High Seas Intervention: Parameters of Unilateral Action*

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I. INTRODUCTION

We find the law of the sea burgeoning in an era of unprecedented legal conflict. Nations are claiming more ocean resources for themselves. Nationalism has nurtured extremism, clouding even legitimate claims with suspicion. Historic rights have been spurious-ously denounced. Emerging claims are prolific, and prolifically unreasonable. Concessions, for the most part, have been few, unrealistic, and unproductive toward lasting solutions. In short, the public order of the oceans is being vigorously challenged, vital interests are at issue, and the direction taken in the next few years may well reshape the law of the sea that will govern for decades to come.

* The opinions and views herein are those of the author and do not necessarily represent the views of the Judge Advocate General, Department of the Army, or any other agency of the United States Government.

The claim to intervene is but one facet of the emerging claims which must be resolved. It offers, however, a uniquely limited context in which to appraise many of the relevant policies and values at issue in the larger arena. Moreover, it permits evaluation of principles governing accommodations of new and conflicting ocean uses and a means of testing the lawfulness of surging unilateral claims in support of such uses.

It is well established that international law prohibits any state from subjecting any part of the high seas to its exclusive control, or from interfering with the exercise of freedom of navigation by ships sailing on the high seas under the flag of another state. Yet, what happens when a supertanker is damaged and empties its oil into the high seas? Must a coastal state stand helplessly by while that oil, pushed by the wind, currents and tides, turns into an agent of death and destruction as it flows toward its shores? To answer this we must analyze the claim of a state to act on the high seas against a foreign vessel which, following a maritime casualty, threatens its coastal interests with pollution by oil, and to take necessary measures to prevent or mitigate such pollution.1

Action pursuant to this claim has been labeled “intervention” by the 1969 Intervention Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties2 (hereinafter, Intervention Convention). Nevertheless, unqualified characterization of the action as intervention may be misleading because it normally implies some interference against the personality of a state or some threat to its territorial integrity.3 For our purposes, the term has little vestige of its traditional usage and is limited exclusively to describe action taken against a vessel to prevent or miti-

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1. The claim of competence to intervene to prevent oil pollution conflicts with freedom of navigation on the high seas and is unlawful unless it can be justified as a limited exception. For a discussion of limited exceptions to freedom on the high seas, see M. McDougal & W. Burke, THE PUBLIC ORDER OF THE OCEANS, Ch. 6 (1962) [hereinafter cited as McDougal & Burke].


gate damage to coastal interests, unaccompanied by a threat to the internal or external affairs of the flag state.

Even in this limited context, the term “intervention” connotes forceful interference, possible violence and destruction of property, the exercise of power against another's will. No less unpleasant is the term “pollution.” It connotes contamination, destruction, suffering, possibly death. When a major oil spill occurs on the high seas, it brings these two negative concepts into direct opposition.

So long as oil continues to be of vital economic importance, nations will protect their right to transport it across the world's oceans. Moreover, with oil's strategic value to national defense, it is obvious that interference with its movement may not be viewed lightly. On the side of an intervening state, however, is the public clamor for protection from oil spills. The past half-decade has recorded an impressive list of major tanker disasters which have caused far-reaching damage to coastal interests. In 1966 the Anne Mildred Brovig spilled oil into the North Sea off the coast of Germany. The Torrey Canyon disaster struck Great Britain and France in 1967. Just a year later, the United States had its first major encounter with oil pollution in San Juan Harbor, Puerto Rico, from the Ocean Eagle. The World Glory polluted the


A 1200-foot tanker of 300,000 tons displacement is 3 ½ times the displacement of America's largest aircraft carrier. “These new tankers are so seriously underpowered they're dangerously difficult to maneuver; the stopping distance of a mammoth tanker from an initial speed of only 12 knots with its propeller rotating full astern is more than a mile and a half. Thirty-thousand installed horsepower in a 1,200-foot tanker is the equivalent of about one-third horsepower.” Wash. Post, Mar. 1, 1971, § B, at 6, col. 7.

5. The Norwegian tanker, Anne Mildred Brovig, collided with the British vessel Pentland. After grounding, the hull broke in two, spilling 125,000 barrels of oil into the North Sea off the Coast of Germany. Two and one-half months were required for the cleanup at a reported cost of $241,000. IMCO Doc. LEG/CONF/6, (Annex II), supra note 4, at 20.


7. In 1968, the Ocean Eagle grounded and broke up while entering the harbor at San Juan, Puerto Rico, contaminating the beach area for 16 miles and the entire harbor. Two months were required for the cleanup at a cost of $2.5 million. Hearings on H.R. 15906 and related bills Before Subcomm. on Rivers & Harbors of the House Comm. on Public Works, 90th Cong., 2d Sess., ser. 90-28 at 296-307 (1968); Cerames-Vivas, Special
coast of South Africa three months later. 1969 found Canada contending with the *Arrow* off Nova Scotia. Heavy fog lifted from a black sludge in San Francisco Bay in January 1971, after the *Arizona Standard* collided with the *Oregon Standard*. South Africa bombed the *Wafra* in March to ease its second major disaster in less than three years. Significantly, more than half of these tanker disasters occurred on the high seas.

Should the potential for harm by the otherwise socially beneficial act of shipping oil become justification for subjecting distressed tankers to national claims of intervention. Or, is a flag state immune under all circumstances from submission of her vessels to such claims? Will failure to acknowledge a right of intervention prevent a response by a threatened coastal state? Assuming it will not, will denial of the right threaten world peace? The challenge to the public order of the oceans clearly exists. It is the task of international law to appraise the respective claims and counterclaims and to resolve them in a manner which will avert or minimize this threat.

II. INTERVENTION TRENDS

With the accelerated number of significant oil spills, the need for effective legal procedures has prompted both unilateral and
multilateral action by coastal states. Among those states acting unilaterally are the U.S., Canada, and Great Britain. In 1970 Congress empowered the U.S. to summarily remove or destroy a polluting vessel so long as it was within the territorial sea.\(^\text{12}\) (Legislation to implement the Intervention Convention which would extend this authority to the high seas is now pending.) Thereafter, Canada authorized similar action \emph{anywhere} in the Arctic Waters,\(^\text{13}\) in certain fishing zones on the high seas\(^\text{14}\) and anywhere within its newly claimed 12-mile territorial sea.\(^\text{15}\) In 1971 Great Britain formally extended its authority \emph{outside} U.K. territorial waters,\(^\text{16}\) and reaffirmed that extension in subsequent legislation.\(^\text{17}\)

The most significant acts of intervention have come in the absence of domestic legislation. Foremost have been the bombings of the \emph{Torrey Canyon} in 1967 by Great Britain and of the \emph{Wafra} in 1970 by South Africa. The former incident was the primary motivation not only for domestic legislation, but for the Intervention Convention concluded two years later in Brussels.

The Intervention Convention is, of course, the first major multilateral effort in this area, and its signing preceded the aforementioned domestic legislation, although Canada is not a signatory. It is largely the product of the Inter-Governmental maritime Consultative Organization (IMCO), a specialized agency of the United Nations. Article I provides:

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

2. However, no measures shall be taken under the present Convention against any warship or other ship owned or operated by a State and used, for the time being, only on government non-commercial service.\textsuperscript{18}

The Convention permits action on the high seas without limitation as to distance and makes no provision for intervention in pollution casualties other than oil-carrying vessels. It is essentially remedial rather than preventive because action is permitted only after an accident has occurred. Although the United States and Great Britain have both ratified the Convention, it is not yet in force.\textsuperscript{19}

III. CLAIMANTS, CLAIMS AND OBJECTIVES

An act of intervention affects many parties and interests. Identifying who participates in the process of claim and decision, their objectives, who and what is affected, and their claims and counterclaims permits a more meaningful appraisal.\textsuperscript{20} By grouping the

\textsuperscript{18} For a good overview of the conventions, see O’Connell, Reflections on Brussels: IMCO and the 1969 Pollution Conventions, 3 CONNELL INT’L L.J. 162 (1970). Also see D. Pharand, International Regulation and Control of Oil Pollution of the High Seas, with Special Reference to the Arctic, 5 WORLD L. REV. 93, 97 (1972).

\textsuperscript{19} The Intervention Convention enters into force 90 days after 15 states have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance or approval or accession. On January 12, 1971, the United Kingdom became the first nation to ratify the Convention. The United States ratified it on October 14, 1971, but has not formally deposited an instrument to that effect, pending implementing legislation. To date, 10 countries have become Parties, as follows: Ratification deposited: Belgium, France, Japan, Sweden, United Kingdom; Accession deposited: Senegal, Norway, Fiji, Liberia; Signature without reservation as to ratification, acceptance or approval: Denmark. For list of signatories, see 9 INT’L LEGAL MATERIALS 25, 45 (1970).

\textsuperscript{20} In the Torrey Canyon incident, e.g., the vessel was registered under a Liberian flag and owned by a Bermuda company, which was a subsidiary of a United States corporation. The crew was Greek and the vessel was on charter to a British Company. The accident occurred on the high seas and pollution damage was suffered by Great Britain and France. See Neuman, Oil in Troubled Waters: The International Control of Marine Pollution, 2 J. MAR. L. & COM. 349, 352 (1971). For an excellent analysis of a domestic oil pollution problem from the viewpoint of par-
major interests, it is easier to identify how the participants are aligned:

At least three such interests, competing for attention and protection, may be identified: 1) owners of private property, whether coastal or sea-borne (e.g., oil cargoes); 2) shipping interests (vessel owners, their charterers and their insurers); 3) national interests in preserving more or less "traditional" law of the sea rights, particularly freedom of navigation (both merchant and naval).21

A fourth is the national and international interest in preserving living resources of the sea. Additionally, there are many derivative commercial and recreational interests.

Readily identifiable participants which represent these interests are the maritime and coastal states, the shippers and owners of oil and vessels, oil-producing states, the United Nations, shipping organizations, insurance companies, environmentalists, fishermen, sportsmen, domestic state and local governments, and other diverse parties.

The principal claimants which represent these interests are, of course, the flag state, the coastal state, and the shipper.22 The coastal state claims a right to intervene to prevent or mitigate pollution, even to remove or destroy the offending vessel, if necessary. It asserts comprehensive authority for that specific purpose over events sufficiently proximate to its shores as to pose a substantial danger of oil pollution. It seeks to protect its coastlines, including the living resources of the sea and wealth-producing processes which are most readily available to its own nationals, as well as the property interests of its nationals. Moreover, it is not seeking the usual expansionary objectives associated with extra-territorial claims, but is acting in a defensive capacity to avert a danger suddenly forced upon it.

