

Saving a Dying Sea—The London Convention on Ocean Dumping

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Recommended Citation

Schenker, Michael S. (1973) "Saving a Dying Sea—The London Convention on Ocean Dumping," *Cornell International Law Journal*: Vol. 7: Iss. 1, Article 3.
Available at: <http://scholarship.law.cornell.edu/cilj/vol7/iss1/3>

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NOTES

SAVING A DYING SEA? THE LONDON CONVENTION ON OCEAN DUMPING

"[T]he Atlantic ocean [*sic*] is beginning to become polluted, and a continued indiscriminate use of the world ocean as an international dumping ground . . . may have irreparable effects on the survival of species."¹

I

A PROBLEM?

The intentional discharge of oil, chemicals, and other matter by ocean-going vessels is a major source of marine pollution.² Oil discharges have caused the deaths of thousands of birds,³ have threatened the existence of

1. Thor Heyerdahl quoted in Report of the Secretary-General, *The Sea: Prevention and Control of Marine Pollution*, 51 U.N. ECOSOC, Annex 2, at 6, U.N. Doc. E/5003 (1971) [hereinafter cited as Report of the Secretary-General].

Dr. Heyerdahl undertook two trans-Atlantic voyages to test the range of papyrus rafts (*Ra I* and *Ra II*). On *Ra II*, oil pollution was reported on forty of the first forty-three days of the voyage (each voyage lasted approximately fifty-six days). At a point equidistant from the African and North American continents metal cans, plastic containers, and "seemingly endless quantities of oil clots" were observed. *Id.* at 2.

William Ruckelshaus, while Administrator of the United States Environmental Protection Agency, admitted that "the [United States] has permitted unregulated and damaging dumping into the oceans But we now know with very little time to spare, that the ocean is fragile." [1970-1971 Transfer Binder: Current Developments] BNA ENVIRONMENT REP. 1277, 1281.

2. Gold, *Pollution of the Sea and International Law: A Canadian Perspective*, 3 J. MARITIME L. & COM. 13, 15 (1971). The yearly intentional discharge of oil has been estimated at one million tons. Marks, *Pollution of the Seas by Crude Oil—A Proposal for Effective Remedial Action*, 33 OHIO ST. L.J. 80, 81 (1972); Schachter & Serwer, *Marine Pollution Problems and Remedies*, 65 AM. J. INT'L L. 84, 89 (1971).

The oil is dumped after the tanker's cargo has been discharged and sea water has been taken into the oil tanker's dirty cargo tanks to help ballast the ship. When the ship is ready for a new cargo of oil the water plus residual oil from the previous cargo is pumped into the harbor or ocean. Marks, *supra*, at 82; Note, *Continental Shelf Oil Disasters: Challenge to International Pollution Control*, 55 CORNELL L. REV. 113, 118 (1969). There is a technique for reducing this type of pollution (for a detailed description of the "Load-on-Top" technique, see Holdsworth, *Ballast and Wash Waters from Tankers*, in WATER POLLUTION BY OIL 195, 197-201 (P. Hepple ed. 1971), but the smaller refineries are not willing to adapt their equipment to process oil contaminated with traces of sea water—*Id.* at 201; and the tanker charterers are not always willing to sacrifice the space filled by the residual oil. *Id.* Rienow & Rienow, *The Oil Around Us*, N.Y. Times, June 4, 1967, § 6 (Magazine), at 115.

3. Marks, *supra* note 2, at 82 n.27.

a dietary staple,⁴ and have led to reports of fish which taste like crude oil.⁵ Additionally, oil and other pollutants are suspected of killing microscopic life forms near the surface of the ocean, thereby altering many of the ocean's food chains,⁶ and causing the reduction of a food resource relied upon by more than one-half of the world's population.⁷

The industrialized nations of the world have been using the oceans as a dumping ground for radioactive wastes, sewage sludge, and discarded chemical and biological weapons.⁸ The Baltic Sea and the Mediterranean Sea are rapidly becoming "dead seas,"⁹ and sewage sludge dumped by New York City into international waters near the mouth of New York harbor has created an additional "dead sea" area.¹⁰

Recently a public outcry was raised over the United States Army's plan to dump nerve gas rockets in an international dumping site east of Cape Kennedy.¹¹ Also the British are reported to have dumped quantities of nerve gas and mustard gas into the Atlantic,¹² and steel drums containing radioactive equipment, dumped into the Atlantic Ocean by the United States Atomic Energy Commission, have been trawled up by fishermen off the coast of Oregon.¹³ In 1971 only the United States Environmental

4. Malaysia apparently fears that dumping by ships in the Strait of Malacca may endanger the existence of its inhabitants' primary source of food. U.N. Doc. A/AC.138/SC.2/SR.11 (1971).

5. Schachter & Serwer, *supra* note 2, at 90-91.

6. Lanctot, *Marine Pollution: A Critique of Present and Proposed International Agreements and Institutions—A Suggested Global Oceans' Environmental Regime*, 24 *HASTR. L.J.* 67, 70 (1972); Rienow & Rienow, *supra* note 2, at 110; Nanda, *The Torrey Canyon Disaster: Some Legal Aspects*, 44 *DENVER L.J.* 400, 403 (1967). In tropical regions, marine life appears to be especially sensitive to pollution. Report of the First Session of the Inter-Governmental Working Group on Marine Pollution, U.N. Doc. A/CONF.48/IWGMP.1/5, Annex 4, at 3 (1971) [hereinafter cited as IWGMP I].

