander Appears at the War Crimes Court*, N.Y. TIMES, Jan. 26, 2015, <http://www.nytimes.com/2015/01/27/world/africa/dominic-ongwen-lords-resistance-army-war-crimes-court-hague.html>.

16. Rick Gladstone & Isabel Kershner, *Court to Look into Possible Israeli War Crimes in Palestinian Territories*, N.Y. TIMES, Jan. 16, 2015, <http://www.nytimes.com/2015/01/17/world/middleeast/international-criminal-court-israel-palestinian-war-crimes-inquiry.html>.

17. Rick Gladstone, *International Criminal Court Seeks U.N. Action on Sudan*, N.Y. TIMES, Mar. 9, 2015, <http://www.nytimes.com/2015/03/10/world/africa/court-seeks-united-nations-action-on-sudan.html>.

laid the groundwork for successful reforms and, long afterward, the ICC (pp. 283-84).

Lewis begins by criticizing the recent historical accounts of international criminal law. Many scholars try to explain the emergence of international trials with one grand and liberal explanation, such as the spread of Enlightenment ideals (pp. 1-2). Lewis believes these accounts are oversimplified. Eschewing easy narrative, he traces a complicated web of forces that changed international law: humanitarianism, nationalism, domestic and international politics, terrorism, and legal scholarship. The interplay of these forces, Lewis argues, produced a “new justice”¹⁸—the basic norms that took shape from 1919 to 1950 and that define international law today (p. 3). These norms include individual criminal liability for violations of international law, prosecution of heads of state and other government officials, and extradition of war criminals (pp. 3-4). In a nutshell, Lewis’s “new justice” is the idea that an individual who does terrible things—even during war or as head of a sovereign state—should be prosecutable by an international tribunal.

Lewis’s scholarship is impressive. He fits a vast history into fewer than 300 pages, maneuvering between wars, peace negotiations, failed tribunals, and international committees. The reader is left a bit overwhelmed by the combined detail and scope of the book, but Lewis makes two big impressions. First, international politics is complex, driven by a complicated web of forces. Second, for all the starry-eyed rhetoric, international criminal justice is a form of politics—its actualization depended on an unlikely confluence of state interests and ideals. *The Birth of the New Justice* makes these points by leading the reader through the many failed efforts to get the “new justice” off the ground. For the first half of the book, each chapter follows a similar pattern: the international community confronts violence, jurists propose an international legal solution, states fight to bend the legal proposal to their interests, and then almost nothing changes.

This disheartening pattern—self-interested states destroying a proposed reform to international law—is on display in Lewis’s discussion of international terrorism (pp. 122-49). He begins by describing the radical violence that haunted Europe in the interwar period. Croatian fascist separatists bombed trains in Yugoslavia, right-wing nationalists murdered the German Foreign Minister in 1922, and Bulgarian communists bombed the Sveta Nedelya Cathedral in 1925 (p. 126). The assassinations of the King of Yugoslavia and the French Foreign Minister in Marseille by members of the Ustaša, the Croatian Revolutionary Movement, finally catalyzed the international community to work together (pp. 127-29). Yugoslavia persuaded the League of Nations to form the Committee for the Repression of Terrorism, a collection of experienced jurists who proposed several reforms (pp. 128-35). Those proposals included a convention to repress terrorism and a convention to form an international criminal court (pp. 133-35). Although laudable on its

18. Lewis himself puts quotations around “new justice” throughout the book, so I will do so in this review.

face, Lewis says, this effort to combat terrorism had multiple motives. Conservative governments generally supported the convention in order to promote state security and criminalize radicalism (p. 136). Liberals supported international cooperation and peace, but they feared that the anti-terrorism measures would restrict minority parties and threaten asylum for political refugees from fascism (p. 136). Eventually, Italy and Germany abandoned the negotiations (pp. 136-37). Many of the countries that did sign the convention to create an international criminal court—Yugoslavia, Czechoslovakia, Romania, and the Soviet Union—did so in order to control restive minority groups (p. 143). Ultimately, however, the court never took shape, as support in the League weakened and more serious violence erupted throughout Europe in the late 1930s (pp. 146-48).

