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The Validity of the Incidents Genre

Richard Falk†

Intellectual breakthroughs in a field of study often come from persevering in a slightly different way of perceiving reality. And so it is with incidents jurisprudence, introduced by Michael Reisman as “a new genre in the study of international law.”¹ It is not new to assess the legal implications of a prominent international occurrence, whether it be a particular cross-border retaliatory raid after allegations of a terrorist attack or the dropping of atomic bombs on the cities of Hiroshima and Nagasaki at the end of World War II. Instead, what is new here is the identification of the incident itself as the law-shaping event, and the regarding of the incident as a basis for the systematic observation and generalized understanding of international law as a distinctive type of law.

Especially after the emergence of realist international theories in the 1950's,² the study of international law in the United States has been accompanied by an appreciation that neither appellate judicial decisions nor doctrines detached from specific factual contexts provide insight into the actual functioning of international law. This recognition has animated the multi-volume enterprise of scholarship carried on at the Yale Law School by Myres S. McDougal and his many associates over the years, including, of course, Michael Reisman, a prime collaborator and heir apparent. Although never free from controversy—or from sniping by more literal-minded, positivist international law specialists—McDougal has put the United States on the map of global legal studies and made New Haven its capital. As with *Prudential Life*, the corpus of McDougal's work is “the rock” upon which to build.

With the incident approach, Reisman and his colleagues have extended the reach of policy-oriented jurisprudence in a challenging new direction. Most of the earlier work done at Yale under the rubric of world policy studies applied the framework developed by McDougal and Harold Lasswell to a particular *area* of international concern: human

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1. Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 *YALE J. INT'L L.* 1 (1984). Articles from the forthcoming book will be cited to the *Yale Journal of International Law* if they first appeared there.

2. See generally H. MORGENTHAU, *POLITICS AMONG NATIONS* (1954); T. SCHELLING, *THE STRATEGY OF CONFLICT* (1960).

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rights, space, oceans, the use of force.³ An attempt was made to analyze the whole of each area by discerning norms over time through the examination of trends and patterns of decision in the main subjects of controversy. These studies gave attention to the consequences of choosing among values and urged an inclusive vision of world community as an orientation for those with institutional decision-making power, including government officials. Despite their comprehensiveness, the main publications in the McDougal series purport to be preliminary mapping operations that need to be further reinforced by elaborate programs of research and seem to impose on readers extended discourses at high levels of abstraction.

I suppose the essay by McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security,"⁴ can be viewed as the earliest direct predecessor of the incident genre. In that extensive study, the atmospheric tests of the hydrogen bomb carried out by the United States in the Pacific are given legal sanction. The incident in this case consists of the carrying out of the tests and the legal attack mounted against them. The article seems polemical; by asserting a particular method of interpreting the law, it seeks to refute a companion article by Emanuel Margolis that attacks the legality of the tests.⁵ McDougal and Schlei invoke a variety of considerations to justify the tests as a lawful security measure given international circumstances at the time, especially the Cold War. The final section of the article is entitled "For a Free World and Free Seas" and ends with a rhetorical flourish: "Without at least a portion of the world defended in its freedom it would be folly to talk of freedom of the seas and the welfare of dependent peoples."⁶ Aside from its partisan tone and length, there is no reason why the piece would not be appropriate as an incident study. Such an observation is not meant as a snide allegation that Reisman and his colleagues have reinvented the wheel. Rather, their creative undertaking is to place an existing type of study within a new category, then to set forth the attributes that qualify individual exercises for inclusion, and finally, to propose that the new category be treated as a distinct object of reflection.

3. See, e.g., M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980); M. McDUGAL, H. LASSWELL & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* (1962).

4. McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 *YALE L.J.* 648 (1955).

5. Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 *YALE L.J.* 629 (1955).

6. McDougal & Schlei, *supra* note 4, at 710.

Another way into the incidents genre relies on problem-oriented jurisprudence.⁷ In that approach, an area of international legal activity is delimited by topic—for example, oceans, foreign investment, or internal war. A series of colliding primary and secondary materials are collected and examined to point up tensions, ambiguities, and policy implications. The whole topic is given coherence by positing one or more hypothetical problems that can only be “solved” by bringing to bear an array of legal materials. The goal is to reveal the nature of legal controversy, including the resistance of both facts and law to any simple rendering as objectively true. These contrived problems can be viewed as hypothetical “international incidents” and are drawn from actual occurrences in international life.