7. Gold, *supra* note 2, at 14. For an excellent introductory study of the ocean, see 221 *SCR. AM.*, Sept. 1969. The fear has also been expressed that oil discharges may lead to the accumulation of carcinogenic substances in human foods. *N.Y. Times*, Jan. 16, 1970, at 18, col. 3.

8. Douglas, *Environmental Problems of the Oceans: The Need for International Controls*, 1 *ENVIRONMENTAL L.* 149, 150 (1971).

9. Lanctot, *supra* note 6, at 68; Klotz, *Are Ocean Polluters Subject to Universal Jurisdiction—Canada Breaks the Ice*, 6 *INT'L LAW.* 706, 707 (1972). In 1930, cannisters containing 14,000,000 pounds of arsenic were dumped into the Baltic Sea. It is now feared that these cannisters have decomposed to a state where they may release their contents into the sea. Douglas, *supra* note 8, at 151.

10. Schachter & Serwer, *supra* note 2, at 106.

11. Cundick, *Army Nerve Gas Dumping: International Atrocity*, 56 *MILITARY L. REV.* 165, 167-68 (1972).

Five thousand sheep were killed when some gas escaped from the Utah testing grounds. It is reported that, if inhaled, 0.000003 grams may be lethal. *Id.* at 167 n.13, 194-95. For additional information on the dumping operation see the *Washington Post*, August 11, 1971-August 19, 1971.

12. Cundick, *supra* note 11, at 188 n.103.

13. *Id.* at 166.

Protection Agency's quick action prevented a United States firm from dumping 140,000 pounds of an arsenic compound into the Atlantic Ocean.¹⁴

This Note deals with the international community's attempts, culminating in the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,¹⁵ to control the intentional discharge of objectionable materials into international waters. The focus will be on the various multilateral conventions which have been executed. The problems to be considered include those related to the adequacy of the definition of objectionable materials; the suitability of enforcement provisions, including who can enforce an agreement and before what tribunal enforcement will occur; and the adequacy of the available remedies.

II

EXISTING CONVENTIONS

Although water pollution control has existed since the sixteenth century,¹⁶ a concerted international effort to fight marine pollution did not begin until this century. In 1926, an international conference was held in Washington, D.C. to negotiate an agreement on the prohibition of the intentional discharge of oil from ships. The United States prepared a draft convention but it was never ratified.¹⁷ It was not until 1954 that the international community was able to agree on the first step in the control of the intentional discharge of marine pollutants.

A. LONDON—1954

In 1954, a convention to control oil pollution of the oceans was approved in London.¹⁸ The convention, while limited to oil discharges,¹⁹

14. [1970-1971 Transfer Binder: Current Developments] BNA ENVIRONMENT REP. 1276.

15. 11 INT'L LEGAL MAT'LS 1291 (1972); 102 MONITOR, Dec. 1972, at 7.

16. Between 1531 and 1543, during the reign of Henry VIII, several laws dealing with the pollution of rivers and streams were enacted: An Act for the Preservation of the River of *Severn*, 34 & 35 Hen. 8, c. 9, §§ 2, 6 (1542-43); (An Untitled Act protecting the Thames River), 27 Hen. 8, c. 18 (1535).

17. Teclaff, *International Law and the Protection of the Oceans from Pollution*, 40 FORDH. L. REV. 529, 533 (1972); Green, *International Law and Canada's Anti-Pollution Legislation*, 50 OREG. L. REV. 462, 463 (1971); 31 DEP'T STATE BULL. 311 (1954).

18. International Convention for the Prevention of Pollution of the Sea by Oil, 1954, opened for signature May 12, 1954, [1961] 3 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3 [hereinafter cited as 1954 Convention]. Signatories include Japan, Liberia, Panama, the Soviet Union, and the United States.

19. *Id.* preamble.

clearly defines in quantitative terms those discharges which are prohibited,²⁰ those areas in which the prohibition applies,²¹ and those vessels to which the convention will apply.²² Unfortunately, the circumstances under which compliance with the convention is excused are so broad that most ships are able to escape liability.²³

The provisions for the convention's enforcement reveal an even more serious defect. While any signatory can report an alleged violation, only the flag state (*i.e.* the state where the ship is registered) can prosecute an offender.²⁴ If the flag state has not been bothered by pollution along its

20. (1) Subject to the provisions of Articles IV and V, the discharge from any tanker, being a ship to which the Convention applies, within any of the prohibited zones referred to in Annex A [footnote omitted] to the Convention in relation to tankers of—

(a) oil.

(b) any oily mixture the oil in which fouls the surface of the sea, shall be prohibited.

For the purposes of this paragraph the oil in an oily mixture of less than 100 parts of oil in 1,000,000 parts of the mixture shall not be deemed to foul the surface of the sea.

Id. art. III. It should be noted, however, that an unlimited quantity of oil may be discharged provided it is sufficiently diluted.

21. *Id.* Annex A(1). The prohibited zones include those areas within fifty miles of land.

22. *Id.* art. II.

23. Marks, *supra* note 2, at 87.

(1) Article III shall not apply to:

(a) the discharge of oil or of an oily mixture from a ship for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea; or

(b) the escape of oil, or of an oily mixture, resulting from damage to the ship or unavoidable leakage, if all reasonable precautions have been taken after the occurrence of the damage or discovery of the leakage for the purpose of preventing or minimising the escape

1954 Convention, *supra* note 18, art. IV.

24. (3) Any contravention of paragraphs (1) and (2) of this Article [article III—see note 20 *supra*] shall be an offence punishable under the laws of the territory in which the ship is registered.

