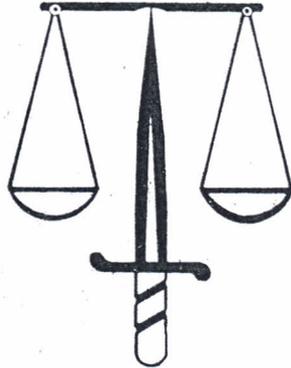


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Review of Recent Developments Regarding The Rule of Extra-Territorial Jurisdiction with Focus on The Control of Marine Pollution*

CHARLES ODIDI OKIDI**

INTRODUCTION

It is often a controversial matter in international law whether a state acts properly when it takes measures to control activities which occur wholly or partly beyond its territorial jurisdiction. In this paper we shall answer the following question: under what circumstances in legal theory and practice can a coastal state properly take measures beyond its acknowledged¹ jurisdiction to abate or prevent polluting incidents which occur on the high seas adjacent to its coast?

The oil spill which the wreck of the *Torrey Canyon* of March 18, 1967 wrought upon the coasts of England is a prime example of the legal uncertainty which a government has to resolve before acting outside its jurisdiction. The facts were as follows: a tanker of Liberian registration carrying about 170,000 tons of crude oil was grounded and broken up about 16 miles from the south-west corner of England, at

* * Research Fellow, I.D.S. and Lecturer, Diplomacy' Training Programme, University of Nairobi.
B.A. (Alaska), M.A. M.A.L.D., Ph.D. (Fletcher School of Law & Diplomacy).

* The paper is excerpted and modified from the author's Ph.D. dissertation accepted at the Fletcher School of Law and Diplomacy in October 1975. The author is grateful to Sylvanus Tiewul of the U.N. Secretariat and Christine Jones of Harvard Law School for useful comments on earlier draft.

1 Coastal states clearly have power to take measures to regulate pollution in the Contiguous Zone extending outward to 12 miles from the baseline from which territorial sea is measured, provided that the pollution within the zone has demonstrable consequences on the territorial interests of the coastal state. See Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. 516 UNTS 205 (1964) The position supporting a limited 12 miles zone is currently under near-fatal challenge by states which either exert actual claims or propose that such a zone be extended to 200 miles, coextensive with the proposed exclusive economic zone. See detailed analysis of the status of the rule and the new trends in C. Odidi Okidi, *The Prospects for the Establishment of Regional Regulatory Arrangements for the Control of Pollution of the Seas* (A dissertation for Ph.D. degree accepted at the Fletcher School of the Law and Diplomacy in October 1975), pp. 142-171. A copy of the dissertation is at library of IDS, University of Nairobi.

What is important for the present discussion is the conceptual delimitation of such a zone; the numerical factor may vary: 12, 100 or 200 miles.

a spot beyond the jurisdiction of any state.² According to a British White Paper, about 60,000 tons of crude oil spilled into the sea within eight days, presenting "the threat of oil pollution evidently on a scale which had no precedent anywhere in the world".³ The oil covered the beaches of Cornwall and spread eastward to Normandy and Brittany, 225 miles away.⁴

British authorities tried to salvage the vessel and to stop the discharge. After these efforts failed, the Royal Navy and the Air Force bombed the ship in order to burn the oil and thereby abate the degree of damage to Cornish resorts and the danger to coastal birds and fish.⁵

According to the White Paper, "Neither legal nor financial conditions inhibited the action at any stage."⁶ Other sources, however, reported that a "legal dilemma" inhibited Prime Minister Wilson from authorizing the bombing earlier.⁷ The "legal dilemma" was stated by Defence Minister Denis Healy in an answer to a question in the House of Commons. He reported that the representatives of the company had arrived in England, adding: "We are not in a position to set fire to the ship until they [representatives of the ship] give their agreement that this can be done. The vessel is on the high seas at the present time."⁸

In other words, the British Government was being cautious for two reasons: (a) its respect for the principle of freedom of the seas and the rule of the supremacy of the flag of state of a ship and (b) the fear of the possibility of being required to pay damages for bombing a foreign ship if the principle and rules were deemed violated.

The following are four principles which states may consider, when acting outside their jurisdiction. They are:

- (1) The principle of objective territoriality, i.e. if the incident occurs on the high seas, the state taking action must show that such incident causes direct physical injury within its territorial waters of shorelines.
- (2) the principle of self-defence, i.e. the state taking action outside its territorial jurisdiction must show the incident taking place

2 Sweeney, "Oil Pollution of the Oceans", 37 *Fordham L. Rev.* 157 (1968); Cowan, *Oil and Water: The Torrey Canyon Disaster* (New York: Lippincott Col., 1968). p. xiii; British "White Paper" on the 'Torrey Canyon' incident, Cmnd. 3246, (April 1967), p. 3.

3 Cmnd. 3246, loc. cit. The amount of oil spilled is also estimate at about 35 million gallons, Sweeney, *op. cit.*, p. 158.

4 Sweeney, *loc. cit.*

5 *Ibid.*; Cmnd. 3246, pp. 5-6.

6 Cmnd. 3246, p. 1.

7 Goldie, "Book Review", I *Journal of Maritime Law and Commerce* (1969), pp. 155-156.

8 Quoted in Cowan, *op. cit.*, p. 63.

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8 Quoted in Cowan, *op. cit.*, p. 63.

- on the high seas would have caused direct physical injury within its territorial jurisdiction had the state not acted;
- (3) the principles of conventions which confer power of unilateral action without fear of retaliation;
 - (4) the principle of universality of offences, i.e. an act is deemed so reprehensible for the interests of humankind, that any state which secures the perpetrator has the authority to try and punish such perpetrator.

Although these principles have been articulated in areas other than marine pollution, they are equally apt for marine pollution.

THE PRINCIPLE OF OBJECTIVE TERRITORIALITY⁹

This principle, if applied to marine pollution, would empower a coastal state to prescribe rules of law attaching legal consequences upon any person responsible for a polluting act which occurs in the high seas beyond its jurisdiction, but which has effects within its territorial waters or on its beaches. According to Moore, the principle derives from the long recognised rule of nuisance in common law, but also has universal validity:

The principle that a man who stands outside a country [and] wilfully puts into motion a force to take effect in it is answerable at the place where the evil is done, recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle of a constantly growing importance and increasing frequency.¹⁰

The principle of objective territoriality, Moore contended, is an "actual" territorial rule, i.e. it allows a state to extend territorial jurisdiction rather than exercise extraterritorial jurisdiction.¹¹ Professor R.Y. Pennings recently postied the same view:

9 "Objective" territoriality is distinguished from the "subjective" one. The former establishes the jurisdiction of a state to prosecute and punish for crimes commenced outside the state but consummated within the territory; the latter, on the other hand, establishes the jurisdiction of the state for offences commenced within its territory but consummated outside it. See Harvard Law School, *Research in International Law*, at 487 and 468 (1935), respectively; Jennings, "Extraterritorial jurisdiction and the United States Antitrust Laws," in 33 *British Year Book of International Law* (1957) 146, 165.

But neither the Harvard Research nor the other writers explained the reason for choice of the terms subjective and objective. John Bassett Moore used the terms long ago as given concepts in international law. He characterized these two concepts as referring to "actual" territorial rule as distinguished from "constructive" theory of territoriality. See Moore, *A Digest of International Law*, Vol. II, p. 243. Mann calls the reference in the Harvard Research to the subjective and objective application of territorial principles "unhappy" phrases and suggested that better terminology should be invented. See, Mann "The Doctrine of Jurisdiction in International Law", in Hague Academy, III *Recueil des Cours*, 1, p. 84 (1964).

