THE RIGHT OF INTERVENTION OF COASTAL STATES ON THE HIGH SEAS IN CASES OF POLLUTION CASUALTIES

Claude C. Emanuelli*

> "In certain circumstances the state cannot await the arrival of a danger to its security within its own territorial jurisdiction, but must take measures to prevent that danger from materializing while still outside its territorial jurisdiction. In this case the state may claim a measure of "protective jurisdiction" and use force in the exercise of that jurisdiction beyond the limits of state territory."[1]

The question of the existence of a right of intervention of coastal States on the high seas following pollution casualties[2] arose in relation to the *Torrey Canyon* incident in March 1967.

The *Torrey Canyon*[3] was a Liberian tanker which ran aground on the Seven Stones Reef,[4] 12 miles off the British coast, i.e. on the high seas,[5] causing major pollution damage to the British and French coastlines and related interests.[6]

In order to minimize any further pollution, the British government first attempted to rescue the tanker; but, following the failure of attempts at salvage it was decided to bomb the wreck in order to set it afire. At that time, the decision of the British government was a

---

* Assistant Professor of Law at the University of New Brunswick, Lic. Droit, LL.M., D.J.

1 D.W. Bowett, *Self-Defence In International Law* (1958), p. 66.

2 The first international efforts to combat sea pollution go back to the League of Nations and the Washington Conference of 1926. Nevertheless, the problem of pollution did not become a matter of public concern and of international antagonism until it was dealt with by the Inter-governmental Maritime Consultative Organization (IMCO) after World War II.

3 It was carrying most modern navigational aids and was classed 100 A-1, the highest standard by Lloyd's Register of Shipping. The Liberian board of investigation found that the stranding was entirely due to the negligence of the master of the ship. See E.D. Brown, The Lessons of the Torrey Canyon (1969) 21 *Current Legal Problems*, p. 113, at p. 114.

4 Navigational hazard between the Isles of Scilly and Land's End.

5 The United Kindgom has made no claim in relation to the establishment of a contiguous zone and could not refer to the provisions of Article 24(1) of the Geneva *Convention on the Territorial Sea and the Contiguous Zone* under which a coastal State is given "the control necessary to prevent infringement of its sanitary regulations within its territory or territorial sea", see text in 1958, 52 *American Journal of International Law*, p. 834.

6 60,000 tons of oil were released causing damage estimated to $18 million.

very daring one and in the abstract seemed contrary to International Law of the Sea principles. Indeed, the *Torrey Canyon* was flying a foreign flag and was on the high seas when the incident occurred; therefore, the *Torrey Canyon* was theoretically protected by the principle of exclusive jurisdiction of the flag State, corrolary to the principle of the freedom of the high seas.[7]

The adoption of measures of intervention by the British government was in fact strongly criticized, first within the United Kingdom by the Chamber of Shipping for the very dangerous precedent it created,[8] second outside the United Kingdom by the French government which asserted that contrary to its objectives, the bombing of the *Torrey Canyon* resulted in further pollution of the French coast, 225 miles away from the place of the casualty.

On its part, faced with these criticisms, the British government was invoking a right of self-protection under general International Law principles.[9]

Nevertheless, whether the British government was sure of its rights under this doctrine or not, it was also conscious of the ambiguity of International Law on the question[10] as well as of the division between coastal and flag States about its issues. Therefore, with a view to clarifying the position of coastal States in similar situations and seeing her rights recognized, Great Britain seized the *Inter-Governmental Maritime Consultative Organization*[11] with the problem.

On May 4, 1967, the Council of IMCO was convened at an extraordinary meeting and asked by the British Government to study three categories of problems:

— Preventive measures against oil pollution;
— Measures to limit the extent of damage;
— Necessary changes in International Law.[12]

In order to deal at best with the legal aspects of these questions, the Council proposed the creation of an ad-hoc Legal Committee within the Organization. This ad-hoc committee has since become a permanent organ of IMCO.[13]

---

7 See *Convention on the High Seas*, especially Articles 2 and 6 in 1958, 52 *American Journal of International Law*, p. 842.

8 See E.D. Brown, *supra* note 3, p. 114 note 5.

9 See Article 38 (1) (c) of the *Statute of the International Court of Justice.*

10 See part B of this paper.

11 Hereinafter IMCO.

12 IMCO Doc. C/ES. III/3 April 18, 1967.

13 See J.P. Quéneudec, Les incidences du Torrey Canyon sur le droit de la mer (1968), *Annuaire Français de Droit International*, pp. 709-710.

