

International Incidents: New Genre or New Delusion?

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In his introduction to the Special Feature in the Fall 1984 issue of the *Yale Journal of International Law*,¹ Professor Reisman proclaimed the study of "incidents" as a "new genre in the study of international law."² Although Reisman's article is challenging, innovative, and eminently readable—as one would expect from his pen—one must nevertheless question whether the incident methodology is truly a new genre, as he claims, or whether this belief is simply a delusion which distracts us from the more serious problems of studying international law.

Certainly, the claims made for this new method are significant. It is envisaged as "a positive first step in restoring rational, deliberative law-making in the international community"³ and "a type of 'meta-law,' providing normative guidelines for decisionmakers in the international system in those vast deserts in which case law is sparse."⁴ It is further claimed that incident studies, if taken up by other scholars, ultimately "can . . . yield an abundant literature of international appraisal, richer than the limited number of cases decided by courts . . . [and] more accurate in expressing international normative expectations."⁵ Moreover, it is clear that Reisman sees this new method as replacing, to some extent, the traditional examination of the formal sources of international law, such as treaties, custom, and judicial and arbitral decisions.⁶

It may be useful to pose two separate questions. First, why is a new method of study felt to be necessary? And, second, what is its likely utility?

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1. Special Feature, *The Incident as a Decisional Unit in International Law*, 10 *YALE J. INT'L L.* 1 (1984). The Special Feature, along with additional incident studies, will appear in book form in the summer of 1987 as *INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS* (W. Reisman & A. Willard eds. 1987).

2. Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 *YALE J. INT'L L.* 1 (1984).

3. *Id.* at 18.

4. *Id.* at 19.

5. *Id.*

6. Reisman concedes, however, the doubtful utility of this new method in persuading international tribunals, since such tribunals are likely to be committed to applying a "wholly anachronistic conception of international law." *Id.* at 19.

I. The Rationale Behind the Search for a New Method

Inevitably, the case for a new method of study of international law rests in part on a critique of the old. Yet Reisman is essentially criticizing international lawyers rather than the traditional methods of study as such. His thesis is that decision-makers prefer to consult political scientists rather than international lawyers because of the inadequacies of the lawyers and the jurisprudential system in which they operate. He claims that because lawyers tend to construct their “normative universe” from texts, they are unable to predict accurately the responses of key actors to any critical event (which the study of incidents would enable them to do). Their advice is thus useless or, at best, of minimal relevance.⁷

Reisman’s criticism is harsh and, if true, constitutes quite an indictment of government legal advisers. But is it true? Where is the evidence to support this indictment? It is frankly inconceivable that the many experienced and able international lawyers in foreign ministries, state departments, and cabinet offices throughout the world are so inept and unworldly as to give advice to their governments that ignores the question of how other governments will react to a particular course of action—if, indeed, they are likely to react at all.

Furthermore, Reisman assumes that governments wish to have legal advice on the likely consequences of the actions they contemplate, but fail to seek it because their legal advisers are too unworldly or unrealistic. There is, however, another possible explanation. It may be that governments, on occasion, simply do not want legal advice because they fear it will be adverse to the action they wish to take, because it may tend to inhibit their freedom of action, or because they simply are not concerned with issues of legality.

We have little hard evidence either way, but this second explanation seems as plausible as the first. Certainly, it was widely assumed in the United Kingdom that the Anglo-French military invasion of the Suez in 1956 was undertaken by the British government without reference to the Foreign Office Legal Adviser. One suspects the same may have been true of the U.S. government’s disastrous involvement in the 1961 Bay of Pigs invasion, the Israeli air attacks in 1981 on the Osirak nuclear reactor in Iraq, the 1979 Soviet invasion of Afghanistan, or Argentina’s 1982 invasion of the Falkland Islands. The matter must remain one for conjecture, since governments are unlikely to publicize the fact that they did not seek, or did not follow, legal advice. The point, however, is that govern-

7. *Id.* at 4.

ments may show scant respect for the law for reasons other than that the legal advice they receive is anachronistic, unrealistic, or uninformed.

