Incidents: An Essay in Method

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In studying incidents for the purpose of monitoring the genesis, modification, and termination of international norms, there are advantages to having a broadly homogeneous approach. While creative efforts in the genre need not conform to rigid specifications, certain general features would seem indispensable to a systematic study. The pieces included in this volume approach the study of incidents in a comparable fashion: each identifies the problem to be covered and its legal importance, presents a detailed account of the facts of the incident and the claims brought by the participants, analyzes how a complex and frequently unorganized decision process resolved the incident, and finally, appraises the international legal significance and implications of the incident.

Methodological Concerns and the Importance of Clarifying Standpoint

A useful incident study draws inferences regarding the expectations of the politically relevant actors. The validity of these inferences depends in part on an understanding of the role the author plays in observing the event (observational standpoint) and of the author's motives in selecting and drawing inferences from the incident (motivational standpoint).

In general, an incident might be viewed from any of four observational standpoints: that of participant, spectator, interviewer, or collector. Since few analysts of international incidents have the opportunity to be involved in the incident immediately as participant or spectator, the most relevant observational standpoints for the purposes of incident study are those of interviewer and collector.

Interviewing the politically relevant actors in an incident usually provides important information about both the facts of the incident and the views of the participants. However, gaining access to the participants can be difficult, and the most accessible persons will usually be spectators.

Perhaps the most common and certainly the easiest observational

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1. Politically relevant actors are those persons or groups whose participation in or reaction to an incident critically affects the outcome.
standpoint to adopt in studying incidents is that of collector. As a collector, the observer relies on records prepared by participants, interviewers, spectators, and other collectors as well as on news accounts and background studies of the area and the issues of concern. In interpreting those facts, one might also examine the sizable literature that explores the origins, role, and importance of perceptions in international politics, particularly those inquiries focused on the identification and function of norms of conduct in transnational and transcultural settings.³

The media occupy at various times each of the four observational standpoints. Initially a spectator, the media may become a participant in an incident as reports or the possibility of coverage influence the perspectives and behavior of participants. Under the right circumstances, the power of the media to focus public attention on a situation might be sufficient to transform that situation into an incident. Because the extensive involvement of the media in the events they report aggravates the problems of bias inherent in all reporting, the author should attempt to find independent corroboration whenever possible. For any information source, the author should be alert to the inherent bias in various collection techniques as well as to the relation between each observer and the subject being observed.

Bias may be a function not only of the observational standpoint, but also of the motivational standpoint of the observer. It is important to distinguish between the descriptive standpoint of one primarily motivated to observe from the prescriptive standpoint of one wishing to influence the behavior of the participants. Because most inquiries are motivated to some extent by both descriptive and prescriptive subjectivities, the analyst of international incidents should seek carefully to separate his or her personal appraisal of the lawfulness of the actor’s behavior (prescriptive) from the international community’s appraisal of lawfulness

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(descriptive). Moreover, the author should be aware of these motivational biases at each stage of the incident study, from selection of an event for study to the evaluation of the conflicting claims of the actors. Certain precautions can be taken to recognize one's biases and to disclose them to the reader. It is generally useful in this connection to discuss one's choice of event or norm, or one's evaluations, with experts from different disciplines or different political or cultural perspectives. Similarly, making explicit the methodology employed in a study and the rationale for the author's choices helps inhibit the tendency to draw broader conclusions than the data support, and discloses to the reader the bases for one's conclusions.4

Selection of Incidents for Study

It is difficult to know whether a particular situation will provide fruitful study as an "incident," that is, as a situation that created, clarified or changed the expectations of elites regarding international norms. Some events may not have called forth norms in a clear or definitive way so as to affect expectations regarding that norm. Further, a norm perceived by the public at large as having been involved in an event may obscure more subtle effects upon other, less obvious, norms. Hence, in assessing the provisional choice of subject, the author must begin by exploring the facts fully to determine whether the event seriously engaged international norms. Rather than judging the behavior of actors against pre-conceived norms, the author should focus on how and in what ways the resolution of the event engaged and subsequently shaped the development of those norms.

This provisional process of selection may be demonstrated by taking as an example the Persian Gulf War between Iran and Iraq. Among the innumerable international legal issues raised by the war are those concerning title to islands lying off the Arabian Peninsula, the effect of treaties purporting to delimit an international waterway, the validity of coerced agreements, the use of chemical and bacteriological weapons, and many other problems about the conduct of hostilities. Each of these issues might appear to engage a norm in a way that would provide a fruitful incident for study. Yet certain issues, such as the alleged use of chemical and bacteriological weapons, failed, at first, to generate sufficient international reaction to provide for satisfactory appraisal.