In relation to the questions presented by the British government to IMCO, the Legal Committee was instructed by the Council to consider:

> "The extent to which a State directly threatened or affected by a casualty which takes place outside its territorial sea can, or should be enabled to, take measures to protect its coastline, harbours, territorial sea or amenities, even when such measures may affect the interest of shipowners, salvage companies and insurers and even of a flag government."[14]

The work of the Legal Committee on this matter resulted in a recommendation for the convening of an international conference intended to define the rights of coastal States vis-à-vis pollution casualties off their shores.[15] In this respect, the Legal Committee drafted the provisions of a proposed treaty.[16] The Assembly of IMCO agreeing on the proposal of the Legal Committee convened an international conference at Brussels in November 1967.[17] The conference resulted in the adoption of an *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*.[18] The provisions of this Convention are very similar to those of the draft convention of the Legal Committee.

A/ THE RIGHT OF INTERVENTION UNDER THE 1969 CONVENTION:

Under the 1969 Convention, the right of intervention of coastal States on the high seas in cases of oil pollution casualties is expressly recognized. The Convention provides also for some limitations to the exercise of the right of intervention, and sanctions in cases of wrongful exercise of this right.

Moreover, the provisions of the 1969 Convention must be read in the light of two basic observations:

— The 1969 Convention is meant to be a limitation on the freedom of the high seas, understood here as a license to pollute, and on its corollary the principle of exclusive jurisdiction of the flag State in cases of oil pollution casualties. In this respect, although the preamble emphasizes that measures adopted according to the right of intervention "do not affect the principle of freedom of the high seas",[19] it is suggested that this right does interfere with the usual understanding of that principle.

---

14 IMCO Doc. C/ES. III/5 para. 15.

15 See IMCO Doc. LEG. II/4, Dec. 11, 1967.

16 See IMCO Doc. LEG. III/2, June 18, 1968.

17 From Nov. 10 to Nov. 29, 1969.

18 See text in 1970, 64 *American Journal of International Law*, pp. 171-480, hereinafter the 1969 Convention

19 Meaning here freedom of communications.

— These limitations are widely understood in accordance with the recommendations of the Council and Legal Committee of IMCO, and the 1969 Convention is coastal State or "victim" oriented. This orientation is defined in rather dramatic terms in the preamble which recognizes the need to protect the interests of the parties' peoples "against the grave consequences of a maritime casualty resulting in danger of oil pollution of sea and coastlines." The preamble also emphasizes "that under these circumstances measures of an exceptional character to protect such interests might be necessary on the high seas . . .".

Thus, the 1969 Convention grants large powers to coastal States on the high seas in cases of oil pollution casualties. The limitations brought to these powers by the Convention are tantamount to a reasonable exercise of the right of intervention by coastal States within the scope of this right. The sanctions for an improper use of the right of intervention are extremely difficult to be enforced and work in favour of coastal States.

1. *The exercise of the right of intervention:*

The right of intervention of coastal States on the high seas in cases of oil pollution casualties is embodied in Article I(1) of the Convention. This key article of the 1969 Convention reads as follows:

> "Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, folowing upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences."

Thus, the right of intervention may not only be exercised with respect to an actual case of pollution but also to a threat of pollution,[20] provided that there is "grave and imminent danger" to the parties' "coastline or related interests".[21]

Also, the right of intervention may be exercised anywhere on the high seas and is not limited to any kind of pollution control zone. This approach stems from the idea that any division of the seas according to legal principles is somewhat artificial in relation to the protection of the marine environment against pollution.

Moreover, the coastal State may take any kinds of measures which seem suitable at the time of the casualty. Indeed, Article I(1)

---

20 The Convention does not provide for a definition of what constitutes a threat of pollution. This will probably depend on the circumstances of the maritime casualty as interpreted by the coastal State concerned in view of the seriousness and the imminence of the danger incurred.

21 In this respect, it is interesting to note the large definition of "related interests" as understood under Article 2(4).

only refers to "such measures . . . as may be necessary" without any further qualification as to the nature of these measures.[22]

Furthermore, the right of intervention may be exercised with regard to all cases of pollution by oil which includes here "crude oil, fuel oil, diesel oil and lubricating oil".[23]

Again, the right of intervention is recognized *in fine* with regard to all categories of ships, tankers or passenger carriers, etc.[24]

Eventually, it is clear that under the 1969 Convention coastal States are granted large rights and powers on the high seas subject only to a reasonable exercise of these rights and powers.

2. *Limitations to the exercise of the right of intervention:*

Under the 1969 Convention these limitations are twofold:

— Some are related to prerequisites to the exercise of the right of intervention;

— Some are related to the actual exercise of the right of intervention.

a) *Prerequisites to the exercise of the right of intervention:*

These prerequisites flow from the circumstances of the *Torrey Canyon* episode and from the questions referred in this connection by the British government to the Council of IMCO.