Reisman's thesis takes a kindlier view of the motives of governments. His argument is not that governments have no respect for international law, but rather that they seek legal advice more responsive to the practical concerns of political actors than traditional counsel appears to be.⁸ If, however, we identify law as norms responsive to a government's political concerns, but concede (as probably we must) that different governments will have different political concerns, then what we are identifying is not international law at all. International law must remain a body of rules applicable to international society as a whole. Attempts to attach a politically partisan character to those rules will destroy the utility of international law, for the nations of the world will not accept international rules that yield a different answer to the question of whether an action is legal depending on the identity of the actor.

II. The Utility of the Method

The selection of incidents for study and analysis is crucial to the new method, and since the purpose of the study is to identify the reactions of "functional elites" so as to obtain "a more accurate and reliable indicator of what elites hold the law to be,"⁹ it follows that the only incidents of any utility will be those in which reactions by these elites can be identified and recorded.

This immediately suggests that the method is one of very limited scope. It is likely to be useful in relation to major instances of the use of force or to significant claims of jurisdiction, such as the U.S. attempt to exercise control over European corporations in the Soviet gas pipeline incident;¹⁰ in such cases one can expect demonstrable reactions from elites. In practice, however, the vast majority of legal relations between states are conducted in a bilateral context, and "incidents" in these circumstances are not likely to evoke any publicized reaction by other parties. Even if it were argued that the silence of other states is itself a reaction,¹¹ how does one interpret this silence—is it approval, disapproval, or disinterest? Thus, in many contexts, the study of a bilateral

8. *See id.* at 2-5.

9. *Id.* at 12-13.

10. *See DeSouza, The Soviet Gas Pipeline Incident: Extension of Collective Security Responsibilities to Peacetime Commercial Trade*, 10 YALE J. INT'L L. 92 (1984).

11. *See, e.g., Ratner, The Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements*, 10 YALE J. INT'L L. 59, 74 (1984).

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dispute as an "incident" is pointless because there are no reactions by functional elites to be observed. Let us take some recent examples.

For the past five years, the Iran-United States Claims Tribunal in the Hague has been dealing with many hundreds of cases, and the case law emerging from the Tribunal offers a fruitful source of study of rules relating to international monetary claims. The large number of learned articles about the Tribunal testifies to the utility of such study.¹² Yet, so far as this writer is aware, none of the decisions of the Tribunal or arguments of the parties before it have evoked any reactions from functional elites. The incident method is therefore quite inappropriate to this area of study.

Another example is the recent dispute between Canada and France over the application of the 1972 Franco-Canadian Fisheries Treaty,¹³ which led to an arbitral award on July 17, 1986.¹⁴ There, the essential question was the legality of the Canadian exclusion (as a matter of policy rather than by reference to conservation regulations) of factory-freezer trawlers registered in St. Pierre et Miquelon from the fishery in the Gulf of St. Lawrence. Necessarily, the argument on both sides (and prior advice to the two governments) had to be conducted on the basis of traditional sources: accepted rules of interpretation of treaties, arguments as to the relationship between treaties and custom, and so forth. No resort to the incident method of study was possible for the simple reason that there were no reactions by third states—or "functional elites"—either before or after the award. The dispute was typically bilateral, with third states minding their own business. Indeed, this also could be said of the U.S.-Canadian dispute over the Gulf of Maine.¹⁵

More broadly, the same is true of the dispute between the United Kingdom and the Republic of Ireland over the continental shelf boundary in the area of the Rockall Plateau. Although there have been reactions by Iceland and Denmark, in the sense that both these states have made competing claims to the Plateau,¹⁶ it is not clear that any disinter-

12. See, e.g., Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT'L L. 1 (1983); Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AM. J. INT'L L. 1 (1984). For the collected decisions of this tribunal, see IRAN-UNITED STATES CLAIMS TRIBUNAL REPORTS (1983-1986), vols. 1-6.