Id. art. III(3). Prosecution, however, is clearly discretionary.

If the Government in the territory of which the ship is registered is satisfied that sufficient evidence is available in the form required by law to enable proceedings . . . to be taken in respect of the alleged contravention, it shall cause such proceedings to be taken

Id. art. X(2). The United States, while signing the convention, "drew attention to the need for internationally uniform penalties and international uniformity of enforcement." Green, *supra* note 17, at 467.

The problem of flag state enforcement and the related problem of "flags of convenience" have led to numerous debates. A "flag of convenience" is a country such as Panama, Liberia, or Honduras whose laws are such that it is easy and inexpensive for a foreign shipowner to register his vessels. The term has been used in a derogatory sense to imply that these countries are not quick to make or enforce restrictive shipping regulations. B. BOZCEK, *FLAGS OF CONVENIENCE* 2 (1962); Goldie, *International Principles of Responsibility for Pollution*, 9 COLUM. J. TRANSNAT'L L. 283, 319 n.125 (1970). *But see* D. BOWETT, *THE LAW OF THE SEA* 57 (1967), who suggests that the "flag of convenience" countries do exercise adequate jurisdiction, and that objections to flags of convenience are economic in nature and stem from the use of less expensive foreign crews.

shoreline, it may tend to relax its regulations and "appreciate the advantages laxity of regulation gives in shipping circles."²⁵

The 1954 Convention was amended in 1962²⁶ and in 1969²⁷ in an attempt to expand the ocean areas where oil discharges are prohibited and to set limits on the quantity of oil which can be discharged in areas where some dumping is permitted. These amendments have not satisfactorily improved the original convention. In addition to being limited to oil discharges, and to allowing uncontrolled dumping outside prohibited zones, the amendments left intact the flag state's prerogative not to initiate any legal action against a polluter, and failed to introduce mandatory pollution reduction procedures for all ships.²⁸

B. THE UNITED NATIONS—1958

The 1958 United Nations Conference on the Law of the Sea,²⁹ which resulted in the adoption of a series of conventions, did little to resolve the problem of the intentional pollution of the ocean. The doctrine that in international waters only the flag state can take any action against its ships was strengthened by the Conference's ratification of the United Nations Convention on the High Seas.³⁰ This convention clearly provides that "[s]hips shall sail under the flag of one State only and . . . shall be subject to its *exclusive* jurisdiction on the high seas."³¹ Furthermore, "[n]o arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State."³² Clearly the language of this convention prevents coastal states,

25. Note, *supra* note 2, at 122.

26. Prevention of Pollution of the Sea by Oil, Amendments to the Convention of 1954, adopted April 11, 1962, [1966] 2 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332.

27. *Inter-Governmental Maritime Consultative Organization: Conventions Concerning Oil Pollution*, in 9 INT'L LEGAL MAT'LS 1 (1970). These amendments, however, are not yet in force. Holdsworth, *supra* note 2, at 202.

28. See note 2 *supra*. Legault, *The Freedom of the Seas: A License to Pollute?* 21 U. OF TORONTO L.J. 211, 213 (1971). The 1969 amendments require that the flag state notify the complaining state of any action taken as a result of information provided by the complaining state. While some pressure to act may be generated by the fear of adverse publicity or diplomatic retaliation, this is not a satisfactory arrangement. Mensah, *Legal Problems Relating to Marine Pollution by Oil*, in WATER POLLUTION BY OIL 298 (P. Hepple ed. 1971).

29. United Nations Conference on the Law of the Sea: Official Records, U.N. Docs. A/CONF. 13/41, 13/42 (1958).

30. Convention on the High Seas, done April 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as Convention on the High Seas]. Parties to the convention include Guatemala, Japan, the Soviet Union, the United States, and the United Kingdom.

31. *Id.* art. 6(1) (emphasis added).

32. *Id.* art. 11(3). The major exception to this rule is piracy on the high seas. *Id.* art. 19. Article 2 of the Convention on the High Seas does provide that "[f]reedom of the high seas is exercised under the conditions laid down by these articles *and* by the other rules of international law" (emphasis added). However, there does not appear to be any

the major victims of marine pollution, from acting against foreign ships to prevent damage to their territorial waters and coastline whenever the polluting actions of these vessels occur in international waters.

The Conference did require each participating country to draw up regulations to control the discharge of *oil* from its own ships and to take any necessary steps to prevent pollution from radioactive materials.³³ This requirement, however, is unsatisfactory, for it fails to specify any minimum standards; there is thus no guarantee of meaningful action by participating countries.³⁴ Furthermore, no specific mention is made of the need to control the many other objectionable materials presently being dumped into the ocean. The only power which the coastal states acquired as a result of the Conference was the power to enforce their own anti-pollution regulations in their territorial sea, the area within twelve miles of their coastline.³⁵

It is thus apparent that even as recently as a decade ago marine pollution was not seriously considered a problem. Treaties were severely limited in their coverage to oil and radioactive wastes. Except for the area of sea within twelve miles of a foreign coastline, a ship could dump objectionable materials with impunity. Enforcement was limited to actions brought by the flag state against its own vessels, a circumstance which some authors suggest meant no enforcement.