Though silence is not devoid of normative effect,5 an incident study is

5. See infra note 18 and accompanying text.
better confined to those factual situations that not only attracted international attention but also set into motion a complex decision process that considered whether a norm was engaged and then moved toward consideration of a sanction. Having identified a situation meeting these criteria, the author can then begin to examine in detail what normative expectations existed when the incident began and how those norms were affected by the outcome of the incident.

Identifying Relevant Norms

Some principles of international conduct are codified in international conventions or expressed in law treatises. But these principles are not norms unless they are reflected in the expectations of political participants and animate their behavior. In other words, the expectations of politically relevant actors are what shape the norm, and therefore are central to the norm-selection process.

When identifying expectations, one must be careful not to accept unquestioningly a participant's assertions as to what it expected and why. First of all, what participants say may be a very poor indicator of what they actually believe or expect. In addition, the actors may not have been conscious of the norms that guided their behavior or were applied in the instance at hand. The researcher is therefore advised to supplement the study of words with a survey of trends in the historical, cultural, and contemporary international context within which the particular events took place.

Additionally, it may be necessary to adjust temporarily the time parameters of the study for purposes of selecting the relevant norms. That is, a norm may have been shaped long before the incident took place; or it may have begun to develop only as a result of the incident.

Brainstorming is also a legitimate means of identifying norms or expectations that might have guided the behavior of participants in particular ways. However, in order to ensure that these norms are relevant, the brainstorming process needs to be disciplined by an understanding of the cultural, historical, and contemporary trends mentioned above. In this way, an adequate balance of creativity and discipline is achieved in the norm-selection process.

8. Each author may have a different method for identifying a norm to be examined. Moreover, even authors using the same method to investigate the same basic situation may draw
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It should also be emphasized that the initial identification of norms is a provisional exercise. It may be undesirable or indeed impossible to formulate the norms very precisely at the outset. Because the policy content of a norm depends on the factual context, the final specification of the relevant norm(s) follows rather than precedes the statement of the facts. The entire process, from norm selection through international appraisal, should be viewed as an integrated and circular process, with each step informing the previous step and all steps remaining tentative until seen in the light of the entire process.

Describing the Facts

The first step in organizing a description of the facts giving rise to the incident is to identify the relevant participants. This exercise is not always a straightforward one since, in many instances, the individuals most immediately involved in an incident are only minor or subsidiary actors. In the study of foreign submarines in Swedish waters,9 for example, it was evident that the submarine commanders — though major figures in creating the events which culminated in the incident — were not critical to the international appraisal of lawfulness; hence, they are mentioned in the statement of facts, but appear only marginally in the discussion of the incident’s impact on expectations of lawfulness.

Not only might undue emphasis be given to participants of marginal importance to the incident, but, conversely, it is easy to overlook important participants, especially those acting at some remove from the incident itself. A checklist of those parties will minimize the chances of overlooking a relevant participant.10

Once the participants have been identified, the author must specify the time parameters of the incident. It is not always clear where the bound-

different conclusions because of predispositional influences. Thus it is especially important that authors make explicit the assumptions and criteria underlying selection of a norm.

10. Possible actors include nation states, international governmental organizations, transnational political parties and orders, transnational pressure groups and gangs, international non-governmental associations and enterprises, and individuals. Since individuals, whether as representatives of organizations or single actors, provide much of the information used to construct an incident study, authors should be sure to determine on whose behalf an individual is operating. To do this, the author should go beyond the individual’s own self-characterization and independently determine the actor’s role and relationship to the events under scrutiny.

Other than interviewing individuals and small groups, the primary sources of information in an incident study include newspapers, radio broadcasts, international chronicles, national documents, bilateral and multilateral documents, treaties, conventions, international judgments and awards, diplomatic communications, and the writings of academic commentators. The Foreign Broadcast Information Service (FBIS) is an important source in this regard. It monitors and provides ongoing English translations of foreign newspaper and radio reports.
ries should be drawn. In a forthcoming study of the Falklands/Malvinas War,\(^{11}\) for example, the battle between Britain and Argentina is seen as one episode in a continuum of events, rather than as a discrete occurrence. If, as that study suggests, it is misleading to isolate a crisis from its historical development, the fact remains that some kind of line must be drawn. A simple rule may be provisionally to set the parameters in the way which is most likely to provide insight into both the norms at issue and the impact of the incident on the norms. Occasionally, as in the Gulf of Sidra incident,\(^{12}\) it will be impossible to develop a consistent statement of the facts. The author of that study resolved the problem by providing the few facts that were stipulated, and by then presenting the American and Libyan perspectives under the heading of “conflicting claims.”