10 *Op. cit.*, p. 244.

it is important to notice that this technique is, in the appropriate case a claim not to extraterritorial jurisdiction but to territorial jurisdiction.¹²

Jennings¹³ cites one of the early applications of the principle in *Queen v. Nillis* (1884), in which the court had to decide whether the accused charged with obtaining goods by false pretences and at all material times physically present in England had committed a crime in the territorial jurisdiction of Germany. Cave, J. concluded:

... it cannot be contended that he did not commit the crime in Germany; he procured the goods there, he altered the forged notes there. It is clear that the crime was committed in the foreign state^{13a}

The court ordered the accused to be extradited, thereby placing him within the territorial jurisdiction of Germany. Professor C.C. Hyde, when referring to the principle of objective territoriality cites the 1927 decision of the Permanent Court of International Justice in the *SS Lotus* case.¹⁴ If the holding is not restricted to collisions between ships, each ship representing the territory of its flag state, the holding of the court empowers a state to prosecute the delinquent, whatever his/her nationality, who is responsible for the act which was committed outside the territory of the state on the high seas, and which inflicted direct injury on its territory. Invoking the principle of objective territoriality to justify the ruling, the Court rejected the contention that the place of origin (causation) of the harmful act will determine which state has jurisdiction over the delinquent. Instead the Court concluded that the place of effect of the act determines which state may prosecute and try the defendant.¹⁵

11 *Ibid.*, p. 243; Moore would probably have grouped under extraterritorial category the modern offences such as war crimes and genocide and jurisdiction to include in addition to the following four classes: 1. Personal, over citizens; 2. Over particular offences whether by foreigners or citizens. (a) Piracy; (b) Offences recognized by conventions such as slave trade; (c) Offences against safety of state: counterfeiting or forging of seals, paper moneys, bank bills authorized by law; 3. Offences committed abroad by foreigners against citizens; 4. All offences, by whomsoever and wherever committed. Moore, *op. cit.*, p. 243.

12 R.Y. Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws," *supra* note 9, pp. 146, 157.

13 *Ibid.*, See also similar reference in Harvard Research's discussion of objective territoriality in Harvard Law School, "Jurisdiction with Respect to Crime", *Harvard Research in International Law*, 489 (1935).

13a Jennings, *op. cit.*

14 Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. I (Boston: Little, Brown & Co., 1945), p. 798.

15 *P.C.I.J. Ser. A. No. 10*, p. 25.

Nearly a decade after the *Lotus* case, the Harvard Research Group in International Law, after surveying state practice, proposed an article that conforms to the principle of objective territoriality in the *Lotus* case. The article specifies that a state may "prosecute and punish for [only] crimes commenced without the state and consummated within its territory,"¹⁶ i.e. an essential constituent element is consummated "within the territory".¹⁷ In the draft convention, a territory includes the land, territorial waters,¹⁸ and ships flying the flag of the state.

More recently, the draftsman of the Second Restatement of the Foreign Relations Law of the United States agrees with the conclusions reached by Moore and the Harvard Research Group. Section 18 of the Restatement provides:

A State has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if either

- (a) *The conduct and its effects are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably legal systems, or*
- (b) *(i) The conduct and its effects are constituent elements of activity to which the rule applied; (ii) the effect within the territory is substantial, (iii) it occurs as a direct—and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.*¹⁹

The Reporter's comments on the foregoing section deem the principles of objective territoriality apt for cases of pollution, citing the arbitral award in the *Trail Smelter* case.²⁰ In that case a mixed tribunal stated that Canada was responsible in international law for environmental injuries caused in the United States by industrial fumes which originated from a smelting firm located in Canada. The rule of international law was:

No state has the right to use or permit the use of the territory in such a manner as to cause injury by fumes in or to the territory of another or the properties and persons therein when the case

16 Harvard Law School, *op. cit.*, p. 480.

17 *Ibid.*, p. 495.

18 *Ibid.*, pp. 487-88.

19 American Law Institute, *Restatement of the Law (Second), Foreign Relations Law of the United States* (St. Paul: West Publishing House, 1965), Section 18, p. 47. The Restatement was a product of about a decade of study and several drafts. For a critique of earlier drafts see Association of the Bar of the City of New York, *Report on Certain Aspect of the Proposed Restatement of the Foreign Relations Law of the United States* (mimeo), dated 22 May, 1962; Jennings, "The Limits of State Jurisdiction," 32 *Nordisk Tidsskrift for International Ret* (1962), 209-229.

20 *Restatement*, pp. 52 and 55.

if of serious consequence and the injury is established by clear or convincing evidence.²¹

The law the Tribunal applied for determining causation, for determining the extent of injury and damage due was the law of the country where the harm occurred, namely, the United States.^{21a}

The principle of objective territoriality has not been applied specifically to a case of marine pollution. The British and French Governments sued for damages for the oil spill from the *Torrey Canyon*, but settled the claim out of court rather than sustain a long trial. There is no reason to suspect that anyone would dispute the principle that would allow a coastal state to prescribe a rule of law—or to sustain its established rules of common law of nuisance—attaching sanctions to the persons who discharge pollutions into the high seas when such acts cause harm to the territory or within the territorial waters of the coastal state. There would be no reason to dispute the basis of state action especially since the direct physical effects, e.g., an oil spill of such disastrous proportion as in the *Torrey Canyon* episode, inflict serious economic consequences upon tourist resorts and the natural environment.

Yet major oil spills are infrequent. The application of the rule of objective territoriality would become controversial when the damage is the result of accumulative small discharges as from valve leaks, tank flushing, bilge pumping, or deballasting.²² The coastal state then must ask when damage is considered direct for the purpose of applying the principle of objective territoriality to try and punish a ship owner found guilty of discharging small quantities of oil in the area of the high seas beyond limits of acknowledged jurisdiction? Professor Jennings warned that states should not use the principle of objective territoriality as protective mechanism. He wrote:

In relation to elementary case of direct physical injury, such as homicide, this unexceptionable, for here the 'effect' which is

21 United Nations, *Report of International Arbitral Awards*, pp. 1965-1966, (hereinafter UNRIAA); Whiteman, *Digest of International Law*, (1968), Vol. 6, pp. 253-256.

21a Note however, that the Tribunal was directed by the *compromise* between the U.S. and Canada that it should apply the laws and precedents dealing with cognate matters in the U.S. and that the Tribunal did not choose the law. The preference, it has been reported, was because the laws in the U.S. more favourable to the polluters than were Canadian laws.

22 Recent major incidents listed are *Juliana* in November 1971, near Niigata Harbour, Japan; *Silver Castle* near Port Elizabeth, South Africa in April 1972; *Saija* incident south of Corsica in June 1972; *Tamano*, near Portland, Maine in July 1972, and the *Torrey Canyon* in March 1967; see a discussion with figures in J. Wardley Smith, "Occurrence, Cause and Avoidance of the Spilling of oil by Tankers" in *Proceedings of a Conference on Prevention and Control of Oil Spills*, March 1973 (Washington, D.C.: American Petroleum Institute), pp. 15-20.

meant is an essential ingredient of the crime. Once we move out of the sphere of direct physical consequences, however, to employ the formula of 'effect' is to enter upon a very slippery slope.²³ ○

The *Trail Smelter* arbitral award, however, shows that the cause of injury can be established from a cumulative deposit of fumes whose origin was from a particular plant outside the United States. In marine pollution the mobility of ships makes it more difficult for a state to trace oil leaks to specific ships or specific act of pollution to specific ships. Since the principle of objective territoriality allows a state to apply its domestic law of causes and effect and damages; there is legal authority in some countries (e.g. United States) for a court to apportion damages among several polluters using the same sea lanes.