In contrast to this method, Reisman’s incidents are not properly occasions for arguing global policy controversies. Rather, they constitute the discrete interactions that give us a special insight into the process and reality of international law itself. If God lives in the particulars, so does international law. Some incident studies are controversial in an East-West sense, but the intent of the overall inquiry is to illuminate how the participants use law for their own ends and to interpret the incident’s effect on legal policy. Thus, for instance, Sadurska’s study of the Swedish response to the penetration of its territorial waters by Soviet submarines examines the Swedish legal claims, identifies their novelty, and assesses the implications for maritime mobility of the acquiescence to these claims by other states, including the Soviet Union.⁸

Two pedagogical strategies merge by focusing on incidents. First, a framework is established for observing how participants in international affairs make use of international law in the pursuit of their goals. The emphasis is on the phenomenon itself, and as such, the incident method is more concrete than traditional efforts to assess the character of international law by reference to aggregate flows of authoritative decisions over time.

Second, the incident method deconstructs the generalized process of international law creation and adaptation into revealing instances. This kind of particularity shows how policies are shaped in a variety of critical issue-areas. Recent incident studies examine such prominent events as the Soviet downing of KAL 007,⁹ the Gulf of Sidra encounter in 1981,¹⁰

7. See generally B. WESTON, R. FALK & A. D’AMATO, *INTERNATIONAL LAW AND WORLD ORDER* (1980).

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

9. See Morgan, *The Downing of Korean Air Lines Flight 007*, 11 *YALE J. INT’L L.* 231 (1985).

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the 1978 crash of the Cosmos 954 satellite,¹¹ the IRA bombing of Harrods,¹² the 1982 Israeli invasion of Lebanon,¹³ the Argentinian invasion of the Falklands,¹⁴ and the conflict over the Soviet gas pipeline.¹⁵ Each incident raises challenging issues of legal policy choice in an area of international life, yet each is grounded in the specifics of its narrative context.

What new, then, is learned? It is important to stress, as Reisman does, that international incident study is a "genre," comparable to such traditional genres as cases, doctrines, and issue-areas, and hence that it enlarges the repertoire of pedagogic strategies available to the student and practitioner of international law. Two further valuable genres, in the manner of "international incidents," can be suggested to underscore the assertion that genre is an expandable category. One is a systematic mapping of "international legal regimes" that is operative and aspirational in some crucial issue areas, such as money, trade, war, nuclear weapons, and human rights. The other is the extension of problems, incidents, and cases into dynamic legal game-play and simulation studies, analogous to war games, that provide insights into the choices and constraints facing decision-makers called upon to apply legal prescriptions in a variety of settings.

Thus, the test of pedagogic value is whether the genre of "international incidents," singly or in combination with other genres, adds something significant to our understanding of international legal process and substance. I am certain that it does. It provides the best available means of comprehending the legislative potential of facts in relation to different topics and different geopolitical configurations on a local, regional, or global scale. This latter point needs to be accented, especially where an incident deals with the use of force. If, in 1981, Libya were testing claims to sustain its legal position vis-à-vis the Chesapeake Bay as an offset to the U.S. position vis-à-vis the Gulf of Sidra, the outcome of the incident would have been markedly different.

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

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

12. See Kuerbitz, *The Bombing of Harrods: Norms Against Civilian Targeting*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Reisman & A. Willard eds. 1987) (forthcoming) [hereinafter INTERNATIONAL INCIDENTS].

13. See Hufford & Malley, *The War in Lebanon: Waxing and Waning of International Norms*, in INTERNATIONAL INCIDENTS, *supra* note 12.

14. See Socarras, *The Argentine Invasion of the Falklands and International Norms of Signaling*, 10 YALE J. INT'L L. 356 (1985).