Under different circumstances a coastal state may find its situation reversed. As a maritime state, one of its flag vessels may threaten pollution to another coastal state. Accordingly, its policies must consider both positions. One view of this dichotomy notes:

The United States has more than one interest. The interest in preserving vast stretches of valuable shoreline is great, while, in comparison with the rest of the world, its economic interest in its tanker fleets is small. This would seem to dictate that the real interest lies in stronger coastal state authority.23

participants, interests and values, see McDonald, Oil and the Environment: The View from Maine, FORTUNE, Apr. 1971, at 82.


22. As used herein, the shipper, as claimant, categorically represents the interests of the owner of the vessel, its charterer, and the owner of the cargo.

23. E. Cowan, Oil and Water: The Torrey Canyon Disaster 68 (1968) [hereinafter cited as Cowan].
The important point is that even when a state favors coastal authority to intervene, unless it has virtually no maritime fleets or seaports of any consequence, it cannot divorce itself from shipping interests. Therefore, its policies may be expected to extend the maximum protection possible to shipping and to prevent unwarranted intervention.

The flag state seeks preservation of the right to navigate the world's oceans free from interference and protection of the property rights of owners of vessels sailing under its flag, as well as the safety and well-being of their crews. It makes a positive demand that it have the exclusive authority to apply policy to its own vessels, and a negative demand that no other state be authorized to apply it save in accordance with international law. Specifically, it claims that its vessels on the high seas are immune to any claim of intervention by a coastal state. Shippers also assert this claim.

IV. APPRAISAL UNDER INTERNATIONAL LAW

The claim to intervene cannot be addressed without analysis of the grave consequences attendant to its exercise. A state acts without consent of either the vessel or its flag state (a condition inherent in such a claim). Hence, destruction or removal of a vessel may invite charges of aggression, reprisals, or some measure of reciprocal sanctioning unless the states involved mutually understand the characteristics of the right of intervention and the liabilities arising from it.

Does such a right exist in the customary practice of states, or must it be created by convention? What are the criteria for its exercise? Are there correlative duties imposed upon the intervening state? What liabilities, if any, are incurred if a state misjudges a situation and acts to the detriment of an innocent vessel? How does the absence or existence of such a right contribute to the peaceful public order of the oceans?

These and similar questions should not remain unanswered until a nation intervenes and actually provokes an international misunderstanding. Present consideration of the claim may prevent such a misunderstanding and permit focus on the adequacy of the

24. See McDougal & Burke, supra note 1, at 868.
law to deal with the situation so that timely changes and safeguards, where necessary, may be instituted. What, then, are the characteristics of the right?

A. 

Convention Right.—The view that the right of intervention must be created by convention looks to traditional approaches as indicative of the limitations on coastal authority. For example, the prescription and enforcement of anti-pollution measures have normally been vested in the vessel’s flag state, as reflected in the 1954 Convention for the Prevention of Pollution of the Sea by Oil. That Convention notes with care that it does not extend the jurisdiction of any state to deal with such matters. (However, it does not purport to deal with the problem of intervention, nor does any other international agreement in force.)

In addressing the draft text of the Intervention Convention, advocates of this view desired to show that the source of the new authority is the consent of the signatory states and not an inherent power in the coastal state—a privilege and not a right. They argued that the purpose of the Intervention Convention was to confer on the contracting states certain powers in order to close a gap in international law. Without the Convention, the argument continues, the coastal state has no right of intervention outside its territorial waters; consequently, if it intervenes on the high seas and thereby causes damage, it does so at its own peril and is liable for compensation to all parties concerned.

B. 

Customary Right.—Coastal states have always exerted a measure of competence upon the adjacent seas to protect their territorial integrity and coastal interests. Yet, to test the exercise of such competence in terms of “sovereignty” or rights in the “territor-

25. To the extent that claims by the coastal state are recognized, they are deemed an exercise of concurrent jurisdiction. See Nanda, The “Torrey Canyon” Disaster: Some Legal Aspects, 44 Denver L. J. 400 (1967).
26. See Cowan supra note 23, at 75. For the view of the Liberian delegation that extraordinary privileges were conferred on the coastal state, see IMCO Dec. LEG/CONF/C.1/SR.18 at 5 (Nov. 24, 1969). The Soviet Union also maintained that additional rights were being conferred upon coastal states. IMCO Doc. LEG/CONF/C.1/SR.5 at 10 (Nov. 14, 1969).
27. The fact that France supported this view is surprising in light of its experience with the Torrey Canyon. See IMCO Doc. LEG/CONF/C.1/SR.11 at 10 (Nov. 18, 1969).
28. Professors McDougal and Burke prefer not to call this competence over the high seas “sovereignty.” The simple dichotomy of “sovereignty”—“no sovereignty” is far from adequate to describe the complex distribution among states of inclusive and exclusive competences over the use of the oceans. It can only be the grossest overgeneralization to equate a competence [an occasional competence to prescribe for the protection of certain particular interests in specified contexts] so
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The most convincing basis, but perhaps the most easily abused, is that a state has an inherent right to protect its territorial integrity. When threatened from its coastal waters, it may protect that integrity and the interests appurtenant thereto. Thus, it must be authorized to extend its laws and prescribe and apply policy to events in those areas which not only affect, but are incompatible with the preservation of those interests. The test is functional. Hence, "the distance from shore at which these powers [in contiguous zones] may be exercised is determined not by mileage but by necessity of the littoral state and by the connection between the interests of its territory and the acts performed on the high sea."

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29. Territorial sea claims vary from 3 to more than 200 miles. Subject to existing navigation rights already vested in the international community, and particularly the right of transit through international straits, there is a growing practice among the majority of states to recognize at least a 12-mile territorial sea.

30. "The real basis for this jurisdiction and the test of its soundness from the standpoint of international law is found in the theory of interests. The facts of life—the needs of nations—must be considered in this connection." W. Masterson, Jurisdiction in Marginal Seas 381 (1929). There is now a right of self-help in the event of the Torrey Canyon type of situation. . . . I do think that the states have an immediate right to abate dangers of the Torrey Canyon type, on their borders, provided . . . the rule of proportionality is observed. Proportionality is a rule of reasonableness, applicable both to an excessive pre-emptive exercise of the freedom of the high seas by a ship engaged in polluting the ocean and the excessive remedial or abatement measures of a coastal state. It limits both to doing no more than is necessary to exercise their rights without harming others unduly. Goldie, Principles of Responsibility in International Law, Hearings on IMCO Civil Liabilities Conventions (Oil Pollution) Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. (July 21 & 22, 1970), note 44 at 103, hereinafter cited as IMCO Hearings.

This principle of protective jurisdiction has never been repudiated.  

On the contrary, it is universally acknowledged that a state's power to secure itself from injury may be exercised beyond the limits of its territory.  

Real danger of the littoral state, rather than the location of the action alone, is the test of the right to act.  

“A state has a right to protect itself against hostile acts in the waters adjoining its coasts, regardless of whether such acts occur within or beyond the limits of its territorial sea.”

Whether the basis for action be called “necessity,” “real danger” or some synonymous term, propinquity, although important, is relative; the location and intensity of the activity in question and its unique impact upon the social processes of a particular coastal state are primary.

One of the interesting aspects of the Intervention Convention was the manner in which states reaffirmed the existence of a customary right of international law to protect themselves from pollution.  

Some delegations observed that the law was uncertain:

The position up till now had been that no real consensus of opinion existed about the rights and liabilities of a State in the event of a casualty approaching its coast and presenting grave and imminent danger of pollution. The first questions to be settled were whether the State in those circumstances had the right to destroy the casualty and whether, if it did so, it might incur liability for damages. Ideas were uncertain as to the answers in law and the purpose of the convention under consideration was to remove those uncertainties.

States voicing these uncertainties advocated a comprehensive convention which would permit intervention in cases of any pollutants, not only oil. However, it became apparent that too little was known about substances other than oil to include them in the Convention. Hence, those opposing a comprehensive convention argued that

34. Littoral states may act in certain ways for the preservation of their safety and the protection of their laws over an undefined and indefinite stretch of coastal water... the whole idea of a peculiar and definite marginal sea tends to be discredited. Real danger to the littoral state or its laws, and actual infractions of these laws, are the tests of the right of the state to act, rather than the scene of that action. P. Potter, The Freedom of the Seas 103, 104 (1924).
36. Some states, such as Canada, were very dissatisfied with the convention and felt that it would be ineffective because it was merely declarative of existing rights. See also Neuman, supra note 20, at 353.
the fact that the Convention made no mention of cases of pollution on the high seas caused by cargoes other than oil did not mean that a Coastal State was prevented from taking measures against such pollution. Although international law upheld the principle of free navigation on the high seas, coastal states should in extreme cases be able to take measures to protect themselves.38 (Emphasis added.)

Conferees finally agreed that by limiting the Convention to oil they were not abridging any right of a state to protect itself against pollution by any other agent.39 If the right of a state to protect itself against pollutants other than oil exists apart from convention law, it is difficult to argue that the right to protect against pollution by oil does not also exist independently.40

38. This position was expressed by the Netherlands delegate. IMCO Doc. LEG/CONF/C.1/SR.2 at 4 (Nov. 12, 1969).
39. The effect of the Public Law [Intervention] Convention is to set out in detail how the right of self-help and abatement in cases of oil pollution should be exercised. Since it relates only to pollution by oil, we have to ask ourselves if this convention limits customary international law? My answer would be in the negative, because the parties to the convention specifically resolved that further studies dealing with pollution agents other than oil would be continued, and that, in the meantime, states would exercise their authority under general international law to deal with other polluting materials and agents in terms of the procedures and notification requirements provided in the Public Law Convention. Goldie, supra note 30, at 99.

Since 1969, work has progressed toward a treaty which does relate to substances other than oil. In its January 1973 meeting, the IMCO Legal Committee prepared a final Draft Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution Damage by Substances Other Than Oil. This draft will be submitted by the IMCO Council for approval to be used as the working draft for the IMCO Marine Pollution Conference in October 1973. In its operative language, the draft is almost identical to the 1969 Intervention Convention. Moreover, it expressly incorporates paragraph 2 of Article I and Articles II to VII of that Convention, applying them to substances other than oil. It also provides for an amendable appendix listing specific substances “liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.” Intervention would be permissible in cases involving substances not contained in the appendix but meeting the preceding test. The burden of proof, however, would be on the intervening state to establish that the substance did meet such test.