Describing Claims of the Parties

As in the domestic context, there are two types of claims made by participants in an incident: factual and legal. Both types are considered appeals to domestic and international audiences, but not all are pertinent to an incident study.\(^{13}\) Claims made purely for domestic consumption are generally irrelevant, since they do not play a role in shaping the relevant norm. The only claims which must be considered are those which are directed at an international audience and which also bear upon the norm.

Claims are expressed by participants in a variety of ways. While at times a straightforward pronouncement may be taken at face value, frequently the real claim will be different from the one being stated. This will be the case where the actor’s domestic concerns have pressured it to express one claim rather than another; or it may be that the actor’s notion of the relevant norm shaped the claim presented. Participants preparing negotiation or litigation strategies will try to fashion their claims to fit what they believe to be the accepted norm rather than argue that other norms apply. In other cases, for tactical reasons, an actor may fashion claims that are overbroad. Unsure of the correct interpretation


\(^{13}\) Determining which claims are pertinent requires a thorough understanding of the historical and contemporary context within which the incident took place, and an ability to discern and make explicit the relationship between the participants’ expectations of lawfulness and their expressions.
of the norm, the actor will seek to leave available as many courses of action as possible.

When attempting to infer the participants' unarticulated or ill-articulated claims, it is unnecessary to adhere to a strict methodology, so long as the method used is explicitly stated. What is important is that the description of the participants' claims be fashioned by the author; the claims never come prefabricated as in appellate litigation.

Describing the Outcome: Appraisal of the International Community

After provisionally identifying relevant norms that the incident may have engaged and thoroughly canvassing the factual background of the incident and the claims of the parties, it is appropriate to begin to assess the outcome of the incident. The outcome may be assessed in respect to three sets of variables: the participants' expectations of lawfulness prior to the incident, the reactions of the international community to the incident, and finally, the impact of the incident upon the previously identified norms. The international appraisal of the lawfulness of an incident is the window through which the analyst can gain insight into how the events may have affected the vitality of legal norms, and hence, the development of international law.

In defining a baseline of expectations, the author must draw upon the historical and contemporary context within which the incident occurred. The author should take care to note the factual underpinnings of this analysis. Expectations of authority and control may be quite specific, tailored to such contingencies as: time and place; the immediate participants and their assets, objectives, and identifications; the presence or absence of crisis; and the kinds of strategic instruments employed. Such considerations as these should be used to identify those situations in the past that are factually similar to the incident, and to evaluate the expectations that may have been generated in the earlier contexts. Expectations of lawfulness may be difficult to assess whenever the relevant participants or their actions cannot be specifically identified. When the author confronts this situation, it may be necessary to examine alternative expectations. As in all studies the author should be mindful of the subtle interplay of data accessibility and research objectives.

The statements of participants and international observers may be helpful in identifying their expectations before, during or after the incident. However, such statements should not be relied upon too heavily

because of the difficulties of distinguishing among biases, distortions, and actual expectations. Finally, there may be political reasons that prevent participants from expressing their actual expectations of lawfulness. Since it is such actual expectations that determine the relevance of the incident to international law, the author will want to rely to the greatest possible extent upon consultation with international experts unconnected with the controversy. Given the fluid nature of elite expectations, the author's analysis can be tentative at best. Due caution dictates that the author provide a detailed explanation of the methodology employed, and that the effort be made clearly to separate description from interpretation to the extent possible.

Once a baseline of expectations is established, the author can describe the reaction of the international community to the incident. The author should look not only to the participants in the incident, but to other elites within the international community. It may not be immediately obvious whose responses are proper subjects for attention. In some instances, the appraisal of two or three parties is critical in shaping the international expectations of lawfulness. In the Cosmos 954 satellite study, for example, the crucial actors included the Soviet, Canadian, and American governments. In other situations, the observer will need to canvass the reactions of many different participants. Particular attention should be paid to the appraisals of participants who may be likely to contemplate actions similar to those that precipitated the incident. For example, in the Soviet pipeline study, Japan's reaction to the conflict between the United States and European governments over trade with the Soviet Union is discussed, for Tokyo, a heavy importer of mineral fuels, was a potential purchaser of such fuels from the Soviet Union. A checklist, similar to that recommended for identifying the relevant participants, might profitably be used in locating other relevant elites.

