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SPECIAL FEATURE— The Incident as a Decisional Unit in International Law*

International Incidents: Introduction to a New Genre in the Study of International Law

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Theory that can face fact . . . is what we need.

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The scene is Beijing. You are an international political adviser to the government of the People's Republic of China (PRC). The news dominating the cable traffic is that Argentina has invaded the Falkland Islands.¹ Even though the invasion is on the other side of the planet, in a region in which the PRC is not directly involved, you will follow the events there with great interest for the next several weeks.

Some of your colleagues will be concerned about the military dimensions of the conflict, for example, problems encountered in launching am-

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1. Spanish speakers refer to the islands as Las Malvinas. Because use of the English or Spanish designation generally marks the user as pro-British or pro-Argentine, United Nations documents, in an effort to escape the politics of names, designate the islands as *Falklands/Malvinas*. I have used the English name alone, because it seems awkward to use both; no political implication should be deduced.

For historical background of the conflict, see GOEBEL, *THE STRUGGLE FOR THE FALKLAND ISLANDS: A STUDY IN LEGAL AND DIPLOMATIC HISTORY* (rev. ed. 1982); for a review of recent literature and an analysis of the 1982 war in legal perspective, see Reisman, *Struggle for the Falklands*, 93 YALE L.J. 287 (1983).

phibious attacks on well-defended island positions, establishing supply lines over long distances, and using weapons in hostile natural environments. But you will be absorbed in quite a different aspect of the matter: the reactions of the international community to the unilateral assertion by a continental nation of a right to seize an offshore island.

The reason is obvious. The People's Republic has claims (the validity of which is now acknowledged by most other states in the world) to the island of Taiwan,² some 100 miles off the Chinese mainland. But even those who concede your claims have admonished you not to use force to regain Taiwan. While the United Nations Charter prohibits the use of force in general terms, you recognize that force is often used in interstate relations and is sometimes not seriously condemned.³ The distant war over the Falkland Islands is of great interest to you because it is almost a laboratory test of just how serious are the objections to the use of force in a situation of this sort. A high degree of actual tolerance for Argentina's unilateral action — words and other verbal condemnations notwithstanding — may be a signal that the international community is willing to accept such unilateral military assertions of right. Substantial condemnation of Argentina and effective support for the United Kingdom may indicate exactly the opposite.

Political Inferences and International Law

In your analysis of a complex event like the Falklands War, you are in fact making inferences about the normative expectations of those who are politically effective in the world community. These expectations constitute significant variables in international political behavior, because shared notions of what is right influence perception, reaction, and capacity for mobilization. These inferences about what other actors think is acceptable behavior are not derived from international judgments or from constitutional documents, statutes, or treaties. They are almost entirely derived from the responses of key actors to a critical event. The

2. For the American position, see the so-called Shanghai Communique, Feb. 27, 1972 in United States Foreign Policy for the 1970's: The Emerging Structure of Peace, A Report by President Richard Nixon to the Congress 28-41 (1972). The United States position was reiterated in the joint communique on the establishment of diplomatic relations between the United States and the People's Republic of China, 79 DEP'T ST. BULL. 25-26 (1979). See also, *Statement of the Government of the People's Republic of China*, 18 I.L.M. 274 (1979). But the issue of title is not without controversy: see Chen & Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L. J. 599 (1972).

3. See generally BLECHMAN & KAPLAN, *FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT* (1978). For legal appraisal, see Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984). See also Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, 1984 PROC. AM. SOC'Y OF INT'L L. (forthcoming).

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expectations and demands of those actors themselves may have been shaped, in part, by many of the formal sources of law just mentioned. But whether those formal sources of law have genuine significance or are merely a facade concealing raw and ephemeral political calculations can only be assessed when you have seen how they fared in a particular incident.⁴

Political advisors are constantly studying incidents such as the Falkland Islands War and making inferences from them about politically relevant expectations. These inferences are constantly updated by new information gleaned from similar events. In predicting or projecting future behavior, of course, account is taken of a variety of other unique political factors that characterize any event. It is no disservice to law to acknowledge that prescriptions about what one *ought* to do are, alas, only one factor in deciding what one *will* do. Naturally, the weight accorded prescriptive norms will vary with the factual context, the identity of the actors, and the effectiveness of the legal system enforcing the norms.