40. “While acceptance of the Convention will not notably advance the rights of governments in pollution disaster situations, it will at least codify the existing state of international law on the subject.” Mendelsohn, Maritime Liability for Oil Pollution—Domestic and International Law, 48 Geo. WASH. L. Rev. 1, 28 (1969). The U.S. Congressional delegation to the 1967 IMCO session recommended legislative action to empower the Presi-
If the right does not exist under customary international law, and the purpose of the Intervention Convention was to create such a right rather than to define the community expectations as to the conditions of its exercise, then several acute problems arise. If the Convention never comes into force, no right is ever created. If it does, there is no provision for action against a non party state. Hence, justification for such action relies on the argument that the Convention has become customary international law. In either case, barring widespread acceptance of the convention in a relatively short time frame, an unsatisfactory vacuum exists.

It is the opinion of this writer that the right of intervention is merely codified and clarified by the Intervention Convention.

1. Criteria for Exercise of the Right

The competence to take unilateral action should only be exercised for the protection of highly important interests. The more interests of other states which are protected, the less objectionable the action. Moreover, the authorization of unilateral prescription does not imply arbitrary decision, for any exercise of such authority is subject to review by the rest of the community. The question then becomes, by what criteria is it judged? Who should be the decision maker?

The preceding questions were addressed at the Intervention Convention. A suggested approach was that the coastal state decide whether it was in danger of being polluted and then intervene "as it deems necessary."\textsuperscript{41} Concern was expressed that this would change the draft text of "as may be necessary" from an objective criterion into a subjective one,\textsuperscript{42} and on this basis the approach was rejected. It is one thing for a state to exercise its power to intervene; it is quite another for it to be the exclusive judge of the legality of its action. Any action must, in the final analysis, be subjected to an objective scrutiny of the international community—a test which discourages arbitrary action.

Even agreement that any intervening action must be measured
dent to take emergency action in the event of a casualty threatening the United States. Of particular interest is the idea that such action would not violate international law. \textit{Water Control News}, Sept. 25, 1967, at 1. It was subsequently advocated that the United States seek "international concurrence" with the United States' view that nations threatened by spills on the high seas can take immediate protective measures. \textit{Secretaries of Interior & Transportation, A Report on Pollution of the Nation's Waters by Oil and Other Hazardous Substances}, at 25 (1968) [hereinafter cited as \textit{Report to the President}].

\textsuperscript{41} IMCO Doc. LEG/CONF/C.1/SR.5 at 3 (Nov. 14, 1969).
\textsuperscript{42} Id. at 5.
objectively does not, however, specify the conditions or standards to be objectively applied. The draft text set forth three conditions: (1) there must be grave and imminent danger to coastal or related interests; (2) there must be some relationship between the casualty and the damage; (3) there must be catastrophic or major consequences involved. The second condition is implicit in the first, but a discussion of the first and the third conditions is helpful.

An act of intervention is so serious that it can only be justified under exceptional circumstances. The acute problem, however, is not in justifying an act under the most serious circumstances, but in ascertaining the minimum conditions under which justification will lie. As a safeguard, the right must only be exercised where danger of sufficient magnitude and imminency is involved. Most states at the Convention agreed that the test requires both "grave and imminent" danger. Considerable difficulty was encountered as delegates attempted to distinguish the consequences of the danger from the danger itself, and then to define those consequences. They felt that mere danger, without some reference to its consequences, was insufficient to justify a state in taking action to protect itself. The original draft text permitted intervention in the event of "grave and imminent danger" from oil pollution which might reasonably be expected to result in "catastrophic or major consequences." That text seemed to imply that intervention was possible only when the damage threatened was virtually irreparable. A less strict phraseology, "major harmful consequences", was adopted as more advantageous to both coastal and shipping interests.\footnote{IMCO Doc. LEG/CONF/C.1/SR.6 at 3 (Nov. 17, 1969). The United States proposed that the words "significant harmful" be substituted for "major or catastrophic." \textit{Id.} For the United States' rejection of the "catastrophic consequences" terminology, see note 41 \textit{supra}, at 3.}

2. Duties Imposed

It is instructive to examine the duties which arise concomitant with the exercise of the right of intervention. Foremost is the duty to preserve living resources. Where intervention would threaten life or result in greater detriment than the pollution itself, restraint is essential. Second is the duty to conserve resources. This means that the proportionality of response must be no greater than
that necessary to prevent or mitigate the pollution. Finally, there is a duty to make adequate compensation or restitution where either of the preceding duties has been breached.\textsuperscript{44}

The context of the right of intervention contemplates a maritime casualty which may or may not result from negligence, but which presumably is not a result of intentional misconduct. The casualty itself may result in injury or loss of life. Therefore, any aggravation of such injury or loss of life by an act of intervention can be but poorly rationalized. To the contrary, a state contemplating intervention has an affirmative duty to render assistance and expedite the safety of passengers or crew before it acts. Human life must be valued above all else.

It is conceivable that under some circumstances the threat of pollution may be grave and imminent, but the danger of loss of life or injury to captain and crew aboard the vessel be less serious. If under such circumstances it is impossible to effect timely removal of the vessel and the only alternative is to order its destruction, what course of action is open to a state in the event that all or a part of the crew elect to remain on board and refuse to evacuate the vessel? A captain, for example, might refuse to leave his vessel until the state contracts to pay for its loss and that of its remaining cargo. He might go a step further and require that the state indemnify the owners against all pollution damages and costs of cleanup in excess of their insured liability.

In such a case, the duty to protect life must not be permitted to be turned against a state and used as a means whereby an offending party may evade the consequences of its action. Promises or agreements exacted under such coercive conditions must be void as against public policy.

The duty to preserve life does not stop with human life. A state must equally take into account the likelihood of other damage which its intervening measures might cause. The cure must not be more deadly than the cause. Clean beaches are not more important than living resources. The decision as to means of containing, dispersing or destroying the oil is an integral part of the decision to intervene. Where the method of intervention poses greater

\textsuperscript{44} On the issue of liability \ldots customary international law has always held that a state cannot be viewed as acting at its peril. \ldots One can argue, however, that even in pre-World War II international case law, the Trial Smelter arbitration, and after it, the Corfu Channel judgment and the Lac Lanoux arbitral award all illustrate the development of negligence without fault. IMCO Hearings, supra note 30, at 100.
threat to living resources than the oil itself, it cannot be sanctioned.45

One of the fundamental safeguards which shipping interests may look to for a restraint on state action is the principle of “proportionality of response.” Essentially, this means that a state must not use excessive force to achieve its objectives.46 Thus, at a minimum, a state must weigh the extent of damage if it does not intervene, the extent to which damage can be averted or minimized if it does intervene, the availability of alternative measures, and the damage likely to result from whatever action it might take.47

Not all damages can be assessed in pecuniary terms, but such terms at least serve as a means of comparison. Should a ship valued at $20 million be damaged or destroyed to prevent $1 million of damage to coastal interests?48 What about damages of $5 million? In each situation a state must determine whether there is an alternative to destruction which will still accord it a reasonable measure of protection. For example, it might be possible to order removal of the oil by pumping it to other vessels or to coastal facilities, rather than destroy the vessel.

An intervening state has a duty to conserve material resources. This requires it to find and use other alternatives which are reasonably available. It is impossible to state categorically how practical or ingenious such alternatives must be to preclude de-

45. It is alleged that the bombing of the Torrey Canyon merely released greater quantities of oil into the sea, thereby causing more damage. Cowan, supra note 23, at 199.
46. Article V of the Intervention Convention provides that the criteria of proportionate response are:
   (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.
47. Article V does not implicitly mention consideration of alternative courses of action as a factor in testing the proportionality of a state’s action.
48. The Canadian view was that “There obviously would be damage to the ship, but the coastal State would not be expected to weigh that up when taking action to combat pollution in the best interest of the largest number of people in the world.” IMCO Doc. LEG/CONF/C.1/SR.11 at 6 (Nov. 18, 1969). The better approach would seem to require consideration of the damage to the ship along with the other factors affecting the decision.
struction of the vessel. However, a state normally has much greater resources at its command to find other alternatives than does a distressed vessel. Consequently, it must discharge this duty with diligence.

It is fair to assume that any maritime casualty of the magnitude to cause consideration of intervention will be scrutinized most carefully by other states. There is a substantial risk of misjudging the situation. Measures taken might well be seriously questioned afterwards, especially when information not available at the time the action was taken comes to light. Opinions may differ when the flag state or its nationals afterwards review what has been done by the coastal state. Therefore, how may an intervening state assure that its actions will stand the scrutiny of the international community? It must discharge its duty to make inquiry into all the facts, circumstances and alternatives which the exigency of the situation will permit. If information is reasonably available which would preclude intervention, and the state has the opportunity to make inquiry but does not do so, that neglect militates against the legality of its action. Conversely, if a state makes diligent inquiry and fails to obtain existing information which later comes to light, it is difficult to appraise its action other than on the basis of the information in its possession at the time the decision was made.

The affirmative duty to make inquiry to obtain such information as is reasonably available will encourage a state to gather its facts. The assurance that, once having done so and after having taken action reasonably justified on the basis of such facts, it will not be judged in light of subsequent information operates as a positive inducement to rational decision making. This works in the best interests of all participants since the more information available on which a state may act, the less likelihood there is for value deprivations in violation of international law.

The duty to inquire has yet another aspect. Oil spills present technical as well as legal problems. Because technology is in flux, a coastal state has an affirmative duty to be abreast of current anti-pollution technology and to be "technologically prepared" in the event of a spill. If it is not, and seeks to intervene under circumstances which do not warrant intervention under existing technology of other states, it may well be that it has forfeited its right.