The right of intervention is limited to a maritime casualty resulting in a case of pollution, involving a private owned ship of one of the contracting parties. Therefore, it does not apply to voluntary cases of pollution,[25] pollution casualties resulting from the exploration or exploitation of the continental shelf or of the deep seabed,[26] pollution casualties involving warships, State owned vessels used on government non-commercial services,[27] or private owned vessels of a flag State which is not party to the Convention.[28]

---

22 Among some of the possible measures to adopt, one can think of taking over the control of the ship, setting it afloat again, towing it away from the threatened area, unloading its cargo, destroying the wreck, etc. See Norman A. Wulf, International Control of Marine Pollution (1970-71), 25 JAG, p. 52.

23 See Article 2(3).

24 See Article 2(2) defining the term "ship". The exclusion related to oil rigs seems to be also the result of constitutional limitations attached to IMCO. See Dennis M. O'Connell, Reflections on Brussels: IMCO and the 1969 Pollution Conventions (1970), 3 *Cornell International Law Journal*, p. 161 at p. 167 note 30.

25 See Article 1(1) *a contrario*.

26 See Article 2(2) (b).

27 According to the principle of soverign immunity these vessels are expressly excluded by Article 1(2).

28 Although the Convention does not mention anything on this question, this idea is in accordance with Article 34 of the *Vienna Convention on Treaties*.

The Convention is limited to pollution by oil.[29] Nevertheless, a resolution annexed to the text of the Convention suggests the existence of a right of intervention with respect to other noxious substances and recommends that IMCO should study a possible extension of the Convention in that direction.[30]

The right of intervention is subordinated to the existence of "grave and imminent dangers . . . which may reasonably be expected to result in major harmful circumstances." Nevertheless, the Convention does not include any information which might qualify these terms. Thus, the coastal State will have to decide according to each instance. In this respect, one can imagine that the coastal State will take into account the size of the ship, the nature of her cargo, climatic, geographical, ecological characteristics of the area where the casualty occurred, etc.[31]

b) *Procedural limitations to the exercise of the right of intervention:*

The limitations provided for by the Convention deal with the right of intervention prior, during and after its actual exercise.

— Prior to the exercise of the right of intervention, the coastal State concerned is under the obligation to consult with "other States affected by the maritime casualty, particularly with the flag State or States",[32] and may consult with independent experts designated by IMCO.[33] It must also notify "without delay the proposed measures to any persons physical or corporate known to the coastal State, or made known to it during the consultations, to have interests which can reasonably be expected to be affected by those measures."[34] In this respect, the coastal State must take into account "any views they may submit".[35]

Nevertheless, in relation to the obligation to consult, the Convention provides for an escape clause "in cases of extreme urgency".[36] Here, "the coastal State may take measures rendered necessary by the urgency of the situation, without prior notification or consultation or without continuing consultations already begun".[37]

---

29 See Article 1(1).

30 See part C of this paper.

31 See J.P. Quéneudec, *supra* note 12, p. 751.

32 See Article 3(a).

33 See Article 3(c). In this respect Article 4 describes the procedures under which the list of experts will be set up.

34 See Article 3(b).

35 *Idem.*

36 See Article 3(d).

37 *Idem.*

It is suggested that the existence of such an escape clause and the fact that consultation with independent experts is not compulsory may be of far reaching consequences in the application of the right of intervention. Indeed, it is to be expected that coastal States threatened with oil pollution casualties will generally use these loopholes to exercise their rights under the Convention without interference or delay from other parties involved. This is especially true when one considers that the views submitted by these other parties may play against the coastal State at the level of the mechanism of control provided for in the Convention.[38]

— Before and during the exercise of the right of intervention, it is emphasized that the coastal State must "use its best endeavours to avoid any risk to human life, and to afford persons in distress any assistance of which they may stand in need, and in appropriate cases to facilitate the repatriation of ships' crews, and to raise no obstacle thereto".[39] These humanitarian considerations are in accordance with the well established principle of maritime law under which all nations must extend necessary assistance to persons in distress at sea.[40]

With respect to the exercise of the right of intervention, the Convention emphasizes that the measures adopted pursuant to this right, must be proportionate to the damage actual or threatened. In this connection, the Convention provides for some guidance for the coastal State which must take into account

(a) "the extent and probability of imminent damage if those measures are not taken; and

(b) the likelihood of those measures being effective; and

(c) the extent of the damage which may be caused by such measures."[42]

Furthermore, the Convention emphasizes the obligation for the coastal State not to "go beyond what is necessary"[43] to prevent, mitigate or terminate the pollution or threat thereof.

