

INTRODUCTION TO THE SYMPOSIUM ON INCIDENTAL JURISDICTION

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The doctrine of incidental jurisdiction has had significant bearing on some of the most important international legal disputes of recent times, challenging one of the truths that international lawyers hold to be self-evident: that the jurisdiction of international courts and tribunals is dependent on the consent of states. But what exactly is this doctrine and why does it deserve to be the focus of this symposium? The doctrine of incidental jurisdiction allows tribunals to bring within their jurisdiction “incidental” or “ancillary” issues that are crucial to answering the question over which the tribunal certainly does have jurisdiction. It is a useful device that in certain, limited situations allows international courts and tribunals to consider legal questions that are beyond the jurisdiction to which states formally consent.

While this may appear to be a relatively unremarkable doctrine, its operation in practice has the potential to bring within the jurisdiction of an international court certain issues, including highly politically sensitive issues, over which states may never have consented to confer jurisdiction (or indeed have explicitly excluded from compulsory dispute settlement). These issues include, for example, sovereignty over territory in the case of the South China Sea, Chagos Archipelago, or Crimea, and the immunity of state officials in the *Enrica Lexie* dispute. Clever framing of legal claims by states has left tribunals facing difficult questions regarding the scope of their jurisdiction and their role within the international dispute settlement system more broadly.

Recent practice shows that while the doctrine of incidental jurisdiction has a long pedigree, it is not particularly well-developed in jurisprudence or in international legal scholarship. And different tribunals have taken contrasting approaches to this issue in recent cases. For example, certain Annex VII United Nations Convention on the Law of the Sea tribunals such as *Chagos MPA* and *Enrica Lexie* have appeared willing to push the boundaries of their jurisdiction in order to offer a fuller answer to the legal questions at the heart of the dispute. In contrast, the International Court of Justice (ICJ) has recently struck a balance that appears to favor state consent over effectiveness.¹ Similarly, the arbitral tribunal in *Ukraine v. Russia* upheld Russia’s preliminary objections that the territorial dispute related to Crimea was not incidental but central to the dispute between the parties and that, as such, the tribunal did not have jurisdiction.² Aside from the diverging approaches of the aforementioned tribunals, what also stands out is the conflicting and often rudimentary nature of the legal reasoning offered by the tribunals in support of their own particular interpretation of the doctrine.

It is in this context that the contributions to this symposium provide some much-needed fresh thinking on this issue. In the opening contribution to the symposium, Payam Akhavan and Eirik Bjorge, of the University of Toronto and University of Bristol respectively, take us back to basics to remind us why the doctrine of incidental

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¹ Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), [Preliminary Objections, Judgment](#), 2018 ICJ Rep. 292 (June 6). On this and other relevant recent ICJ cases, namely *Certain Iranian Assets (Iran v. U.S.)*, [Preliminary Objections, Judgment](#), 2019 ICJ Rep. 7 (Feb. 13), see Eleni Methymaki & Christian J. Tams, [Immunities and Compromissory Clauses: Making Sense of Enrica Lexie \(Part II\)](#), *EJIL: TALK!* (Aug. 27, 2020).

² Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), [Award Concerning the Preliminary Objections of the Russian Federation](#), paras. 195–96 (Perm. Ct. Arb. Feb. 21, 2020).

jurisdiction is required in the first place. Because of course, in a world in which the ICJ had unlimited jurisdiction, all international legal issues would fall within its purview. But we live in a world of “multiple, parallel, and often fragmented jurisdictions” in which “there is still a need for an overarching scheme to eliminate gaps” in the jurisdictional coverage of international courts.³ In such situations, Akhavan and Bjorge argue, international courts and tribunals find themselves constantly torn “between consent and coherence.” There may be compelling reasons to exercise incidental jurisdiction to ensure the coherence of the international dispute settlement procedures, but courts and tribunals must be wary of broad interpretations that will make states reluctant to give their consent in the future. As Akhavan and Bjorge note, “[e]xpansive interpretations by international courts and tribunals of their competence ultimately cannot compensate for the failure of states to establish a comprehensive system of judicial dispute settlement.”⁴ To that end, the pair set out some important limitations on the inherent power to exercise incidental jurisdiction.