Any state is free to pass legislation dealing specifically with pollution on the high seas from major oil spills and leakages. Whether the law would conform to international principle of objective territoriality would depend on the domestic law meeting two test: (1) the polluting conduct must have a determinable effect in the territorial waters or on the breaches of the coastal state; (2) and states whose flagships use the high seas adjoining to the territorial waters of other coastal state would not legitimately protest the legislation.

However, even if domestic legislation did not measure up to these two standards of propriety, the Permanent Court of International Justice settled in the *Lotus* case, and the Restatement confirmed, that in international law if the polluting agent is physically within the recognized territorial jurisdiction of the coastal state which is alleging injury, then that coastal state has jurisdiction to try the polluting agent under the domestic laws that proscribe pollution on the high seas when that pollution inflicts physical harm on the coast state's territory.

THE PRINCIPLE OF SELF-DEFENCE

The principle would empower a coastal state to act physically against a polluter on the high seas without the state prosecuting the polluter within the state's recognized territorial waters. In international law of a state may respond in self-defence only to acts which threaten its territorial integrity or political independence. As to who decides what these categories of threat requiring a response in self-defence are, many states²⁴ have accepted the position stated by the

23 *Loc. cit., op. cit.*, 159. Even though Jennings was discussing economic effects of combination in restraint of trade the caution he raises on the determination of "effect" generally is relevant in the context of objective territoriality.

24 *Papers Relating to Foreign Relations of the United States* (1928), Vol. I, p. 91, where in a letter from Kellogg to the U.S. Ambassador in Paris he noted the concurrence of the Governments of Great Britain, Germany, Japan, Italy and India.

as much as the devastation which it wrought—sinking three Cambodian gunboats and bombing airfields, oil depots and other installations in Cambodia, was out of proportion to the damage by detention of the *Mayagüez* and a questioning of the crew.³⁴ In post mortem statements, two U.S. Senators implied that self-defence—whether in proportion to or in excess, of measures taken—self-defence by the foreign state should not be invoked in retaliation to an initial cry of self-defence until all chances of diplomatic settlement have been exhausted.³⁵

Thus, the threat of military action against oil producers and the *Mayagüez* affair illustrate that military measures which are ordinarily used to exercise self-defence may be used indiscriminately or even be used as a guise for what is really bullying of less powerful states. From a practical point of view, a small coastal power which may decide to take measures against a U.S. ship in defence of economic interests threatened by indiscriminate polluting activity by that ship on the high seas would have to consider the possibility of military retaliation by the U.S. in “defence” of the ship if owned by American concerns. The converse is highly unlikely.

If the principle of self-defence were to be basis for a rule allowing a coastal state to take measures on the high seas to prevent pollution of their own territory, the principle would have to be further qualified in order to restrict excessive self-defence measures taken either by the state which wishes to curb pollution or by the state accused of polluting or allowing its nationals to pollute with impunity. One such qualification was articulated at the Nurnberg trial. Ordinarily, the onus of determining the degree of acceptable measures rests with the state threatened. But as the Nurnberg Tribunal emphasized, the validity of such measures is subject to international law and this requires that when excesses are alleged, the propriety of the action should be determined by a third party.³⁶

Another qualification was declared in a Note by the U.S. Secretary of State Webster on the *Caroline* incident.³⁷ In that incident the British

34 *The New York Times*, 17 May, 1975. Text of the Communique by the Cambodian Government is reprinted in *The New York Times* 16 May, 1975, p. 16.

35 See statements by Senators McGovern and Nelson in *ibid*, 16 May, 1975, p. 15.

36 The Nurnberg Tribunal addressed this issue in the trial of Germans for invading Denmark Norway. The Tribunal wrote: “It was further argued that Germany alone could decide, in accordance with reservations made by many of the Signatory Powers at the time of the conclusion of the Briand-Kellogg Pact, whether preventive action was necessary, and that in making her decision her judgment was conclusive. But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is to be enforced.” *Opnd.* 6964 (1946), p. 30; Green *International Law Through the Cases, op. cit.*, p. 701. See also Kellogg’s statement, *supra* Note 24.

authorities captured the *Caroline*, a U.S. vessel, and set it afire in order to stop traffic of aid from the U.S. to Canada for the rebels. The British claimed to have acted in self-defence. In an exchange of correspondence, Secretary Webster described the conditions which ought to be met before self-defence is appropriate. He asserted that the Government claiming a right to take measures in self-defence must show that the

necessity of that self-defence is instant, over-whelming and leaving no choice of means, and no moment for deliberation. It will be for us to show, also that local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by the necessity, and kept clearly within it. It must be shown that admonition or remonstrance for persons on board the *Caroline* was impracticable, or would have been unavailable; it must be shown that day-light could not be waited for, that there could be no attempt at discrimination between innocent and guilty; that it would not have been enough to seize and detain the vessel; but that there was necessity, present and inevitable, for attacking her in the darkness of the night while moored at the shore and while unarmed men were asleep on board...³⁸

Several governments and scholars have deemed the above standards apt for most situations, including pollution control, *mutatis mutandis*. Professor Goldie has argued that the British Government could have relied on the standard in the *Caroline* case to justify acting earlier to curb the damage of the *Torrey Canyon* spill. He wrote:

... from the moment of realization on, a reasonable British abatement could have fallen within Secretary Webster's formulation of the right of self-defence in the *Caroline* case. For the emergency which the *Torrey Canyon* precipitated was, arguably, from the point of view the coastal state, one where 'the necessity of self-defence is instant, overwhelming and leaving no choice of means, and no moment for deliberation' (The delays and deliberations which did occur were responsible not only for the loss of an increasing amount of its volatile fractions, thus causing an even greater resistance to firing).³⁹

37 Moore, *A Digest of International Law*, Vol. II (1906), pp. 409-14; Jennings, "The *Caroline* and *McLeod* Cases", 32 *A. J.* (1938), 82-99.

38 For the full text of the Note see 29 *British and Foreign State papers* (1840-1841), pp. 1129, 1137-1138. Webster addressed the Note to Fox, the British later submitted by Webster to Lord Ashburn before the final settlement was made. For communication on final settlement 30 *British and Foreign State Paper* (1841-1842), pp. 193-203. See also Moore, *Digest of International Law*, Vol. II, *op. cit.*; 412.

39 Goldie, "Book Review" I *Journal of Maritime Law and Commerce* (1969), 155, pp. 158; Goldie, "Development of an International Law—An Appraisal" in Hargrove, *Law, Institutions and the Global Environment* (Leiden: A.W. Sijhoff, 1972), pp. 104, 117. The application of Webster's formulation to

The British Government could be accused only of excessive caution, as Goldie suggests. The measures which they ultimately took were well within the limits of Webster's formulation of self-defence. They were directed against a threat to vital national economic interests; they were not excessive, being the result of deliberations over the choices of means to stop the spill before drastic military action was taken. For pumping out the oil and thereby floating the ship was tried for ten days before the ship was ultimately bombed.⁴⁰

Nonetheless, an international rule of law that restricts self-defence to catastrophic episodes like the *Torrey Canyon* incident, would serve few purposes because the noxious substances are by that time in the waters. Coastal states might therefore need a rule which governs the right to take anticipatory measures in self-defence. Such anticipatory measures would consist in passing laws that exclude ships from areas where they are likely to cause disasters, or from areas which are particularly vulnerable if a disastrous accident occurred.