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

Another benefit of the international incidents approach is that it relates law to the texture of international life. Incident studies read, in the first instance, like media accounts. These accounts do not suffer from *a priori* constraints or preconceptions, although incomplete and withheld information may give an incident an illusory and problematic status. A related difficulty is the assessment of proclaimed and real intentions. When a government attacks targets in a foreign country in retaliation for earlier alleged acts of terrorism, it is likely to assert a deterrent or preventive justification because of the unacceptability of a purely punitive rationale. However, providing a legal interpretation of these events shows how pervasive the reliance on law in world affairs is, at least in the sense of communicating claims to legitimate action and reaction. At the same time, such inquiries are not necessarily reassuring about the role of international law in *regulating* conflicts. The incident genre makes us appreciate not only the pervasiveness of law but also its embeddedness in geopolitics and its subordination to power dynamics.

A further contribution of the international incident approach is the additional bridge it builds between the study of international law and that of international relations. For those who are either cynical about the relevance of international law or sentimental and legalistic, the incident genre is an excellent antidote. It provides a foundation for realistic assessment of international law because it views law as shaped by wider contexts. In other words, actual fact patterns generate legal arguments, while specific outcomes create expectations about the future by altering or sustaining the expectations created by past decisions in comparable or related incidents. As such, the incident genre enables non-lawyers to discern non-regulative functions of international law—for example, the crystallization of a controversy through the invocation of legal justifications to articulate opposing claims—as well as the play of power variables upon regulative expectations.

Reisman is suitably restrained about locating the incident genre within this wider terrain of international legal studies and is cautious enough to identify the initial incident studies as no more than opening probes. He notes that one rationalization for the incident genre is the paucity of cases decided by established tribunals. In this regard, incidents help introduce elements of potential legal order into “those vast deserts in which case law is sparse,”¹⁶ thereby enriching the material available for consultation when tribunals are called upon to decide, students to contemplate, or advisors to advise.

16. Reisman, *supra* note 1, at 19.

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This cluster of international incident studies is described as part of “a first, experimental effort at establishing a format for a new genre in international legal analysis.”¹⁷ Reisman acknowledges that the undertaking would have little value if it were to stop at this point. To survive as a genre, incidents will require a group of specialists to join with Reisman and his students in adopting the genre, updating it, extending its reach, and exploring analogous material from a variety of perspectives. Reisman calls upon his professional colleagues to join in producing more studies “on a regular basis, setting out current incidents,” and upon “[i]nnovative student international law journals” to “establish a section of each issue dedicated to incidents, alongside the more conventional case note.”¹⁸ Thus, Reisman and his collaborators are both acknowledging the limited character of what has been done to date and seeking to overcome these limits by expanding the enterprise.

Will this new genre catch on? Should it? Is it a good claim on scarce resources of time and energy available to the scholarly community? I would respond affirmatively to all of these questions. One of the appeals of the genre is that the conversion of an international incident into a study can be guided by a framework of inquiry, and that it presupposes relatively little specialized background. Andrew Willard’s essay on method provides a clear guide for any law or graduate student.¹⁹ However, the assessment of the factual and legal dimensions of an incident entails reliance on overall knowledge and sensitivity. Grasping the implications of an incident while assuring as much disinterestedness as possible requires a legal guru of some sort in the background. Even gifted students are likely to produce rather thin and biased studies of incidents if merely turned loose with a few incident studies as models of how to proceed. Depth and sensitivity in relation to an incident necessarily draw upon reserves of scholarly experience and intelligence.

So far, the selection of incidents, their presentation, and their pedagogic effectiveness exhibit an unevenness to be expected of such an early effort. Reisman and Willard deserve praise for successfully imposing an overall format for the investigation of each incident without being too rigid or reductionist in their drive for uniformity of approach. In addition, incident studies have achieved a responsible degree of scholarly balance and have been executed with technical competence. There are, in other words, no blatant polemics or ideological posturings in the studies, although inevitably the selection of events and sources is heavily

17. *Id.*

18. *Id.* at 20.

19. Willard, *Incidents: An Essay in Method*, 10 YALE J. INT’L L. 21 (1984).

weighted toward the West, and specifically toward the U.S. mindset and professional literature.