The normative expectations that political analysts infer from events are the substance of much of contemporary international law. The fact that the people who are inferring norms from incidents do not refer to the product of their inquiry as “international law” in no way affects the validity of their enterprise, any more than Molière’s M. Jourdain’s obliviousness to the fact that he was speaking prose meant that he was not. Whatever it is called, law it is. Yet, at least on first consideration, it is startlingly inconsistent with our accepted notions of law to suggest that one ought to orient oneself in the international legal system by reference to these incidents rather than primarily by reference to statutes, treaties, venerable custom and judicial and arbitral opinions. Indeed, as we shall see, the jurisprudential implications of this reorganization of focus are profound, in ways going beyond even Jellinek’s disquieting observation about the “normative force of the factual.”⁵

International Lawyers and Incidents

International lawyers frequently lament the fact that they are rarely consulted by foreign policy decisionmakers. This cannot be attributed to

4. The problem is not identifying “sources” of law, but being certain that something in a particular source *is* law. “[M]ore traditional approaches, such as the enumeration of sources in the International Court’s statute article 38 are not wrong, but are incomplete. Something may fall within one of the formal sources, but simply not be or have ceased to be law.” Reisman, *International Lawmaking: A Process of Communication*, 1981 PROC. AM. SOC’Y INT’L L. 101, 119 (1981).

5. G. JELLINEK, ALLGEMEINE STAATSLHRE 308 (1900).

a general, visceral dislike of lawyers, for government officials, when operating in a domestic setting, frequently consult their lawyers. They correctly assume that lawyers are reliable specialists in understanding the expectations of those who are politically and legally effective. Why is it that the same decisionmakers do not resort to their international lawyers with comparable frequency?

There are numerous reasons why international lawyers are increasingly irrelevant in many areas of international politics, not all of them attributable to the lawyers themselves. We cannot ignore the advanced decay of the formal legal system that was painstakingly reconstructed after World War II. One is as unlikely to seek and pay for the advice of the votaries of a demonstrably ineffective legal system as one is to seek and pay for the blessings of the high priests of a sect manifestly out of favor with the pertinent divinity. But the problems we call "legal" continue to present themselves for resolution, whatever the state of the system; someone must perform legal functions even in a decaying system.

The reasons for the diminished relevance of international lawyers are attributable less to the system than to the international lawyers themselves and the jurisprudential framework within which they operate. For key areas of public international law, international lawyers make themselves irrelevant by failing to identify what international law in this context is and by failing to report it to those to whom they are responsible. International lawyers pay relatively little attention to the incidents from which political advisers infer their normative universe. Rather, they persist in constructing their normative universe from texts. They thus confine their attention to sources of international law that were either merely ceremonial at their inception, or that, although animated by more normative intentions when they were created, have ceased to be congruent with expectations of authority and control held by effective elites.

To be sure, some international lawyers try to examine practice but, as we will see, that exercise is quite a different enterprise from the intuitive legal research of the political adviser. Rather than seeing incidents as norm-indicators or norm-generators, as does the political adviser, the international lawyer generally reacts to them in judgmental fashion, assuming that the norm in question is *a priori* and enduring and examining the incidents in terms of whether they indicate that a particular norm has been violated.

The question the political analyst will ask, in contrast, is not simply whether the acts at issue have violated some preexisting norm but rather, whether expectations entertained by effective elites about what is permissible may be inferred from their behavior. The question is eminently

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practical, for even those who do not regularly use the word “law” in their discourse, and even those who snicker when others use it, must make estimates about the subjectivities of allies and adversaries alike. These subjectivities necessarily include what those actors think is right. In a world in which allies and adversaries do not submit to intensive interviews and rarely volunteer or are permitted to tell the whole truth (if any part of it), deeds — actions and reactions — become one of the few available windows to what others are thinking, either consciously or unconsciously.

By default, the political adviser becomes a do-it-yourself lawyer.

Finding the Law in Domestic Systems

All lawyers, whether domestic or international, face the same core problem in seeking to ascertain the law: to identify the operational norms used by those who are politically and legally relevant in projected situations, so that accurate predictions of how they are likely to characterize and react to different behavioral options can be made, and the most promising plans of action can be fashioned and recommended to the client.

In the United States, identifying the law is simple and relatively routinized. For one thing, the lawyer knows who the decisionmakers are. Statutes are reliable guides to legal expectations, but it is court decisions that present the real test: experience has taught American lawyers that for almost all of their purposes, lawmaking is what the courts in fact do. That insight has allowed American legal science to adopt, as its basic unit of knowledge, what we might call its “epistemic” unit, the appellate decision. A tremendous and technologically impressive industry has developed to report, catalogue, and analyze these epistemic units, all of which are made available to practitioners and scholars in retrieval systems of increasing speed and sophistication. The systems of inference called “legal reasoning” or “legal logic” are applied to these epistemic units and become an important part of the repertory of the lawyer in predicting future decisions by courts and in trying to influence them.