Nor would an international rule restricted to catastrophic episodes serve the needs of coastal states which are concerned about cumulative pollution from leakages, and want to take anticipatory and not provocative measures. The Canadian Arctic Waters Pollution Prevention Act of 1970 is controversial because it implies that coastal states have a right to anticipatory self-defence. The Act confers unilaterally on Canada jurisdiction to control activities threatening pollution in the Arctic as far as 100 miles, from Canada's shorelines. The Canadian Government has jurisdiction to exclude from the Arctic waters any ships not meeting construction standards prescribed by Canadian authorities including failure to carry sufficient insurance commensurate with the size of the ship and its cargo. The U.S. Government protested the proposed bill, arguing that it was an illegitimate interference with the freedom to use the high seas and that Canada should have sought protection within an international framework.⁴¹ In response, Professor L.C. Green quoted approvingly the following statement made by the Canadian External Affairs Secretary in the House of Commons:

I find it anomalous that certain countries can accept the right of a coastal state to sink a foreign ship on the high seas when a marine incident threatens pollution, but at the same time assert that coastal states do not have the right to prevent such an incident by turning away such a ship from the area off their coasts, or

the *Torrey Canyon* was suggested by Prof. Albert Utton but only with regard to the Contiguous Zone. See Utton, "Protective Measures and the 'Torrey Canyon,'" 9 *Boston College Industrial and Commercial Law Review*, (1968), 613, pp. 623-24.

40 Cmnd. 3246 (1967), pp. 4-5.

41 Text of the legislation in 9 *Int. Leg. Materials* (1970), pp. 543-605.

by imposing safety standards or preconditions for entry into these areas.⁴²

The Canadian authorities argued further that they had made every effort on a global level—carrying on sufficient deliberation—for international agreements that would impose stringent controls, but these efforts had been unsuccessful. Specifically, the External Affairs Secretary told the House of Commons in Ottawa that Canada's unilateral action arose from "the failure of international law to keep with technology, to adapt itself to the special situations."⁴³

Other states can always doubt whether a state claiming the right to self-defence allows sufficient time for deliberation with other states before acting unilaterally. The Arctic Pollution Prevention Act was enacted in 1970, one year after the visit of one of the world's largest tanker to Canadian waters and two years after the *Torrey Canyon* incident. As Professor Bilder recounts:

The immediate stimulus for Canadian legislation was the historic voyage in the summer 1969 of the United States tanker *S.S. Manhattan* through the waters and ice of the Northwest Passage north of the Canadian mainland. The voyage was intended to demonstrate the feasibility of utilizing icebreaking super-tankers on this route as a means of large scale transportation of oil from the developing fields of Alaska's slope to the markets of the U.S. eastern sea board. The 1967 *Torrey Canyon* incident, the 1968 *Santa Barbara* oil spill; and a succession of similar incidents had earlier dramatically highlighted the environmental hazards posed by the possibility of marine tanker or oil drilling accidents. The *Manhattan's* feat gave warning that Canada's Arctic environment might soon be subject to similar threats. The risk was underlined in Canadian public consciousness by the grounding of the Liberian tanker *Arrow* in February 1970 in Chadabucto Bay off Nova Scotia, with consequent oil pollution of the waters and adjacent coast.⁴⁴

Alan Beesley, then legal advisor of the Canadian Department of External Affairs, in a symposium in 1973, summarized the opportunities which Canada had exhausted in order to secure a multilateral control of pollution in the Arctic waters:

In brief, we have had a series of bilateral consultations with all other Arctic states and several non-Arctic states in an attempt to reach agreement on a Conference directed towards the elabora-

42 Green, "International Law and Canada's Anti-Pollution Legislation" in 50 *Oregon L.R.* (1971), pp. 462, 484.

43 Cited in MacDonald, "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice," 8 *The Canadian Yearbook of International Law* (1970), pp. 3, 34.

44 Bilder, "The Canadian Arctic Waters Pollution Prevention Act," in Alexander (ed.), *The United Nations and Ocean Management* (Kingston, R.I.: University of Rhodes Island, 1971), pp. 204, 205.

tion of a regime for the control of pollution of and the assurance of safety of navigation in all Arctic waters. These efforts have proven unsuccessful thus far, but they have not been abandoned. We have also endeavoured to work out the basis of multilateral treaty laying down such a regime for Arctic waters without the necessity of a negotiating conference, simply by opening such a treaty for signature after careful negotiations through bilateral discussions. Thus far these efforts have been unsuccessful, but the Canadian Government has also not abandoned these attempts; in addition to these bilateral discussions attempts at 'regional' approach, Canada raised in appropriate international fora . . . particularly as it relates to the rights and duties of Coastal states concerning the protection of the marine environment.⁴⁵

At the global level, both the 1971 amendment to the 1954 Convention on the Prevention of Pollution of the sea by oil, and the 1973 Convention on the Prevention of Pollution from ships made the first moves in the direction suggested by the Canadian legislation of 1970 in that both agreements prescribed certain standards for the construction of ships.⁴⁶ However, these conventions reserved enforcement powers to the flag states in all areas beyond the Contiguous Zone. Therefore, they were of little reassurance to the Canadians who were anxious to ensure actual protection of broader Arctic zones. Consistent with the principle of self-defence, and while taking unilateral action to protect its interests which they deemed were threatened given past incidents in other parts of the world, Canada has continued, after the enactment of the Arctic Waters Pollution Prevention Act to engage in deliberation on the international level. In fact, it seems that as a result of Canadian action the United States became interested in discussing regional arrangements.⁴⁷

However, the Canadian statute enacted in self-defence does not meet all the standards of the international rule of self-defence. International law defers to the individual states the right to determine the nature of interest threatened, but the reasonableness or legality of the measures taken to defend the interests must ultimately be reserved for international adjudication. Canada, as part of its defensive measures withdrew its prior submission to compulsory jurisdiction of the ICJ and reserved from the court.

(d). . . Disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of living resources of the sea, or in

45 Beesley, "The Arctic Pollution Prevention Act: Canada's Perspectives" in *(Syracuse J. of Int. L. Com. 1973)* pp. 226, 233.

46 The 1971 amendment to the 1954 Convention, IMCO Resolution A. 246 (VII) 15 October, 1971, and the 1973 Convention on the Prevention of Pollution from Ships, *12 Int. Leg. Materials* (1973), p. 1319.

47 Ratiner, "Commentary" in Alexander, *op. cit.*, p. 309.

*respect of the preservation or control of pollution or contamination of the marine environment in the areas adjacent to the coast of Canada.*⁴⁸

Admittedly, the reservation does not necessarily foreclose application of international law should Canada and another party agree to submit a dispute to an arbitral tribunal or other mechanism for settlement of dispute when the other party disputes Canadian formulation of its law.

