DOCUMENT NO. 474
APRIL 15, 1964

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

REPORT OF THE COMITE COMMITTEE ON THE NUCLEAR SHIP CONVENTION

The Committee submitted to you at the 1962 fall meeting a report recommending approval of the 1962 Brussels Convention dealing with the Liability of Operators of Nuclear Ships. This report was included in Document No. 459. Mr. Herbert Ost, a naval officer, requested that action be deferred until May. He was concerned only with the question of the inclusion of warships in the Convention. Action was accordingly deferred.

At the 1963 annual meeting in May the Committee stated that two committees and one section of the American Bar Association were recommending to the House of Delegates approval of the principles of the Nuclear Ship Convention and of the conventions dealing with the liabilities of land-based reactors.

The Association voted at that meeting to join these three groups and support the resolutions which they were presenting to the House of Delegates.

At the meeting of the House of Delegates of the American Bar Association in August, 1963, the Insurance, the Public Utility and the Mineral and Natural Resources Sections requested that action on the resolutions be deferred. This request was granted.

A meeting of representatives of these groups was held in Washington on December 21st in an effort to iron out the differences. At this meeting there was no objection stated to the Nuclear Ship Convention. There was some objection to the conventions dealing with liabilities of land-based reactors.

At the meeting of the House of Delegates in February, 1964, these resolutions were passed to the August 1964 meeting.

It is now proposed by the Admiralty Committee, with the concurrence of part if not all of the Committees and Sections to submit

a resolution approving the Nuclear Ship Convention. There will be support from some of the other groups. We anticipate opposition from none.

The Committee on Atomic Energy of the Association of the Bar of the City of New York submitted a report dated July 2, 1963, and in its Conclusion stated:

> "For the reasons indicated in this report, the Committee believes that ratification of the Convention by the United States is merited. The only feature of the Convention which the United States delegation to the 1962 Brussels Conference found unacceptable was its inclusion of warships. But a nuclear ship convention which excluded warships would not adequately achieve all of the purposes of the Convention, and it is unacceptable to the other leading nations of the West. The United States, which played a leading role in the formulation of the Convention, should reconsider its objection to the inclusion in the Convention of nuclear warships.
>
> Respectfully submitted,
>
> COMMITTEE ON ATOMIC ENERGY."

This report correctly sets forth the principal features of the Convention as follows:

1. The operator of a nuclear ship is absolutely liable, without regard to fault, for nuclear damage caused by a nuclear incident involving such ship.

2. No other person is liable for such damage.

3. The liability of the operator as to each nuclear ship is limited to $100 million for each nuclear incident.

4. The operator shall maintain insurance or other financial security covering his liability for nuclear damage, in such amount and of such type as the licensing state requires; and the licensing state shall ensure the payment of claims established against the operator by providing the necessary funds, up to the $100 million limit specified above, to the extent that the insurance or financial security maintained by the operator proves inadequate to satisfy such claims.

5. Any action for compensation may be brought, at the option of the claimant, either in the courts of the licensing state or in the courts of any contracting state in whose territory nuclear damage has occurred.

6. Final judgment entered by a court having jurisdiction shall be recognized in any other contracting state, and the merits of the claim shall not be reexamined, except where the judgment was obtained by fraud or the operator was not given "fair opportunity" to present his case.

7. The Convention applies to all nuclear-powered ships, whether warships or merchant ships.

The American delegation voted against Article 1 of the Convention as adopted at Brussels because it included warships in its definition of a nuclear ship. On this Article the vote was 29 in favor, 10 against and 2 abstentions. The votes against were the United States and 9 Iron Curtain countries, the two abstentions were Finland and Switzerland.

The American delegation also voted against the Convention as a whole because of the inclusion of warships. This vote was 28 in favor, 10 against and 4 abstentions. The votes against were the United States and 9 Iron Curtain countries. The abstentions were Denmark, Norway, Sweden and Switzerland.

The report of the Chairman of the American delegation to the Secretary of State dated June 21, 1963 contains a statement as to warships:

> "When the vote came, the 8 Soviet Bloc countries and the United States and Belgium stood for exclusion, 26 favored inclusion and 6 abstained."

This is not quite in accord with the record of the Conference which reports Belgium voting in favor of the inclusion of warships and 9 Iron Curtain countries and the United States voting No.