— Subsequent to the exercise of the right of intervention, the coastal State must without delay notify the measures taken under the Convention to "the States and to the known physical or corporate persons concerned, as well as to the Secretary General of the

---

38 See infra pp. 10-13.

39 See Article 3(e).

40 See Article 12 of the *Geneva Convention on the High Seas.*

41 See Article 5(1).

42 See Article 5(3).

43 See Article 5(2).

Organization".[44]

This compulsory duty to notify is intended to enable the States or persons concerned by the intervention to verify that the measures adopted by the coastal State on the high seas are in accordance with the provisions of the Convention. Otherwise, parties damaged by these measures will be entitled to compensation.

3. *Control over the exercise of the right of intervention:*

Because the 1969 Convention grants large powers to coastal States, there might be abuses in the exercise of these powers. Therefore, the Convention provides for a mechanism of control over the exercise of the right of intervention. In this respect, the Convention creates a compulsory mechanism of peaceful settlement of disputes, arising from the exercise of the right of intervention and sanctions against coastal States in cases of wrongful exercise of this right.

a) *Procedure of dispute settlement*

This mechanism is spelled out in Article 8 of the Convention and described in detail in an annex attached to the text of the Convention. It is twofold and consists of a procedure for conciliation and, in case of failure, compulsory arbitration.

The procedure of dispute settlement may be commenced by any party concerned.[45] In this respect, the Convention provides for an accelerated procedure of settlement at the international level. Under this procedure any party concerned may start proceedings in the international arena without waiting first for exhaustion of local remedies.[46]

b) *Compensation of damage*

It is suggested here that the procedure for compensation provided for in the Convention is aiming at sanctioning any abuse in the exercise of the right of intervention rather than at compensating damaged parties.

Under Article 6 of the Convention:

> " any party which has taken measures in contravention of the provisions of the present Convention causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article 1."

Therefore, to give rise to a right of compensation, the measures adopted by the coastal State must first be in contravention of the Convention, and, second, fail to meet the "reasonable man" test introduced in the field of pollution control by the 1969 Convention. In

---

44 See Article 3(f).

45 See Article 8(1).

46 See Article 8(2).

both cases, the onus of proof lies on the claimant.[47]

In this respect, the unlawfulness of the exercise of the right of intervention is related to a number of conditions set out in detail by the Convention and should generally be demonstrated easily. On the contrary, it is suggested that it would be more difficult to appreciate the standards related to the seriousness and imminence of a danger... from pollution or threat of pollution.

The same observation should apply to the reasonableness of the exercise of the right of intervention by the coastal State and the proportionality of the measures adopted under this right. Indeed, what may seem reasonable at the time of the casualty may be seen in a different light once the danger is over.

The idea has been developed by a French writer in the following terms:

> "La proportionalité des mesures prises par rapport aux dangers encourus ne peut être appréciée qu'en tenant compte des circonstances existant au moment de l'adoption de ces mesures, même si les mesures en question apparaissent par la suite effectivement disproportionnées par rapport aux conséequences dommageables réellement subies par l'Etat ayant adopté ces mesures. Ce qui peut paraître vraisemblable et probable aussitôt aprés l'échouement d'un pétrolier ne se réalise pas nécessairement et il est, en conséquence, extrêmement malaisé de démontrer le caractère injustifié des dispositions adoptées par un Etat pour se prémunir d'un danger probable, et pas seulement éventuel, surtout lorsque l'action de cet Etat a pu modifier notablement le cours des évènements."[48]

Consequently, it is suggested that the mechanism of sanctions provided for by the Convention is not likely to restrain the action of coastal States.

B/ *THE RIGHT OF INTERVENTION UNDER THE 1969 CONVENTION: DE LEGE LATA OR DE LEGE FERENDA?*

The question here is to decide whether the 1969 Convention merely codifies an existing right of intervention inherent to coastal States or on the contrary creates such a new right.

As mentioned above, at the time of the *Torrey Canyon* incident, the United Kingdom justified her intervention by invoking a right of self-preservation under general principles of International Law; conversely this right was denied by some organisms like the British Chamber of Shipping.

In this respect, and notwithstanding the concern of public opinion with regard to pollution or the worries of some governments over the international impact of unilateral measures of intervention

---

47 See J.P. Quéneudec, *supra* note 13, p. 756.

48 Idem.

on the high seas, the *Torrey Canyon* incident constituted a challenge for the "doctrine". Indeed, legal writers used their best endeavours to justify the measures adopted by the British government with some adequate concept, and thus to explain the refusal of coastal States, and especially of Great Britain, to consider the future convention as constitutive of a new right.[49] The question appeared to be of a very complex nature, and this explains the number of solutions[50] examined and the eventual recourse to a solution involving a rather vague concept.