Some important lessons about the selection and conceptualization of incidents emerge. The genre needs to be, in my judgment, more rigorously focused on discrete occurrences with relatively tight boundaries in time and space, highlighting a central normative controversy as to claims of right. For instance, the studies on foreign submarines in Swedish waters, Cosmos 954, the Gulf of Sidra incident, KAL 007, and the bombing at Harrods²⁰ are fine as incidents, but the Soviet gas pipeline controversy, the Argentinian invasion of the Falklands, and the war in Lebanon²¹ are in various degrees either too diffuse—containing multi-dimensional issues—or else arbitrarily delimited in order to create a framing suitable for incident analysis. It seems to me that a complex interaction over time, like a war, is not susceptible to encapsulation within the incident genre. One possible extension of the notion of incidents would be to take a process situated in time and place, such as the 1982 Israeli invasion of Lebanon, and treat a series of interrelated events that arise in the course of the war as the basis for a volume of incident studies. For instance, the collection could include studies of the pre-invasion retaliatory bombing strikes against Beirut, the terrorist attack on the Israeli diplomat in London, the siege of Beirut, the massacres at Sabra and Shatilla, the Israeli withdrawal from Lebanon, as well as the original Israeli attack itself. Each of these incidents would cast light on its neighbors, and one could imagine an incidents workshop under Reisman's direction devoting a whole semester to the 1982 war.

By such comments, I do not mean to deprecate the achievement of the Hufford and Malley study.²² It provides a good, legally-oriented basis for appraisal of some of the main issues presented by the Israeli invasion by concentrating on the underlying Israeli claim of anticipatory self-defense. My objection is that this study regards a broad range of events as one incident. These events lack a natural focus, and as I suggested above, should more appropriately be treated as "a complex incident" or "a multiple-incident process."

Hufford and Malley's presentation includes, inevitably, characterizations of the issues that seem superficial and misleading. A phrase like "Israel views the PLO as a terrorist group"²³ is unsatisfactory; it fails to capture the subtleties and complexities of the situation. It is useful for

20. *See supra* notes 8-12.

21. *See supra* notes 13-15.

22. Hufford & Malley, *supra* note 13.

23. *Id.*

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the government of Israel to treat the PLO as a terrorist group, but whether the government is sincere and monolithic in doing so, or is merely invoking the symbolism of terrorism as a way of withholding legitimacy and justifying its refusal to enter into negotiations with the only tenable representative of the Palestinian people, is unclear. Why a government acts as it does and its explanation of its actions may radically differ when recourse to force is being justified, especially if the government is seeking to mobilize support or dilute opposition. The MacBride Commission was told repeatedly by Lebanese and Jordanian informants that the main Israeli objective in the 1982 invasion was either the political and economic restructuring of Lebanon or the shattering of the Palestinian national movement on the West Bank.²⁴ Instances of cross-frontier violence were dismissed as inconsequential, and the invasion was explained by these officially unacknowledged goals and motives. If the invasion had indeed been motivated by these objectives, then the claim of anticipatory self-defense was not a valid interpretation of this incident, but rather a pretext, creating at most a further subcategory of "artificial" or "contrived" incidents.

In the study, the authors discuss the assessment of the necessity and proportionality of the Israeli invasion from a number of perspectives other than those of the belligerent parties. Their most significant conclusion is that Western European nations, the United States, and even the Soviet Union, while disapproving of the invasion to varying extents, nevertheless did so in such a restrained way as to give Israeli claims a degree of qualified legal endorsement. The failure of the authors to provide their own appraisal of the incident is a serious omission, as it might have provided a clearer sense of the character of the incident and its impact on the wider legal policy issues involved. One wonders, however, whether any such attempt at focus would not have seemed inconclusive or arbitrary because of the uncertainty as to precisely which Israeli claim was being assessed—to invade in the first instance, to extend the zone of invasion to include Beirut, to try to remove the PLO and Syria from Lebanese territory, or to attempt to destroy the PLO and its leadership.

Similarly, Socarras's essay on the norms of signalling intentions, focusing on the controversy over the future of the Falklands,²⁵ hardly constitutes an incident; rather, the norms seem to be abstracted from an analysis of the diplomacy between Great Britain and Argentina over a

24. ISRAEL IN LEBANON: THE REPORT OF THE INTERNATIONAL COMMISSION TO INQUIRE INTO REPORTED VIOLATIONS OF INTERNATIONAL LAW BY ISRAEL DURING ITS INVASION OF THE LEBANON (1983) (The MacBride Commission Report).