A coastal state properly invoking a right of intervention should not be compelled to compensate for damage or destruction occasioned to the vessel by its act. Where a casualty occurs without the negligence of the vessel, the question is one of allocating the burden
of loss between two innocent parties. It may be arbitrary to place the loss on the vessel so long as the shipping of oil is deemed beneficial to states. However, the vessel undertakes its voyage consonant with the perils of the oceans. Its value is known and can be protected by insurance. By contrast, a coastal state has no way of predicting what vessels will become casualties off its shores and usually must bear its own costs of intervention. Moreover, the unmeasured and uncompensated damages resulting from that portion of the oil which is not abated will in the long run also be borne by the coastal state.

A separate situation arises where one party is not innocent, as when a state acts for purposes other than to abate pollution, or uses excessive force. Such a situation requires that the injured party be compensated. However, where the intervention is justified, but the force employed excessive, compensation should be required only to the extent of the damage caused by excessive force.

3. Justification for Action on the High Seas

The problem of whether to distinguish between action in the territorial sea and that on the high seas turns on the reasonableness of a state in appraising what action it should take in terms of arbitrary boundaries rather than in terms of actual danger to its interests. Oil pollution is unique in that the chief damage is not to

49. For the view that political motives, prestige and passion may be involved, see Y. Dinstein, Oil Pollution by Ships and Freedom of the High Seas, 3 J. Mar. L. & Com. 363 at 372 (1972). Dinstein harbors deep mistrust of the intervention route and would require an international panel or flag state to assent to any sinking of a vessel.

50. The Norwegian view was that "it was a general principle of international law that a State which exceeded its powers should pay compensation." IMCO LEG/CONF/C.1/SR.17 at 8 (Nov. 19, 1969). Greece felt that a coastal state should have to pay compensation for excessive action even in its own territorial waters. See note 37 supra, at 18. Liberia said that compensation for excessive action was at the heart of the Convention and "a duty was imposed on the coastal State and that duty should not lightly be attenuated." IMCO Doc. LEG/CONF/C.1/SR.18 at 5 (Nov. 24, 1969). The latter view is not surprising since most of the tankers involved with the intervention problem have flown the Liberian flag.

51. The United States desired that an intervening state be liable only for that portion of its action which was in excess of the action permitted under the Convention. See Article VI of the Convention.
the place where the casualty occurs, but to the coasts where the oil is carried by wind and waves. For this reason it is obvious that to deal effectively with the danger it is not practicable to differentiate between the high seas and the territorial sea.

In its territorial sea, a state enjoys the rights of sovereignty with relatively few limitations. One recognized limitation, however, is that it must not interfere with the non-prejudicial passage of foreign vessels. If it does, justification must be founded on some principle of international law which is accorded greater priority. Security or self-protection might be such a principle.

Implicit in the concept of freedom of navigation as applied in territorial seas is that there is no prejudice to the peace, good order or security of coastal interests by a traversing vessel. Therefore, a vessel exercising this right is deemed free from juridical claims and unwarranted interference. However, if it substantially threatens coastal interests or violates a state's laws, it thereby abuses its right, forfeits it, and becomes subject to coastal sanctions.

Where a vessel in the territorial sea discharges immense quantities of oil, there seems little doubt that the coastal state could lawfully intervene. Is the basis for such action an inherent right? If so, is it an inherent right to extend its sovereignty beyond national boundaries? Or is the inherent right one to prescribe and apply only such policy as is necessary to reasonably protect its legitimate interests?

If the former is true and there is neither the requirement of a rational interest to be protected, nor of a casual relationship between the action taken and the interest sought to be protected, the competence to apply jurisdiction becomes arbitrary—and dangerous. The wider the territorial sea claimed, the greater the chance of arbitrariness. Moreover, if a nation were not accountable for action taken within its territorial sea, it would only need to extend it to justify any action it desires to take.

Fortunately, it is not a state's inherent right to prescribe and apply arbitrary policy beyond its shores. Rather, its right to act within its territorial sea has evolved primarily because the activities regulated therein, at least where a narrow width is claimed, have normally had a substantial causal relationship to, and impact on, its coastal interests and territorial integrity. In similar fashion, a limited right to regulate activities outside a state's territorial sea can be established. Moreover, in view of the extreme differences in widths of territorial seas claimed by various nations today, it seems confusing at best to suggest that claims be appraised solely on an arbitrary differentiation between territorial and high seas.
There is little equity, for example, in a situation where one state, having taken excessive action on the high seas, would be accountable whereas a second state having an extensive territorial sea could, under similar circumstances, hide under its sovereign cloak.

Whatever the precise location of the offending vessel in relation to the boundary of the territorial sea, the danger to the coastal state remains constant. If protection is needed, the need is unchanged by the vessel being inside or outside its territorial sea. Given circumstances of a catastrophic nature, it is unrealistic to assume that most states will not act. If a fundamental principle of international law comparable to self-protection is not recognized as a basis to intervene, then a likely alternative is for a state to attempt to extend its territorial sea to justify future action which might otherwise fall outside its sea. Such action can hardly be in the best long-range interests of either that state or the community of states.

The United States is particularly sensitive to the resolution of problems by an extension of territorial waters. Yet, it recognizes that oil spills occurring outside its own three-mile limit can affect its coasts severely. The obvious temptation is to recognize the twelve-mile territorial sea concept now finding growing acceptance. But in view of the existing conflicts with other states involving expansive unilateral claims to sovereignty up to as far as 200 miles, it would be shortsighted to seek to solve this limited problem by a unilateral expansion of its interests.

A preferred alternative is to look to some source of positive international law as authority to regulate activities on the high seas. Article 24 of the Convention of the Territorial Sea and the Contiguous Zone of 1958, for example, permits a coastal state to exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territorial sea and in a zone of the high seas contiguous thereto for a distance of twelve miles from its shores.52 The contiguous zone alternative recognizes the need for a pragmatic approach to regulating oil spills which permits action in an area already sanctioned by inter-

national convention. To accomplish this, however, it assumes that reacting to oil spills falls within the purview of “sanitary regulations.”

Does the discharge of oil into the contiguous zone, extending an additional nine miles beyond the territorial sea, constitute an infringement of sanitary regulations “within its territory”? To answer a question with a question: “Where did the accident occur?” Traditional law as well as logic would seem to support an argument that the place of the accident is the place where the impact is felt. If this is true, then at least those spills creating injury within the territorial seas could be reached by the enforcement power of the United States.\textsuperscript{53}

If the foregoing is true, and Article 24 is the only juridical basis on which action can be taken, a state is still left helpless when the activity to be regulated is more than twelve miles off its shores, as was the Torrey Canyon.

Whether or not there is authority to regulate oil spills as a “sanitary measure” is debatable. Intervention as a means of regulation in this context is extremely tenuous. Moreover, if customs, fiscal, immigration and sanitary activities are the only four recognized activities which may be regulated on the high seas, and a fifth activity seriously threatens a coastal state, it must stand helplessly by or act in contravention of international law.\textsuperscript{54}

To so limit the activities which may be lawfully regulated is to lose sight of the purpose of recognizing authority to regulate any activity in the first instance. If there is a recognized interest to be protected, there must be a means of protecting it without forcing states to make tenuous, perhaps unacceptable arguments to justify actions under international convention, or to choose between extending their territorial waters and taking action, or permitting injury to their coastlines. There is a legitimate need to permit intervention, with all its attendant duties and responsibilities, at the source of injury—the locus of the vessel. The criteria by which intervention is permissible should be the same wherever competence is applied because the coastal interests and the right of navigation at issue are substantially the same whether the vessel is in the territorial sea or on the high seas. Accordingly, competence to act on the high seas is not only lawful in this context, but consistent with the principles on which action within the territorial sea is juridically based.


\textsuperscript{54} On the need for a precise agreement for coastal rights, see Clingan, \textit{supra} note 53, at 72. For rejection of the need for an exhaustive enumeration of related interests for which a state might intervene to protect itself, see IMCO Doc. LEG/CONF/C.1/SR.7 at 12 (Nov. 15, 1969).
C. Test of Reasonableness.—The concept of freedom of the seas is the result of balancing competing claims in their context of reasonableness. The test asks what, considering all relevant policies and all variables in context, is reasonable between the parties. The determination of what is reasonable in a particular controversy requires both (1) an authoritative decision maker, which in customary international law is the community of states, and (2) decision by community or objective criteria. A state may not unilaterally decide what is reasonable with respect to its exclusive claims, for it is not the unilateral claim, but the acceptance by other states which creates some uniformity of expectations in the international arena.

The validity of a competing claim is considerably strengthened when its basis has some historical context. When freedom of navigation is threatened, we may ask whether the threat is from protecting an interest, other than navigation, which has been traditionally recognized. The intervention claim finds cognizance in this context because self-protection is one such interest. The mere existence of a competing interest traditionally recognized does not, of itself, however, support a claim. Relevancy to the coastal interests must also be established by some direct causal connection between the claimant state and the high seas activity it desires to regulate. The connection between an intervening state and a vessel polluting from without, but causing damage within the state's territorial sea, would appear sufficiently causal in nature.

The mere existence of a right of intervention does not automatically sanction its exercise under all circumstances. Any specific claim to exercise that right in a particular situation must be appraised in its unique fact situation. This requires balancing the claim and counterclaim in their context of reasonableness, considering all relevant factors.

The objective of the shippers is to transport oil. They have the usual business expectations of being permitted to operate in the world arena with a minimum of interference, burdens, and demands from non-flag nations. They look to their flag state to protect them and enhance their access to markets. Flag states, too,
have an interest in developing a prosperous shipping industry without outside interference, but they also have an interest in protecting their own shores from pollution by oil.

Coastal states which are potential intervenors are merely seeking mitigation of a situation forced upon them. There is no attempt to extend sovereignty nor to increase domestic wealth at the expense of the shipping industry. They seek to preserve the means of livelihood for those dependent on local sea resources, but in a much broader sense, to preserve the resources for all who would rightfully share them. The well-being of the wealth-producing resources of the inhabitants of the coastal state is threatened, whereas the threat to shippers is exclusively economic and finite.

Although the ship and cargo may be destroyed without compensation from the intervening state, intervention is only permitted when there is no other reasonable alternative. This means that the shipper is unlikely to lose much more than he would have lost as a result of the casualty alone because the circumstances under which extreme measures of intervention are likely to occur would be sufficiently grave that the vessel would probably have been lost anyway. Therefore, the risks to the shipper would not greatly exceed his ordinary risks of loss of vessel and cargo by natural maritime perils. Moreover, once this risk is recognized as an integral part of doing business, it seems that adequate protection could be reasonably obtained through insurance.

