

# ILA COMMITTEE ON INTERNATIONAL LAW AND SEA LEVEL RISE

## Minutes of the Closed Session (I)

Washington D.C., 9 April 2014

(10:45 am – 12:15 pm)

Chair: *Professor Davor Vidas*

**The Chair** welcomed all Members to the first closed session of the Committee. He then thanked Professor David Freestone, Co-Rapporteur of the Committee, for his hospitality displayed the night before inviting all Members to an informal dinner at his home. The Chair moved on to make a brief introduction on the history of the establishment of the Committee.

He recalled that the initiative for setting up the Committee was given during the 75<sup>th</sup> ILA Conference in Sofia, Bulgaria, in August 2012, where an ILA Resolution was adopted, acknowledging that international law issues linked to the prospects of sea-level rise require consideration by a committee established for the specific purpose of addressing a broad range of related concerns. The establishment of the Committee was thereafter approved by the Executive Council of ILA in November 2012. Then, nominated Committee Members were approved by the Executive Council in two rounds in the course of 2013, first held in May and the second one in November. The Chair stated that the membership of the Committee on that basis consists of 21 Members; in addition, there are also 4 Alternates. The Chair pointed out that 14 of the 21 Committee Members, thus two-thirds, are present at this first session, which he considered as a good level of participation at the initial Committee session. Moreover, the Chair informed that several new membership nominations have been put forth and will be considered by the ILA Executive Council at its next meeting. The Chair considered that, with the current membership composition and pending nominations, the Committee already has a good and diversified composition, in terms of different and complementary expertise represented, professional background (academics and practitioners), balanced gender representation (10 female and 11 male Members), as well as diversified regional coverage.

The Chair then referred to the written material circulated to the Members by email in advance of the Washington session, in particular the ‘Initial Discussion Paper for the First Session of the Committee on International Law and Sea Level Rise’ containing introductory notes by the Committee Chair, by the two Co-Rapporteurs, and by two other Members of the Committee. The Chair pointed out that this paper contains the background material for the discussion at this first session. He also referred to the first draft of a Discussion Paper on statehood, distributed to the present Members; along with other discussion papers, this will be the subject of discussion at the inter-sessional meeting of the Committee to be held in 2015.

The Chair stated that that he would not repeat all of the information already contained in the Initial Discussion Paper, and would instead focus on several aspects he considered of primary importance to deal with at this first closed session of the Committee, including: what will be

the Committee's task; how will the Committee undertake its task; in accordance with which timeline will the Committee operate; what are the products expected and when; what are the outreach options for the Committee; and how should the Committee operate at its first open session, to be held the next day.

As to the question of what will be the Committee's task, the Chair recalled the Committee's mandate as approved by the Executive Council, which reads as follows:

study the possible impacts of sea-level rise and the implications under international law of the partial and complete inundation of state territory, or depopulation thereof, in particular of small island and low-lying states; [and] develop proposals for the progressive development of international law in relation to the possible loss of all or of parts of state territory and maritime zones due to sea-level rise, including the impacts on statehood, nationality, and human rights.

Then, as to the question of how the Committee might operationalize its task, the Chair pointed out that, whilst in *all* future cases of sea-level rise, questions relating to the law of the sea will be present, only in *some* of those cases will, additionally, the questions of forced migration and human rights, as well as fundamental issues of statehood be posed. The Chair therefore identified three main issue areas to be dealt with by the Committee: the law of the sea, forced migration and human rights, and issues of statehood.

As to the timeline for the Committee's work, the Chair outlined several milestones in the next years. First, in 2015, an inter-sessional Committee meeting will be held in Oslo, Norway, on 11-12 June, organised by the Fridtjof Nansen Institute. For this meeting, preparation by the Committee Members of several discussion papers on the three key areas of work previously mentioned would be sought for, in order to enable a discussion of these during two full working days. On the basis of these contributions and outcomes of discussion, the Committee would work on its preliminary report by the end of 2015, with a view to have an interim report presented at the next, 77<sup>th</sup> ILA Conference, to be held in Johannesburg (South Africa) in 2016. The Chair highlighted that, since the issues at stake are far-reaching and operate on a long-term basis, the interim report would not be expected to be fully comprehensive nor conclusive. In 2017, Members of the Committee would be invited to a major international conference on international law and sea level rise, to be held in Oslo, organized by the Fridtjof Nansen Institute. Therefore, various publications and other types of outreach can be considered in relation to the activities along the Committee's timeline.