Lewis dedicates similar chapters to the efforts to create military tribunals after World War I (pp. 27-63) and the efforts of international law societies to design a permanent international criminal court (pp. 64-77). Reading these chapters is like sampling the frustrations of international politics and diplomacy. In each one, the international community takes two steps forward and one step back. Then, once the book reaches the end of World War II, we finally see some of these ideas of the “new justice” realized: the Allied victors reject amnesty for Axis leaders (pp. 165-67), tribunals convict Nazi war criminals (pp. 173-78), and a genocide convention enters into force in 1951 (p. 225). Yet, despite significant progress, political conflict once again prevents the creation of a permanent international court to prosecute individuals (p. 274). In the epilogue, Lewis skips to the end of the Cold War, when the principles of the “new justice” finally take hold for good (p. 283). Today, the International Criminal Court is our world’s permanent criminal court, trying war criminals and embodying the principles that Lewis traces back to the interwar years.¹⁹

Lewis declares in his introduction, “I am . . . reluctant to interpret the history merely as an expression of self-interest and colonial imperialism” (p. 7). Instead, he wants to consider five factors that influence the success of international law reforms efforts:

[T]he extent of the problem the group wished to address . . . ; the level of credibility and legitimacy of their ideas in the eyes of governments, other legal organizations, and domestic societies; the groups’ strategies for lobbying . . . ; the existence of competing projects that could hinder them; and the level of obligation their solutions placed on states (pp. 4-5).

However, the most recurrent theme is that state interests limit international justice, which causes the reader to doubt the significance of the other factors and the unsuccessful reforms. Was the failed terrorism convention a necessary antecedent to later developments in international law? Did the Allies need to fail in their prosecutions after World War I to succeed after World War II? Lewis implies that the answer is yes—that these unsuccessful reforms helped lawyers and associations refine the concept of international

19. Of course, despite the creation of the ICC, state interests frequently collide with international criminal justice. See Gladstone, *supra* note 17 (describing Sudan’s refusal to send its president to The Hague for prosecution).

prosecution that took shape after World War II (p. 298). However, Lewis's own account of the wars makes it seem that the fundamental difference was power and state interests: the Allies of World War II had more *power* than the Allies of World War I, and could therefore impose tribunals on the defeated.²⁰ By the same token, a mainstream explanation for the creation of the ICC is the power shift that occurred after the Cold War.²¹

In *Prologue to Nuremberg*, James Willis acknowledged the difficulty of drawing a clean causal arrow from World War I to Nuremberg. He concluded, "whatever lasting significance the effort to punish the war criminals of the First World War may have remains uncertain. . . . It was the prologue of a revolutionary development in international law, and like other revolutions it emerged from varied influences and motives."²² Lewis has taken the final chapter of Willis's work and turned it into a book of remarkable detail. In it, he makes an admirable effort to trace the development of international criminal law from 1919 to 1950, accounting for many causes. But that history still appears to be a Gordian knot. Lewis shows us that the knot is complicated, but he does not quite manage to untie it. He does not prove that all the strings of his narrative matter or that they can be united. Perhaps this is an impossible task and he does it as well as anyone could. But it is ultimately a bit unsatisfying. And, perhaps, this is why so many realists try to slice through the knot with one simple answer: the self-interest of states.

Technology and the Law on the Use of Force: New Security Challenges in the Twenty-First Century. By Jackson Maogoto. Oxford, UK: Routledge, 2015. Pp xviii, 111. Price: \$117.71 (Hardcover). Reviewed by Asaf Lubin.

In *Technology and the Law on the Use of Force*, Dr. Jackson Maogoto sketches the legal challenges to the regime on the use of force in the digital age. The author is particularly concerned with how technological advances within the "Information Revolution" in military affairs challenge current international legal regulation.²³ As part of this revolution, militaries are gravitating towards heavier reliance on non-kinetic uses of force (i.e. the ability to create effects that do not rely on physical explosives or munitions) in the conduct of their

20. In contrast with the unconditional surrender and zones of occupation after World War II, the Allied victors of World War I could not even obtain extraditions. For instance, the Dutch, supported by the Vatican and other neutral powers, refused to extradite the ex-Kaiser. The Germans also refused to extradite military officials, instead conducting their own (dubious) trials in Leipzig (pp. 55-59).

21. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT ix-x (4th ed. 2011).

22. See JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 176 (1982). Lewis himself appears to agree, listing the end of the Cold War first among a "confluence of factors" that made way for the ICC (p. 283).