The limitations on the polluting vessel are imposed by common interest and are designed to maintain and restore, not to breach, minimum order. The conditions of intervention are limited; the safeguards extensive. The value deprivations to the shipper are few, and are such that he is in a position to insure himself against them. The benefits to the coastal state in preventing harm to its interests, as well as to those of other nations, are significant. Conversely, in the absence of the intervention right, deprivations to the shipper remain almost constant, while the potential damage to life and property interests becomes almost immeasurable.5

The alternatives to denying the intervention right are few: a state may do nothing or intervene under its own terms and theory of justification. It seems a much more responsible approach to acknowledge the existence of the right of a coastal state to protect itself, thereby imposing the duty to do so with extreme caution, and to make adequate compensation if its action is excessive. Fall-

57. For the view that the Intervention right may open a Pandora's box of international conflicts, see Dinstein, supra note 49, at 372.
ure to acknowledge the claim will not remove the possibility of intervention since states always have acted to protect themselves. Such failure can only encourage more desperate attempts by states to remedy the threat, resulting in less responsible intervention, greater detriment to shippers, and possibly undesirable sanctions and counter-sanctions.

The claim is extremely limited. The unique circumstances under which it may be exercised and the correlative duties attendant thereto negate any substantial threat to freedom of navigation. Moreover, its objective assessment by the world community protects against abuse. These factors, when considered with the conservation of resources effected if the claim is recognized and the extreme value deprivations if it is not, all weigh heavily for its reasonableness and validity under international law.

V. Intervention in International Waters

Two significant examples of the actual practice of states in an intervening role are the bombing of the Liberian tanker Torrey Canyon by the British government in 1967 and of the Liberian tanker Wafra by South Africa in March 1971. Both incidents required action in the absence of an international agreement or domestic legislation, and, therefore, permit an evaluation of rights and obligations under customary international law.

A. The British Experience.—The most publicized oil spill in which intervention has been a key issue resulted from the events of March 18, 1967, when the Torrey Canyon58 grounded in international waters approximately 16 miles off the coast of England and spilled tons of oil into the sea. After 12 days of unsuccessful attempts at salvage, Prime Minister Harold Wilson ordered the ship bombed. More than 90,000 tons of oil had escaped into the sea to pollute the British and French coasts, one of the world's largest oil tankers lay sunken in international waters, and states pondered the status of international law governing such action.

58. This article does not focus on the Torrey Canyon, except as it bears on intervention. Some official reports deal with it in depth. See COMMITTEE OF SCIENTISTS, CABINET OFFICE, UNITED KINGDOM, REPORT TO THE PARLIAMENT: THE TORREY CANYON (1967); SECRETARY OF STATE FOR THE HOME DEPT, REPORT TO THE PARLIAMENT: THE TORREY CANYON, Cmnd, 3246 (Eng. 1967).
Although much has written about the incident, little focus has been given to its significance in the development of international law respecting the right of intervention. It provides, in fact, a unique opportunity to scrutinize a domestic decision-making process and the extent to which the decision-makers adhered, or failed to adhere, to principles of international law. In this regard, the approach taken by the British government, its search for alternatives to intervention, factors leading to the decision to bomb, and the effects of the bombing all offer important lessons from which the international community can profit.

Involvement by the British government was immediate. Within two hours of the wreck a Royal Navy helicopter was surveying the situation, by afternoon Royal Navy ships began spraying detergent on the ever-growing oil slick, and the Under-Secretary of State for Defense for the Royal Navy was placed in charge. Through-out the ensuing week the Royal Navy transported salvage personnel and equipment to the scene, provided air reconnaissance, directed ships in spraying detergent on the floating oil, and formulated extensive plans to deal with the oil if it reached the beaches. In short, the government undertook a comprehensive role.

Immediate pressures were placed on the government to move cautiously. Destroying the ship and cargo would be an affront to the private property system, to include the insurers (both American and British) and the salvor (a Dutch company). Moreover, the government would risk condemnation by states if it violated international law.

In contrast, pressures for intervention came from hotelkeepers, lobstermen, town officials, tourists, politicians, the press—all those to whom ecological interests were dominant.

Criticism heightened as salvage efforts made almost no progress. An editorial in the Guardian pointed out that as time passed, the public interest might begin to weigh more heavily in the balance than the property rights of the tanker's owners. The London Times chastised the government for permitting key decisions to be made by the owners and the salvor, noting that their interests did not coincide with the interests of the British government and

59. The British Cabinet placed Maurice Foley, Parliamentary Under Secretary of State for Defense for the Royal Navy, in charge of the problem. Within a few hours of his assignment, Foley was advised that the Navy recommended that the tanker and cargo be burned, as a purely technical assessment, but “Her Majesty's government could not destroy someone else's ship simply because it was leaking oil.” COAN, supra note 23, at 61.

60. Id. at 62.
people. At the risk of charges of outrage, piracy on the high seas and an act of aggression against Libera, “the government should have been ready to take the law into its own hands.”61 Liberal Members of Parliament charged that “the government has shown too much regard for legality and precedent.” Even Conservatives charged: “Can anyone believe, if a British Tanker had gone aground outside New York harbor, that President Johnson would still be negotiating with the British owners ten days later?”62

Government ministers countered that minimizing pollution had been their concern and that financial considerations and international law had not been considered from the time the ship foundered.63 At odds with this, however, was the remark of Secretary of State for Defense, Denis Healey, that “We are not in a position to be able to set fire to the ship until they [the ship’s owners] give their agreement that this can be done. The vessel is on the high seas at the present time.”64

Great Britain clearly recognized the difficult legal situation. It risked action without precedent in international law. Salvage was the first course it necessarily had to try. The majority of tankers stranded in the past few years had been successfully floated,65 and experts, government and private, felt there was a reasonable chance of getting the vessel off the rocks. While salvage efforts

61. PETROW, IN THE WAKE OF TORREY CANYON, 186 (1968).
62. Id. at 105 (comments of John Nott).
63. SECRETARY OF STATE FOR THE HOME DEP’T, REPORT TO THE PARLIAMENT: THE TORREY CANYON, Cmd. 3246 at 3 (1967) [hereinafter cited as REPORT TO THE PARLIAMENT].
64. Secretary Healey expressed a preference for destroying the ship, but that such action depended on the owners. “I hope it will be decided later this afternoon by the owners whether they wish to go on trying to refloat the ship or whether they would agree that steps should be taken to destroy it and to try to fire the oil aboard.” COWAN, supra note 23, at 64.
65. Experience provided reason for supposing that the chances of salvaging a stranded tanker and her cargo were good. Salvage had been successful even in difficult cases. For example, the flotable fore section of the Norwegian tanker Anne Mildred Brovig was successfully cut from the remainder of the ship and salvaged with 14,000 of the original 39,000 tons of oil aboard. However, this operation took two and one-half months and 7,500 tons of oil had to be pumped out to give the recovered section sufficient buoyancy to be towed to port. COMMITTEE OF SCIENTISTS, CABINET OFFICE, UNITED KINGDOM REPORT: THE TORREY CANYON 42 (1967). [Hereinafter cited as COMMITTEE OF SCIENTISTS REPORT].
were in progress, other possibilities were explored, although the government admitted that if salvage failed, bombing was the “only reasonable alternative left.”

Britain did not want to destroy a foreign vessel without the owner’s consent, and Union Oil would only consent if it were paid for the ship. Allowing for the ship’s condition, it was still worth $10 million. The Cabinet declined to buy the tanker, but did begin making arrangements to buy out the salvor if the ship were refloated so that it would have complete and immediate control over her disposal.

An alternative to buying the tanker was to exclude it from British waters and Prime Minister Wilson announced that the government reserved the right to refuse entry for the ship into British territorial waters. This doubtlessly posed substantial obstacles to effective salvage even if the remaining sections of the ship could be refloated and towed to a port.

On Easter afternoon the major salvage attempt failed. The hull tore apart, opened formerly unruptured cargo tanks and poured more oil into the sea. Still, the salvor continued salvage efforts until Tuesday morning when he formally withdrew with the consent of Union Oil.

In London on Monday night government ministers decided that “all hope of minimizing pollution through towing away the ship, or any part of her, must be abandoned.” The Royal Navy was then ordered to set fire to the remaining oil.

The oil might have been contained by placing a boom around the ship. A boom was constructed, but not in time. Immobilizing the oil by gelling, freezing or mechanical means was impracticable. The transfer of the remaining oil to another tanker was not feasible. Burning the oil in situ required calm weather; moreover, boarding the ship to emplace demolitions and destroying the ship to get to the oil was extremely hazardous. When the vessel broke apart and weather worsened, burning was rejected. Salvage continued to be the most desirable alternative. For a discussion of the alternative considered, see COMMITTEE OF SCIENTISTS REPORT, supra note 65, at 13. The appraisal of the hazards posed was not without foundation. On March 22 a terrific explosion occurred in the engine room. A number of men on deck were injured, two were blown overboard, and the salvage captain was killed. See COWAN, supra note 23, at 72, 80.

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67. COMMITTEE OF SCIENTISTS REPORT, supra note 65 at 18.

68. COMMITTEE OF SCIENTISTS REPORT, supra note 65 at 14.

69. COWAN, supra note 23, at 93; REPORT TO PARLIAMENT, supra note 63, at 4.

70. For comments of the Dutch Foreign Ministry in reply to Britain’s announcement, see COWAN, supra note 23, at 88.

71. REPORT TO PARLIAMENT, supra note 63, at 3.

72. At 9:00 A.M. Tuesday, March 28, the Commander in Chief of Naval
That Great Britain intended to intervene at this point is certain, but there is uncertainty as to the exact sequence of events which followed. According to Home Secretary Jenkins, "The owners and insurers were told of the government's decision to bomb the ship Tuesday morning. We did not ask them; we told them." It is not clear whether the owners and insurers were told before or after they had themselves abandoned the ship, but the actual order to bomb was not given until hours after they had abandoned salvage efforts. This raises the unique question of whether the act of destroying a derelict constitutes intervention.

A separate consideration from the actual decision to bomb is the effects of the bombing itself. In deciding to bomb, the government took the position that no less destructive means was reasonable. If, however, excessive force was employed, it thereby subjected the government to responsibility for disproportionate damages inflicted. Such might also remove much of the liability of the owners for pollution damage because of the difficulty in proving whether or not the Owners had agreed to the bombing.