The Canadian government defended its decision to renounce compulsory jurisdiction of the Court in pollution matters by its fear of the bias in the international law. It feared the Court would not develop new doctrines to fit the new needs but would apply only existing rules. Prime Minister Trudeau told the House of Commons that "Canada is not prepared . . . to engage in litigation with other states concerning vital issues where the law is either inadequate or nonexistent and thus does not provide a basis for judicial decision It is well-known that there is little or no environmental law on the international plane . . ." He added that where there is law, "it favours the interests of shipping owners engaged in large scale carriage of oil and other potential pollutants."⁴⁹

In conclusion, we agree with J.L. Hargrove that coastal states have a right to resort to unilateral measures in self-defence beyond their territorial jurisdiction *to abate or prevent* serious environmental injuries as in the *Torrey Canyon incident*.^{49a} Yet such *ad hoc* measures will not be apt for states which want to conserve the marine ecosystem from long term effects of accumulative pollution. The ideal solution for this kind of preservation is the creation of multilateral body responsible for supervision that would ensure that ships move along only certain routes and avoid areas where pollution can do much harm. Yet in the absence of these multilateral mechanisms states are justified in taking measures in anticipatory self-defence. These measures are restricted to passing legislation. Such measures would serve to protect the interests of the the state by preventing *Torrey Canyon*-type spills in particularly vulnerable ecological and economic zones. In this way a state could avoid the use of high-handed force when imminent danger of a spill arises. However, a state cannot argue that in the absence of multilateral mechanisms it need not subject the application of its anticipatory self-defence activities to the scrutiny of third parties. This principle of

48 Full text of the Declaration is reprinted in 9 *Int. Leg. Materials* (1970), pp. 598-599; International Court of Justice, *Yearbook ICJ* (1970-1971) (The Hague, (1971), pp. 48-49.

49 House of Commons Debates (Canada) 8 April, 1970, pp. 5623-24 also cited MacDonald, *supra* note 42, pp. 34-35. It should be printed out here however, that to date there has been no actual application of Canadian legislation.

49a Introductory comments in Hargrove, *op. cit.*

international law of self-defence is worthwhile preserving if only for practical benefits: when third parties are involved, nations are alerted to the need for international solution to problems of special ecological and economic interests.

POWERS CONFERRED BY RECENT CONVENTIONS

The 1969 International Convention Relating to Intervention on the High Seas in Case of oil Pollution Casualty was the first convention to empower coastal states to deal with an incident like the *Torrey Canyon* disaster. The operational paragraph deserves to be quoted in full:

*1. Parties to the present convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastal 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.*⁵⁰

Thus, a state may act only when there is, in fact a casualty on the high seas, when the casualty results in a discharge of oil; and when the oil presents grave and imminent dangers to the territorial interests of the coastal state. In 1973 the terms of the Convention were extended to pollutants other than oil.⁵¹ Under article 3 a state is restricted in the timing of its measures. It should not act without consultation with and notification to the involved states. A further limit the convention places on the nature of the measures taken is that of proportionality, i.e., the measures “*shall be proportionate to the damage, actual or threatened to it*” (the territory).⁵² But proportionality of means in the Convention is not precisely defined.

It is submitted that the Convention only codifies general inter-

50 Text of the Convention is in United Nations, *Legislative Series: National Legislations and Treaties Relating to law of the Sea*, Part II, ST/LEG/SER.B/16 Add.1, 8 May, 1972, p. 31; *Int. Leg. Materials*, (1970), p. 25.

51 Adopted at the London Conference, 3 November, 1973, IMCO Document MP/CONF/WP. 35 Attachment 2, dated 2 November, 1973; also reprinted in 13 *Int. Leg. Materials*, 605 (1974), and a special Marine Environment Protection Committee has been set within IMCO to oversee all problems of the protection of oceans from pollution. See 13 *Int. Leg. Materials* (1974), p. 476.

52 Art. V(1). The rule of proportionality which is key to the exercise of self-defence was also central in the 1928 arbitral decision of the Germany-Portugal Special Arbitral Tribunal over the *Naulilaa* incident. German forces, reacting to Portuguese murder of a German Officer, as a result of misunderstanding, crossed from South West Africa into Angola and demolished villages. The German action was found to be illegal to the extent it was beyond proportion to the prior illegal action giving rise to it. See 2 *United Nations Report of International Arbitral Awards*, 1012-1019; Green, *op. cit.*, pp. 639-645; Mc.Nair and Lauterpacht (eds.) *Annual Digest of Public International Law Cases, 1927-1928*, (London: Longmans, 1931), pp. 274-526.

national principles.⁵³ For the language of Article V (1) on proportionality echoes the rules of the *Caroline* and *Naulilaaa* cases. Similarly, the requirement of consultation prior to measures and notice afterwards if circumstances were so extreme as to require action before consultation could take place, was formulated in the *Caroline* Note.⁵⁴

The Convention did introduced two improvements in international law. First, it requires the Secretary-General of the Inter-Governmental Maritime Consultative Organization (IMCO) to maintain a list of experts who may be called upon the advice that threatened state about the technical aspects of the threat and possible remedies.⁵⁵ Second, the Convention specifies procedures for conciliation and arbitration for disputes arising from the implementation of the Convention. Prior to the Convention private international law allowed states to recover damages through municipal courts either in the state of the registry of the vessel or in the state of the owners of the cargo or of the ship. For instance, after the *Torrey Canyon* disaster, the British and French sued in the courts of Singapore where the owners and time charterer of the tanker resided.⁵⁶

On the whole, the Convention allows states to extend its territorial jurisdiction beyond its borders only when a disaster has occurred and action is needed to stop the spread of injury to a state's territory. Therefore, it is not empowered under the Convention to act beyond its borders to prevent the disaster from occurring in the first place; as a practical matter, once disaster occurs, stopping the spread of the injury can be futile and costly. Therefore, the Convention has no preventive value; much less is it capable of regulating cumulative chronic pollution.

The Convention has shortcomings even in regard to claim for damages for injuries from disastrous spills and defences to such claims. Being a treaty, the Convention binds only the state parties. A third party owner of the ship or cargo may not invoke the Convention to claim that the coastal state acted illegitimately and recover damages

53 See similar views by Swan, "International and National Approaches to oil Pollution Responsibility: An Emerging Regime for a Problem," 50 *Oregon L.R.* (1971), pp. 506, 545.

54 Art. III That matters concerning protection of human environment should be handled through international co-operation and consultation is fairly well accepted now. See also Principle 24 of the Stockholm Declaration on Human Environment which emphasizes that "International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on equal footing..." U.N. Doc. A/CONF.48/14, 3 July, 1972.

55 Art. IV.

56 House of Commons, Parliamentary Debates (Hansard), Vol. 791, No. 11, 11 November, 1969, reproduced in 9 *Int. Leg. Materials* (1974), p. 633; Sweeney, *op. cit.*, p. 158n.

for excesses of the state. This is because of the maxim *pacta tertiis nec nocent nec prosunt*.⁵⁷ Nor can the coastal state plead the Convention in order to recover from such third party owner the damages for injuries caused by the polluting incident or recover the cost of measures taken to mitigate and prevent the injuries.⁵⁸

PRINCIPLE OF UNIVERSALITY OF JURISDICTION

By this principle a court may rule that one who deprives others of use of the marine resources either by destroying such resources or rendering the resources unfit for human consumption should be declared an enemy of all mankind—*hostes humani generis*—and be subject to the penal jurisdiction of any state that captures him/her.

To date, the most frequently adjudicated crime against mankind is piracy. Fenwick deems pirates “by custom of immemorial origin [to-] have been *hostes humani generis*.”⁵⁹ Lord McNair went so far as to state that piracy is the only international crime recognized by customary international law.⁶⁰ The 1958 Geneva Convention on the High Seas defines piracy to be:

*Any illegal acts of violence, detention or any other of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft.*⁶¹

The Convention places the offence within international concern only when it occurs on the high seas and against another ship, i.e. the crew (or passengers) of a ship cannot commit a piratical act against the ship carrying them. This limit on the scope of the definition originates from the rules formulated during the sea when piratical ships frequently depredated commercial ships on the high seas.

