

W. MICHAEL REISMAN
ANDREW R. WILLARD

International Incidents

The Law That Counts in World Politics



PRINCETON LEGACY LIBRARY

INTERNATIONAL INCIDENTS

INTERNATIONAL INCIDENTS

The Law That Counts in World Politics

W. MICHAEL REISMAN AND

ANDREW R. WILLARD,

EDITORS

Princeton University Press
Princeton, N.J.

Copyright © 1988 by Princeton University Press
Published by Princeton University Press, 41 William Street,
Princeton, New Jersey 08540
In the United Kingdom: Princeton University Press, Guildford, Surrey

All Rights Reserved

Library of Congress Cataloging in Publication Data will be
found on the last printed page of this book

ISBN 0-691-07772-X

ISBN 0-691-02280-1 (pbk.)

This book has been composed in Linotron Electra

Clothbound editions of Princeton University Press books
are printed on acid-free paper, and binding materials are
chosen for strength and durability. Paperbacks, although satisfactory
for personal collections, are not usually suitable for library rebinding

Printed in the United States of America by Princeton University Press,
Princeton, New Jersey

Contents

Preface and Acknowledgments	vii
List of Contributors	xi
1. International Incidents: <i>Introduction to a New Genre in the Study of International Law</i> W. MICHAEL REISMAN	3
2. Incidents: <i>An Essay in Method</i> ANDREW R. WILLARD	25
3. Foreign Submarines in Swedish Waters: <i>The Erosion of an International Norm</i> ROMANA SADURSKA	40
4. Cosmos 954: <i>The International Law of Satellite Accidents</i> ALEXANDER F. COHEN	68
5. The Soviet Gas Pipeline Incident: <i>Extension of Collective Security Responsibilities to Peacetime Commercial Trade</i> PATRICK J. DESOUZA	85

CONTENTS

6. The Argentine Invasion of the Falklands: <i>International Norms of Signaling</i>	
MICHAEL P. SOCARRAS	115
7. The War in Lebanon: <i>The Waxing and Waning of International Norms</i>	
D. BRIAN HUFFORD AND ROBERT MALLEY	144
8. The Gulf of Sidra Incident of 1981: <i>The Lawfulness of Peacetime Aerial Engagements</i>	
STEVEN R. RATNER	181
9. The Shooting of Korean Air Lines Flight 007: <i>Responses to Unauthorized Aerial Incursions</i>	
CRAIG A. MORGAN	202
10. The Bombing of Harrods: <i>Norms against Civilian Targeting</i>	
RONALD J. KUERBITZ	238
11. The Study of Incidents: <i>Epilogue and Prologue</i>	
W. MICHAEL REISMAN AND ANDREW R. WILLARD	263
Index	271

Preface and Acknowledgments

In November 1983, a notice was posted on the Yale Law School bulletin board announcing a new seminar to be offered in the spring semester. The seminar was called "The Incident as a Decision Unit in International Law." Since the words in the title were not exactly terms of art in the trivium and quadrivium, the notice set out, at rather unusual length, what was intended:

An incident is an international dispute that shapes or reinforces elite expectations about lawfulness, in which the appraisal of lawfulness by relevant international actors occurs in a nonformal setting. The Soviet destruction of KAL 007, the U.S. invasion of Grenada and the Israeli attack on the Iraqi reactor are examples of recent incidents. Because of the structure of the international political system, most international decision is found in incidents rather than cases and judgments. Yet paradoxically, there is no accepted method for recording incidents. The discipline of international law has adopted the notion of the national judgment as its basic if not exclusive epistemic unit; statements of courts are expanded by generative logic into a codex which is taken to be

PREFACE AND ACKNOWLEDGMENTS

international law. As a result, much international jurisprudence is not congruent with contemporary elite expectations that are reflected in practice. It serves neither descriptive nor predictive functions, contributing little to the performance of indispensable legal tasks.

This seminar will attempt to develop a concise method for recording and appraising incidents in the hope that it can install a new genre in international law. It will use the research techniques of contemporary historiography and political science in addition to the methods of international law. Each student, alone or in collaboration with another, will be responsible for researching a particular incident. Each will circulate a draft to the other seminar participants and explain and defend it in a session. It is planned that the better papers in the seminar will be collected in a volume and published.

The convenor of the seminar thought it would be useful to have a number of graduate students in international relations and politics. Arrangements were made to give a brief introductory lecture to students in that department and several very able recruits (or conscripts) joined the seminar.

The papers in this volume are part of the product of the seminar. Some were published in successive numbers of the *Yale Journal of International Law*. They have been reedited for the present publication.

The epigraph to Chapter 11 is reprinted with permission from *The Collected Poems of Wallace Stevens* by Wallace Stevens (copyright 1942 by Wallace Stevens and renewed 1970 by Holly Stevens), published by Alfred A. Knopf, Inc.

Many people helped in the preparation of this book. Particular thanks are due to the editors of Volumes 10 and 11 of the *Yale Journal of International Law*, and especially to the Editor-in-Chief of Volume 10, Mark D. Agrast. Though he did not participate in the seminar, he quickly grasped the possibilities of the incident genre and made the journal and his staff available to us for discussion, criticism, and research assistance. Barbara A. Glesner was a powerful force on the journal for this project and worked with us afterward as well. Cheryl A. DeFilippo was indispensable as office manager, secretary, and coordi-

PREFACE AND ACKNOWLEDGMENTS

nator. As usual, Myres S. McDougal was always available for discussion and ideas.

Useful insights were also gained from discussions with Richard A. Falk and Burns H. Weston. The editor and staff of Princeton University Press provided substantial and skillful assistance in the final phases of the preparation of the manuscript.