C. BRUSSELS—1969

Apparently spurred by events such as the *Torrey Canyon* disaster,³⁶ recent international agreements have continued to emphasize the prob-

customary rule of international law with regard to ocean dumping which would allow a coastal state to act in spite of the Convention's restrictions. Teclaff, *supra* note 17, at 532, 544.

33. Convention on the High Seas, *supra* note 30, art. 24, provides that "[e]very State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships" Article 25 further states:

1. Every State shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations.

Id. art. 25. For a review of United States regulations on oil pollution, see Note, *supra* note 2, at 120-22. A Senate bill to provide a system for controlling the ocean dumping of materials originating in the United States, S. 1238, 92d Cong., 1st Sess., did not progress through the Congress.

34. Teclaff, *supra* note 17, at 534.

35. Convention on the Territorial Sea and the Contiguous Zone, *done* April 29, 1958, arts. 16(1), 17, 24, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

36. The *Torrey Canyon* went aground in international waters off the coast of Great Britain in March, 1967, and ruptured, thereby polluting the coastlines of Britain and France with large quantities of oil. For a discussion of the efforts to combat the spill, see Cabioch, *The Fight Against Pollution by Oil on the Coast of Brittany*, in *WATER POLLUTION BY OIL* 245-49 (P. Hepple ed. 1971); Rienow & Rienow, *supra* note 2, at 24; Note, *supra* note 2, at 117-18.

lems of oil pollution, and to ignore the need to define and control the other objectionable materials which are endangering the oceans. Nevertheless, these recent agreements do suggest that there may be a lessening of the flag state's absolute and exclusive control over its vessels; in certain specified circumstances a coastal state does have the right to act without regard to the desires of the flag state.

In 1969 an international conference on marine pollution, meeting in Brussels, adopted two conventions³⁷ which are important because, for the first time, coastal states were given the right to act unilaterally beyond their own territorial sea to stop marine pollution, and because an owner could be held civilly liable by the coastal state for damage caused by his ship. The Convention on Intervention allows coastal states to:

take such measures on the *high seas* as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea *by oil, following* upon a maritime casualty³⁸

The Convention further provides that:

in cases of extreme urgency requiring measures to be taken immediately, the coastal state may take measures rendered necessary by the urgency of the situation, without prior notification or consultation [with the flag state]³⁹

Admittedly the "maritime casualty" requirement⁴⁰ precludes the application of the convention to situations of intentional discharge of objectionable materials.⁴¹ But the coastal state's right to act "without prior notification" and "on the high seas" suggests the realization that there is a need to balance the competing interests of the flag state and the coastal state.

The conciliation and arbitration provisions of the Convention on In-

37. Note, *Reflections on Brussels: IMCO and the 1969 Pollution Conventions*, 3 CORNELL INT'L L.J. 161, 166 (1970). The conventions are the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, done November 29, 1969, in 9 INT'L LEGAL MAT'LS 25 (1970) [hereinafter cited as the Convention on Intervention]; and the International Convention on Civil Liability for Oil Pollution Damage, done November 29, 1969, in 9 INT'L LEGAL MAT'LS 45 (1970) [hereinafter cited as Convention on Civil Liability].

Delegations to the conference included representatives from Canada, Guatemala, Japan, Liberia, the Union of Soviet Socialist Republics, the United Kingdom, and the United States.

38. Convention on Intervention, *supra* note 37, art. I(1) (emphasis added).

39. *Id.* art. III(d) (emphasis added).

40. A "maritime casualty" is defined as a collision, stranding, or occurrence which results in damage or the threat of damage to the ship or its cargo. *Id.* art. II(1).

41. The convention has been criticized because it makes no provision for preventive measures which can be enforced before a collision has occurred. Green, *supra* note 17, at 476.

tervention are also significant.⁴² By their terms the flag state no longer has the absolute power to make, interpret, and enforce its own regulations. The coastal state may take whatever actions it feels are necessary and in accord with articles I and III of the Convention. The propriety of these decisions is to be determined by conciliation and arbitration,⁴³ *not* by the unilateral decision of either the coastal state or the flag state.

The Convention on Civil Liability is significant because its express goal is "to ensure that adequate compensation is available to persons who suffer damage caused by pollution from the escape or *discharge* of oil from ships."⁴⁴ Since the "maritime casualty" requirement of the Convention on Intervention is not present in the Convention on Civil Liability, the intentional dumping of oil is sufficient grounds to allow a coastal state to make a claim for damages.

The owner of the ship is liable for the damages inflicted on the territory and the territorial sea of the injured country as well as for the cost of any preventive measures.⁴⁵ Legal action to secure compensation for pollution

42. Convention on Intervention, *supra* note 37, art. VIII, Annex. The Annex consists of nineteen articles which provide in detail for the selection of members to and operation of a Conciliation Commission and an Arbitration Tribunal, as well as for the issuance of opinions thereby.

43. 1. Any controversy between the Parties as to whether measures taken . . . were in contravention of the provisions of the present Convention . . . shall . . . be submitted upon request of any of the Parties concerned to conciliation or, if conciliation does not succeed, to arbitration

Id. art. VII.

44. Convention on Civil Liability, *supra* note 37, preamble (emphasis added). "Persons" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions." *Id.* art. I(2).

45. *Id.* arts. II, III(1).

1. Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident . . . shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.

Id. art. III(1). "Incident" is defined as "any occurrence, or series of occurrences having the same origin, which causes pollution." *Id.* art. I(8).