13. Agreement on Their Mutual Fishing Relations, Mar. 27, 1972, Canada-France, 862 U.N.T.S. 209.

14. Fishing Dispute (Can. v. Fr.), 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R. GÉN. DR. INT. PUB.] 713 (1986).

15. See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (Judgment of Oct. 12).

16. On May 7, 1985, the Danish government issued a "Provisional Administrative Measure" defining the Danish shelf in respect of the Faroes to include the Plateau; the United

ested states—or their “functional elites”—have reacted at all to this complex situation.

Similarly, in the current dispute between Israel and Egypt concerning sovereignty over Tabah,¹⁷ notwithstanding the dispute's special importance in light of its implications for the stability of the Camp David Agreements,¹⁸ no other state seems to have reacted. Rather than expressing a view on the norms relied upon by the parties, the efforts of the United States—perhaps the most interested third party—appear (very prudently) to have been confined to persuading the two parties to arbitrate their dispute.

These examples could be multiplied many times. The point they make is simply that any study of these disputes has to be by way of the normal, traditional analysis: what are the claims of the parties, on what facts and legal norms do they rely, from what sources are these norms derived, and how, ultimately, does the settlement of the dispute either confirm or deny such norms? The idea that one can test the validity of norms by reference to the reactions of functional elites does not work because there are no such reactions.

Reisman and his associates might argue that these examples of international claims and fishery, maritime, and territorial disputes are not major international events that can be appropriately classified as “incidents.” If so, then it confirms the point made above that the method is of limited scope. Moreover, even when we do examine significant international events that might seem to be ideally suited for study using the incident method, we often find that widespread reactions by international elites simply have not occurred.

For example, on July 10, 1985, the Greenpeace vessel *Rainbow Warrior* was sabotaged and sunk in a New Zealand port by French agents.¹⁹ The government of New Zealand apprehended and brought to trial the two agents who appeared, on all the evidence, to have acted on behalf of the French government. This episode seems to have all the characteristics of an “incident.” But in fact it cannot be usefully studied as one because the reactions of foreign governments appear to have been limited

Kingdom protested on May 13, 1985. The Icelandic claim is contained in the Regulations of May 9, 1985, issued under Law No. 41 of June 1, 1979; the United Kingdom protested by Note of June 19, 1985.

17. The dispute has been submitted to arbitration. The formal opening of the ad hoc arbitral tribunal took place in Geneva on December 10, 1986.

18. Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, March 26, 1979, 18 I.L.M. 362 (1979).

19. See Rousseau, *Chronique des Faits Internationaux* (France and New Zealand), 90 R. GÉN. DR. INT. PUB. 171, 216 (1986).

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to the United Kingdom's protest to France over the sinking of the vessel (which was U.K.-registered), the Netherlands' protest over the death of one of the crew (a Dutch national), and the Swiss protest over the unauthorized use of Swiss passports by the two French agents.²⁰ The key issue, however, was whether New Zealand could properly indict government agents for acts done in their official capacity or whether it should have proceeded via an international claim against France. On that issue there appear to have been no reactions.

There is, of course, one category of events about which there will always be significant governmental reaction: those which lead to discussion and debate in an international forum, such as the specialized agencies or regional organizations of the United Nations. Within these organs, member states are required to express a view—to react—either in debate or in voting on a resolution. Yet there is nothing terribly new in the idea that one should analyze such reactions; indeed, such analysis is a commonplace research technique. We do not need the new genre of “incidents” to point us in this direction.

III. Difficulties in Applying the Method

Even assuming that in relation to particular incidents there are reactions from functional elites beyond those which occur within the context of traditional international forums, two further questions remain. First, are these reactions sufficiently widespread to provide a reasonable representation of the reaction of the international community to the norms in question? And, second, have these reactions been correctly interpreted?