23. See Norman C. Davis, *An Information-Based Revolution in Military Affairs*, in IN ATHENA'S CAMP: PREPARING FOR CONFLICT IN THE INFORMATION AGE 79, 79 (John Arquilla & David Ronfeldt eds., 1997) (noting as early as 1997 that as a result of advances in computerized information and telecommunications technologies, the world "is on the cusp of an epochal shift from an industrial- to an information-based society," which is bound to fundamentally change the way war is conducted).

operations. With governments' critical infrastructures becoming increasingly dependent on digital systems and information technologies, two new domains for military offensive interferences have emerged: the "fourth domain" of outer space, and the "fifth domain" of cyberspace (pp. 23-27). The author examines these domains at great length throughout the book, and attempts to show how "hi-tech weaponry" has so far been regulated by "low-tech legal safeguards" (Chapter Two). Maogoto's book, in this regard, adds to the expanding literature calling for a new international legal order to govern new types of non-armed coercive interventions, including in the form of information warfare (p. 86).²⁴

The book comprises five short chapters. Chapter One reviews the doctrines and principles identified under the U.N. Charter's regime governing *jus ad bellum*. As part of the chapter, the author posits restrictionist against counter-restrictionist approaches to the U.N. Charter to tease out the "shades of legal grey" that surround the prohibition on the use of force and the inherent right of legitimate self-defense as articulated by the Charter's drafters (pp. 13-14).

Chapter Two focuses on the problems posed by military technology in the twenty-first century. The militarization and weaponization of outer space and cyberspace strains traditional definitions of the use of force regime (a concept that is introduced in Chapter One). Maogoto argues that while technology has leapt ahead, the legal framework has failed to adapt, rendering states unable to effectively defend themselves against these new types of threats (pp. 27-29).

Chapters Three and Four provide case studies on outer space and cyberspace, respectively. The chapters reflect upon some of the most troubling questions for scholars writing in this field. For example, what do the terms "peaceful purposes," "threat" and "use" of force, "armed attack," and "self-defense" entail in a world of military communication satellites and wired infantries? Would the manipulation of another state's satellite into a different orbit be considered a violation of U.N. Charter Article 2(4), and how should we treat electronic blockades or the destruction of data using malware in cyberspace?

Chapter Five rounds up the discussion with forward-looking evaluations of current international legal principles' ability to constrain potential hostile action in the outer and cyberspace domains. The author seeks to "disengage legal shadows from operational substance" (pp. 72-76),²⁵ i.e. to restate the law, as a first step towards a reorientation of the international peace and security

24. See, e.g., BATTLEFIELD OF THE FUTURE: 21ST CENTURY WARFARE ISSUES (Barry R. Schneider & Lawrence E. Grinter eds., 1998); Emily Haslam, *Information Warfare: Technological Changes and International Law*, 5 J. CONFLICT & SECURITY L. 157 (2000); Duncan B. Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS & CLARK L. REV. 1023 (2007); Christopher C. Joyner & Catherine Lotrionte, *Information Warfare as International Coercion: Elements of a Legal Framework*, 12 EUR. J. INT'L L. 825 (2001); Michael N. Schmitt, *Computer Network Attacks and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885 (1999).

25. In a way, this methodological approach resembles that of Professor W. Michael Reisman, which determines the status of a particular sub-field in international law by examining the discrepancies between its "myth system" and its "operational code." See W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 34-35 (1979).

framework. In particular, the author puts forward two potential prescriptive models: (a) a moratorium (and eventually a total ban) on the deployment of weapons in outer space (p. 78); and (b) the development of a conclusive multilateral framework for cyberspace that would both refocus the principle of nonintervention, and reconceptualize the legal threshold for information warfare (pp. 83-85).

The book provides an abbreviated summary of the legal discourse concerning the use of force and information warfare in the twenty-first century. This concise analysis, which is important in and of itself, is perhaps the book's greatest contribution to the scholarship in this field. However, the book might disappoint those hoping to find novel operative recommendations and suggestions for international legal regulation moving forward. Aside from making general observations, Chapter Five does not detail the contents of either a suggested moratorium or ban in the outer space domain or a potential governing multilateral framework in the cyberspace context.