Some authorities have construed the convention as imposing strict liability. See Green, *supra* note 17, at 475; Teclaff, *supra* note 17, at 545; Note, *supra* note 37, at 178. Others have interpreted it as intending absolute liability. See Goldie, *supra* note 24, at 316; Swan, *International and National Approaches to Oil Pollution Responsibility: An Emerging Regime for a Global Problem*, 50 OREG. L. REV. 506, 528 (1971). A third position suggests that the liability involved falls somewhere between fault and strict liability. See Utton, *A Survey of National Laws on the Control of Pollution from Oil and Gas Operations on the Continental Shelf*, 9 COLUM. J. TRANSNAT'L L. 331, 358 (1970).

To some extent the confusion may be simply a matter of semantics; however, it is also indicative of the changing standards of liability in international law. Joseph C. Sweeney has listed five different types of liability (including fault liability, strict liability, and absolute liability)—Sweeney, *Oil Pollution of the Oceans*, 37 FORDH. L. REV. 155, 195-200 (1968); and Professor L.F.E. Goldie has suggested a scale of liability dependent on the exact "social situation" which is being considered. Goldie, *supra* note 24, at 317-19.

damages must be brought in the courts of the injured coastal state,⁴⁶ thereby eliminating the fear of lax enforcement of regulations by the flag state. Without directly interfering with the doctrine of freedom of the seas, the coastal states, by the terms of the convention, have acquired a degree of indirect control over the flag state's ships.

While the two conventions have been hailed as "pacesetting milestones,"⁴⁷ such enthusiasm may be overly optimistic. Neither convention attempts to handle the broad problem of the discharge of objectionable materials into the ocean. Instead, they have chosen to limit themselves to the narrow problem of oil pollution.⁴⁸ The conventions have been further criticized for not covering damage to marine life in the high seas (*e.g.*, damage to fishing grounds),⁴⁹ and for failing to establish a system of absolute liability without exceptions.⁵⁰ Finally, the reliance on national court systems in the Convention on Civil Liability would seem simply to trade the potential bias of the flag state's courts for that of the coastal state's courts.⁵¹ In Canada's view, however, the two conventions still "[do] not pay sufficient attention to the fundamental interests of the coastal states as compared with the commercial interests of the flag states."⁵²

The two conventions do suggest, however, a trend toward balancing the interests of flag states and coastal states. In appropriate cases, a coastal

It does appear, nonetheless, that fault liability will no longer be considered as a basis for liability in pollution cases. Teclaff, *supra* note 17, at 544, 547. The various treaties covering the operation of nuclear devices have provided for absolute liability (meaning a more rigorous form than that labeled as strict liability). Goldie, *supra* note 24, at 310-14. Under these treaties, no exoneration based on *force majeure*, acts of God, or intervening acts of third parties is available. *Id.*

46. Convention on Civil Liability, *supra* note 37, art. IX.

47. Petaccio, *Water Pollution and the Future Law of the Sea*, 21 INT'L & COMP. L.Q. 15, 18 (1972).

48. The conference specifically recommended, however, that something should be done with regard to other pollutants. *Resolution on International Co-operation Concerning Pollutants Other than Oil*, in 9 INT'L LEGAL MAT'LS 65 (1970).

49. Green, *supra* note 17, at 475; Swan, *supra* note 45, at 526.

50. Mendelsohn, *Ocean Pollution and the 1972 United Nations Conference on the Environment*, 3 J. MARITIME L. & COM. 385, 390 (1972); Letter from Senator Edmund S. Muskie to Secretary of State William P. Rogers, Nov. 17, 1971, in 3 J. MARITIME L. & COM. 427, 428 (1972); *see also*, Convention on Civil Liability, *supra* note 37, art. III, which reads in part:

2. No liability for pollution damage shall attach to the owner if he proves that the damage:

- (a) resulted from an act of war, hostilities . . . or a natural phenomena of an exceptional, inevitable and irresistible character, or
- (b) was wholly caused by an act or omission done with intent to cause damage by a third party

Id. art. III.

51. Lancot, *supra* note 6, at 89; and *cf.* note 24 *supra*.

52. Green, *supra* note 17, at 476.

state may act on the high seas against the ship of another state without violating the principles of freedom of the high seas. Furthermore, the conventions recognize the civil liability of ship owners for damage caused by pollution due to the discharge or escape of oil, thereby giving the coastal state some indirect control over the conduct of a ship in international waters. Finally, the conciliation and arbitration provisions of the Convention on Intervention do much to eliminate many of the objections which were raised to the use of national court systems.

III

THE PRESENT SITUATION

A. THE UNITED NATIONS

The international community appears to have accepted the argument that at best the Brussels agreements leave the world "one convention behind the next . . . disaster."⁵³ The treaties do not provide adequate protection, because only oil pollution is covered and there is no right of action prior to an accident.

In 1969, the United Nations General Assembly requested that the Secretary-General both review the operations of the various national and international organizations which were dealing with the problem of marine pollution, and inquire into the feasibility of drafting an international treaty.⁵⁴ The Secretary-General subsequently reported that there was no existing international agreement which effectively controlled marine pollution; the existing international agreements were either too broad, failing to provide for the enforcement of many of the concepts which were agreed to, or too narrow, failing to be applicable to much of the existing range of pollution problems.⁵⁵

In preparation for the 1972 United Nations Conference on the Human Environment⁵⁶ the Preparatory Committee established the Intergovernmental Working Group on Marine Pollution (IWGMP) for the purpose

53. Mendelsohn, *supra* note 50, at 398; see Beesley, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, 3 J. MARITIME L. & COM. 1, 8 (1972).