Forces, Plymouth, drafted a message to the Commander of the Royal Naval Air Station at Lossiemouth, in Northern Scotland: "Question: Let me have your suggestions on how you would rupture oil compartments and ignite contents of Torrey Canyon." Forty-five minutes later, Lossiemouth replied: "Answer: Bombing with 1,000 pound Medium Capacity High Explosive bombs attacking from side to which ship is listing to achieve penetration without ricochets." COWAN, supra note 23 at 106.

A vessel which has been abandoned by her master and crew is a "derelict" but this by no means is the same thing as saying she does not still belong to her Owners. When the British bombed the TORREY CANYON she was a "derelict" as she had been abandoned by her master and crew, but I do not know whether or not the Owners had agreed to the bombing.

Letter from Nicholas J. Healy to R. Palmer Cundick, Apr. 16, 1971. Mr. Healy represented the British Petroleum interests, as owners of the cargo lost as a result of the Torrey Canyon stranding, in the limitation of liability proceedings in the U.S. District Court. After settlement was made with England and France, the British Petroleum claim was withdrawn. See in re Barracuda, 281 F. Supp. 228 (S.D.N.Y. 1968); 409 F.2d 1013 (2d Cir. 1969). In practical terms, the coastal state is faced with a continuing threat from a derelict over which the owners are unable to exercise control. Having thus abandoned a dangerous and uncontrollable instrumentality, do they retain the right to object to necessary measures by the coastal state to abate the danger posed? Whereas abandonment of salvage normally does not constitute abandonment of ownership, it may well constitute a waiver of the right to object to disposition of the vessel until the threat is abated. In such circumstances, the legal effect of destruction may be something less than intervention.
not the intervening action mitigated or increased such damage. The bombing may have been too late to have significantly abated the pollution. Independent scientists and tanker men argue that little oil remained in the tanker and that part of this survived the flames to add to the pollution of the Cornish coast. The government maintains that there was substantial oil in the tanker, most of which was destroyed by the bombing.

When faced with liability for pollution damages, the Barracuda Tanker Corporation, a subsidiary of Union Oil and legal owner of the Torrey Canyon, asserted the bombing as a defense and said that the bombing itself was primarily responsible for the pollution. Moreover, it challenged Britain’s right to bomb the tanker while it lay in international waters, calling the bombing “a trespass.”75 Whatever the merits of the contentions, insurance proceeds permitted settlement short of litigation and removed resolution of these issues from the courts.76

It is the opinion of this writer that when, under similar conditions, there is a reasonable difference of opinion as to the proportionality of response, resolution should be in favor of upholding the coastal state action. Responsible decision-making must encourage the exhaustion of alternatives short of destruction. Every day that such alternatives are unsuccessfully tried, the effectiveness in destroying oil by bombing is lessened. If Great Britain had resorted to bombing the first day of the grounding, only a small amount of oil might have escaped, but little can be said in defense of such action as being consistent with international law. It is far better to encourage a coastal state to seek responsible alternatives, and then, if they fail and if bombing is not clearly a disproportionate measure, to resolve doubts in its favor.

British experience permits some observations concerning the decision-making process. First, the government named a responsible official to act in its behalf and authorized him to utilize available national resources to solve the problem. This assured not only

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75. A private landowner wrote to the Barracuda Tanker Corporation informing them of his intent to seek damages. Barracuda’s Bermudan lawyers replied: “We have been instructed to deny any responsibility for this damage, either past, present, or future, for even if it can be substantiated that the oil came from the Torrey Canyon the majority of the oil was released by the bombing of the ship by the British government without the consent or connivance of the owners.” Perrow, supra note 61, at 232.

76. The settlement on the Torrey Canyon was made promptly. On April 10, 1967, American Hull Insurance Syndicate paid Union Oil Company of California $8,250,000. Two days later Lloyds made payment in the amount of $6,600,000.
that maximum efforts would be made to abate the pollution, but provided a source of first-hand facts on which he could act. Second, the official consulted with leading scientists, Admiralty experts, and other advisors to examine reasonable alternatives. Third, every effort was made to preserve life, to respect private property rights, and to conserve material resources—in short, to resolve the conflict without resorting to unilateral governmental action. Fourth, the decision to act unilaterally was made only after other alternatives were no longer feasible. Finally, despite the avowals of some British leaders that national interests were their first consideration, there was a de facto respect for law demonstrated. Clearly, intervention was permissible under the circumstances.77

B. The South African Experience.—The Liberian tanker Wafra ran aground on February 28, 1971, on a reef 6 miles off Africa's southernmost tip. After leaking oil for a week and starting widespread pollution, the $12 million ship was freed from the reef, towed 200 miles out to sea, and destroyed by the South African Air Force.78

South Africa's approach is instructive and significantly different from Great Britain. Immediately after the grounding, experts concluded that unless the vessel could be pulled free, the only solution to a major oil pollution threat would be the complete destruction of the vessel. This opinion was endorsed by representatives of the ship's owners, but the decision left to the South African government.79

Salvage efforts were begun, but made little progress. Oil con-

77. The emergency which the Torrey Canyon precipitated was, arguably, from the point of view of the coastal state, one where [under the doctrine of the Caroline case] "the necessity of that self-defence is instant, overwhelming and leaving no choice of means, and no moment for deliberation." A case, surely, could have been made for a swift abating action on the part of the British Government, provided it did not involve risking the lives of the stricken vessel's officers and crew. Goldie, Book Review, 1 J. Mar. L. & Com. 155, 158 (1969). For the Caroline case, see Jennings, The Caroline and McLeod Cases, 32 Am. J. Int'l L. 82, 92 (1938).


continued to pour out into the sea. The question of intervention was unavoidable. Government officials met with anti-pollution surveyors, oil, salvage and insurance companies and decided that it would be best to tow the tanker as far away as possible as fast as possible. But someone had to bear the costs. On this issue the government and the owners began negotiations.

It was in the interest of the government to remove the ship, even if it subsequently became necessary to destroy it. If the ship could be salvaged in the process of removing it from the reef, this was also in the interests of the owners. Unlike the Torrey Canyon, no salvage company would take the job on a “no cure—no pay” basis. A contract guaranteeing a fixed remuneration not contingent on success was demanded by the salvor.

The government agreed to hire a salvor to pursue salvage efforts for 10 days. If salvage were successful, the ship and cargo would be retained by the owners. If not, the vessel would be destroyed, at sea if possible. In turn, the owners of the cargo and vessel agreed to grant indemnity to the government, promising that whatever was done with the ship, they would not institute actions for damages or compensation.

On March 9, the tanker was freed from the reef, but was beyond effective salvage. It was then towed 200 miles on the high seas, bombed and sunk.

The single most important contribution which the Wafra disaster has disclosed is another alternative to intervention: a coastal state and the owners of the vessel and cargo realistically negotiating their differences. While this approach requires a state to expend some of its resources to reach a compromise position, it is doubtful that such costs, at least in a comparable situation, are disproportionate to the benefits received, especially in averting damage to coastal interests incurred while there is indecision, or in averting expenses which a state might incur if it subsequently became involved in extensive litigation to resolve these very issues. Moreover, the approach provided a particularly appropriate solution in view of some of the potential questions which it mooted: (1) whether the vessel was in territorial waters or on the high seas

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80. The salvage contract in the Torrey Canyon was the usual “no cure—no pay” agreement in which the salvor is successful in obtaining remuneration only if he is successful in salvaging the ship. Success is a condition precedent to remuneration.
(South Africa claims a 6-mile territorial sea);\(^83\) (2) whether the facts warranted intervention; and (3) whether the towing of a ship 200 miles on the high seas and sinking it is within the lawful scope of the intervention right.

In the light of this experience, negotiation is a realistic alternative. It has considerable practical appeal because it apportions some of the loss. Moreover, if a state's offer to negotiate is refused, or a reasonable compromise cannot be reached, its claim to intervene is considerably enhanced.

VI. STATUTORY CLAIMS

Now that we have considered the characteristics of the right of intervention as a customary right, we may test particular claims of states to intervene. Since Canada, the United States, and Great Britain have enacted legislation which does not purport to be treaty-implementing, their respective claims merit particular attention.

A. Canadian Claim.—In 1970 the Canadian Parliament took action on three bills having a bearing upon intervention, the Arctic Waters Pollution Prevention Act (hereinafter, Arctic Waters Act),\(^84\) An Act to Amend the Territorial Sea and Fishing Zones Act (hereinafter Territorial Sea Act),\(^85\) and An Act to Amend the Canada Shipping Act (hereinafter, Canada Shipping Act).\(^86\)

These Acts are comprehensive. Attention is herein limited, however, to those portions dealing with intervention, except as it is

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85. An Act to Amend the Territorial Sea and Fishing Zones Act, supra note 14. The legislation seeks to extend the territorial sea from 3 to 12 miles and to establish exclusive Canadian fisheries zones in areas of the high seas beyond 12 miles.
86. An Act to Amend the Canada Shipping Act, 18-19 Eliz. 2, c. 35 (Can. 1970). The Act permits regulation of oil pollution by ships in Canadian waters south of the 60th parallel, all Canadian waters north of the 60th parallel that are not within a shipping safety control zone prescribed pursuant to the Arctic Waters Pollution Prevention Act, and to any fishing zone prescribed pursuant to the Territorial Sea and Fishing Zones Act.
necessary to examine other portions which clarify the claim, or which cannot be reasonably separated from it.

Concerning intervention, the Arctic Waters Act provides that:

13(1) Where the Governor in Council has reasonable cause to believe that a ship that is within the arctic waters and is in distress, stranded, wrecked, sunk or abandoned, is depositing waste or is likely to deposit waste in the arctic waters, he may cause the ship or any cargo or other material on board the ship to be destroyed, if necessary or to be removed if possible to such place and sold in such manner as he may direct.

The Act applies to all ships, public or private, which are in arctic waters. The definition of "waste" is comprehensive and would include oil. "Arctic waters" include waters in both a liquid and frozen state within specified geographical designations.

The Canadian Shipping Act asserts a similar authority to intervene in all Canadian waters not within shipping zones under the Arctic Waters Act, including the newly claimed 12-mile territorial sea, claimed by the Territorial Sea Act, and any fishing zones outside those territorial waters prescribed pursuant to that Act.