PREVIOUS ACTIONS OF THE ASSOCIATION

The principles of the Convention have already been approved by the Association. The original draft which was prepared by a special committee of the Comite was approved at a special meeting held August 18, 1959. These same principles were approved by you in May of 1963. This report therefore is primarily concerned with the question of whether warships should be included or excluded.

The original draft which this Association approved in 1959 included warships. The Convention adopted by the plenary session of the Comite in Rijeka in 1959 included warships. Representatives of the Government attended that conference. The Maritime Administrator, Clarence Morse, and his general counsel E. Robert Seaver, were members of the American delegation and participated in the work of the Conference. No suggestions came from any Government source at that time that there was any objection to the inclusion of warships. We were advised just before the Brussels Conference in 1961 that the Government had taken a position against the inclusion of warships. A strenuous effort was made by the American delegation at Brussels in both 1961 and 1962 to have warships excluded. These efforts were unsuccessful.

One of the important features of the Convention is the channeling of liability. This means that if there is a collision between a nuclear ship and a non-nuclear ship, the non-nuclear ship will incur no liability for nuclear damage, whether it is at fault or not. This channeling of liability is necessary for the protection of non-nuclear ships and to induce those countries which have non-nuclear but do not have nuclear ships to ratify the Convention. From a practical point of view this is necessary. The non-nuclear ship should not be subjected to the extensive liability which might result from nuclear damage as a result of a collision. It is a liability against which the non-nuclear ship will have difficulty in getting insurance, and even if the insurance is obtainable it will be expensive. There are other reasons for the channeling of liability, but this is a very important one.

Most of the risks of nuclear damage in the operation of nuclear ships are from collision. Merchant ships and warships use the same waters. They must obey the same rules of road. It is just as important to protect the non-nuclear ship from liability by reason of nuclear damage from a warship as from a merchant ship.

The whole trend of modern times is to make all ships liable for collision damage, whether privately owned or governmentally owned, and whether merchant ships or warships. This is illustrated by our Suits in Admiralty Act and our Public Vessels Act.

Herzel H. E. Plaine, as chairman of the American Bar Association Committee on Atomic Energy Law, asked the Secretary of Defense for his position on the question of the inclusion or exclusion of warships. This was answered by Benjamin Forman, Assistant General Counsel for International Affairs, Department of Defense, in a letter dated November 20, 1962 as follows:

> "The Convention was conceived originally as one means of encouraging the development, construction and operation of nuclear merchant ships. In that form, it was supported by the United States. It was only later that an attempt was made by other countries to extend it to warships. The United States has never supported this extension. The shift in the U. S. position from one of support of the Convention to one of non-adherence is the result of this change of scope.
>
> "The Department of Defense sees no present legal need for the Convention to apply to warships. The Public Vessels Act (46 USC 781 et seq.) is an effectual remedy for nuclear incidents involving U. S. warships. Further, protection of suppliers and builders is provided for in their contracts with the Government.
>
> "Admittedly, the Convention specifies that its provisions do not make warships subject to arrest, attachment or seizure and does not authorize inspection. As a practical matter, however, it can be anticipated that many nations visited by nuclear ships will draw no distinction between warships and merchant ships insofar as safety is concerned and will demand nuclear safety information and the right of inspection on board of safety measures regarding reactor operation and waste disposal. To treat warships and merchant ships in the same Convention would furnish a justification for such demands and weaken the traditional distinctions at international law between the two types of ships. In our view, any diminution of the traditional immunity of warships from foreign inspection or search would be detrimental to the national security of the United States.

"As a matter of interest, the Maritime Law Association of the United States at its meeting on November 2, 1962, voted to defer action on the Convention. May I request that your committee, after considering the views expressed herein, lend support to the position of the U.S. Government."