The competence that international law conferred on any state to prosecute and punish pirates was based on two premises: one, the pirate was a private robber, who had no commission and therefore, no protection any state,⁶² second and the pirate “preyed on all alike

57 The principle that treaties do not ordinarily impose obligations nor confer rights on third parties is fundamental to treaty law, and a corollary to the maxim, *res inter alios acta*. See Article 34 of the 1969 Vienna Convention on Treaties. 8 *Int. Leg. Materials* (1969), p. 679.

58 Art. VI Provides that: “Any party which has taken measures in contravention of the provisions of the present Convention causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in the Article.”

59 Fenwick, *International Law* (New York: Appleton-Century-Croft, 1965), p. 504.

60 Lord McNair, *International Law Opinions*, Vol. I (Cambridge University Press, 1956), p. 265.

61 Art. 15 of the 1958 Geneva Convention on the High Seas, 450 *UNTS* 82 (1962).

62 Green, *op. cit.*, pp. 412, 415.

[and hence] was enemy of all alike".⁶³ As a result of these premises, the pirate is subject to the jurisdiction of any state that captures him/her. Viscount Sankey justified the jurisdiction of any municipal court over pirates by the rule of law in *Re Piracy Jure Genitum* (1934) that "a person guilty of such piracy has placed himself beyond the protection of any state. He is no longer a national but a *hostis humani generis* and as such is justiciable by any state."⁶⁴ That decision made it clear that piracy is an offence recognized by all nations: its source of law is custom, and not domestic legislation...⁶⁵ Its source was custom because all states had common objection, that is, no state offered protection to the perpetrator of the robbery.

Early in the nineteenth century some advocates attempted to expand the definition of piracy to facilitate the suppression of various politically and economically motivated behaviour.⁶⁶ The attempt failed when opponents of the slave trade tried to classify the slave trade as piracy in order to subject traders to the jurisdiction of whoever captured them. In one prominent instance, in the early 19th century the British Admiralty Court in Sierra Leone agreed with such a view and found for the captors of the French ship *Le Louis* carrying slaves from Africa that the vessel had engaged in slave trade contrary to the law of nations embodied in the laws of France and the treaty of 1815. High Court of Admiralty reversed the lower court, arguing:⁶⁷

It is perfectly clear that this vessel cannot be deemed a pirate from any want of national character legally obtained. She is the property not of sea rovers, but of French acknowledged domicile subject. She has a French pass, French register, and all proper documents, and is an acknowledged portion of the mercantile marine of that country.⁶⁸

The decisive point in the opinion is that the traders enjoyed the protection of the laws of a flag state and hence were not *hostes humani generis* like pirates. However, anyone reading the opinion should note that to conclude that slave traders are not pirates is not necessary to imply a rejection of the act as an offence for universal jurisdiction.

Since the slave trade boosted commerce in the 18th century—rather

63 *Harvard Research in International Law*, Part II (1935), p. 566.

64 Green, *op. cit.*, p. 450.

65 *Ibid.*, pp. 452-453. See also Briggs, *The Law of Nations; Cases Documents and Materials* (New York: Appleton, Century and Croft, Inc., 1952), pp. 389-390.

66 From an analysis of application of the concept of piracy to summary suppression of politically motivated behaviour see Rubin, *The International Personality of the Malay Peninsula: A Study of the International Law of Imperialism* (Kuala Lumpur, Malaysia: Penerbit University), and also by the same author, *Piracy Paramountcy and Protectorates* (Kuala Lumpur, Malaysia: Penerbit University, 1974), pp. 5-18.

67 Green, *op. cit.*, p. 412, Lord McNair, *op. cit.*, Vol. II, p. 78.

68 Green, *op. cit.*, pp. 412, 415.

unlike piracy which hindered commerce—courts could easily argue that no custom had actually evolved evidencing that slavery was one of the *delicta juris gentium*. Therefore, slavery could become subject to universal condemnation and jurisdiction only if the various governments, entered into an undertaking to prohibit the commerce in slaves within their domains and refuse protection to persons who persisted in slave trade. Hence, as Lord McNair points out, after the *Le Louis* decision, “The British Government began a laborious process of negotiating with other states treaties providing for the mutual right of visit and search of ships suspected of slave trading and for their condemnation by a appropriate tribunals.”⁶⁹ As a result, according to Professor Georg Schwarzenberger,

The anti-slave trade treaties—bilateral and multilateral—are the most famous illustration of the extension... of powers of men-of-war in time of peace over foreign merchant shipping. On the basis of reciprocity, British men-of-war were granted the right to visit and search ships sailing under the flags of other contracting parties suspected of being engaged in the slave trade.⁷⁰

Suppression of slave trade became a matter for all the states co-operating under treaties. This indicates that universal jurisdiction does not have to evolve from “custom immemorial” as did piracy: and piracy is not the only offence which can be classified under *hostes generis humani*. The Harvard Research Group found fourteen other offences that qualify for universal jurisdiction. Included on the list were crimes against humanity.⁷¹ Ten years after the publication of the Harvard Research, the Tribunal at Nürnberg had occasion to apply the law of crimes against humanity.⁷² After World War II the Convention on the Prevention and Punish-

69 McNair, *op. cit.*, p. 78.

70 Schwarzenberger, *A Manual of International Law*, (New York: Frederic A. Praeger, 1967), pp. 136-137.

71 Harvard Law School, *op. cit.* pp. 570-571. Briefly summarized, the other listed offences are:

1. Brigandage in neighbouring states.
2. Crimes against public health of the world such as the spread of contagious diseases.
3. Propaganda in favour of war of aggression.
4. False radio signals, especially false signals of distress.
5. Crime against international protection of deep sea fisheries.
6. Abuse of the Red Cross.
7. Injury to international means of communication.
8. Crimes against internationally protected industrial or literary property.
9. Counterfeiting of foreign moneys.
10. Traffic in women and children for immoral purposes.
11. Injury to submarine cables.
12. Traffic in narcotics.
13. Use of explosives or poisons to cause common danger.
14. Traffic in obscene publications.

72 See Woetzel, *The Nurnberg Trials in International Law* (London: Stevens and Sons, 1962); Gross, “Punishment of War Criminals: The Nurnberg Trial” in *Netherlands International Law Review* (1955), Vol. II, pp. 356-374 and Vol. III (1956), pp. 10-24.

ment of Crime of Genocide in 1948 is the most prominent of efforts of states to use treaties to create international prohibition or offences against humanity.⁷³ In 1949, the General Convention on Laws of Armed Conflict provides that offenders may be punished by any state which secures custody of the person suspected of responsibility for the crime.⁷⁴ To the list may be added the South African apartheid policy, which has been universally condemned as a violation of the conventions of universal human rights.

All of these attempts to recognize and define crimes against humanity rest on consideration for the problems which threaten human life, safety, and freedom. Even though in history the number of instances where actual jurisdiction was effectively exercised over universal offences are not many, because of national political and economic interests, e.g. in the case of the slave trade, international opinion about offences that should come within the purview of universal jurisdiction is not likely to diminish. For ever expanding communications and transactions have increased the number of activities which international opinion deems threats to the well being of individuals or groups.