W.M.R.

A.R.W.

New Haven, 1987

Contributors

ALEXANDER F. COHEN is currently a J.D. Candidate at the Yale Law School. He holds B.A. and M.A. degrees from Yale University.

PATRICK J. DESOUZA, J.D. Yale Law School, is currently Law Clerk to the Honorable Thomas Gibbs Gee, United States Court of Appeals for the Fifth Circuit. He is also a Ph.D. Candidate in Political Science at Stanford University.

D. BRIAN HUFFORD is an associate at Davis Polk & Wardwell in New York City. He holds a B.A. and an M.U.A. from Wichita State University and received his J.D. from the Yale Law School.

RONALD J. KUERBITZ is an attorney practicing in Chicago. He received his J.D. from the Yale Law School.

ROBERT MALLEY is currently a D. Phil. candidate in Politics at Oxford University and a J.D. Candidate at Harvard Law School. He holds both B.A. and M.A. degrees from Yale University.

CONTRIBUTORS

CRAIG A. MORGAN is an attorney practicing in Austin, Texas, with the firm of Brown, Maroney, Rose, Barber & Dye. He received his J.D. from the Yale Law School.

STEVEN R. RATNER is Attorney-Adviser, Office of the Legal Adviser, United States Department of State. He received his J.D. from the Yale Law School in 1986. With the exception of minor revisions, his contribution was written while he was a student at the Yale Law School. The views expressed are his own and not necessarily those of the United States government.

W. MICHAEL REISMAN is Wesley Newcomb Hohfeld Professor of Jurisprudence, Yale Law School.

ROMANA SADURSKA is Lecturer, Faculty of Law, University of Sydney. She received her Ph.D. from the Polish Academy of Sciences and her LL.M. from the Yale Law School.

MICHAEL P. SOCARRAS, J.D. Yale Law School, is currently Special Assistant to the Assistant Attorney General for Civil Rights, United States Department of Justice.

ANDREW R. WILLARD is Research Associate in Law, Yale Law School.

INTERNATIONAL INCIDENTS

INTERNATIONAL INCIDENTS:

Introduction to a New Genre in the Study of International Law

1 W. MICHAEL REISMAN

Theory that can face fact . . . is what we need. *Karl Llewellyn**

The scene is Beijing. You are an international political advisor to the government of the People's Republic of China. 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 People's Republic 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 amphibious attacks on well-defended island positions, establishing supply lines over long distances, and using weapons in hostile

* Llewellyn, *The Constitution as an Institution*, 34 COL. L. REV. 1 (1934).

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).

INTERNATIONAL INCIDENTS

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 the 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. Although 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 the objections are 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, be-

2. For the American position, see the so-called Shanghai Communiqué, 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 communiqué 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 INT'L L.

THEORY

cause 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 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 façade concealing raw and ephemeral political calculations can only be assessed when you have seen how the sources 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 the obliviousness of Molière's M. Jourdain 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.

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).

INTERNATIONAL INCIDENTS

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 decision makers. This cannot be attributed to a general, visceral dislike of lawyers, for government officials, when operating in a domestic setting, frequently consult 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 decision makers do not resort to 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, however, 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 advisors 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

5. G. JELLINEK, *ALLGEMEINE STAATSLAHRE* 308 (1900)

THEORY

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 advisor. Rather than seeing incidents as norm-indicators or norm-generators, as does the political advisor, 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 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 advisor 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 decision makers 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

INTERNATIONAL INCIDENTS

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 accept 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 nineteenth 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 twentieth century.⁶

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

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

THEORY

more effective the legal system in question. This is not the only possible constellation of power and authority. In Venezuela, during the nineteenth 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 preeminent 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 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's 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 that 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

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)).

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).

INTERNATIONAL INCIDENTS

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 nineteenth century, great efforts have been mounted to create in the international arena a set of institutions comparable to those to be found in Western Europe and North America. Since 1945, the result of this handiwork has been a complex superstructure and administrative apparatus that 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 of Justice sits in splendor in The Hague, as the "principal judicial organ" of the United Nations.¹¹

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 to predict the development of law because the context within which his

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

11. UN CHARTER art. 92.

THEORY

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 certain 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

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:

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.

INTERNATIONAL INCIDENTS

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 institutions, which are, in fact, controlling; operational code because it is applied by others. The myth system is readily retrievable through conventional research in the formal repositories of law. The operational code, in contrast, must be sought in elite behavior.

Even if there is little divergence between myth system and operational 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 partic-

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

THEORY

ular 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 sociopolitical context prevailing at the time and the sociopolitical presumptions of the legislation. Once legislation is expressed in relatively enduring textual form, however, its rate of decay is minimal; the rate of decay of the encompassing sociopolitical 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 sociopolitical 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 noninstitutional 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 Tex-

INTERNATIONAL INCIDENTS

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 fieldwork 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."

aco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic, 17 I.L.M. 1, 27-31 (1978).

THEORY

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 advisors rarely use their international lawyers.

TOWARD A NEW INTERNATIONAL EPISTEMIC UNIT

Our hypothetical political advisor 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 advisor 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 that 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 nonjudicial fashion. Finally, and of critical importance, its resolution must provide some indication 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 that routinely indicates law in

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 vs. Libyan Arab Republic*, 726 F.2d 774, 823-27 (D.C. Cir. 1984).

INTERNATIONAL INCIDENTS

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, 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 advisor. 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, because 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

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

THEORY

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 central 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, once parties submit to it, the cases it will hear, 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 decision maker 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

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.