54. G.A. Res. 2566, 24 U.N. GAOR Supp. 30, at 38, U.N. Doc. A/7630 (1969).

55. Report of the Secretary-General, *supra* note 1, at para. 135.

56. Established by G.A. Res. 2398, 23 U.N. GAOR Supp. 18, at 2-3, U.N. Doc. A/7218 (1968). The conference was held in Stockholm in June, 1972. N.Y. Times, June 5, 1972, at 1, col. 1.

of formulating a draft convention on ocean dumping.⁵⁷ The IWGMP met several times, and eventually prepared and forwarded a draft convention on ocean dumping to the United Nations Conference.⁵⁸ Unfortunately, and apparently for reasons unrelated to the content of the draft convention, no definitive action was taken on the convention at the Human Environment Conference,⁵⁹ although there was support for the completion of an ocean dumping convention.⁶⁰

B. THE LONDON CONFERENCE

An intergovernmental conference was held in London between October 30 and November 13, 1972, for the purpose of drafting and adopting a global convention on ocean dumping.⁶¹ Over ninety countries participated,⁶² and the result was the adoption of the London Convention on Ocean Dumping.⁶³

The convention consists of a preamble, twenty-two articles, and three annexes. The preamble acknowledges that the sea can not be treated as an indestructible and unlimited resource, and that some action must be taken, without delay, to control the pollution of the sea.⁶⁴

The coverage of the convention is desirably broad. "Dumping" includes any deliberate disposal of matter (including the deliberate disposal of vessels);⁶⁵ "[s]ea" means *all* marine waters other than the internal

57. U.N. Doc. A/CONF. 48/PC. 11, at paras. 194, 195, 197 (1971); Identification and Control of Pollutants of Broad International Significance, U.N. Doc. A/CONF. 48/8/Add. 1, at 1 (1972) [hereinafter cited as Identification of Pollutants].

58. Identification of Pollutants, *supra* note 57, at 3.

59. N.Y. Times, June 5, 1972, at 24, col. 8.

60. 102 MONITOR, December, 1972, at 4-5.

61. *Id.* at 6; N.Y. Times, November 14, 1972, at 1, col. 4.

62. Participants included Guatemala, Honduras, Japan, Liberia, Panama, the United Kingdom, the United States, and the Union of Soviet Socialist Republics. There were also observers from organizations such as the International Maritime Consultative Organization; the Secretary-General of the United Nations was also represented. 11 INT'L LEGAL MAT'LS 1291-92 (1972).

63. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *opened for signature* Dec. 29, 1972, in 11 INT'L LEGAL MAT'LS 1291 (1972); 102 MONITOR, Dec. 1972, at 7 [hereinafter cited as London Convention on Ocean Dumping]. The Convention will come into force after it has been ratified by fifteen countries. *Id.* art. XIX. The United States and the Soviet Union signed the convention on December 29, 1972. The Hartford (Conn.) Courant, December 30, 1972, at 5, col. 4.

64. London Convention on Ocean Dumping, *supra* note 63, preamble.

65. 1. (a) "Dumping" means:

- (i) any deliberate disposal at sea of wastes or other matter from vessels, aircraft . . . or other man-made structures at sea;
- (ii) any deliberate disposal at sea of vessels

Id. art. III.

waters of States";⁶⁶ and "[w]astes or other matter" are defined as material and substance of *any* kind, form, or description.⁶⁷ The London Convention on Ocean Dumping is not limited, as were previous conventions, to only oil discharges or to just certain types of ships.⁶⁸ This change is noteworthy.⁶⁹

The convention's strongest point is its *prohibition* of the dumping of specific materials (*e.g.* oil, radioactive materials, and chemical and biological warfare weapons) and the listing of criteria for the evaluation of the suitability of all other materials for dumping.⁷⁰ The dumping of non-prohibited materials requires the issuance of a permit *prior* to the disposal of the material.

The permit system is desirable because it allows the designated national licensing body to examine the potential damage to the ocean, taking into account the material to be dumped, the quantity of material, and the proposed dumping site, prior to the time the dumping occurs, rather than restricting enforcement to remedial measures such as fines after the ocean has been damaged.⁷¹ Although some sources have criticized this system as effectively legalizing ocean dumping,⁷² permitting some dumping recognizes the ocean's capacity to act as a waste treatment facility. It is important to recognize, however, that this capacity to handle waste material is not unlimited.⁷³

66. *Id.* art. III(3) (emphasis added). There is no distinction between the high seas and the territorial sea of a coastal state.

67. *Id.* art. III(4) (emphasis added).

68. See 1954 Convention, *supra* note 18, art. II; and see Convention on Civil Liability, *supra* note 37, art. I(1). The London Convention on Ocean Dumping, *supra* note 63, art. III(2), provides that "[vessels] and aircraft" mean waterborne or airborne craft of any type whatsoever.

69. See Mendelsohn, *supra* note 50, at 398; and see Beesley, *supra* note 53, at 8.

70. The London Convention on Ocean Dumping, *supra* note 63, art. IV provides:

1. In accordance with the provisions of this Convention Contracting Parties shall prohibit the dumping of any wastes or other matter in whatever form or other condition except as otherwise specified below:

a. The dumping of wastes or other matter listed in Annex I is prohibited;
 b. The dumping of wastes or other matter listed in Annex II requires a prior special permit;

c. The dumping of all other wastes or matter requires a prior general permit.