Furthermore, this problem was of a very practical interest for coastal States in relation to pollution control. Indeed, if the right of intervention of coastal States in cases of oil pollution casualties was a well established International Law principle, the scope of this right could be broadly understood in favour of coastal States, no matter what the limitations brought to it by the Convention were.[51]

Among the various concepts examined by legal writers, three principles were mainly retained to explain the existence of a right of intervention in favour of coastal States: the concepts of self-defence[52], necessity[53], self-protection.[54]

These concepts differ in nature; nevertheless, they are all based on the same basic idea that in exceptional circumstances threatening the vital interests of a State, that State may adopt measures of an exceptional nature to protect its interests.

1. *The Concepts of self defense:*

This concept was essentially used by the British press, at the time of the *Torrey Canyon* incident, to explain the measures taken by the British government.

However, this concept was usually not considered by legal writers as constituting a valid legal argument in favour of the bombing of the sinking tanker.

---

49 See J.C. Sweeney, Oil Pollution of the Oceans (1968-69), 37 *Fordham Law Review*, p. 155, at p. 203.

50 Among them the concepts of piracy on the high seas, contiguous zone, abuse of rights, were referred to by some writers.

51 See L.J.H. Legault, The Freedom of the Seas: A Licence to Pollute? (1971), 21 *University of Toronto Law Journal*, p. 211, at p. 216.

52 See E.D. Brown, *supra* note 3, p. 126; L.C. Caflisch, International Law and Ocean Pollution: The Present and the Future (1972), 8 *Revue Belge de Droit International*, p. 7.

53 See E.D. Brown, *supra* note 3, pp. 127-30; L.C. Caflisch, *supra* note 52, pp. 21-22; J.C. Sweeney, *supra* note 49, pp. 202, 203.

54 See L.A. Teclaff, International Law and the Protection of the Oceans from Pollution (1971-72), 40 *Fordham Law Review*, p. 556 at p. 557; D.M. O'Connell, *supra* note 24, p. 173.

According to cases and legal writers "(s)elf-defence is a right against the unlawful acts or omissions of another subject of international law or against the acts of objects of international law when the acts are such as to preclude diplomatic protection or the objects lack any link of nationality with a subject of international law".[55]

Here, with respect to pollution problems, the occurrence of such unlawful acts is closely related to voluntary cases of discharge of noxious substances at sea. In this respect, until the 1969 Convention, the question of oil pollution was merely covered by the 1954 London Convention for the *Prevention of Pollution of the Sea by Oil*.[56] This Convention regulates the conditions of discharge of oil at sea and bans such discharge in certain cases, but expressly excludes cases of incidental release of oil from its provisions.[57]

Also, even if incidental discharges of oil were to be considered as unlawful *per se*, coastal States would not, under International Law principles, have jurisdiction over such activities. In this respect, the 1954 London Convention, in accordance with traditional International Law, recognizes the exclusive jurisdiction of the flag State over violations of the prohibition to discharge.[58]

Moreover, as suggested by one author, in a case similar to the *Torrey Canyon* incident, the State of registration "will not have acted illegally and the act of the ship concerned will amount at most to negligence giving rise to prosecution under the municipal law of the flag State".[59]

At last, in relation to Article 51 of the U.N. Charter, the concept of self-defence is often referred to with regard to "agression, which is used in the sense of a use of force by human agents rather than natural disasters".[60]

2. *The Concept of necessity*:

Unlike the notion of self-defense, the concept of necessity has been often used by legal writers in relation to the measures taken by the British government against the *Torrey Canyon*.

To define this concept with precision is somewhat difficult, for the doctrine of necessity divides writers over its understanding. Thus, some authors relate its use to the exercise of the right of self-defense,

---

55 See E.D. Brown, *Supra*, note 3, p. 126.

56 See Article 4.

57 See Article 6.

58 See E.D. Brown, *supra* note 3, p. 126.

59 Idem at p. 127; see also L.C. Caflisch, *supra* note 52, p. 19.

60 See Bin Cheng, *General Principles of International Law*, (1953) p. 69; G. Schwarzenberger, The Fundamental Principles of International Law (1955), 87 (1) *Recueil des Cours, Académie de droit International*, p. 343.

to which it would be ancillary. For other writers, it is a notion quite distinct and independent from the principle of self-defense.[61] In any case, writers usually agree that the doctrine of necessity does not give rise to a right but merely excuses what would otherwise be considered as an unlawful act. In this respect, it may give rise to a duty to compensate injured parties. Moreover, it is agreed that action taken on the basis of the doctrine of necessity is not limited to unlawful acts or omissions. In this respect, it might very well be used with regard to cases of incidental pollution. Nevertheless, the approach adopted by the 1969 Convention with respect to the right of intervention does not seem to fall within the framework of the doctrine of necessity.

Thus, as previously mentioned, the doctrine of necessity cannot be the basis for the establishment of a right.