Why have judicial decisions in the United States been a fairly accurate indicator of the operational norms entertained by politically relevant strata? Some American lawyers, without comparative or historical perspective, have assumed that the answer to that question can be found in the inherent character of courts. This is a misleading oversimplification, for it looks at a result without reference to the causal factors that produced it. In particular, it evades the important prior question of *why* courts are effective in this environment. Not surprisingly, those who ac-

cept this apparent insight and have sought to apply it in the international sphere have concluded that the unruliness and violence of international politics is attributable to the absence of courts. For instance, the Peace Movement in the United States of the late 19th century was, in large part, a movement to establish an international judicial system. Indeed, it was a major factor in the creation of the international courts of the 20th century.⁶ The *locus classicus* of this view was Andrew Carnegie's bequest establishing the Peace Palace in the Hague as a home for the Permanent Court of Arbitration. So confident was Carnegie that the Court would succeed that he instructed the trustees to use the remainder of the money in ways they thought most likely to serve the interests of mankind.

Since 1899, international courts in one form or another have existed, but the unruliness and violence of the arena have persisted. Plainly, it is not the presence or absence of courts that determines whether minimum order will obtain. Other factors are critical.

Courts have been significant political institutions in the United States not because of something inherent in courts or in the law they process but because of the continuing congruence in U.S. politics of expectations of authority and expectations of control. Expectations of authority are subjective images of how power ought to be exercised; expectations of control are subjective images of how power will in fact be exercised. The more congruent those two sets of expectations, the more effective the legal system in question. This is not the only possible constellation of power and authority. In Venezuela, during the 19th century, to cite only one contrasting example, a type of *caudillo* system obtained: all of the formal institutions of power — legislature, court, and sometimes even the executive branch — were essentially powerless, and were largely ignored by those holding effective power.⁷

In the United States, the relatively stable political system and the pre-eminent role assigned to courts within it had a striking effect on the sociology of legal knowledge. Coordinately, it was an important factor in stimulating the creation and then in shaping the unique direction of American law schools and the specialized methods developed there for teaching the "science of law." Oliver Wendell Holmes captured the basic spirit of this new legal science when he stated that law was nothing more than the prediction of what courts will do: "The prophecies of what the

6. For background see DAVIS, *THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE* (1962).

7. See, e.g., R. PEREZ PERDOMO, *EL FORMALISMO JURIDICO Y SUS FUNCIONES SOCIALES EN EL SIGLO XIX VENEZOLANO* (1978); see also Reisman, Book Review, 29 *AM. J. COMP. L.* 727 (1981) (reviewing R. PEREZ PERDOMO, *EL FORMALISMO JURIDICO Y SUS FUNCIONES SOCIALES EN EL SIGLO XIX VENEZOLANO* (1978)).

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courts will do in fact, and nothing more pretentious, are what I mean by the law.”⁸ Obviously, American lawyers were doing and continue to do much more than merely predict what courts will do. But the power of Holmes’ insight derived from the regularly validated fact that what courts in the United States were saying was a remarkably reliable indicator of the probable future actions and reactions of effective elites. Given this degree of predictive power, it is hardly surprising that lawyers should have begun to study appellate decisions.

It has been said that a key part of the American genius is the capacity to mass produce and distribute a good idea. Consistent with Holmes’s apothegm, Christopher Columbus Langdell established, at the Harvard Law School, a teaching method which assumed that the fundamental epistemic unit of legal science was the appellate opinion. “It seemed to me,” Langdell wrote in the introduction to his casebook on contracts, “. . . to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines.”⁹ Thus, one could organize these opinions into a coherent body of law, treating each as a self-contained and self-explanatory unit, consistent in its properties with others. The examination of these epistemic units could provide the basis for a thorough and systematic legal education.

Law schools stimulated the development of a new genre of legal literature, the “casebook,” to be used in the institutions of legal education. Casebooks encompassed the legal universe, for Langdell had decreed “[f]irst, that law is a science; secondly [*sic*], that all of the available materials of that science are contained in printed books.”¹⁰ This preoccupation with cases engendered increasingly sophisticated procedures for gathering, processing, analyzing and retrieving appellate opinions on a national scale. All of these developments combined to enculturate, even more intensely, those trained in American law, to think in terms of cases, with all that that implied.

Transposing Domestic Methods to the International System

Since the end of the 19th century, great efforts have been mounted to create in the international arena a set of institutions comparable to those

8. Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 173 (1921).

9. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vii (1871).

10. Address by Langdell (1886), cited in Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSPECTIVES OF AMERICAN HISTORY 405, 436 (1971).

to be found in Western Europe and North America. Since 1945, the result of this handiwork has been a complex superstructure and administrative apparatus which bears striking resemblance, at least superficially, to national governments in Western Europe and North America. In the General Assembly of the United Nations, some purport to find something comparable to a legislature. The Secretariat of the United Nations is compared to a domestic Executive Branch, and the specialized agencies of the United Nations are likened to the regulatory agencies of modern industrial government. Most reassuring, the International Court sits in splendor in the Hague, as the "principal judicial organ" of the United Nations.¹¹

Plainly, it is absurd to assume that the mere existence of this network of international institutions means that it is as effective as a domestic government and that its edicts may be relied upon; Holmes could plausibly direct his readers to do no more than study the behavior of courts so as to predict the development of law because the context within which his courts operated gave them effective power to prescribe legal rules.¹² Professors who gave the same instructions to their students of international law would be leading their charges into a fantasy world. The sad fact is that the apparent governmental network that has been established internationally has little power. What power it has in particular cases is assigned to it by effective elites who have sometimes found it useful to use the United Nations or a related agency in a particular instance.