Annex I provides that materials such as mercury, persistent plastics, persistent synthetic materials, oil, radioactive wastes, and material for biological and chemical warfare shall not be dumped. Annex II provides that special care must be taken when dumping materials which contain arsenic, lead, cyanides, pesticides which are not banned by Annex I, and several other chemicals. Annex III provides a 21-item checklist of characteristics of the material to be dumped, and of the dumping site, as well as other related factors which must be considered prior to the issuance of any permit.

71. Lanctot, *supra* note 6, at 103.

72. U.N. Doc. A/CONF. 48/PC. 13, at para. 122 (1971).

73. See Identification of Pollutants, *supra* note 57, at 4, preamble.

As with its predecessors,⁷⁴ however, the biggest fault in the convention is the lack of any provisions for its uniform and effective enforcement. The convention provides that:

1. Each Contracting Party shall designate an appropriate authority or authorities to:
 - a. issue special permits . . .
 - b. issue general permits⁷⁵
-
2. Each Party shall take in its territory appropriate measures to prevent and punish conduct in contravention of the provisions of this Convention.⁷⁶

The establishment of over ninety national authorities for the purpose of issuing permits can only lead to confusion and to the creation of a variety of interpretations of the Annexes. This confusion could, as the result of questionable interpretations of the convention, lead to the creation of "pollution havens," in the same way that some states have become tax shelters or "flags of convenience."⁷⁷ An international organization should be established at least to insure that data concerning the effects of chemicals and other materials is available to all interested parties.⁷⁸ Additionally such an organization could finance research into the effects of new materials on the sea and, in appropriate cases, add materials to either the Annex I or Annex II listings.⁷⁹

Regional organizations, to deal with the problems of specific geographical regions such as enclosed seas (*e.g.* Baltic Sea, North Sea, Mediterranean Sea) could be established to supplement the minimum standards set by the international organization.⁸⁰ The London Convention on Ocean Dumping does anticipate the possibility of regional organizations,⁸¹ but

74. See notes 23 & 30 *supra* and accompanying text.

75. London Convention on Ocean Dumping, *supra* note 63, art. VI.

76. *Id.* art. VII.

77. Lancot, *supra* note 6, at 89.

78. COMMISSION TO STUDY THE ORGANIZATION OF PEACE, TWENTY-THIRD REPORT: THE UNITED NATIONS AND THE OCEANS: CURRENT ISSUES IN THE LAW OF THE SEA 24 (1973). Lancot, *supra* note 6, at 90-91; Teclaff, *supra* note 17, at 563; Kennan, *To Prevent a World Wasteland*, 48 FOREIGN AFF. 401, 405 (1970).

79. Within their own limited spheres agencies such as the Intergovernmental Maritime Consultative Organization (IMCO) and the Organization for Economic Development Cooperation (OECD) do resemble international bodies promulgating rules and regulations. IMCO, a specialized agency of the United Nations, deals in an advisory and consultative manner on technical shipping matters and has assisted in the drafting of the 1954 Convention and the two 1969 Brussels Conventions. Note, *supra* note 37, at 162-64. It has been proposed that an organization such as IMCO be used as an international body responsible for the control of marine pollution. Kennan, *supra* note 78, at 406; IWGMP I, *supra* note 6, at para. 17.

80. Lancot, *supra* note 6, at 89, 92.

81. In order to further the objectives of this Convention the Contracting Parties with common interests to protect in the marine environment in a given geo-

it neither attempts to define those areas which are in immediate need of attention nor provides any guidelines as to the structure of a regional organization.

The convention does follow the Convention on the Territorial Sea and the Contiguous Zone⁸² in allowing a coastal state to act against a ship within the coastal state's territorial waters.⁸³ The convention goes further, however, and permits enforcement, in international waters, not only by the flag state, but also by the state where the matter to be dumped is initially loaded.⁸⁴ But the coastal states are still deprived of any power to enforce the convention unless the ship is in the coastal state's territorial waters, a limitation which must be viewed as a serious defect.⁸⁵

Canada has repeatedly argued that coastal states, or perhaps all of the parties to a dumping control convention, should have enforcement rights against all vessels on the high seas.⁸⁶ This has some basis in international law, which permits *any* ship on the high seas to arrest a pirate ship.⁸⁷ Furthermore, various North Atlantic countries have signed a convention empowering authorized officers of a contracting country to stop and board

graphical area shall endeavour . . . to enter into regional agreements consistent with this Convention for the prevention of pollution

London Convention on Ocean Dumping, *supra* note 63, art. VIII.

82. Note 34 *supra* and accompanying text.

83. Each Party shall take in its territory appropriate measures to prevent and punish conduct in contravention of the provisions of this Convention.

London Convention on Ocean Dumping, *supra* note 63, art. VIII(2).

84. 1. Each Contracting Party shall apply the measures required to implement the present convention to all:

- a. vessels and aircraft registered in its territory or flying its flag;
- b. vessels and aircraft loading in its territory or territorial seas matter which is to be dumped

Id. art. VII(1).

85. The suggestion that coastal states should also be allowed to enforce the terms of an international convention has met with some resistance. The biggest fears seem to be the belief that there would be differences in interpretations of the convention resulting in ships being driven from one part of the ocean to another with a more flexible interpretation. In an extreme case, the ships of an individual country might be discriminated against. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.N. Doc. A/AC. 138/SC. 3 SR. 3-14, at 35, 53 (1971) [hereinafter cited as 1971 Sea-Bed Records]. *But see Id.* at 74, and Beesley, *supra* note 53, at 7— suggesting the need to give the coastal states more power to act— and *see* Kennan, *supra* note 78 at 405— recommending that enforcement should be by a single international body.

86. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.N. Doc. A/AC. 138/SC. 3/SR. 15-19, at 92 (1972); 1971 Sea-Bed Records, *supra* note 85, at 121-22. The Canadian position was presented during a discussion of the United Nations Draft Convention on Ocean Dumping, *supra* note 57, an agreement very similar to the London Convention on Ocean Dumping.

87. Convention on the High Seas, *supra* note 30, art. 19.

another member-state's fishing vessels while that vessel is operating on the high seas of the North Atlantic.⁸⁸

The London Convention does provide that:

[t]he Parties agree to cooperate in the development of procedures for the effective application of this Convention, particularly on the high seas, including procedures for the reporting of vessels and aircraft observed dumping in contravention of the Convention.⁸⁹

This article, however, seems to acknowledge that at present there is no adequate method of enforcing the convention, particularly on the high seas. The injured party has no impartial enforcement body to which it can turn and be assured of action.

The convention is also deficient because of its failure to establish any standard of liability for damage caused by either legal or illegal dumping.⁹⁰ Also, there is neither an established impartial tribunal to settle disputes, nor any provisions by which one could be convened to evaluate conflicts and award damages.⁹¹ Finally, there is no mention of the problem of how to handle damage to a "world resource." If an international fishing ground is damaged, if some of the other living resources of the sea are killed, or if the sea is simply rendered aesthetically less pleasing, there are no provisions delineating who could bring a charge of conduct in contravention of the convention.⁹² It is also unclear who would receive any damages which were awarded, or, indeed, if damages could be awarded at all for such actions.

The main hope of the convention lies in articles VII and X. Article X provides that:

[i]n accordance with the principles of international law regarding State responsibility for damage to the environment of other States or to any other area of the environment, caused by dumping of wastes and other matter of all kinds, the Contracting Parties undertake to develop procedures for the assessment of liability and the settlement of disputes regarding dumping.⁹³

88. Convention on Conduct of Fishing Operations in the North Atlantic, art. 9, opened for signature June 1, 1967, in 6 INT'L LEGAL MAT'LS 760, 762 (1967). This convention also provides that "no vessel shall dump in the sea any article or substance which may interfere with fishing or obstruct or cause damage to fish . . ." *Id.* at Annex V, rule 4. The former United States Secretary of State, William P. Rogers, has characterized the enforcement provision of the convention as "a major step forward." Letter from William P. Rogers to President Nixon, Mar. 29, 1969, in 63 AM. J. INT'L L. 806, 808 (1969).

89. London Convention on Ocean Dumping, *supra* note 63, art. VII(3).

90. For a discussion of the problem of liability, see note 45 *supra*.

91. See notes 42 & 43 *supra* and accompanying text for the conciliation and arbitration provisions of the Convention on Intervention.

92. See note 89 *supra* and accompanying text.

93. London Convention on Ocean Dumping, *supra* note 63, art. X.

It will be the meetings of the signatories (where the problems raised in articles VII(3) and X are to be faced)⁹⁴ which will determine if the London Convention on Ocean Dumping is to have any lasting value. The initiation of action by any party, before an impartial tribunal, and upon standards of absolute liability for damage to the environment wherever that damage may occur, is not yet a reality.

CONCLUSION

"[T]he subject of marine pollution [is] one [of the] most deserving of priority for concrete action, indeed *demanding* of action by the international community"⁹⁵ The evidence establishes the need to control the dumping of waste materials into the sea before it is irreparably damaged. The earlier conventions on ocean dumping have been confined, in general, to the discharge of oil. In addition, these conventions did not purport to cover all vessels, and their enforcement and liability provisions are not satisfactory. With the exception of the narrow set of circumstances in which the Convention on Intervention is applicable, enforcement has been exclusively within the control of the flag state, and has been based on the use of national court systems.

The London Convention on Ocean Dumping, in contrast, applies to all vessels, and its strongest points are a definitive list of prohibited and restricted materials, and the establishment of criteria for evaluating materials not individually listed. The use of a licensing system is also noteworthy. The convention acknowledges the ability of the ocean to handle some quantity of waste material, but provides for an evaluation of the environmental impact of the proposed dumping before any damage can be done. These points are clear improvements over the provisions in earlier conventions.

A final assessment of the effectiveness of the London Convention on Ocean Dumping, however, must await an examination of the procedures to be established in accordance with the mandate of articles VII, X, and XI.⁹⁶ Coastal states must be given some method of protecting their in-

94. "The Contracting Parties shall at their first consultative meeting consider procedures for the settlement of disputes concerning the interpretation and application of this Convention." *Id.* art. XI.

95. Address by Maurice F. Strong, Secretary-General of the United Nations Conference on the Human Environment, IWGMP I, *supra* note 6, Annex IV, at 1.

96. See notes 89, 93 and 94 *supra* and accompanying text.

terests, either by resort to conciliation and arbitration procedures, or by initiation of an action before a regional or international body. Additionally, parties which intentionally dump objectionable materials must be held absolutely liable for any damage which results, and a procedure must be established for instituting an action when the high seas have been damaged.

The London Convention on Ocean Dumping is a significant improvement in the area of defining objectionable materials and bringing them within the scope of the convention. Any evaluation of its enforcement provisions, however, must await ratification of the convention and the initial organizational meetings.

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