Underlying these statutes is the Canadian argument that the arctic ecology is peculiar, that life there exists under extremely severe conditions, and that any major oil spill in the Arctic Ocean might have disastrous and irreversible ecological consequences. Nevertheless, these special circumstances should not be the predominant factor insofar as the right of intervention is concerned. Clearly, if they were the predominant justification, the claim to intervene in non-arctic waters, also asserted by Canada, must fail. Rather, they should be only one of many factors to balance in appraising the claim.

Conceivably, the unique arctic environment and the propensity for disproportionate damages in event of an oil spill might substantially reduce the availability of other reasonable alternatives and tip the balance in favor of intervention where such intervention might not be justified in non-arctic waters. But such justification must result from the balancing process, not in lieu of it.

Canada has expressed that in environmental matters it is not prepared to await the gradual development of international law, neither by other states through their practice nor through the possible development of rules of law through multilateral treaties.87

In the Canadian view the international law that now stands does not sufficiently protect countries on the pollution aspect of international waters. Moreover, traditional principles of international law concerning pollution of the sea are based mainly on ensuring freedom of navigation to maritime states. "Such traditional concepts are of little or no relevance anywhere in the world if they can be cited as precluding action by a coastal state to protect this environment." Consistent with this view, Canada objected to, and abstained from voting on, the Intervention Convention on the grounds that it failed to permit sufficient prior control to prevent accidents from occurring.

This position reflects the vigor and candor with which the Canadian claims are being pursued, but not the merits of those claims. The proposition that there are legitimate interests to be protected and that conventional international law has been slow to develop is substantially correct. However, the proposition that international law does not sufficiently protect countries from pollution arising in international waters is not persuasive, particularly since customary international law has always recognized the right of a state to protect itself from harm. In fact, Canada relies on the existence of such fundamental principles because it bases its claim on the right of self-defense, considering that "a danger to the environment of a state constitutes a threat to its security." To determine the reasonableness of a particular claim there must be (1) an authoritative decision-maker, and (2) a decision by objective criteria. Immediate conflict was created with the first requirement when Canada announced, concurrently with its overall environmental claim, the withdrawal of its consent to compulsory jurisdiction of the ICJ in any matters pertaining to

disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect to the conservation, management or exploitation of the living resources of the sea, or in respect of prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.


89. Id. at 608.

By this means, Canada sought to free its claims from any binding international evaluation. But whereas it removed consideration of the claims from the formal decision-making process as implemented by the ICJ, it did not effect removal of the claims from the decision-making process. It merely removed decision one step back to the world community itself, which is itself an authoritative decision-maker. All that has been accomplished is that Canada's motives and objectives are under closer scrutiny and are subject to more severe criticism, which does little to enhance the claim.

The heart of the difficulty with the Canadian claim lies in the second requirement of decision by objective criteria. Whatever basic principle of law be applied, whether it is self-defense or something else, there must be some standards by which to apply it. Nowhere in the legislation is there any requirement specifying the magnitude of the danger of pollution required before intervention is justified. The discharge of oil may be enormous, of catastrophic proportions; it may be very minor. All that is required is that the vessel deposit a pollutant into waters within the prohibited zones. Further, there is no attempt to define the magnitude of the consequences of the danger which must threaten Canada. The legislation does specify that the vessel must be “removed if possible” as opposed to being “destroyed,” but this is a mandate as to the degree of intervention, not to whether intervention is even justified under a particular situation.

Without some reasonably objective qualification at least as to the degree of danger which must be threatened before intervention may be effected, the burden on any domestic decision-maker to enforce the claim is onerous. The criteria of whether to intervene is totally discretionary, too vague, too broad, and cannot be sanctioned under international law.

B. United States Claim.—In 1969 and 1970 the United States passed major legislation dealing with environmental problems. The

drawal of jurisdiction could, in the Canadian view, only be regarded as highly hypocritical in view of the United States' own much broader “Connally Reservation.” The vulnerability of the United States to these arguments serves to illustrate the reciprocal effects of national decisions in the international arena. A state is in no position to complain if another state imitates its actions. See 114 H.C. Deb. 5949 (Apr. 16, 1970) and Id. at 5945 (remarks of Mr. Douglas), cited in Bilder, supra note 84, at 28 n.19.

91. Sections 736(j) & 738(i), An Act to Amend the Canada Shipping Act, supra note 86; Sections 2(h) & 13(1), Arctic Waters Pollution Prevention Act, supra note 13.

92. The Canadian claim is not enhanced by the failure of its delegation to sign the Intervention Convention because, in its view, it fell short of effective protection for coastal states.
principal legislation regulating pollution of water by oil and other hazardous substances is the Water Quality Improvement Act of 1970 (WQIA). Section 11 regulates the control of pollution by oil. The claim to intervene is set forth in subsection (d) as follows:

Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge of oil from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provision of law governing the employment of personnel or the expenditure of appropriated funds (emphasis added).

Authority claimed by the United States to remove or destroy a vessel follows closely the philosophy and language of the same authority vested in the Secretary of the Army by the River and Harbor Act of 1899 in situations where a vessel constitutes a threat to navigation. That act empowers the government to take immediate possession of a vessel and to remove or destroy it where, under an emergency, the vessel stops, seriously interferes with or specifically endangers navigation.

In passing the WQIA Congress carefully limited the authority it granted: although it proscribed discharges of oil even in the contiguous zone, it restricted the power to intervene to navigable waters. Nowhere is there even any hint that the statutory power to intervene was intended to apply outside territorial waters. A House bill entitled the Tanker Disaster Act of 1969, had it been enacted, would have given the President comprehensive authority to remove the threat of pollutants of any kind, including the power to destroy a vessel within or without territorial waters.

94. It is surprising that the scope is so narrow because the River and Harbor Act of 1899 already authorizes the United States to take immediate possession of any vessel so far as to remove or to destroy it to clear navigable waters. Thus, it is difficult to find any substantive authority which has been added by the WQIA to the power to intervene since it is limited to territorial waters and the authority to act there is already existant.
95. The bill died in the Committee on Merchant Marine and Fisheries.
This bill more closely paralleled the Canadian legislation, but was never reported out of committee.

Consistent with the Congressional intent to confine the claim are the implementing regulations by the executive branch which narrowly define "navigable waters of the United States" for purposes of Section 11(p)(1) as including only "the coastal territorial waters of the United States, the inland waters of the United States including the United States portion of the Great Lakes and the Saint Lawrence Seaway, and the Panama Canal." 9

Like the Canadian claim, the United States claim is also part of a much broader legislative anti-pollution program. In sharp contrast, however, there is no concurrent provision for extension of the United States territorial sea from 3 to 12 miles, nor for the establishment of extremely broad pollution control zones, such as the 100-mile Canadian arctic zone. Moreover, so narrow are the objectives of the U.S. claim that even though it is only authorized in territorial waters, it is still the intent of Congress that "every precaution be exercised in the use of this authority;" even then it should only be used when the pollution threat is substantial and the danger imminent. For this reason, the claim can hardly be construed as seeking more than the protection of coastal interests through limited intervention under unique circumstances.

In view of the strong determination of Congress to provide adequate means of dealing with massive oil spill problems, it is surprising that no proscription is applied to the high seas; especially since it is within the contiguous zone that the United States claims competence to regulate oil pollution for practically all other purposes besides intervention.

A possible explanation of the narrowness of the claim is that the United States anti-pollution approach to non-territorial coastal waters within the contiguous zone appears to be based on the power

Its pertinent parts provide:
Whenever, as a result of marine disaster within or without the territorial waters of the United States, an ocean-going vessel shall release substantial quantities of fluids or other substances, which may tend to contaminate the oceans or the shoreline or the atmosphere, ... [the President] shall have the power to take such steps as he may deem necessary, within or without territorial waters of the United States, including the destruction of the offending vessel and its cargo (emphasis added). H.R. 6218, 91st Cong., 1st Sess. (1969).

under the 1958 Convention to prescribe sanitary regulations where the public health and welfare are affected, as opposed to an independent basis such as self-protection. On such a theory it is tenuous to argue that the extraordinary right of intervention is within the purview of contemplated regulation authorized by that Convention.

The decision of Congress to limit the claim places the United States in a rather vulnerable position because more than half of the major oil spills from tanker disasters during the past half decade have occurred beyond three miles from a nation's coastlines. Thus, it has no statutory authority to intervene beyond its 3-mile territorial sea nor to intervene to protect against hazardous substances other than oil even within its territorial waters, unless the latter power is derived from the River and Harbor Act.

Perhaps the Congressional intent was to fill this gap, at least as to oil pollution, by subsequent legislation to implement the Intervention Convention. Another possibility might have been the expectation that there would be international consensus on a 12-mile territorial sea in the forthcoming Law of the Sea Conference, which would automatically extend the statutory intervention power limited to the territorial sea from 3 to 12 miles. Whatever the Congressional intent, the result is that the United States has a lawful but perhaps ineffective claim until the Intervention Convention comes into force concurrent with implementing legislation, or until a multilateral forum agrees upon a wider territorial sea than three miles. The statutory claim does not, of course, prevent the United States from exercising its customary international law right to intervene.

C. The British Claim.—The British legislation is most forthright in providing guidance to the decision-maker. The Parliament first authorized intervention outside territorial waters only if Her Majesty by Order in Council so provided. An Order was then published with the announcement that it merely gave statutory backing to action taken by the government in relation to foreign vessels outside its territorial waters and to make clear in domestic law the government's right to take such action.98 Shortly thereafter, the

Oil in Navigable Waters Act 1971, which authorized the Order, was repealed and consolidated by the Prevention of Oil Pollution Act 1971. The repealing Act, in identical fashion, also permits extension of the intervention powers, which, under the Act’s savings clause, continue in force as previously authorized by the Order.

When the intervention powers were initially extended to the high seas, the government noted that adequate powers were available to it under international law and that the Intervention Convention which it had ratified (not yet in force) merely gave such powers formal expression. Moreover, the Parliament declared in both Acts that they were without prejudice to any rights or powers which the United Kingdom might exercise under international law.

The intervention provisions of both Acts are substantially the same. Action is permitted where emergency powers are urgently needed to prevent or reduce large scale oil pollution. Before taking any action the government is required to seek the best professional advice and to act in the fullest consultation with those having an interest in the ship or its cargo. The powers are to be invoked “only in the last resort after all reasonable attempts to deal with the situation by persuasion and consultation have failed.”