Next, Matina Papadaki, of the University of Athens, considers incidental jurisdiction as a “gatekeeping doctrine.” After a masterful and concise survey of much of the relevant jurisprudence on incidental jurisdiction, Papadaki notes a trend in recent cases toward identifying the “real” or “main” subject of the dispute. This approach, Papadaki argues, not only involves an additional (superfluous) step, but more importantly also introduces “unnecessary evaluative determinations while obscuring normative clarity.”⁵ Any approach that seeks to identify the “real” subject of the dispute brings with it “a great degree of subjectivity. . . which in turn accords immense power to a subjective framing of the facts and motives underlying an application.”⁶ Papadaki not only warns of the dangers of the current trend, but points to potential ways forward, to which I will return momentarily.

Lea Raible, of the University of Glasgow, focuses on incidental jurisdiction in human rights litigation. In her sophisticated contribution,⁷ Raible starts with a perhaps surprising observation: human rights courts and bodies do not rely on the concept of incidental jurisdiction. But instead of stopping there, she asks why this might be. Noting that there is nothing unique about the institutional set up of human rights courts and human rights bodies that might explain the lack of use of this doctrine, she offers a “plausible reconstruction” of this absence. Raible argues that the tension between dispute settlement and state consent is heightened in international human rights law, which justifies treating incidental questions with the weight usually attached to the main issues of a case by turning them into questions of treaty interpretation. A survey of practice reveals that international human rights bodies employ “rival techniques” as alternatives to the doctrine of incidental jurisdiction.

Similarly, Relja Radović, of BDK Advokati in Serbia, notes⁸ that the doctrine of incidental jurisdiction has played a remarkably limited role in one of the busiest and most vibrant areas of international dispute settlement—international investment arbitration. Like Raible’s observation regarding international human rights litigation, Radović does not see investment arbitration as being special in any way that would explain why arbitral tribunals have failed to rely on incidental jurisdiction as a doctrine. Nevertheless, Radović notes one possible explanation for this phenomenon: that investment tribunals, being ad hoc in nature, are acutely aware that their existence depends on the consent of states. This, in turn, militates toward more restrictive interpretations of their jurisdiction. However, Radović argues that there is no convincing reason for investment tribunals (or in fact

³ Payam Akhavan & Eirik Bjorge, *Between Consent and Coherence: Incidental Questions in an Imperfect World*, 116 AJIL UNBOUND 164 (2022).

⁴ *Id.*

⁵ Matina Papadaki, *Incidental Questions as a Gatekeeping Doctrine*, 116 AJIL UNBOUND 170 (2022).

⁶ *Id.*

⁷ Lea Raible, *Incidental Jurisdiction in Human Rights Litigation: Surprising Absence and Rival Techniques*, 116 AJIL UNBOUND 176 (2022).

⁸ Relja Radović, *Incidental Jurisdiction in Investment Treaty Arbitration and the Question of Party Consent*, 116 AJIL UNBOUND 181 (2022)

international courts and tribunals more generally) not to make much greater use of the doctrine of incidental jurisdiction.

Radović's striking contention is that inherent powers of international courts and tribunals, such as incidental jurisdiction, never actually challenge the consensual foundations of the jurisdiction of international courts and tribunals. Why? Because the resolution of issues brought within a court or tribunal's jurisdiction using the doctrine of incidental jurisdiction is not binding on the parties. Radović argues that incidental determinations made for the sole purpose of resolving the dispute at hand do not have any "formal value," or *res judicata* status and do not form part of the operative part of any decision. It is thus immaterial whether a state has consented to such issues falling within the jurisdiction of a court or tribunal.