A. *The Representative Character of the Reactions*

Obviously, if in relation to a particular incident the United States reacted one way and the Soviet Union in a quite opposite way but otherwise there were no reactions, one would be hard put to pronounce on the validity of the norm in question. In other cases, the number of the reactions may be so small as to raise serious doubts about their reliability as indicators of a norm of general application.

The case studies in the *Journal's* Special Feature offer several good illustrations of this problem. Sadurska's article on the problems faced by Sweden due to the presence of Soviet submarines within its territorial waters²¹ notes that international reactions were confined to protests by

20. See *id.* at 225.

21. Sadurska, *Foreign Submarines in Swedish Waters: The Erosion of an International Norm*, 10 *YALE J. INT'L L.* 34 (1984).

Norway, Denmark, and Iceland and criticism of the submarines' nuclear capacity by China, while the major Western powers remained silent. Thus we have three protests and one rather ambiguous response. In Ratner's article on the Gulf of Sidra incident,²² the analysis of international reactions is confined to newspaper articles. However, except in the case of Pravda in the Soviet Union, newspaper correspondents are scarcely to be regarded as key elites. Thus, one has no idea how other states reacted. In Cohen's article on the crash in Canadian territory of the Soviet satellite Cosmos 954,²³ the only international reactions identified are those of U.S. elites, and these reactions seem to be derived from telephone conversations with Cohen, not published documents. (Do elites answer telephone inquiries of this nature, or do low-level officials?)

DeSouza's article on the Soviet gas pipeline incident²⁴ is on surer ground because, as is commonly known, there was an official reaction by way of protest from the European Economic Community (EEC) on behalf of all its members. Even so, DeSouza analyzes the reactions of only the two disputants (the U.S. and the EEC); apart from Japan, no other state seems to have adopted a position.

Thus, taking these four articles as examples, one might conclude that even when other states react to an international incident, the reactions may be insufficient in number to be useful and may not represent the views of the key elites of these states. Another problem is that the reactions of elites in states actually involved in "incidents" tend to be self-serving and lacking in objectivity. This is particularly true if the elites are government officials.

B. *The Interpretation of the Reactions of Elites*

The final question is how to interpret the responses of elites to international incidents when there exist responses susceptible to analysis. Clearly, if one views such reactions as establishing norms, it is important to interpret these reactions accurately. Yet the articles under survey testify to the difficulties of interpretation.

For example, Cohen asserts that a new "norm of joint compensation" appears to emerge from the Cosmos 954 incident.²⁵ This interpretation is based on Canada's having accepted an offer of U.S. assistance in cleaning up the damage caused by a Soviet satellite and on the United States'

22. Ratner, *supra* note 11.

23. Cohen, *Cosmos 954 and the International Law of Satellite Accidents*, 10 YALE J. INT'L L. 78 (1984).

24. DeSouza, *supra* note 10.

25. Cohen, *supra* note 23, at 91.

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having incurred costs of \$2 to 2.5 million which were not claimed from the Soviet Union. However, we are given no clear evidence of the motives of the United States, and Cohen admits the payment may have been *ex gratia*.²⁶ To extrapolate from this one incident and postulate a norm of joint compensation, in which even faultless satellite-launching nations must contribute towards the cost of compensating an injured state, is highly dubious. It seems unlikely that European satellite-launching states would accept this "norm."

It may well be that Reisman would deny that an international norm can be extracted from one incident. Thus a more cautious interpretation would view one or more incidents as indicative of a trend, and therefore as a basis for predicting likely conduct, and likely reactions, in the future. If this is so, then the method of study is not new at all, for the traditional methods of identifying customary rules involve the analysis of state practice, and state reactions, in a series of similar events. The only real difference is that a few incidents would form a basis for predicting future conduct and responses, but would not constitute the kind of settled, uniform, and general practice needed to identify such conduct as obligatory by custom.