Furthermore, if a right of compensation is envisaged under the 1969 Convention as under the doctrine of necessity, the approach is somewhat different in each case. As stated before, the mechanism of compensation created by the 1969 Convention is not primarily aimed at compensating damaged victims but rather at sanctioning any abuses of the right of intervention. Conversely, under the doctrine of necessity there can be no abuse of right because there is no right in the first place. Some act, otherwise unlawful, is excused by the concept of necessity, but gives rise to compensation of injured parties, especially third parties, merely because they have suffered damage and not because, unless excused by the doctrine of necessity, it would be unlawful. It is possible to say that in this latter case only, the protection of innocent victims is truly envisaged.

Eventually, neither the concept of self-defense nor the doctrine of necessity being applicable to the establishment of the right of intervention under the 1969 Convention, legal writers had recourse to the doctrine of self-protection.

3. The Concept of self-protection:

This concept has been developed with respect to environmental protection by the 12th Commission of the Institute of International Law in its report on marine pollution in 1969.[62]

Thus, according to the report of the Institute:

> "Les membres de la Commission ayant adopté le point de vue que le fondement du droit d'intervention de l'Etat riverain en cas d'accident survenu se trouve dans le droit d'autoprotection . . ."

---

61 See Mesures Internales Concenant les Pollutions Accidentelles des Milieux Marins, Résolution adoptée le 12/9/69, partie B, 40 *Revue Générale de Droit International* Public, p. 1199.

62 See Bin Cheng, *supra* note 60, p. 31; G. Schwarzenberger, *supra* note 60, pp. 343-345; D.W. Bowett, *The Law of the Sea* (1967) pp. 4-10.

Furthermore, it was specified that:

> "De même, il faut éviter de parler de légitime défense, non seulement parce que cette notion a donné lieu à trop de discussions (cf. celles suscitées par l'Article 51 de la Charte), mais surtout parce qu'elle est trop étroitement liée à l'idée d'une agression, laquelle n'a rien à voir ici."
>
> "La notion d'accident et celle d'une fonction d'intérêt général s'accordent, au contraire, avec la notion de l'autoprotection. Celle-ci est l'idée de base vraiment inhérente à l'existence de l'Etat. Le droit dit de nécessité et celui de légitime défense n'en sont que des formes particulières, dérivées et discutées."

The doctrine of self-protection is usually considered as being the most permissive, vague and controversial of the three concepts under examination. Based on the formula *Salus Populi Suprema Lex Esto*, it seems to justify any measures adopted by a State faced with some danger affecting its vital interests.[63] Therefore, the doctrine of self-protection might constitute a threat to the existence of any legal order within the framework of which it is applied.[64] In this respect, the existence of such a doctrine has often been denied as a legal concept and confined to a "psychological denominator: the instinct of self-preservation".[65]

However, the Institute of International Law has tried to supplement the doctrine of self-protection and limit its exercise to pollution casualties within certain boundaries. These limits are spelled out in the resolution which was adopted at the issue of the 1969 meeting of the Institute and are basically similar to those provided for in the 1969 Convention with regard to a reasonable exercise of the right of intervention.[66]

4. *The solution adopted by the 1969 Convention:*

The parties to the 1969 Convention did not deny the existence of an inherent right of intervention of coastal States on the high seas in cases of oil pollution casualties, without, however, referring expressly to any concept of general application.

In fact, the resolution adopted by the Conference and attached to the Convention seems to suggest that its provisions were a codification of existing principles. Thus, the *Resolution on International Cooperation Concerning Pollutants Other than Oil* specifies that "the limitation of the Convention to oil is not intended to

---

63 See Bin Cheng, *supra* note 60, p. 344 who writes:

> "In view . . . of the frequent abuses of the principle of self-preservation, it may be emphasized at the outset that a proper knowledge of the limits and conditions of its application is just as important as knowledge of the existence of the principle itself."

64 See G. Schwarzenberger, *supra* note 60, p. 344.

65 Same as note 14.

66 *Idem.*

abridge any right of a coastal State to protect itself against pollution by any other agent".

Another element in favour of the idea of codification of an existing right is that the resolution recommends "that there should be an extension of the Convention to such pollution" (by agents other than oil), and "that Contracting States which become involved in a case of pollution danger by agents other than oil co-operate as appropriate in applying wholly or partially the provisions of the Convention".

The consequences attached to the existence of an inherent right of intervention outside the 1969 Convention are of far reaching consequences for coastal States. These consequences can be described as follows:

The right of intervention can be applied to all pollution casualties, whatever the noxious substance. In this respect, the Institute of International Law recognized the existence of an inherent right of intervention without distinguishing between different polluting agents. Thus, Article 1 of its resolution on oil pollution casualities states:

> "Tout Etat se trouvant en face d'un danger grave et imminent pour ses côtes ou intérêts connexes par une pollution ou menace de pollution des eaux de la mer à la suite d'un accident survenu en haute mer ou des actions afférentes à un tel accident, susceptible d'avoir des conséquences très importantes, peut prendre les mesures nécessaires pour prévenir, atténuer ou éliminer ce danger."[66]

Also, one can imagine that the right of intervention be applied, wherever the pollution casualty occurs, including in the territorial waters of a foreign State.[67]

Moreover, the right of intervention can be applied whether the pollution is caused by a maritime casualty or results from the exploration or the exploitation of the seabed.