Having identified the politically relevant elites — i.e., those whose appraisal of an incident will affect the norm—the author should then examine the reactions of those actors. First, the verbal reactions to the incident may be examined. Since all participants and observers are communicating with multiple audiences simultaneously, the analyst must focus on those communications that relate most directly to international expectations of lawfulness.

This focus requires an assessment not only of what was said, but to whom, through what channels, and with what effects. It is important that

15. See Cohen, supra note 7.
16. See DeSouza, supra note 14, at notes 139-42 and accompanying text.
17. See supra note 11.
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the author be attentive to the subjective nature of the words employed. The meaning of “invasion,” “international law,” “stability,” and “erosion” for the various participants will depend on such factors as culture, class, personality, and previous exposure to crisis; indeed, the author’s own perceptions will be colored by the same factors.

Similarly, the author should keep in mind that silence and apparent inaction may reveal significant attitudes toward lawfulness. Indeed, the adoption of such postures may be a considered response. Where, for example, there was little overt reaction to the Gulf of Sidra incident,\textsuperscript{18} the author concluded that the international community’s “silence” was best understood as reflecting a decision to neither condemn nor approve explicitly the U.S. military action. Through their silence, the study suggests, other parties wished to preserve for themselves the competence to undertake similar exercises. Sometimes, of course, silence will indicate only the absence of international appraisal; in such a case, the events generally will not qualify as an incident since no lawmaking is involved.

Of course, actions, as well as words, may reveal elite perspectives. Some actions that are relevant may be far removed in space or time from the incident itself.\textsuperscript{19} Because they require a greater mobilization of resources, actions often indicate the resolve of participants better than words; they may also better reveal the intensity of elite expectations. Whether a reaction is expressed in word or deed, the author should evaluate its intensity, duration, and specificity, its intended audience, and the degree to which it has captured the attention of others in the world community.

By generalizing from the baseline expectations and the international reaction, the author may arrive at an overall appraisal of the lawfulness of the incident, and of its effect on legal norms. Although the degree of consensus in the international appraisal is significant, the absence of consensus does not necessarily make the appraisal problematic. As in domestic contexts, a pattern of normative expectations may exist without complete agreement as to its policy content or complete support for its application in every conceivable context. Unanimity is not required for there to be authoritative and controlling expectations, under which participants are aware of the likelihood of their violating the norms and of the probable costs of those violations.

\textsuperscript{18} See Ratner, \textit{supra} note 12.

\textsuperscript{19} One consequence, perhaps ironic, of an interdependent world community is the tremendous increase in the sites for and variety of ways of exerting leverage through the combined use of ideological, diplomatic, economic, and military strategies. The author should consider each strategy because its use or non-use provides insight into the perspectives of participants.
Expectations of lawfulness may be affirmed, denied, suspended, attenuated, or elaborated. Affirmation implies that what took place was largely in conformity with existing or emerging expectations of authority and control. Denial implies the opposite. In assessing the effect upon norms, the author should keep in mind that expectations of lawfulness change continuously through the simultaneous processes of normative accretion and erosion. Thus, denial does not imply that a set of expectations has been extinguished, nor does affirmation mean that expectations are crystallized for eternity.

In addition to the extreme effects of affirmation or denial, the analyst should consider less permanent effects upon the norm. Where a set of normative expectations plays no apparent role in an incident which might have been expected to implicate the norm, the norm may be considered suspended, rather than denied. Attenuation of a norm is marked by curtailment of the domain, scope, range, or intensity of existing expectations, while elaboration or extension of the norm coincides with an enhancement of these features.

Appraisal of the effect of an incident upon a norm requires the author to make an inference about how participants translate perception into judgment. Determinations of lawfulness by participants are difficult to separate from judgments about the merit of the existing norm, or from claims for changes in the norm. This is especially so when the subject matter is as emotionally charged as it frequently is in the study of international incidents. Even when determinations of lawfulness appear straightforward, conclusions regarding the effect on a norm are not absolute predictors of future behavior. Expectations of lawfulness tend to guide rather than predetermine the behavior of participants, and clarifying the state of an international norm does not mean that participants will abide by the norm in all future instances. Even when an incident evokes a strong reaction, its effect on normative expectations will not be indelible. Under such circumstances, conclusions are necessarily contingent, based, as they are, on incomplete data drawn from a specific configuration of events and conditioning factors. They are also general, because the outcome of the appraisal process — a determination of lawfulness — is incorporated by all participants, though with differing degrees of coherence and intensity.