In reading Maogoto's book, one cannot help but be reminded of Professor Colin Picker's article entitled *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*.²⁶ In this article, Picker suggests that "technology is an invisible hand guiding, destroying, and creating international law."²⁷ As noted by some commentators writing on information warfare technologies as early as 1998, "no law can change as swiftly as technology; unless law is to somehow stop technology's seemingly inexorable worldwide progress, it cannot fully control the use of its fruits for warfare. Legal measures can thus supplement, but not supplant, vigilance, preparedness, and ingenuity."²⁸ In many respects, Maogoto's reliance on legal regulation as a panacea seems almost anachronistic given the supremacy and inevitability of technological advancement.

In addition to these concerns, the book does not adequately address the topic of espionage. At certain junctures, Maogoto seems to suggest, without further explanation, that "passive" surveillance (from either outer space or cyberspace), when serving minimum order goals, would be legitimate. For example, Maogoto suggests that passive outer space surveillance by states for the detection of nuclear explosives on earth, serves "peaceful purposes," and would thus be deemed lawful (p. 72). But the question of the lawfulness of the "second-oldest profession" under international law is an unresolved one.²⁹ In

26. Colin B. Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149 (2001).

27. *Id.* at 202.

28. LAWRENCE T. GREENBERG ET AL., INFORMATION WARFARE AND INTERNATIONAL LAW 37 (1998).

29. Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1129-30 (2006) (suggesting that until effective political and legal mechanisms are developed, "intelligence will continue to exist in a legal penumbra, lying at the margins of diverse legal regimes and at the edge of international legitimacy"); see also Richard A. Falk, *Foreword to ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW*, at v, v (Ronald J. Stanger ed., 1962) ("[T]raditional international law is remarkably oblivious to the peacetime practice of espionage. Leading treatises overlook espionage altogether or contain a perfunctory paragraph that defines a spy and describes his hapless fate upon capture"); W. Hays Parks, *The International Law of Intelligence Collection*, in NATIONAL SECURITY LAW 433, 433-34 (John Norton Moore et al., eds., 1990) ("No

light of the fact that, as part of the information revolution, the function of intelligence collection in cyberspace and outer space has significantly intensified, one would expect Maogoto to have discussed it further in the development of his thesis.

Finally, it would seem that Maogoto conveniently dodges the legal and factual complexities posed by the increasing privatization of both the outer space and cyberspace domains. The author makes clear at the outset that his research focuses “only on those information intrusions that are instigated by or imputable to States,” suggesting that as a matter of general practice “non-statal activity” tends to fall within the spectrum of criminal law rather than the use of force paradigm (p. 5). However, the author himself recognizes the difficulty in establishing a sufficient nexus for the purposes of attribution of wrongful conduct to states in these domains (referencing, for example, the difficulty in ascribing liability to States in the context of the “Code Red” and “Stuxnet” worms). Moreover, individuals are becoming even more active than certain states in operating within the digital global commons; consider, for example, George Clooney’s involvement with the Satellite Sentinel Project,³⁰ or the international network of “hack-tivists” known as Anonymous.³¹ The erosion in the power of states, as they lose their monopoly over the fourth and fifth domains, leads to an accountability gap that Maogoto unfortunately avoids.

Regardless of these few shortcomings, *Technology and the Law on the Use of Force* provides valuable observations for scholars and policy makers interested in the field of information and security. Maogoto neatly charts out, in a short and powerful book, a complete list of the pitfalls of currently existing regulatory frameworks governing the fourth and fifth domains. Readers should expect to find more questions than answers, as Maogoto only provides a call for action by defining the areas within the law in need of further clarification. It is up to international practitioners to shed light on the legal shadows and penumbras of information warfare in the *jus ad bellum*.

serious proposal ever has been made within the international community to prohibit intelligence collection as a violation of international law because of the tacit acknowledgment by nations that it is important to all, and practiced by each”); Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT’L L. & POL’Y 321, 321 (1996) (“International Law regarding peacetime espionage is virtually unstated, and thus, international law has been an inappropriate and inadequate reference for either condemnation or justification of actions involving intelligence gathering.”).

30. See generally Chris Rojek, ‘Big Citizen’ Celanthropy and its Discontents, 17 INT’L J. CULT. STUD. 127, 134 (2013) (further detailing Clooney’s involvement with the Harvard Sentinel Project to surveil human rights abuses in South Sudan).