Particularly controversial are activities classified as terrorism. In their commentary on the Draft Convention on Terrorism and Kidnapping of Persons for Extortion, the Inter-American Juridical Committee expanded in 1970 the meaning of terrorism to include any act that creates common threat to life, health, physical integrity of freedom of persons.⁷⁵ In 1930 the International Conference for the Unification of Penal Law supplied an ambitious list of what may be called terroristic activities. These include *inter alia*, pollution and deliberate poisoning of drinking water or foods.⁷⁶ The Conference concluded that the crimes enumerated "shall be proceeded against and

73 United Nations, *Human Rights: A Compilation of International Instruments of the United Nations* (New York, 1973), p. 41; Cmnd. 2904 in force since 1951 with 78 ratifications.

74 Article 49, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field adopted 12 August, 1949. 75 UNTS 31 (1950); Art. 50 Geneva Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea signed on 12 August, 1949, *ibid.*, p. 85; Art. 129, Geneva Convention Relative to the Treatment of Prisoners of War signed at Geneva on 12 August, 1949, *ibid.*, p. 135. All the three conventions came into force on 21 October, 1950.

75 Inter-American Juridical Committee, *Work Accomplished by Intra-American Juridical Committee During Its Special Session, 31 August, 6 October, 1970*. (Washington, D.C.: OAS, January, 1971), p. 33.

76 Reproduced in "Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardized Fundamental Freedoms and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence which Lies in Misery, Frustration, Grievance and Despair and which Causes Some People to sacrifice Human Lives Including their own, in an Attempt to Effect Radical Charges," (Study Prepared by the Secretary General), U.N. Doc. A/C. 6/418, dated 2 November, 1972, Art. 1.

punished, irrespective of the place where the offence is committed or nationality of the offender in accordance with the law in force in the country of which he is a national", provided that if the penalties are different in the prosecuting country from those of the country of the nationality of the culprit then the higher penalty shall be imposed.⁷⁷

Whether international law should punish without distinction all classes of persons—juridical or real—who perpetrate terroristic activities remains unsettled in international law and practice. Even if the definition of terrorism in international law were settled, there would be further need for defining the nature of the culpable intent. Further still, courts applying the law of terrorism would be under pressure to consider whether certain kinds of motivation can excuse the culpable intent. For some states have endeavoured to distinguish "between criminal international terrorism, unrelated to the struggle of peoples and the concept of resistance and the struggle against all forms of colonialist and imperialist practice."⁷⁸ Thus, they seek to exempt from punishment such liberation movements as those of the Palestinians and the peoples of Southern Africa. Other states oppose the distinction. For example, South Africa, ironically, advocates the following view:

Terrorism is terrorism whenever it may be committed and the United Nations can therefore not condemn it in one part of the world and condone it in another... Cause, motive and purpose are immaterial and to apply subjective standards based on such criteria is to doom to failure any attempt to combat it effectively.⁷⁹

This statement would fall in line with the views of those who hold that the government of South Africa is itself guilty of terrorism because of its treatment of the non-white population. Certainly, the South African delegate could not have meant to condemn his own government by the above statement. What the foregoing polemics show then, is that there may be agreement on broad principles regarding a behaviour that should be condemned under international law but that differences might arise in matters of detail, and this could occur on the parsing out of universal control of marine pollution.

From the foregoing statements and opinions it seems certain that there is a universal condemnation of pollution. Condemnation has been formally expressed since 1930, when the International Conference for the Unification of Penal Laws included pollution and deliberate poison-

77 U.N.Doc.A/C.6/418 2 November, 1972, Art. 3. There has been no major changes in the range of possible terroristic offences as listed above except that as a result of the events in the past decade there has been considerable focus on activities related to kidnapping for purposes of extortion and hijacking of aircrafts.

78 See Observation of state in the UN "Ad Hoc Committee on International Terrorism" 91973), UN Doc. A.C. 160/2 (1973), Para. 13.

79 UN, Doc. A/AC. 160/2. (1973), p. 8, para. 15.

ing of drinking water among the crimes subject to universal jurisdiction.⁸⁰ If at that time juristic focus was on a small scale—viz., on urban drinking water and foods—the expansion of human demand for food-stuffs via trade, exploitation of the sea food resources and other internationally shared resources, makes the 1930 proposal relevant to modern problems of conservation of the ocean environment. Only recently legal scholars attending the First International Criminal Court Conference agreed to list “Criminal pollution endangering the health and safety of mankind” among the universal crimes recommended for the jurisdiction of the proposed court, where the offender either is prosecuted by the state having custody of him or is extradited to face trial in the country of his nationality.⁸¹

The fact that many of the subjects covered in the lists of universal offences—including pollution—do in various ways affect economic and social interests of the states limits the speed with which the principle of universal jurisdiction may be accepted. The states prefer to deal with these problems by treaties, declarations (unilateral and bilateral) and resolutions rather than by evolution of custom. Since the first global convention was adopted in 1954, the number of global and regional agreements on pollution of the seas has proliferated. The large number of declarations and recommendations adopted by the 1972 Stockholm Conference on the Environment suggests a seriousness with which the problem is viewed on an universal scale.⁸²

States at the Third UN Conference on Law of the Sea are currently negotiating, among other topics, the rules for the protection of marine environment. A number of states have submitted draft articles that would require states to adhere to internationally agreed rules, standards, and recommended procedures.”⁸³ In a draft article of Enforcement of Regulations Concerning the Protection of the Marine Environment Against

7b.

80 See note 7b. *supra*.

81 Art. VI of the Draft Convention on International Crimes. See report of *The First International Criminal Law Conference* convened at Wingspread, September, 1971 (copies obtainable from The Foundation for the Establishment of an International Criminal Court, 286 Central Street, Auburndale, Mass. 02160, U.S.A.). A comment by Prof. Leo Gross, “International Terrorism and International Criminal Jurisdiction.” 67 *A.J.I.L.* (1973), 508, praising the “comprehensive” proposal by the Foundation, was criticized by Prof. John Murphy, who doubts the efficacy of the system, 68, *A.J.I.L.* (1974), 306; this was followed by two other commentators in support of Gross: Woetzel and Lador-Lederer in 68 *A.J.I.L.* (1974), p. 717 and p. 718; and by Ciobanu in 69 *A.J.* (1975), p. 138.

82 For a comprehensive conference report see UN, Doc. A/CONF. 48/14, dated 3 July, 1972. See also analysis of the 26 Principles adopted at Stockholm and their legal significance” Sohn, “The Stockholm Declaration on the Human Environment,” 14 *Harv. Int. L.J.*, 423).

83 Draft article on preservation of the marine environment submitted jointly by Canada, Fiji, Ghana, Iceland, India, Iran, New Zealand, Philippines and Spain U.N. Doc. A/CONF. 62/C. 3/L.6, dated 31 July 1974, para. VII (3).