Notwithstanding the contingent nature of the appraisal process, the incident study furnishes both a guide for predicting future behavior and, perhaps more significantly, a coherent picture of the process by which norms are continually redefined through the interaction of competing elites. Comprehension of this process is critical because the activities
which comprise it figure prominently in the establishment and maintenance of what reliability there is in a world community characterized by an unceasing flow of reciprocal and oftentimes conflicting claims and a strained but still effective mutual tolerance.

Analyzing the Significance of the Incident: The Author's Appraisal

The author's personal appraisal of the implications of the incident may take any of various approaches. One approach might examine the significance of the incident in terms of its likely recurrence or its relevance to analogous situations in which similar norms might be engaged.20

In addition to these projections regarding the outcome of the incident, the author's appraisal might critically examine the outcome in terms of policy goals. The author might ask whether the outcome of the incident serves to promote world order, human dignity, or other values, or how an outcome more conducive to such values might have been achieved. Where the author approves of the policies furthered by the outcome, the appraisal might consider ways in which the world community could build upon this incident so as to strengthen further desirable norms.21 In either instance, the author must postulate goals against which the proposals are to be appraised and explore the personal, cultural, and environmental factors that would affect the outcome of any proposal.

20. Accomplishing this task requires the author to explore many factors, including the psychological, historical, political, and geographic features of the particular context that comprised the incident, in order to determine the extent to which similar factors and configurations of such factors are likely to appear elsewhere in the future. By performing this exercise, the author will be able to make disciplined statements about the extent to which the present incident can be generalized.

21. In general, the author should make clear why and how he or she agrees or disagrees with the international appraisal of lawfulness. The author may also propose alternative ways for improving those appraisals, and may suggest ways to facilitate incorporation of the proposed method of determining lawfulness into the expectations of participants. Finally, the writer may choose to focus not on alternative methods of appraising lawfulness, but rather on alternative actions that participants in the precipitating events could have taken that would have altered the incident's impact on the norm(s) in question. If this is done, the researcher should demonstrate why the proposed actions would have led to a better outcome. In this vein, alternative strategies can also be offered that the author believes would either mitigate or enhance the immediate or subsequent impact of the incident on the norm(s) under consideration.
Appendix:

Suggested Sequence for Research and Writing of Incident Studies

I. Preliminary Research and Problem Selection.
   A. Background reading and interviewing.
   B. Problem selection, with a statement of its relevance to international law.
   C. Provisional characterization of the particular problem, facts, and relevant norms.
   D. Clarification of author's standpoint and methodological concerns.

II. Statement of the facts, including:
   A. Who participated?
   B. With what perspectives (i.e., expectations, demands, identifications)?
   C. In which situations (e.g., geographic, temporal, institutional, crisis)?
   D. Employing what bases of influence (e.g., control over people, perspectives, situations, values, resources, and strategic instruments)?
   E. Manipulating what strategies (e.g., diplomatic, ideological, economic, military), in what combinations, and in what modalities (e.g., persuasive, coercive)?
   F. With what outcome(s)?

III. Identification and description of conflicting claims, including fact characterization and legal justifications.

IV. "Final" identification of the norm(s) under consideration.

V. Description and analysis of the international appraisal of the incident, including:
   A. Who participated in the international appraisal?
   B. With what perspectives (e.g., notion of lawfulness, criteria for determining lawfulness, method and rationale for applying criteria of lawfulness)?
   C. In what situations?
   D. Employing what bases of influence?
   E. Manipulating what strategies, in what combinations and modalities?
   F. With what outcome(s) (i.e., the impact of the incident on the norm(s) under consideration in terms of intensity, scope, domain, and duration)?

VI. Author's appraisal.
   A. Establishment of standpoint and procedures for self-scrutiny.
   B. Delimitation of focus of inquiry (clarifying conceptions of relevant community, with balanced emphasis on perspectives and operations, and conceptions of law, including expectations of authority and control).
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C. Performance of intellectual tasks.
1. Postulation of basic goals and clarification of related community policies.
2. Evaluation of the contribution of the norm(s) to the achievement of goals and policies.
3. Analysis of factors that determine how the norm(s) translate into practice.
4. Projection of probable courses of development for the norm(s).
5. Design, evaluation and proposal of alternative means for influencing development of the norm(s) in ways intended to yield results compatible with postulated goals and clarified policies.

VII. Bibliography and list of persons consulted and interviewed.