25. Socarras, *supra* note 14.

period of years, climaxing with the invasion. The incident could be defined as the invasion or the war, but an emphasis on the latter would result in the same problem of diffuseness present in the Lebanon study. Emphasizing the invasion as the incident, on the other hand, is not of great legal policy interest because once the situation is so delimited, the fact that minimum legal inhibitions on the use of force across boundaries were violated is obvious.

Socarras is correct in selecting for study the signalling aspects of the incident. British signalling failures suggest Britain's culpability in not indicating clearly, in the decade prior to the invasion, a resolve to uphold, by force if necessary, its claims to the Falklands. Indeed, British signals encouraged the opposite inference in Buenos Aires. Britain acquiesced in earlier Argentinian "violations" of British sovereignty over the Falklands, especially during the South Georgia landing of 1981.²⁶ This implicitly encouraged the Argentinians to believe that the British would relinquish sovereignty if directly challenged, and certainly would not go so far as to fight a war to retain it.

Importantly, although Socarras's emphasis on signalling finds little precedent in traditional sources of international law, in some circumstances signalling allows the gradual resolution of conflict, the avoidance of war, and incremental nonviolent readjustment of rights and duties between adversaries. As such, signalling is an informal extension of the reach of international law within the domain of conflict. Signalling has been explored to some degree by international relations specialists,²⁷ but widening the domain of law to include its study is important and helpful. Signalling also relates to other informal structural arrangements in international society, such as spheres of interest, which can limit conflict in situations of tension and minimal direct communication. This stress on signalling in the Falklands setting was perhaps the most arresting substantive concern addressed in any incident study so far.

If Reisman and Willard had been rigid about their delimitation of the genre, the study of the Falklands incident would have had to exclude this inherently valuable inquiry into the norms of signalling. Using the Falklands War as a base for the study of norms of signalling seems to fall outside the genre as currently defined.²⁸ To the extent that the purpose here is to delimit a new genre, it seems to me that an incident must be

26. *Id.* at 374-75.

27. See, e.g., F. KRATOCHWIL, *INTERNATIONAL ORDER AND FOREIGN POLICY: A THEORETICAL SKETCH OF POST-WAR INTERNATIONAL POLITICS* (1978).

28. I would say the same for my article on the legal status of a reprisal claim as assessed by reference to the single incident of the Israeli raid on Beirut in 1967. See Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969).

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defined broadly enough to encompass real world dynamics. Perhaps I can clarify this point by example. The exclusion of Kurt Waldheim from entry to the United States would qualify as an incident, but the Contadora process of diplomatic moves and countermoves would not. Even the Waldheim exclusion may not be an appropriate incident because its fulcrum is the exercise of discretionary policy-making power by the United States with respect to foreign citizens physically outside its borders. Nevertheless, the exclusionary policy rests on a putative connection to war crimes and to the assertion of individual responsibility for those crimes, a widely endorsed claim of international law since 1945. Therefore, the exclusionary claim of the United States has a precedential character that will undoubtedly influence the practice of other governments in the years ahead. Whether a norm of exclusion will emerge remains to be discovered with the passage of time. Its emergence would depend on such factors as the treatment of analogous instances and the degree of consensus among governments, including their willingness to generalize and formalize practice, or even to produce an appropriate convention or accord on the subject.

In conclusion, Reisman and Willard have made an important contribution to international legal studies. Their framework can be used to explore incidents from a variety of cultural and ideological perspectives, as well as over long stretches of time. I find their own essay, "The Study of Incidents: Epilogue and Prologue,"²⁹ despite its clever title, to be disappointing because of its failure to clarify the boundaries that separate opportunities from problems in the future elaboration of the incidents approach. My suggestion is to reverse their conception of prologue and epilogue, and to regard early incident studies themselves as the prologue, tangible achievements in being, yet preliminary, and to await as the true epilogue a deferred process of subsequent composition that builds on and refines what we have thus far.

29. Reisman & Willard, *The Study of Incidents: Epilogue and Prologue*, in *INTERNATIONAL INCIDENTS*, *supra* note 12.