Students of international law, like their domestic counterparts, frequently tend to define decisions in terms of the institutions rendering them. In the domestic law systems of Western Europe and North America, courts, for historical reasons, have been deemed to be the authoritative appliers of the law. Hence legal decisions are defined essentially as the handicraft of those courts. Insofar as there is a congruence between actual political power in the community and the authority of courts, that focus can provide a cogent indicator of decisions. In fact, such a congruence is rarely perfect, and the identification of judgments as decisions in a larger sense frequently leads to the distortions characteristic of much academic law.¹³

11. U.N. CHARTER art. 92.

12. Holmes, *supra* note 8 at 167.

13. Constitutional law in American law schools is identified as the work of the Supreme Court in supervising the discharge of what is decided are the "constitutional functions" performed by all other authorized agencies in the national community. But the Constitution is not a document; it is an institution, as Llewellyn put it. As such, it involves a process in which many other formal and informal, authoritative and functional actors participate. These, alas, are never studied under the rubric of constitutional law. In this respect, there is no comprehensive course on constitutional law in any meaningful sense in American law schools.

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Indeed, even in effectively organized legal systems, which are characterized by a general convergence of authority and control, key parts of “book law” may fail to approximate the actual normative expectations of elites. This may occur for two major reasons, inherent in the very character of law: discrepancies between myth system and operational code and the differential rates of decay of text and context.

In an earlier study, I noted that, in all legal systems, much of what is expressed in legal formulae and is attended by signals of authority is not intended to govern, regulate, or provide effective guidelines for official or private behavior. This part of the “legal system” conveys aspirations and images, not of the way things are, but of the way group members like to believe they are. This is particularly striking in the area of public law:

The picture produced by control institutions does not correspond, point for point, with the actual flow of behavior of those institutions in the performance of their public function: indeed, there may be very great discrepancies between it and the actual way of doing things. The persistent discrepancies do not necessarily mean that there is no ‘law,’ that in those sectors “anything goes,” for some of those discrepancies may conform to a different code. They may indicate an additional set of expectations and demands that are effectively, though often informally, sanctioned and that guide actors when they deal with ‘the real world.’ Hence we encounter two ‘relevant’ normative systems: one that is supposed to apply, which continues to enjoy lip service among elites, and one that is actually applied. Neither should be confused with actual behavior, which may be discrepant from both.

A disengaged observer might call the norm system of the official picture the myth system of the group. Parts of it provide the appropriate code of conduct for most group members; for some, most of it is their normative guide. But there are enough discrepancies between this myth system and the way things are actually done by key official or effective actors to force the observer to apply another name for the unofficial but nonetheless effective guidelines for behavior in those discrepant sectors: the operational code. Bear in mind that the terms *myth system* and *operational code* are functional creations of the observer for describing the actual flow of official behavior or the official picture.¹⁴

People who seek legal advice plainly require it with regard to both the myth system and the operational code: myth system because it is applied in part by some control institutions, operational code because it is applied by others. Myth system is readily retrievable through conventional research in the formal repositories of law. Operational code, in contrast, must be sought in elite behavior.

Even if there is little divergence between myth system and operational

14. REISMAN, FOLDED LIES: BRIBERY, CRUSADES AND REFORMS 15-16 (1979).

code, the differing rate of decay of text and context may limit the usefulness of formal sources of law. The proverbial decrees of the Medes and the Persians still exist; the context in which they were created and in which they had legal relevance is gone. Whether a particular exercise of lawmaking seeks to stabilize or change a situation, if it is concerned not with ornamenting myth but with doing what it says it is doing, there must be a minimum congruence between the socio-political context prevailing at the time and the socio-political presumptions of the legislation. Once legislation is expressed in relatively enduring textual form, however, its rate of decay is minimal, while the rate of decay of the enveloping socio-political situation will always be greater and may, indeed, be extremely rapid.

Where fidelity to text acquires in itself a symbolic political value, texts whose literal congruence with the socio-political situation is less than when they were created may misguide those who would rely on them. At the very least, those who would rely on them may need a validation technique for determining their degree of accuracy. Courts may serve this purpose, but if they themselves and the ambit of their jurisdiction are creatures of legislation, a functional and non-institutional test is required.