This was effectively answered by the Committee on Atomic Energy of the Association of the Bar of the City of New York, as follows:

"The Public Vessels Act gives the District Courts of the United States jurisdiction of actions against the United States for damages caused by public vessels of the United States. In order to recover under this statute, a tort claimant must ordinarily prove negligence. Furthermore, no suit may be brought under the Act by a national of a foreign government unless that government, under similar circumstances, allows United States nationals to sue in its courts. Quite apart from these provisions, however, the two most serious limitations on the efficacy of this statute are the following:

(1) The Act provides expressly that the United States 'shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels.' This means that the United States, when sued under the Public Vessels Act, can take advantage of the Limitation of Liability Act, which, as noted above, permits an owner to limit his liability to the value of the vessel and her pending freight at the end of the voyage on which the loss or damage occurs, provided there shall be a minimum of $60 per ton available for the payment of death and personal injury claims. The United States has in fact invoked such limitation of liability in litigation under the Public Vessels Act. If it should seek to do so in a suit arising out of a serious nuclear incident caused by a United States nuclear warship—and there is no basis for assuming that it would not seek to avail itself of the Limitation of Liability statute in such a case—the result could well be that the total fund available to claimants would be highly inadequate, and but a small fraction of the $100 million fund provided for in the Brussels Convention.

(2) The Public Vessels Act fails to meet the problem caused by the risk of collision between a nuclear warship and a non-nuclear merchant ship, in which the latter is wholly or partially at fault. Although the merchant ship could seek to avail itself of the Limitation of Liability statute in such a case, private insurance against the risk of a collision of this sort is very difficult to obtain, and, if obtainable at all, quite costly.

"According to the Department of Defense statement quoted above, protection of suppliers and builders of nuclear warships is provided for in their contracts with the Government. Such protection has serious shortcomings. A 1962 amendment to the Atomic Energy Act of 1954 extends the authority for Atomic Energy Commission indemnity agreements to AEC contractors and lower tier suppliers for nuclear incidents occurring outside the United States, up to a maximum of $100 million in excess of any financial protection required of the contractor by the Commission. It is not clear whether such indemnification will include persons who contract directly with the Department of Defense to supply components of nuclear warships. Such Department of Defense contractors might seek and obtain indemnity agreements from the Government under other statutes, but even if such statutes provided the requisite authority for such an agreement in a particular case, the contractor's indemnity rights would ultimately depend upon the availability of appropriated funds and would not ordinarily extend to lower tier suppliers. Moreover, the limitation-of-liability established by the 1962 amendment to the Atomic Energy Act for nuclear incidents occurring outside the United States to which an AEC indemnity agreement is applicable, (namely, $100 million plus the amount of financial protection, if any, required by the AEC of the contractor), would not necessarily be recognized in suits brought in foreign courts; as a result, United States concerns which build, or supply parts for, our nuclear warships remain exposed to the risk of liability in excess of the indemnity limit, even if they have the benefit of an AEC indemnity agreement.

"The above-quoted letter from the Department of Defense also expresses concern that the Brussels Convention would

weaken the traditional distinctions at international law between warships and merchant ships, particularly with regard to the traditional immunity of warships from foreign inspection or search. However, as the letter itself recognizes, the Convention provides expressly that nothing contained in it shall make warships or other state-owned or state-operated ships on non-commercial service liable to arrest, attachment or seizure, or confer jurisdiction in respect of warships on the courts of any foreign state. The Convention does not purport to set standards of safety or operation for any nuclear ships, or to authorize any form of inspection or control for any such purpose. The Convention provides that nothing in it shall affect the right of a contracting state to deny access to its waters and harbors to nuclear ships licensed by another contracting state. And finally, the Convention provides that no liability thereunder shall attach to an operator in respect of nuclear damage caused by an incident due directly to an act of war, hostilities, civil war or insurrection.

"On the other hand, the purposes of the Convention would be to a large extent defeated if nuclear warships were excluded from its coverage. Today the only nuclear ships other than warships which are in operation are the N.S. SAVANNAH and the Soviet icebreaker LENIN; whereas 51 nuclear warships have been commissioned by the United States and at least an additional 29 are under construction, a number of nuclear warships are reported to have been commissioned by the Soviet Union, and Great Britain has recently commissioned the H.M.S. DREADNAUGHT and is planning to build additional nuclear submarines. Thus, at present nuclear warships, by reason of their greater number, present a far greater risk to the public than do nuclear merchant ships, and by the same token non-nuclear merchant ships face a far greater risk of collision with nuclear warships than with nuclear merchant ships. And even after the nuclear merchant ship industry has progressed to the point where the present-day disparity between the number of nuclear warships and the number of nuclear merchant ships no longer exists, the exclusion of warships from the Convention would create a serious gap in its coverage. A nuclear warship is as great a source of potential danger as a nuclear merchant ship, and the same principles of liability should apply to both.

> Accordingly, the Committee believes that the appropriate agencies of the United States Government should reconsider the present United States position with regard to the application of the Convention to warships."