Ratner's article affords another example of the difficulties of interpretation. He interprets the Gulf of Sidra incident as relevant to the establishment of norms governing the application of Rules of Engagement (ROE).²⁷ This interpretation, however, is altogether too technical. Certainly, the incident illustrates the scope of the right of self-defense, but the conclusions that emerge are valid whether or not a state has issued any ROE to its armed forces.

These examples illustrate the problems of interpreting state reactions to incidents. Moreover, there is a more general difficulty that arises whenever states react to an international incident: can one assume that a particular state's reaction manifests a view about the norm at issue? Indeed, this question has been faced for many years by writers concerned with evaluating voting patterns or statements made in the context of international organs. The fact is that states tend to vote or speak for *political* reasons largely divorced from considerations of legality.²⁸ Bloc

26. *Id.* at 89.

27. Ratner, *supra* note 11, at 75-77.

28. See Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AM. J. INT'L L. 811, 830-31 (1984). For example, Israel has consistently rejected resolutions or pronouncements on the Middle East crisis made in UN organs, claiming that they have no objective validity as statements of the legality of Israel's actions. See, e.g., Blum, *The Beirut Raid and the International Double Standard*, 64 AM. J. INT'L L. 73, 98-104 (1970) (discussing the dominance of political concerns in UN votes on the Arab-Israeli conflict).

voting and statements in support of another state's position based entirely on political affiliation do not necessarily tell us a great deal about how states view the underlying norm. In another context, with different actors, they might take a very different position on the same basic legal issue.

Let us take the Falklands episode as an illustration. On April 3, 1982, the UN Security Council adopted Resolution 502, demanding the immediate withdrawal of all Argentinian forces from the Falkland Islands.²⁹ Yet on May 29, 1982, the Organization of American States (OAS) by resolution condemned the United Kingdom's "armed attack" on the islands.³⁰ If the nations of the world agreed in the UN Security Council that the Falklands invasion was violative of international law, how does one interpret the reactions of the elites representing OAS member states? It may well be that any search for normative rules of conduct entirely misses the point, for the OAS resolution is better seen as a political expression of hemispheric solidarity than as a reflection of normative rules. Moreover, extrapolation would be highly dangerous. The OAS elites might react quite differently if Mexico sought to recover parts of Texas or California from the United States, or if Morocco sought to expel Spain from the Spanish-held enclaves and islands off the Moroccan coast.

Conclusion

This writer is forced to two conclusions. First, the incident genre is not as novel as one might suppose. Any survey of the literature over the past fifty years shows a continuing preoccupation with occurrences of this kind: the nationalization of the Suez Canal; the invasions of Tibet, Czechoslovakia, Afghanistan, Cuba, Grenada, Suez, and Chad; the Icelandic Cod War; the Pueblo incident; the Entebbe rescue operation; the seizure of the U.S. hostages in Teheran—the list could be extended indefinitely. In fact, international lawyers have always studied "incidents" and tried to assess the objective reactions of the world community to the rival claims of the interested parties.³¹

Second, the study of international incidents is merely a useful adjunct to traditional methods of study. It supplements rather than replaces them. Most norms evolve without "incident" and without overt reaction

29. S.C. Res. 502, 37 U.N. SCOR Res. & Decs. at 15, U.N. Doc. S/INF/38 (1982).

30. See Res. II: *Serious Situation in the South Atlantic*, Consultation of Ministers of Foreign Affairs (20th mtg.), O.A.S. Doc. OEA/ser. F/II.20, doc. 80/82 rev. 2 (May 29, 1982).

31. The exposition of a rule of international law must be tested for its conformity with state practice, an exercise that has always involved looking at how other states act and at how they react to the conduct of others. The process is not radically changed simply by calling it an analysis of the expectations of elites.

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by disinterested elites, and so the study of such norms must be by traditional methods. Above all, we should not delude ourselves into believing that if only we can adopt the incident method of study the statesmen of the world will suddenly start listening to what we, as international lawyers, have to tell them.