31. See generally Noah C.N. Hampson, *Hactivism: A New Breed of Protest in a Networked World*, 35 B.C. INT’L & COMP. L. REV. 511 (2012) (analyzing the phenomenon of hacktivism from an international law perspective).

Fraudulent Evidence Before Public International Tribunals: The Dirty Stories of International Law. W. Michael Reisman & Christina Skinner. Cambridge, UK: Cambridge University Press, 2014. Pp. vii, 222. Price: \$90 (Hardcover). Reviewed by Elizabeth Chan & Amnart Tankiriphimarn.

In *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law*, Professors W. Michael Reisman and Christina Skinner shed light on a taboo subject: parties' use of fraudulent evidence before public international tribunals (p. xi). Surveying seven cases, the authors expose the ways in which disputing parties resorted to questionable tactics, such as suborning witnesses and forging documents, to win their cases. Reisman and Skinner's investigation into the factual records of these cases is both impressive in its detail and novel in its demonstration that the problem of fraudulent evidence is not an aberration, but an occurrence of frequent concern in public international cases.

Parties' use of fraudulent evidence is a problem because adjudicative bodies rely on parties to disclose all relevant facts. It is important that tribunals make their decisions based on accurate information; thus, parties' use of fraudulent evidence "undermine[s] the essence of judicial function" (p. x). This is especially true given that adjudicative tribunals, unlike national executives and legislatures, have limited intelligence-gathering ability and rely on the parties to supply a full and accurate account of the facts (p. 1). However, the adversarial system is an "imperfect system" for "flush[ing] out falsehoods and reveal[ing] the truth" because of information asymmetries between litigants (p. 1).

Fraud is hard to define. As Reisman and Skinner observe, "[n]ot all intentionally inaccurate facts constitute fraud in its strict legal sense" (p. 3). From the seven case studies, they highlight some activities that may fall into either the core or the penumbra of fraudulent evidence. While Reisman and Skinner expressly say that the use of forged documents and the suppression of material documents are fraudulent (p. 194), they reserve their position on whether the selective presentation of facts and the failure to disclose evidence helpful to one's adversary may amount to fraud (p. 198). The courts and tribunals in each of the seven cases they present adopted varying approaches in dealing with the incidents of fraud (or quasi-fraud), which appear to fall into four categories: denial, burden of proof, duty of assistance, and sanctions.

I. Denial: In *Qatar v. Bahrain*, Qatar presented eighty-one documents that experts in the International Court of Justice (ICJ) later proved to be fabricated (Chapter Eight). There, the Court denied the existence of the fraud: there was no mention of the fabricated evidence in the Court's final decision. Only ad hoc Judge Fortier mentioned in his separate opinion that Qatar relied on fabricated evidence (p. 13). Similarly, in *Corfu Channel*, the United Kingdom suppressed a crucial document containing certain naval orders, called the XCU, which undermined the United Kingdom's claim of innocent passage through the Corfu Channel (Chapter Three). The Court requested that the United Kingdom

disclose the XCU (p. 67) but drew no negative inferences from their refusal to produce the document (p. 73). In *Nicaragua v. United States*, Nicaragua's witnesses allegedly gave false testimony concerning whether Nicaragua had supplied arms to the armed opposition in El Salvador (Chapter Four). In response, the majority of the Court relied on a legal theory that avoided needing to decide whether Nicaragua had in fact supplied arms (p. 94). However, Judge Schwebel, in his dissenting opinion, considered that the international "unclean hands doctrine" should deny a party implicated in fraud from bringing its claim before the ICJ (p. 95).

II. Burden of proof: In the Iran-United States Claims Tribunal, some U.S. claimants relied on forged official documents against the Iranian government in circumstances where it was impossible to check the authenticity of those documents because the original documents had been lost in the Iranian Revolution (Chapter Six). The Tribunal adopted a burden of proof mechanism to deal with fraud. It presumed that official documents submitted by claimants were prima facie valid (p. 105). The burden would then fall to the respondent (who would presumptively possess potential rebuttal documents) to challenge the validity of the evidence (p. 105). Reisman and Skinner identify two problems with this approach. First, it is difficult for the respondent to disprove fraudulent documents if it does not have the original valid documents (p. 105). Second, tribunals are reluctant to label any evidence as fraudulent. As they point out, instead they merely label doubtful evidence as "inauthentic" when the proponent of the evidence has failed to establish its prima facie authenticity (p. 125). Reisman and Skinner's criticism seems apt because a presumption of validity in these cases may have facilitated claimants' use of inauthentic evidence. This burden-of-proof approach bears similarity to the denial approach, in that under both approaches the tribunals do not explicitly condemn the use of doubtful evidence. However, given that so many of the relevant documents could not be found for the specific claims before the Iran-United States Claims Tribunal, the Tribunal was justified in applying this burden of proof mechanism.