The Costs of Transposition

In the international arena, the law is applied, for the most part, through a variety of informal channels, and rarely benefits from formal appraisal by a court or tribunal. The International Court, with its usual load of two or three cases per year, and public international arbitral tribunals, with scarcely more than that, can hardly be deemed to represent international decision.

Despite the relative inactivity of these institutions, many international scholars continue to view them as the virtual apotheosis and most authoritative expression of international law. The deference given ad hoc arbitral tribunals is symptomatic of this general problem and sometimes takes the most extraordinary form. A tribunal established by one party, in the absence of the other, and composed of a single person, let us say a professor of international law, is treated by other scholars as an authoritative oracle of international law. At the same time, commentators who defer to such an award will insist that a contrary General Assembly vote, supported by virtually every member state, is not indicative of international law but is only a "recommendation."¹⁵

15. See, e.g., the Caltex Award, and the *ipse dixit* of the arbitrator overruling a widely supported vote of the General Assembly. Award on the Merits in Dispute Between Texaco

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There are, to be sure, certain methodological advantages in using the international case as an epistemic unit. Part of the attraction lies in its relative simplicity, economy, and availability. Once there is fundamental agreement among scholars that the case is an epistemic unit, there need be no detailed investigation of factual material outside of the case, for the case carries its own authoritative factual statement. Alternative methods of research could require extensive field work or culling through thousands of pages of documents of uneven probative value, in order to determine what the decision actually was. A case presents that decision in a neat "bite-sized" and easily digestible package, creating in the process an illusion of consensus about the underlying events that probably does not exist.

"Stipulating" the facts permits students of this epistemic unit to get on with discussions of the law, freed from complicating political issues. For those who confuse clerical tidiness with scientific method, there is the ecstasy of imagining that the case method is "scientific," an enthusiasm apparently animating many of the consumers of Langdell's work. And of course, there is the latent drive among all who have been given professional legal training to view things in terms of courts. Outside of the United States, admiration for the stability and achievements of the American political-legal system leads many scholars to seek to adopt the American legal style, as if the method of observation can bring about qualitative changes in the things observed.

Yielding to these attractions, contemporary international legal science has adopted a decisional unit that is convenient for scholars but ill-tooled for the subject matter. It is reminiscent of the familiar story of a man, out walking one night on a street in Vienna, who happens on another well-dressed and plainly sober citizen who is crawling about on all fours in the light cast by a street lamp. Naturally, the first fellow stops to find out if there is something wrong. When the man on the ground explains that he has lost his watch, the passerby offers to help him find it and asks exactly where it fell. "Back there," the man on the ground motions, pointing into the darkness on the other side of the street. "Then why aren't you looking there?" the first fellow asks in exasperation. "Because," the man on the ground explains as if it were perfectly obvious, "it's dark over there and I can't see. But here it's light."

The transposition of the case unit to the international arena has permitted international lawyers to dwell in a comforting pool of light. Yet

much of the resulting international legal description is patently out of step with elite expectations. The discrepancy is so painfully obvious that, outside the small circle of international lawyers, it brings discredit upon the very notion of international law.¹⁶ Small wonder that political advisers rarely use their international lawyers.

Toward a New International Epistemic Unit

Our hypothetical political adviser in Beijing studying the responses of effective elites around the world during the Falkland Islands War is an intuitive Holmesian. Rather than examine what is written in books about law, the adviser located the functional elites whose behavior determined the outcome and made inferences about international law accordingly.

If law is to be found in significant part in the application of norms to particular cases and controversies, it is plain that such applications in international politics must be sought in a much wider range of arenas than the highly formalized and structured judicial fora of domestic systems. If this is done effectively, both scholar and practitioner will have more reliable barometers of prevailing conceptions of law and the realities of the application of norms. Increased realism may aid not only the practitioner advising clients but those attempting to identify pathological features of the international legal system in order to develop alternatives.

One such alternative would take account of the limited cogency in the international arena of the case as an epistemic unit by developing an additional unit which might be referred to generically as the "incident." I define an "incident" as an overt conflict between two or more actors in the international system. It must be perceived as such by other key actors and resolved in some non-judicial fashion. Finally, and of critical importance, its resolution must provide some indications of what elites in a variety of effective processes consider to be acceptable behavior. Though the incident is "resolved" in a factual if not authoritative sense, without the judicial imprimatur which routinely indicates law in domestic settings, the incident may often be a more reliable indicator of international law than are codes or case law.

Note that the inquiry being proposed here is quite different from the routine examination of "practice" in international law. That inquiry seeks to establish the existence of a bilateral or general norm or custom,

16. Indeed, even from judges in a system in which international law is the "supreme law of the land." See, e.g., separate opinion of Robb, J. in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823-27 (D.C. Cir. 1984).