Furthermore, it seems that States not parties to the 1969 Convention can apply the right of intervention to oil pollution casualties.

At last, parties to the 1969 Convention can interpret and apply its provisions in an extensive manner according to the principle that "(t)he right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipula-

---

66 *Idem.*

67 See L.A. Teclaff, *supra* note 54, p. note 143.

tions do not conflict with such an interpretation."[68]

Eventually, it seems possible to say that 1969 Convention constitutes a limited application of the doctrine of self-protection to the problem of pollution. In this respect, the provisions of the Convention and of the resolution of the Institute of International Law seem similar enough to indicate the influence of the work of the Institute on the Conference. This influence is especially obvious at the level of the resolution adopted by the Conference and suggesting an extension of the provisions of the Convention to constitute a more general application of the doctrine of self-protection to pollution casualties.

C/ *EXTENSION OF THE PRINCIPLE OF INTERVENTION TO SUBSTANCES OTHER THAN OIL:*

Although it falls short of covering all cases of pollution, the 1969 Convention is not intended to limit the right of intervention of coastal States to pollution by oil.

In this respect, the parties to the Convention could not overlook the defects of such a limitation provided for by the provisions of the Convention. Therefore, a resolution was, as already mentioned, adopted at the end of the Conference and annexed to the text of the Convention. The *Resolution on International Co-operation Concerning Pollutants other than Oil* stipulates "that the limitation of the Convention to oil is not intended to abridge any right of a coastal State to protect itself against pollution by any other agent."

If it can be argued that the provisions of this resolution suggest the existence of a right of intervention outside the Convention, these provisions do not specify the conditions of exercise of this right in such case. It was especially important, here, to know the kinds of noxious substances other than oil along with the kinds of situations to which the right of intervention could be applied.

Thus, in order to extend the scope of these principles to pollutants other than oil, it seemed necessary to have prior knowledge of the existence of substances likely to present grave and imminent danger to the coastline or related interests of coastal States following upon a maritime casualty or acts related to such a casualty which may reasonably be expected to result in major harmful consequences.

The combination of these elements suggested the existence of some information related to the vessel, its cargo, the type and place of incident, the nature of the coastline and related interests, climatic, geographical, ecological or any other kind of factors likely to have an impact on the consequences of the incident. While it is possible to

---

68 *The S.S. Wimbledon*, Permanent Court of International Justice, (1923) Series A, No. 1, 1 *World Court Reports*, p. 163.

assume that coastal States have the required knowledge with regard to their own environment, it is difficult to imagine that they will always have the accurate information vis-à-vis the stranded vessel. This might be of especially serious consequences since the two categories of information are obviously interrelated and that the lack of information in one case is likely to reflect on the other.

For these reasons, the 1969 Conference recommended also that "the Inter-Governmental Maritime Consultative Organization should intensify its work, in collaboration with all interested international organizations on all aspects of pollution by agents other than oil".

In accordance with these recommendations IMCO and especially its Legal Committee took up the question of a possible extention of the right of intervention to noxious substances other than oil.[69] Following the work of the Organization on pollution matters a new conference was convened in London in October 1973 under the auspices of IMCO.[70] At the conclusion of this conference a *Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil*[71] was adopted and opened for signature between January 15, 1974 and December 31, 1974.[72]

Article 1(1) of this Protocol, extends in terms essentially similar to the provisions of Article 1 of the 1969 Convention, to substances other than oil the right of intervention of coastal states on the high seas in cases of maritime pollution casualties. Subsection 3 of the same article establishes the conditions of the application of the right of intervention.

For the purpose of applying Article 1(1), subection 2 of the same article defines substances other than oil as :

(a) those substances enumerated in a list which shall be established by an appropriate body designated by the Organization and which shall be annexed to the present Protocol,[73] and

(b) those other substances which are liable to create hazards to human health, to harm living resources and marine life to damage

---

69 See IMCO Doc. LEG XII/8, paragraph 12.

70 See IMCO Press Release, Nov. 2, 1973.

71 See text in (1974) 13 *International Legal Materials*, p. 605.

72 Article 4(1). In this respect it must be noted that the Protocol may be ratified, accepted, approved, or acceded to the 1969 Convention Article 4(4). According to Article 6(1) the Protocol shall enter into force on the ninetieth day following the date on which the Fifteenth ratification, acceptance, approval or accenscion with the Secretary General of IMCO.