Vessel Source Pollution, the Federal Republic of Germany proposed the following firm position for the contracting states:

*States shall ensure that ships flying their flags comply with regulations established in accordance with this convention and shall issued these ships certificates required or provided for in such regulations. They shall deny the right to fly their flags to ships which do not comply with such regulations.*⁸⁴

Liberia, the chief of the flags of convenience club, proposed with respect to enforcement of pollution regulations, a provision that,

*Each port state shall ensure, by national legislation, if necessary, that its courts of competent jurisdiction may entertain actions brought by another contracting state for the purpose of enforcing such judgements obtained in accordance with the terms of this convention.*⁸⁵

A group of Latin American States submitted this provision requiring acceptance by reference:

*All States shall be obliged to comply with international regulations designed to prevent, reduce or eliminate damage or risks arising from pollution or other effects detrimental or dangerous to the ecological system of the international seas, water quality use, living resources and human health.*⁸⁶

And the E.E.C. States proposed that every flag state taking measures to control pollution from ships "shall conform to the generally accepted international regulations, procedures and practices."⁸⁷

Some of the draft articles finally adopted at the end of the second substantive session of the conference would give powers to coastal states to take limited measures to ensure that foreign ships comply with international rules and standard on pollution, even when the territorial interests of such states are not specifically affected by the polluting incident. For an example, article 27 of the Third Committee's draft provides *inter alia*:

E. *When a State has reasonable grounds ^{to} believe that a vessel irrespective of its flag or state of registration, which is voluntarily within one of its ports or at one of the off-shore terminals has violated the international rules and standards regardless of where the violation occurred, it must:*

- (a) *Undertake an immediate investigation of the violation;*
- (b) *Provide an immediate notification of the results of the investigation to the Flag State concerned and any state affected by the illegal violation.*

84 U.N. Doc. A/CONF. 62/C. 3/L. 7, August, 1974, Art. 1 (1).

85 U.N. Doc. A/CONF. 62/C.3/L. 10, 6 August, 1974, Sec. F.

86 Second Committee, Informal Working Paper No. 7/Rev. 2, 27 August, 1974, Provision XIV.

87 *Ibid.*, Provision VII (3).

2. *The Coastal State may prevent this vessel from sailing if it presents an excessive danger to the marine environment: it may, however, authorize it to leave the port or terminal to go to the nearest appropriate shipyard for repairs.*⁸⁸

Another draft article adopted at the session would empower the coastal states to stop, board and inspect a vessel navigating a zone adjacent to the territorial sea if it has reasonable grounds for believing that the vessel had violated international rules and standards, provided that “*the violation has been of flagrant character causing severe damage or threat of severe damage to the marine environment, or the vessel proceeding to or from the internal waters of the coastal state.*”⁸⁹ The territorial interests of the state do not have to be involved. The coastal, state would be required to act simply to protect the marine environment generally, according to universal standards.

The above discussions indicate a growing acceptance among states that a marine polluter is a *hostes humani generis*, enemy to all peoples and states. Certainly, enforcement by any court of sanctions against polluters could be done under authority of international law; custom need not be existing since “time immemorial.” Intensive practice over a short period of time may create a custom in international law. As Professor Lauterpach once wrote:.....

A consistent and uniform usage by state in question—to use the language of the International Court of Justice in the *Asylum* case—may be packed within a short period of years. The evidence of a general practice of Law’—in the word of Article Thirty-eight of the Statute [of International Court of Justice] need not be spread over decades. Any tendency to exact a prolonged period for the crystallization of custom must be in proportion to the degree of intensity of the change it purports or is asserted to affect.⁹⁰

It is also in the interest of preventive control that the international community should agree on the regulatory standards within a short space of time rather than leaving the long-term evolution of custom. General condemnation of the pollution in conventions, declarations and resolutions—if there is no general practice of actual trying and sentencing of polluting ships, should be considered as sufficient basis for recognizing an international norm. Although in regard to terrorism or piracy universality of jurisdiction would generally be agreed on and enforced if such acts were defined strictly in law, in regard to marine pollution, the law embodied in custom, treaty provisions or other

88 UN. Doc. A/CONF./62/WP. 8/Part III, 7 May, 1975.

89 *Ibid.*, Art. 31.

90 H. Lauterpach, “Sovereignty Over Submarine Areas” 27 *British Yearbook of International Law* (1950), p. 393. See also D’Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971), pp. 56-61.

negotiated documents would have to be broad in scope. There are three reasons for this. First, coastal states may readily take enforcement measures in areas within their territorial jurisdiction and when territorial interests are injured by incidences occurring outside their territories, but a system of comprehensive enforcement is needed for states to enforce regulations beyond the limits of territoriality or territorial interests. Second, political incidences such as terrorism, that have disastrous consequences usually affect territorial interests directly and hence fall within the scope of national measures. Accumulative pollution however usually results from ships having been subject to different standards of construction, loads, routing, discharge mechanisms, etc. Preventive control requires comprehensive legislation to be enforced by any state, so that no one state gives "safe haven" to offending polluting vessels. Third, the comprehensive and broad regulations may be further defined, but in a consistent manner, for enforcement by regional organizations according to exigencies of local circumstances.⁹¹

CONCLUSION

The foregoing discussion shows that in legal theory the three principles are applicable to the abatement or control of marine pollution. In practice, however, there are serious questions of efficacy that are revealed. The principle of objective territoriality is clearly applicable in instances of major polluting incidents such as that of the *Torrey Canyon*. It may also be applicable to some lesser degree of pollution, but there is the formidable problem of establishing the direct physical effects of small spills. Any measures that attempt to apportion the damages among ships using a given sea route would meet with problems of enforcement which only a massive military capacity may overcome. Besides, the principle of objective territoriality has no presentive value, and its deterrent effect is highly doubtful.

From the point of view of theory the principle of self-defence is applicable to pollution control given the high priority which most states place on economic and aesthetic interests that may be damaged by major or continued spills. On the other hand, the examples given in the discussion above illustrate the drastically serious possibilities in instances where the concept may be put to practice. It is clear that in instances where real threats of pollution may occur application of the principle would necessarily have to be backed by evident military might. This is the lesson from the *Mayagüez* analogy. The *Mayagüez* incident and the Kissinger idea of self-defence to avert economic strangulation

91 See a detailed discussion in C. Odidi Okidi "Toward a Regional Regulation of Pollution of the Seas: An Appraisal of Options" 4 *Ocean Development and International Law: The Journal of Marine Affairs* No. 1 (1977).

also illustrate how the principle of self-defence may, in fact, be used by the military powers as a basis for bullying the smaller states. A preventive legislative measure of self-defence such as that adopted by Canada in 1970 is also of little utility unless it can be backed by considerable military capability. Certainly, Canada could not have taken the legislative measures without considering the dangers of military confrontation with the United States or the Soviet Union.

To invoke the principle of universality of jurisdiction a party needs to establish clear universal view that a particular conduct is so reprehensible that every state ought to act to punish the perpetrator. Establishment of such a view through custom (as in the case of piracy) may depend on state practice. However, in the above discussion it was shown that the existence of the international custom may also be ascertain on the basis of the range of international resolutions, declarations, recommendations and treaties even though these may accumulate over only a short period of time. This trend which is currently evident in the case of pollution of the sea, among other shared resources, becomes a basis of further international agreements which may empower states to take measures to bring polluters to book, even though the territorial interests of the state may not be damaged. Such agreements may restate the principles of objection to pollution, then to provide precise strategies for dealing with the scourge and perpetrators.

The development of international agreements may be encouraged both at global and regional levels depending on the exigencies of ecological situations and the level of consciousness. In fact, there are solid reasons why states should encourage development of regional regulatory arrangement for pollution of the seas.⁹² Among other reasons, the collective regional approach, with resources pooled and utilized at regional level, would achieve more effectively the purposes that Canada sought to achieve through unilateral measures. It may be emphasized that given the obvious inefficiency and dangers of applying the traditional concepts to the control of marine pollution, the developing coastal states, limited in their military capabilities, should forge a head with combinations of global and regional agreements and regulatory arrangements.

92 See *ibid.*, and Okidi note 1, *supra*.