Finally, Peter Tzeng, of Foley Hoag LLP, takes us in a slightly different direction in his pithy contribution, noting that it is not only international courts and tribunals that are faced with something resembling incidental jurisdiction. Using the example of the role of the UN secretary-general as a treaty depository regarding questions of statehood and recognition, Tzeng notes the different approach taken by the ICJ. In short, the secretary-general as treaty depository apparently considers statehood to be an indispensable issue, while the Court has treated statehood as incidental. From this Tzeng concludes that what constitutes an incidental question involves more than evaluating whether an issue is necessary or ancillary. Instead, the *nature* of the body making determinations on incidental questions is somehow significant. In other words, "[t]he identity of the decision-making body in question, and its relationship with the implicated issue in question, should also be taken into account."⁹ It is a thought-provoking suggestion, which invites us to consider whether the particular nature and function of international courts and tribunals themselves should have similar bearing on how they approach incidental questions. For instance, should the ICJ, with its unlimited subject-matter jurisdiction and its status as the principal judicial organ of the United Nations, have the greatest latitude in making incidental determinations on issues of public international law? And following that logic, should commercial arbitral tribunals generally refrain from exercising incidental jurisdiction over matters of territorial sovereignty and suchlike? It is certainly an intriguing thought.

One thing that I had hoped would come of this symposium was some consideration of whether it might be possible to develop a theory of incidental jurisdiction. Papadaki's contribution comes closest to doing so, and points in a tantalizing direction for the future development of such a theory. To elaborate, Papadaki calls for the development of a theory for identifying which "extraneous" norms can and should be considered to fall within a tribunal's jurisdiction and why. She suggests that certain norms, by dint of their very nature, might qualify for this purpose: "meta-norms" (treaty law); constructive norms (procedural law and matters of state responsibility); and conflict resolution norms should be brought within a tribunal's jurisdiction if they are not already. Although this is not spelled out explicitly, one imagines that this is because such norms are "norms about norms," rather than primary norms concerning rights and obligations.

Even these tentative thoughts show that the development of any theory of incidental jurisdiction will reveal a great deal about its proponent's normative commitments and their view of international dispute settlement and international law. Law has no meaning in and of itself.¹⁰ Meaning has to be given to legal objects like the doctrine of incidental jurisdiction through interpretation, through the attribution of certain values that these objects strive to achieve.¹¹ I would suggest that being open and honest about the value one sees the doctrine of incidental jurisdiction striving to achieve—whether that is coherence or effectiveness or some other value—would be a good starting point since everything else turns on this.

⁹ Peter Tzeng, *Incidental Jurisdiction in International Adjudication and Incidental Determinations by International Organizations*, 116 AJIL UNBOUND 186 (2022).

¹⁰ Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

¹¹ LEA RAIBLE, *HUMAN RIGHTS UNBOUND: A THEORY OF EXTRATERRITORIALITY* 35 (2020).

Taking relevant practice into account, I think that in the majority of cases the doctrine of incidental jurisdiction advances effectiveness and that the best version of this doctrine will reflect this value. In practice, courts and tribunals should not be overly deferential to state consent. Instead, they should prioritize, in the words of the tribunal in *Enrica Lexie*, giving a complete answer to the question.¹² The legal philosopher Ronald Dworkin tells us that the best interpretation is one that “fits” within relevant practice in a particular context.¹³ As such, it may well be that the doctrine of incidental jurisdiction operates differently from one international court to the next, as Tzeng suggests in his contribution.¹⁴ But in the absence of a centralized system of international dispute settlement such contextual variety is inevitable, and in certain cases it may even be desirable. Regardless, being more open about the value that the legal decision maker ascribes to this doctrine, combined with fuller and more robust reasoning, would ensure that the authority of such tribunals that derives from the content of their decisions is not negatively affected.¹⁵

Papadaki is surely right when she concludes that “connections between legal norms and their interplay with consent and *ratione materiae* jurisdiction . . . merits further exploration since it carries untapped potential to provide a more coherent framework of treating incidental questions.”¹⁶ It is my hope that the fresh thinking contained in the diverse contributions to this symposium might inspire others to tap into this potential in order to help us think more clearly about this practically and theoretically important international doctrine.

¹² The *Enrica Lexie* Incident (It. v. India), [Award](#), para. 808 (Perm. Ct. Arb. May 21, 2020).

¹³ RONALD DWORKIN, [LAW'S EMPIRE](#) 66 (1986).

¹⁴ [Tzeng](#), *supra* note 9.

¹⁵ James G. Devaney & Christian J. Tams, [In re Arbitration Between the Italian Republic and the Republic of India Concerning the “Enrica Lexie” Incident](#), 115 AJIL 513, 519 (2021).

¹⁶ [Papadaki](#), *supra* note 5.