III. Duty of assistance: In *Tunisia/Libya*, Libya's intentional omission of certain facts led to the ICJ's validation of a wrong de facto maritime boundary line (Chapter Four). There, the Court considered it Tunisia's responsibility to challenge Libya's false assertion of the geographic coordinates marking the de facto line (p. 86). Thus, Libya was not required to proactively assist Tunisia and the Court by presenting a complete factual record. This approach, in Reisman and Skinner's view, effectively meant that there was "no sanction for negligent or intentional misrepresentation" (p. 88). Contrast *Tunisia/Libya* with the *Taba* arbitration, where Israel failed to inform Egypt of the latter's misunderstanding of a crucial event that had taken place in the territory under Israel's control in a boundary dispute before an ad hoc arbitration tribunal (Chapter Seven). The Tribunal adopted Egypt's conception about what constituted good faith in pleading and negotiation. That is, the Tribunal's approach required Israel to consider Egypt's case and not simply make available information that would be useful to Egypt, but to take the extra step

of actually giving it to Egypt and making sure Egypt understood that information (p. 161). The *Taba* approach seems appropriate, although in *Tunisia/Libya*, the Court might have required Libya to disclose all relevant facts if it had known, before rendering its judgment, that Libya had not done so.

IV. Sanctions: The *Sabotage Cases* involved suborned witnesses giving false testimony before the German-United States Mixed Claims Commission (Chapter Two). There, the Commission said it had authority to re-open a case when it had been “misled by the fraud and collusion of witness” (p. 33). In this case, after becoming aware of false testimonies, the Commission set aside its prior decision and issued a new decision holding Germany liable for the sabotage in question (p. 34). Reisman and Skinner note with disappointment, however, that tribunals after the German-United States Commission have been reluctant to build on the precedent established in the *Sabotage Cases* (i.e., to reopen cases involving fraud) (p. 53). *Tunisia/Libya* presents an example of this reluctance. In this case, the limitation of the ICJ’s jurisdiction under Article 61 of the Court’s Statute,³² made it impossible for the Court to revise its decision, which was based on wrong facts, when it found that Tunisia should have known that the disputed information was wrong.

How can we discourage or prevent the use of fraudulent evidence in public international tribunals? It would be necessary to sanction both parties themselves and their legal representatives. The authors note, however, that it is often difficult to point to a particular wrongdoer—both the client (as principal) and the lawyer (as agent) may be implicated in fraudulent conduct. For example, in *Qatar v. Bahrain*, it could not be shown that Qatari officials had authored the eighty-one forged documents (p. 188). In *Nicaragua v. United States*, counsel for Nicaragua contested Judge Schwebel’s assessment of fraud in the Court and denied that Nicaragua’s counsel’s conduct had been ethically objectionable (p. 98). In any case, the direct sanctioning of state parties would raise a very serious concern because the unfavorable judgments would not affect only state officials participating in those cases, but also the state’s citizens for generations. For instance, at first glance, the Court’s option to apply the unclean hands doctrine in *Qatar v. Bahrain*, which would have prevented Qatar from asserting its claim, might seem to be a proper response. However, it seems the approach would leave the boundary dispute unresolved, arguably making the situation worse.

Regarding legal representatives specifically, Reisman and Skinner propose imposing a duty to investigate the truth of documents before presenting them in Court—but they ultimately reject this solution for two reasons. First, it is difficult to know how far a lawyer could and should investigate its own client. Further, such a duty to investigate might sow distrust and thus

32. Article 61(1) of the International Court of Justice Statute provides:
An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

undermine the lawyer-client relationship (p. 190). Sometimes lawyers' hands are tied. In *Corfu Channel*, Reisman and Skinner note that the decision not to disclose the XCU was ultimately the decision of the state, and not of the state's counsel (p. 75). Government-lawyer relationships can be fraught with tension, as lawyers owe competing duties to the state as well as to the international tribunal. As Lord Chancellor Shawcross asked in the *Corfu Channel* case, "Does the maxim 'My country . . . right or wrong, my country' relieve one from the professional consequences which would otherwise arise?" (p. 77).