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by examining, ostensibly, a broad pattern of practice of states.¹⁷ There are many intellectual difficulties with the inquiry into practice. Neither the volume nor the degree of uniformity of practice required has ever been stated with precision. Moreover, examinations of practice do not control for the variable of power. They do not seek to identify who, among a large cast of characters, is effective. The incident, in contrast, is not based on a large volume or flow of supposedly “uniform” events, but instead takes a single critical event as a prism through which the reactions of elites to particular behavior may be examined and assessed as an indication of their views of law.

The incident as an epistemic unit does not, of itself, provide a more accurate and reliable indicator of what elites hold the law to be. There must be some systematic and disciplined way of reporting, codifying, and appraising incidents. Without such a systemization, there is little to recommend the incident over the intuitive inferences of political analysts such as our Chinese adviser. Moreover, reliance on a single incident, or a small number of them, can lead to the same skewing effect encountered in making inferences about contemporary international law from a small number of judicial decisions. Indeed, the skewing effect may be even more distorting, for given the political context of the events being examined, only a small segment of the global elite may be involved in a single incident. What is needed is a systematic method for studying and recording incidents so that through their constant preparation, our understanding of elite expectations can be continually refined and corrected. In short, a paradigm must be established and a genre created.

Choosing Incidents

Among the formidable challenges posed by this proposal is the development of criteria by which incidents are to be selected. Pending the development of a substantial catalogue of incidents, the necessarily subjective choice from among the infinite number of international events may tend to reflect the biases of those making the selection. This problem would not be a novel one for legal epistemology, though at first glance, it might appear to be. At a superficial level, the body of case law, both domestic and international, exhibits a certain random if not haphazard quality. In the domestic sphere, most cases are initiated by private entities seeking to maximize their special interests, and, accordingly, the judicial responses to these private claims may have little to do with cen-

17. On the role of practice in the formation of international law, see generally BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-11 (1973); JENKS, *THE COMMON LAW OF MANKIND* 1-19 (1958); O'CONNELL, *INTERNATIONAL LAW* 1-22 (1965).

tral elite concerns. In the international sphere, key actors rarely go to court. If they do, they usually are careful to prescribe in advance the norms to be applied and to circumscribe the potential consequences of the judgment. This randomness would appear to minimize the bias of a formal selection process, though, of course, it also renders case law less reliable as an indicator of elite perspectives.

A closer look at the judicial function reveals a very different picture. Formal decision makers are not passive receivers of the cases they hear or the codes they shape. In the United States, the Supreme Court reserves for itself, in all but a limited category of cases, the power to determine which cases it will certify for appeal before it. In this respect, it is an implicit but nonetheless decisive factor in establishing the contours as well as the content of the normative code it processes. As the agency with the ultimate competence to determine its own jurisdiction, the International Court may play a comparable role in its sphere. Hence it is far from unprecedented that those preparing incidents themselves choose, from the sadly abundant harvest of conflict in daily international political life, events that are especially fit for study as incidents.

In fact, the student of incidents may be in a position to make a more neutral choice than that of the formal decisionmaker and to provide a more accurate picture of the operation of international law. An institution like the International Court of Justice may have to avoid cases which would pit it head-on against the power process in order to preserve itself.¹⁸ As a result, the case law it produces may be limited to certain peripheral areas of community organization. In contrast, the student of incidents may choose to study and report as incidents any congeries of past events. The critical problem is to choose events that accurately reflect key elite expectations. How is this to be done?

In constitutional law, the archetypal "important case" is characterized by an appreciation on the part of all those who are involved in the case that it is "decisive," i.e. that its disposition is likely to reshape the constitutive process or key aspects of public order. Some incidents may be characterized by participants in the same manner; they sense that the issues at stake and the way they are decided will have a decisive effect on expectations of authority with ramifying effects on political processes. But this sense of moment on the part of participants in a situation is not a necessary characteristic of those events that are chosen to be treated as incidents. Their perceptions may be underinclusive, overinclusive, or

18. See generally REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 268-418 (1971); see also Reisman, *supra* note 4.

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both. Thus, they may accord little authoritative weight to events which reinforce or make only minor changes in norms, but which are nonetheless of importance in explaining how international decisions are made. On the other hand, they may exaggerate the importance of particular events as a way of mobilizing themselves, their polities, or their allies in a program that serves their own interests. It is, in the final analysis, the perspective of the student of incidents, rather than the participants in the events themselves, that must be determinative. Important cases are not all constitutional cases; and incidents do not comprise only “constitutive” events.

Identifying the Relevant Facts

Napoleon’s remark that history is a collection of lies we all agree upon has an especially wicked relevance when we consider as a source of history the recital of the facts contained in judicial opinions. The statement of “relevant” facts determined by a court would rarely satisfy a historian; indeed, what the court leaves out is often of most interest to the student of politics and history. Consider a few examples.