Conjointly with asserting its rights, the government accepts responsibility for damages if statutory guidance is exceeded.

Once intervention is contemplated the government must first consider directing the owners, master or salvor in charge of the

99. See note 17, supra.
100. See note 98, supra.
101. Id. See also Section 12(4) of the Prevention of Oil Pollution Act 1971.
102. Section 13 of the Prevention of Oil Pollution Act 1971, c.21 (Eng.) provides:

(1) If any action duly taken by a person in pursuance of a direction given to him under section 12 of this Act or any action taken under subsection (4) or (5) of that section—
(a) was not reasonably necessary to prevent or reduce oil pollution, or risk of oil pollution; or
(b) was such that the good it did or was likely to do was disproportionately less than the expense incurred, or damage suffered, as a result of the action,
a person incurring expense or suffering damage as a result of, or by himself taking, the action shall be entitled to recover compensation from the Secretary of State.
(2) In considering whether subsection (1) of this section applies, account shall be taken of—
(a) the extent and risk of oil pollution if the action had not been taken;
(b) the likelihood of the action being effective; and
(c) the extent of the damage which has been caused by the action.
ship to take a particular course of action, such as moving the ship, discharging or unloading oil or other cargo, or taking particular salvage measures. If that does not abate the threat, the government may take control of the ship and destroy it if necessary.\textsuperscript{103}

The British intervention legislation reflects a comprehensive understanding of international law and should seriously be considered by other states as a worthy model.

VII. INTERNATIONAL OCEANS POLICY

A meaningful appraisal of the claim to intervene must consider not only the immediate stresses which it creates on the legal regime of the high seas, and an acceptable easing of those stresses, but also the long-range impact which its approval or disapproval will have on that regime. Essentially, the appraisal must be policy-oriented, considering the extent to which an optimum oceans policy should permit accommodation or new uses, the limitation on unilateral action, and the reciprocal sanctions it anticipates if unilateral action is excessive.

The need has never been greater for a regime of the high seas which can, with minimum conflict, accommodate continuously emerging claims while maintaining that balance providing the greatest possible access to the oceans by all ships, allowing them the greatest freedom of movement compatible with the essential protection of exclusive coastal interests.

A. Amenability to New Uses.—An optimum oceans policy must be amenable to positive changes, taking into account past expectations, but must also seek a net gain in deciding whether a new competing use is to be accommodated. Any departure from traditional rules must only be in those exceptional cases which are themselves in the best interest of the international community.

Where there is a demonstrable need for the law of the sea to accommodate special interests of coastal states, maritime states must recognize that established law (as opposed to principles of law) may not give sufficient recognition to these interests. Concerning pollution, for example, it is both practical and equitable for coastal states to have some control over hazardous shipping activity adja-

\textsuperscript{103} Id. § 12(4).
cent to their coasts. A policy which refuses to accommodate these coastal interests will unlikely diminish efforts by states to exercise such control. Moreover, it may result in unreasonable claims if states become dissatisfied with the role and function of international law as a viable system to resolve contemporary problems.

The heart of the controversy is to find a meaningful solution which will make the system work when it is challenged by a new use. In the intervention situation the use of the oceans to transport oil competes with the enjoyment of coastal waters free from pollution by oil. If continued shipments of oil are deemed beneficial, perhaps the price of those shipments is recognition of the competence of the coastal state to intervene when pollution is threatened. That accommodation does not add unreasonable burdens to the shipping industry and still permits vessels to operate in productive oceans commerce. If, on the other hand, the alternative is to exclude vessels from certain ports or territorial waters, or to permit them to pollute, the result contributes little.

B. Resistivity to Unreasonable Claims.—The trend internationally is from the protection of exclusive uses by a few states toward protection of common uses of the community of states. Unfortunately, some states have recognized that trend and have attempted to counteract it by making unreasonable unilateral claims which frustrate efforts to balance the equities and to develop internationally agreed rules under which they may protect their legitimate coastal interests. Such actions undermine established law and are especially damaging when the claimants assert that they may act unilaterally if they judge existing law to be invalid or inadequate. Such states must recognize that competing interests need not be irreconcilable. Moreover, there must be a genuine attempt at reconciliation and a distinction in practice between the right of sovereignty over a particular area or activity, and the right to exercise a merely protective jurisdiction over it when it is outside the national domain. A contrary approach will ultimately injure those states as they develop and find a need for a greater participation in the world community. The propensity for abuse through the unilateral approach is great; the result is often little more than a setback for the international legal process.

There is, of course, a legitimate right of unilateral action under certain circumstances. A claimant state must, however, be able to demonstrate a need for it in terms of some recognized principle of international law, as well as an ability to satisfy effec-
tively that need by means of the claim. In the absence of some agreement to the contrary, its validity should not be measured in terms of the number of miles from the coast at which it is asserted, but in terms of the functional relationship between the authority claimed and the exclusive interest allegedly requiring protection, and by how effectively those interests are protected by that particular claim. The naked assertion of a claim without its providing a rational means of satisfying a particular recognized need starts the departure from international law and resistance by the world community to its accommodation.

Unilateral claims face yet another difficulty in acceptance because of the multitude of international organizations and processes through which change may be effected multilaterally. The convention route is one means of obtaining the widest possible acceptance for a particular use. Given the opportunity to work through international channels, a state, having elected not to do so, considerably jeopardizes recognition of any unilateral claim.

C. Reciprocity as a Stabilizer.—Establishment of prudent national and international goals for use of the oceans requires consideration of the contemporary practice of states as it has evolved through a pattern of mutual claim and reciprocal tolerance. There has always been considerable give and take. The intervention claim, as worked out in practice in both the Torrey Canyon and Wafra experiences, is illustrative of how all interests had to make de facto accommodations. The shipping interests, the insurers, the flag state and the coastal states all sustained a net loss in time and resources expended. Yet, coastal states did not generally condemn the action taken by either Great Britain or South Africa for they recognized their own vulnerability to a similar situation. This was further evidenced by the comparatively little resistance voiced to the Intervention Convention.

Reciprocity is important even to major powers. The Soviet Union, for example, has shown concern, not that its vessels might be subject to intervention, but that the intervening state might not abide by the principle of proportionality, and the attendant duties in event of its violation, to which the Soviet Union impliedly subscribes. At the Intervention Convention the Russian delegate expressed that the Soviet Union owned a very large tanker fleet which sailed over the seas of the entire world, and it
was permanently conscious that one of its ships might one day cause an accident; it was obvious that in such a case it hoped that the coastal state which was obliged to take measures [by way of intervention] to prevent pollution would not take excessive measures liable to cause the Soviet fleet any damage which would not give rise to compensation.  

The mutual restraint by nations in asserting claims is probably the best evidence of how effectively the principle of reciprocity operates. Nevertheless, abuses occur. What one country can do, another can do also—and perhaps to a greater degree. When a state acts unilaterally, other nations, while not necessarily taking identical action, can be expected to copy the basis of the action taken. If the basis is improper or too loosely defined, the snowball effect is difficult to halt.

VIII. RECOMMENDATIONS

In the charting policy for future regulation of activities of the oceans, there is opportunity to make law responsive to community needs without unreasonably jeopardizing recognized common uses. As to intervention, clearly, an unrestrained, unqualified right, whether on the high seas or in territorial waters, is not desirable or even lawful. Conversely, the case for denying intervention under any circumstances increasingly weakens as man realizes that the vast oceans do have an exhaustion point to their assimilative capacity for pollutants.

Experience with massive oil spills have not been without some positive effects. Claimants to the right of intervention have created an awareness of the need for such a right and for a responsible criteria for its exercise, especially through the Intervention Convention. Efforts are being made world-wide to develop safeguards to reduce the probability of maritime disasters and thus the situations in which intervention might be necessary. Improved methods of cleaning up oil spills have been developed.

The lawyer can play a major role in developing the law of the sea in this area if he will:

1. Emphasize the duties and responsibilities of intervention rather than debate the right. The problem is not in recognizing the right; it is in preventing its abuse. States must understand their duty to make diligent inquiry into all the facts and circumstances, to consider all reasonable alternatives, and then, if intervention is justified, to use only that degree of force necessary (and to compensate if excessive force is used).

(2) Educate states as to the extremely limited application of the claim—the unusual circumstances in which it would be justified—especially by distinguishing the existence of the right from its lawful exercise under very unique circumstances.

(3) Encourage states, where appropriate, to seek a negotiated compromise with the owners of the polluting vessel and its cargo whereby they may remove or destroy the vessel with the owners’ consent if other alternatives fail. Even though this compromise may result in payment by states of part or all of the salvage costs or some other allocation of expenses, states may still find such an arrangement to their advantage. This approach avoids the necessity of intervention and the problems it presents.

(4) Emphasize the sharing of technology for preventing or cleaning up oil spills. Development of effective, harmless cleaning methods might produce a more reasonable alternative than intervention.

(5) Encourage the establishment of safer shipping laws and navigational aids. This will not eliminate tanker disasters, but should significantly reduce them. Reducing the propensity for disasters and the harm should one occur can only minimize the need to intervene.

(6) Educate states to the customary international law principle of reasonableness. A policy which measures each danger of pollution on its facts in context, weighing the benefits against the risks and looking closely at other alternatives to intervention, is more realistic than one which prohibits any intervention under any circumstances. The reasonableness criterion has the merit of adapting to change as new and better methods are developed. Moreover, solutions which might have been reasonable only a few years ago may be rejected as no longer reasonable. In this manner it permits adaptability to new conditions rather than being tied unyieldingly to the past. This assumes, of course, that there will be diligence in research for improved methods of handling the problem. Moreover, once any nation develops the technology to abate a particular pollutant effectively and makes it available to

the international community, the criterion of reasonableness must take such technology into account.

We may anticipate situations of potentially graver consequences as new and more extensive uses are made of our oceans. The need for flexibility will become even greater if coercion and conflict are to be minimized. International law must assume a positive stabilizing role and effect a workable regime in which the complex activities of the world community can be accommodated and encouraged without threat of violence and disruption. Nations asserting unilateral claims must recognize that the world community will subject them to careful scrutiny and analysis. If their claims can withstand such scrutiny, they will find their lawful place. If not, they must be rejected as inimical to a proved world ocean policy which allocates international resources for the benefit and shared use of all nations.