Tribunals could also sanction legal counsel who are knowingly complicit in fraud committed by their clients. However, the international legal system lacks a uniform approach to defining parties' and lawyers' ethical obligations to international tribunals. Some codes of conduct for international counsel already exist such as The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals³³ and The International Bar Association's IBA Guidelines on Party Representation in International Arbitration.³⁴ Reisman and Skinner are skeptical of whether a code of conduct for international counsel would change counsel's behavior. Although such codes of conduct might set norms for ethical behavior, they argue that they have little practical effect if there are no enforceable sanctions for breaching such codes of behavior (p. 199). For example, an international arbitral tribunal applying the IBA Guidelines on Party Representation in International Arbitration has the authority to sanction parties for misconduct, with remedies including admonishing counsel, drawing appropriate inferences in assessing evidence relied on by counsel, taking into account the misconduct in allocating costs, and taking "any other appropriate measure in order to preserve the fairness and integrity of the proceedings."³⁵ These sanctions sound effective, but in practice, the application of the guidelines depends on parties' consent to apply them in the first place.³⁶

Reisman and Skinner reflect that part of a solution lies in national systems with domestic bar associations and law societies disciplining the conduct of their lawyers who litigate abroad (p. 200). Generally, domestic legal systems are able to sanction parties and lawyers for unethical conduct (for example, by bringing perjury charges against dishonest witnesses or disbaring a lawyer for breach of the relevant ethical obligations applying to lawyers).³⁷ However, in the international context, the national solution is not entirely satisfactory, particularly where the state is complicit in the fraud and thus may face a conflict of interest in sanctioning its lawyers for misconduct that the state itself may have encouraged.

33. Standard 6.1 states, "Counsel shall present evidence in a fair and reasonable manner and shall refrain from presenting or otherwise relying upon evidence that he or she knows or has reason to believe to be false or misleading." THE ILA HAGUE PRINCIPLES ON ETHICAL STANDARDS FOR COUNSEL APPEARING BEFORE INT'L CTS. § 6.1 (2010).

34. IBA GUIDELINES ON PARTY REPRESENTATION IN INT'L ARBITRATION §26 (2013).

35. *Id.* § 26.

36. *Id.* § 1.

37. *See, e.g.*, 18 U.S.C. § 1626; ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.10 (2002).

Although the most recent case studied in this book, *Qatar v. Bahrain*, was decided in 2001, it would be wrong to assume that it is the last instance of fraudulent evidence before a public international tribunal. The type of questionable behavior evidenced in the seven cases studied remains a problem today. For example, Thailand's legal representative in the 2013's *Interpretation of Preah Vihear*³⁸ admitted at an academic conference that the Thai legal team had deliberately omitted mentioning a fact that favored Cambodia's claim to disputed territory: "We had always been aware of the fact. And we hoped that Cambodia would not use that fact, which it didn't. But the Court found the fact itself [without Thailand bringing the fact to the Court's attention] The truth is always the truth, and we have to accept that."³⁹ This recent example of a strategic omission demonstrates the original problem posed by Reisman and Skinner: that the use of fraud undermines courts' and tribunals' function in making decisions based on accurate facts. Further, this case shows that the problem of fraudulent evidence before public international tribunals still exists and is an issue the international community should take seriously (p. 14). Unfortunately this book does not provide comprehensive normative guidance on how tribunals and international lawyers should deal with the problem of fraud before public international tribunals. However, it does encourage further research on this topic. In this regard, *Fraudulent Evidence Before Public International Tribunals* would be a seminal reference for people who want to learn more about the problem.

38. Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thai.), 2013 I.C.J. 277 (Nov. 11).

39. Virachai Plasai's transcript in an academic conference held at Chulalongkorn University in Bangkok, Thailand on November 15, 2013. Virachai Plasai, *Recording of Conference at Chulalongkorn University in Bangkok, Thailand*, at 21:30-23:55, YOUTUBE (Nov. 15, 2013) <https://www.youtube.com/watch?v=7e-1JoqMb9Q>.