The *Schooner Exchange*¹⁹ judgment of Chief Justice Marshall is usually cited as the cornerstone for the doctrine that the public acts of foreign governments will not be reviewed by the courts of another state even if the effects of the act are felt in that other state. Somehow the judgment never states the extraordinary fact that the case was being decided against the background of the War of 1812, in which the British had set fire to Washington. France, the real defendant, was the only ally of the United States. It seems most unlikely under these circumstances that any United States court would have risked imperilling that relationship. In the *Corfu Channel Case*, (United Kingdom v. Albania)²⁰ the International Court somehow never mentions the fact that the Greek Civil War was under way, that the United Kingdom was a major supporter of the Royalist cause, and that Albania, as a proxy for another superpower, was supporting the Communist insurgency. The presence of the British ships in the Straits of Corfu unquestionably constituted a manifest military communication to the Albanians and others about the limits of British tolerance, the susceptibility of Albania to coastal attacks, and the capacity of the British fleet to project its force into that arena.

The point need not be belabored. What these cases demonstrate is that there is no authoritative institution to decree or stipulate that the facts

19. 11 U.S. (7 Cranch) 116 (1812).

20. 1949 I.C.J. 4.

which have been assembled in judgments meet the standards of historical accuracy.

Indeed, legal science is often impatient to finish with "the facts" and to get on with "the law." First instance factual determinations are only rarely reviewed. Subsequent instances simplify the facts even further. In American legal education, the tendency of first-year students to seek to learn more about the facts of the case is often characterized as a frivolous interest; students are urged to get on with the legal analysis.

There are some cogent reasons for this cultivated astigmatism. Every science develops its own specialized lens in order to focus more sharply and intensively on that aspect of life of interest to it. The particular focus of legal science distinguishes it from history and sociology and does, indeed, permit it to concentrate more effectively on the normative or policy dimensions of problems. But sometimes, sticky political problems or issues can be concealed under a bare factual statement and the infinitely obscurantist potentialities of legal language. These selective abbreviations, whatever their intra-disciplinary justification, inevitably produce a legal version of the facts which historians and political advisers often see as, at best, thin and brittle, and, at worst, caricatures of what actually transpired. Since a fuller and more accurate understanding of the facts is indispensable to ascertaining what was actually decided, the versions of the facts often presented by judges may undermine the effectiveness of the predictive function of case law.

The sporadic fashion in which the facts become available in incidents presents a special problem. Many facts are concealed for years or even generations. The attack on Pearl Harbor, for example, could not be described with any accuracy until the archives in all the relevant capitals were at last made accessible to historians. It took a generation for scholars to provide a comprehensive picture that could demonstrate the incorrectness of many of their initial conclusions about the incident.²¹ Similarly, the extent of U.S. involvement in the overthrow of the Mosaddegh government in Iran and the reinstallation of the Pahlavi dynasty in 1953 was not established until years later.²²

If incidents studies had been prepared for each of these events, they would, in all likelihood, have been factually inaccurate or incomplete. Similarly, if a complete statement of the facts were a prerequisite for

21. *See, e.g.*, G. PRANGE, *AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR* (1981).

22. *See* 1 SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT ON FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 755, 94th Cong., 2d Sess. 111 (1976).

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studying incidents, several of the studies in this volume would be barred. That would be most unfortunate, for whether or not lawyers study incidents, political actors unquestionably do. They use the best information available in making inferences about normative expectations, among other things.

This is not a problem unique to incidents. In some cases, national courts refuse to exercise jurisdiction because information indispensable to judgment cannot be secured. In international law, judgments of the ICJ may be reopened and revised on the basis of new facts or new information.²³ If anything, the problem is considerably less severe in the study of incidents. The student of incidents, it will be recalled, is not involved in judging the lawfulness of the behavior of actors in the incident concerned, but rather evaluates the reactions of other relevant actors and, through those reactions, the subjective conceptions of right and/or tolerable behavior entertained by those other actors. Hence what is important in this exercise is not so much what happened as what effective elites think happened and how they react.

A related practical difficulty in constructing the genre of incidents is the question of boundaries: where does a particular incident begin and where does it end? A case presupposes a consensus that critical events begin and end at some point. An incident is not bounded with such precision. Because of this, there is some question as to when it ends, if at all. Territorial losses, for example, may be viewed by the party securing acquisition as completed incidents, with title consolidated by adverse possession. But the losing party may continue to view the lost territories as its own and dream and plan for their repatriation. Hence the two parties to an incident may have diametrically opposite conceptions of when the incident ended. It is the observer of the incident who must, in effect, establish boundaries in time. Those boundaries are determined primarily by the norms the observer chooses to examine.