The Chairman of the American delegation to the Brussels Conference in his report to the Secretary of State indicated that he was very unhappy with the position of our Government against the inclusion of warships. In his final recommendation he stated:

> "The circumstances leading to the United States position against ratification of a convention which included warships should be re-examined by the Government departments concerned. Whether the present policy, which if continued would, *inter alia,* require conventional shipowners or operators and third parties to carry uninsurable nuclear risks, remains in the overall best interest of the United States should be given consideration."

This Convention will not be workable if warships are excluded. If you have a collision between a nuclear warship and a non-nuclear commercial ship and nuclear damage results, the owner of the non-nuclear ship could probably limit his liability under the convention statutes. The Government might also be able to limit its liability under the existing Statute of Limitation of Shipowners Liability. In that case the victims of the nuclear incident would recover very little. The owner of the non-nuclear ship might suffer very serious nuclear damage for which he could not recover.

The rules governing liability for collisions should be the same for all ships. They both use the same oceans and they both must obey the same rules of the road. In a collision between a warship and a merchant ship, any damage it causes do not differ from those caused by a collision between two merchant ships.

Professor David F. Cavers in an article in the February 1964 Harvard Law Review under the title "Nuclear Risk Protection" 77 H.L.R. 644, 684 states:

> "At the very least, the case for becoming a party to the Brussels Convention is plain. Not only is it free from some defects of the other conventions, but also it covers activities in which American nationals and corporations will be engaged

that now enjoy only limited Price-Anderson protection (nuclear incidents in our territorial waters, contractors supplying reactors for government-owned nuclear ships, and the special case of the N.S. SAVANNAH). If nuclear propulsion realizes its promise, an international convention governing liability will be essential. However, instead of exerting leadership toward this goal, we have become bed-fellows of the communist bloc, joining it in a refusal to sign because the convention covers warships."

* * *

"Our obduracy is not due to lack of safeguards in the convention; rather we suffer from a not uncommon form of legal hypochondria; a fear emanating from the Department of the Navy that, by becoming a party to the convention, 'we will have a wedge which will permit the argument that warships and merchant ships should be considered together in the future for other regulations and for safety features and for inspection.' The convention's terms do not require this result either directly or by implication. In the spirit of inconsistent pleading, the Navy spokesman also notes that the Government may now be sued for injuries done by warships under the Public Vessels Act. The result of our position is a stalemate: the non-nuclear maritime states refuse to accept the convention as long as the nuclear states refuse to permit most of their nuclear-propelled vessels to come under it."

Pieder Konz, the Deputy Secretary General of the 1961-2 Brussels Diplomatic Conference, writing in the American Journal of International Law for January, 1963, page 110, states:

"In many respects, the 1962 Brussels Convention is an American convention. American views prevailed on the limit of liability, on indemnification by the licensing state, on channeling of liability, on the barring of recourse actions, and, finally, even on many of the final clauses, including Article XIX, which insures the continued application of the Convention for as long as twenty-five years of operations to ships licensed prior to the termination of the Convention. This provision, which was one of the few adopted by less than a two-thirds majority, is particularly important for the American nuclear industry which is, and may be expected to remain, one of the principal suppliers

of nuclear equipment and which, in the absence of the Convention and its provisions limiting and channeling liability, would be particularly exposed to tort liability for nuclear damage."

It is your Committee's opinion that the Brussels Nuclear Ship Convention is a good one, and that it deserves your approval and they recommend that you do approve it. They further recommend that the representatives of the Association be authorized so to advise the State Department and any other interested departments of the United States, and if occasion should arise to appear before the appropriate committees of the Congress to urge the ratification of the Convention or adoption of legislation making it a part of our domestic law.

Respectfully submitted,

HENRY C. BLACKISTON
LEAVENWORTH COLBY
NICHOLAS J. HEALY
WALTER P. HICKEY
HERBERT M. LORD
EDWIN LONGCOPE
EDWARD H. MAHLA
LEONARD J. MATTESON
JOHN C. MOORE
CLARENCE MORSE
L. deGROVE POTTER
F. HERBERT PREM
EDWARD D. RANSOM
JOS. M. RAULT
CLEMENT C. RINEHART
WILLIAM G. SYMMERS
GEORGE B. WARBURTON
ARTHUR M. BOAL, *Chairman*