73 Resolution 26 adopted pursuant to Article 3(1) of the Convention requests IMCO to establish the appropriate body at the earliest practicable opportunity and instructs that body to draw a list of substances not later than November 30, 1974. This list must be adopted by a 2/3 majority of those present and voting in IMCO and according to Article 3(4) it can be amended by resort to the same procedure.

amenities or to interfere with other legitimate uses of the sea."[74]

The foregoing distinction between poisonous substances calls for a number of comments: First of all, it reflects an attempt on the part of the international community to define these substances other than oil which give rise to a right of intervention of coastal states on the high seas in cases of maritime pollution casualities,[75] without limiting the inherent nature of that right. On the contrary the said distinction takes implicitly into account the unforseability and particularity of each casually in accordance with the arguments discussed earlier, it confirms the fact that the 1969 Convention and its 1973 Protocol merely codigy general principles of International Law and emphasizes the "victim-orientated" character of the provisions of these texts. It must be noted at this point that, the obligation imposed by Article 1 (1) and (3) on coastal states falls under the general comments made previously in relation to the application of the corresponding provsisions of the 1969 Convention.

Moreover, under article 2, the substantive provisions of the 1969 Convention relative to the exercise of the right of intervention as well as the Annex attached thereto are applicable under the present Protocol to substances other than oil.

CONCLUSIONS

In the final analysis, it is suggested that the 1969 Convention along with its 1973 Protocol constitute a major achievement towards the protection of coastal States' interests against marine pollution hazards.

Stemming from a case of unilateral intervention relying on ambiguous bases, both texts establish beyond doubt, the existence of a right of intervention of coastal states in cases of maritime pollution casualties.

In this respect, the approach adopted by the international community towards the existence of this right is a practical one and if the existence of such a right seems to be recognized outside the express provisions of an agreement this is only implicitely done. Conversely, the Institute of International Law explains the existence of a right of intervention within the framework of the broad doctrine of self-protection. In this connection, both the Institute of International Law and the 1969 Convention help to give a legal meaning to this extremely vague theory.

---

74 This definition of pollutant substances is modelled on the early definition of maritime pollution developed by the Group of Experts on Scientific Aspects of Marine Pollution (G.E.S.A.M.P.) established within the Framework of the United Nations. See J. Barros, D.M. Johnston, *The International Law of Pollution* (1974) p. 6.

75 See tentative list in J. Barros, D.M. Johnston, *supra* note 79 pp. 9-12.

Also, the 1969 Convention and its 1973 Protocol adopt a very pragmatic attitude vis-à-vis the exercise of the right of intervention, and allow coastal States to take all necessary measures according to circumstances and provided they act in a reasonable manner. Eventually, the mechanism of control created by the Convention over the right of intervention seems again to work in favour of coastal States' interests; it is suggested, here, that, as long as coastal States will use the right of intervention within the legal framework established by the Convention, the reasonableness of their action will be difficult to challenge.

Nevertheless, all coastal States do not value the outcome of the 1969 Convention with the same enthusiasm. In this respect, Canada was the only State party to the Conference which never became member of the Convention. In Canada's view, the Convention is among other things incomplete because confined to pollution by oil and because it does not cover pollution cases arising from the exploration or the exploitation of the seabed.[76]

The Canadian attitude may seem especially negative here, since the 1969 Convention has proven to provide the basis for future developments of the right of intervention. In this respect, it has been demonstrated that IMCO offers a valuable framework for such developments. Conversely, most European States have become parties to the 1969 Convention and its 1973 Protocol. They have also efficiently completed the provisions of these texts by concluding regional agreements dealing with shipborne pollution.[77] It is suggested there that the combination of such multilateral and regional agreemtnts constitues a very valuable example which sould inspire a world wide solution with respect to the serious question of the protection of the marine environment.

---

76 See L.C. Green, International Law and Canada's Antipollution Legislation (1970-71), 50 *Oregon Law Review*, p. 472; L.J.H. Legault, *supra* note pp. 214-215. For a discussion of the peculiar application of the right of intervention in the Arctic, see A.E. Utton. The Arctic Water Pollution Prevention Act and the Right of Self-Protection (1972), 7 *University of British Columbia Law Review*, p. 221, at pp. 224-227; Donat Pharand, Oil Pollution Control in the Canadian Arctic (1971-72), 7 *Texas International Law Journal*, p. 45, at pp. 67-71.

77 *Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil*, see text in (1970), 9 *International Legal Materials*, p. 359; *Convention on the Protection of the Marine Environment of the Baltic Sea Area*, see text in (1974) 13 *International Legal Materials*, p. 544.