Bias in the Choice and Construction of Incidents

Most of the incidents in this volume were prepared by young North American students in a seminar conducted by North American scholars. Every effort was made to be scrupulous in the description of the events

23. Statute of the International Court of Justice, art. 61, § 2. The government of Tunisia recently invoked this provision in seeking a revision of the ICJ's 1982 judgment regarding the delimitation of the continental shelf between Tunisia and Libya. See ICJ Application Instituting Proceedings filed in the Registry of the Court on 27 July 1984. Application for Revision and Interpretation of the Judgment of 24 February 1982 in the case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya).

and the facts. Yet, without question, factors such as nationality, culture, class, race or ethnicity, interest group, and exposure to crisis influenced the choice of events, their description, and their appraisal. Students of incidents are certainly prone to this pathology, but theirs is not a unique susceptibility. Court personnel are as subject to bias as anyone else, yet, as we have seen, their factual recitations receive remarkably uncritical acceptance by virtue of their presumed neutrality. Precisely because this is a presumption which students of incidents are never likely to enjoy, it is arguably the case that factual bias will prove less of a problem for the incident study than it is for the judicial opinion. The quality of the factual description will be assessed on its merits and, thus, must meet a standard ordinarily not applied to factual statements in judgments. Moreover, the relation of facts to conclusions is qualitatively different in an incident than in a judgment. The incident, after all, is not a judgment of the lawfulness of the behavior of a given actor. It is, rather, an attempt to identify, by an examination of the reaction of all other actors, what norms were actually engaged in a particular incident.

Normative Implications of the Approach

The modern notion of law envisions a rational process of organized public deliberation. This is seen as increasing the likelihood of agreement on community goals, with a thorough canvassing of the comparative social costs of alternative methods of securing them. Additionally, such a process ensures equality of treatment and facilitates participation by all interested parties.

Some who endorse this concept of law are apt to find disturbing the fact that the incidents approach draws its normative inferences from no more than the apparent expectations of elites. The approach thus seems to devalue the rational and deliberative elements of law-making. It is not the intention of the incidents approach to do so. It strives merely to acknowledge the painful fact that these elements are all too frequently jettisoned by effective elites in their decision-making calculus. It is true that in recognizing the potential desuetude of the formal legal order, the approach may, in the short term, exacerbate the problem. However, insofar as it aids in diagnosis, it may be hoped that the incidents approach will be a positive first step in restoring rational, deliberative lawmaking in the international community.

Using the Results of Incident Studies

In formal systems based on *stare decisis*, previous judgments of courts are invoked in current disputes in an effort to persuade the court that the

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facts in the older case are sufficiently similar to those at bar to warrant applying the same legal specification to them. Citation of previous decisions performs a systemic function as well, for it validates the authority and significance of the very institution which has been called upon to render judgment.

It is doubtful that incidents can aspire to a comparable utility in formal decision situations. In the first place, international adjudication and arbitration are creatures of contract. The international tribunal trying a case is frequently bound to apply law, as defined in its constitutive instrument. Thus, the International Court of Justice is admonished in its Statute to apply to the cases before it a wholly anachronistic conception of international law that excludes some of its most dynamic elements. In this context, it would be unavailing and possibly perilous to invite a tribunal to conceive of the law it is to apply in terms of incidents.

In a more profound sense, international tribunals may be expected to resist the very idea of the incident as an epistemic unit of law. After all, its *raison d'être* as a genre, as well as each individual incident study, presupposes the frequent ineffectiveness of formal decision institutions. In this respect, the incident cannot and, indeed, should not be expected to supplant case law. Rather, incidents may serve as a type of "meta-law," providing normative guidelines for decisionmakers in the international system in those vast deserts in which case law is sparse. The incident study can also aid in evaluating the output of the formal institutions of international law in those rare oases where its growth is luxuriant.

Conclusion

This volume contains a set of studies of contemporary incidents. Together, they may be taken as a first, experimental effort at establishing a format for a new genre in international legal analysis. It is hoped that the economy of the format and the reliability of the normative descriptions it provides will gain international acceptance for the incidents approach.

A single collection of incidents will be of relatively little value. A genre whose practitioners continue to update and correct the expression of the code of international law is required. If it is established and adopted (and adapted) by a number of other scholars, it can ultimately yield an abundant literature of international appraisal, richer than the limited number of cases decided by courts, more representative of actual decision trends, more indicative of the political context in which decisions are taken and implemented and, most importantly, more accurate in expressing international normative expectations.

It is to be hoped that this effort will generate interest in the incident as

an indicator of law and a form of knowledge, and that volumes will follow on a regular basis, setting out current incidents. Innovative student international law journals in the United States might establish a section of each issue dedicated to incidents, alongside the more conventional case note. By providing a more accurate and comprehensive picture of how international law is made and applied, efforts such as these may aid in the performance of legal tasks and in identifying and bringing about needed constitutive changes in the international legal system.