The Chair then invited the two Co-Rapporteurs, Professor David Freestone and Professor Jane McAdam, to follow-up with their reactions and any additional aspects of the work-plan.

**Professor David Freestone (United Kingdom)**, Co-Rapporteur of the Committee specially dealing with the law of the sea aspects of the Committee's mandate, first praised the high level of expertise already present in the Committee's membership. He then paid tribute to the success of Professor Vidas in recently obtaining a remarkable grant from the Research Council of Norway, in support of a four-year research project closely related to the theme of

work of the Committee, which will therefore also facilitate various activities of the Committee. As to the products from the Committee's work that could be expected, Professor Freestone noted that, in addition to the ILA reports, the Committee could seek the publication of journal articles, such as in the form of a special issue of an academic journal, for instance the *International Journal of Marine and Coastal Law*, or *Climate Law*. He considered that this would be a benchmark that would give great impetus to the work of the Committee. He explained that these articles could be drawn from several discussion papers produced by Committee Members for the planned 2015 Oslo inter-sessional meeting. Then, following the submission in 2016 of the Committee's report (preliminary or interim), a major international conference would be held in Oslo in 2017, enabled by the research project led by the Fridtjof Nansen Institute, to which policy-makers and scholars of other disciplines could be invited. The proceedings of this Conference would also be published, and they would be useful for the Co-Rapporteurs for their work on the respective parts of the Final Committee Report.

**Professor Jane McAdam (Australia)**, Co-Rapporteur specially dealing with the aspects of forced migration and human rights, thanked the Chair for the preparation of the work of the Committee, and of the larger research project closely related to it. She noted that her views about the nature of the Committee's work on this theme were set out in the Discussion Paper circulated prior to the meeting, so she would only comment briefly. She explained that her research to date, along with that of Committee Member Professor Walter Kaelin, had not focused on sea-level rise specifically as a driver of migration, but rather on the impacts of natural disasters and climate change more generally (of which sea-level rise is one element). Research shows that such impacts will interact with other political, socio-economic and environmental stressors, which means that it is impossible to pinpoint 'sea-level rise' as *the* cause of movement: what we are discussing is a multicausal phenomenon. She noted that among other things, the 'Nansen Initiative on Disaster-Induced Cross-Border Displacement', launched by the Governments of Norway and Switzerland in October 2012, could constitute a rich source of material on the desires and expectations of affected populations. It is engaged in a series of sub-regional consultations around the world and its findings will be reported in mid-2015. Professor McAdam observed that it is essential to appreciate that long before a State's territory is submerged by sea-level rise, the population will need to have moved. This necessarily has important implications for understanding the nature of movement and the types of legal and policy responses that will be appropriate. While international refugee law, human rights law, and the law on statelessness are assumed to be the most relevant to this context, existing research shows that they are unlikely to provide much assistance to those who seek to move – especially in anticipation of disasters or hazards that may render their homes uninhabitable. Further, rather than seeking to rely on remedial mechanisms once conditions become intolerable, most affected communities would prefer to have opportunities to migrate earlier on (e.g. for work, education, etc). In this way, they could use migration proactively – as a form of adaptation.

**The Chair** then opened the floor for discussion about the mandate of the Committee and operationalization of the work of the Committee through the three areas previously identified – the law of the sea, forced migration and human rights, and issues of statehood – as well as about the possible inter-linkages among these.

**Professor Jane McAdam (Australia)** explained that the discussion paper on statehood, distributed to the Members of the Committee attending the closed session, had been prepared by the University of New South Wales’ team for the 2012/13 Jessup International Law Moot Competition, drawing on their own submissions and those of the other top 10-ranked teams. Committee Alternate, Mr. Derek Wong, was a co-author of that Jessup *compromis*. Professor McAdam further noted that, whilst the present draft of this discussion paper is not a finished product but an initial draft which could be further developed for the 2015 inter-sessional meeting, its distribution at this year’s closed session might serve as a useful background already at this point and perhaps stimulate some thoughts about the next steps for research.

**Professor Patrick H G Vrancken (South Africa)** explained that the introductory note on sea-level rise he drafted, and which is included in the Initial Discussion Paper, had mainly been prepared for his own orientation and understanding of the problems involved in the mandate of the Committee. He remarked that the Committee will have to deal with a set of complex issues, some of which have already been dealt with by other ILA Committees. He wondered how the three streams will fit within the bigger picture, and considered this matter as an important point for the Committee to bear in mind while working in parallel tracks. Professor Vrancken also pointed out that the Committee will have to deal with the progressive development of the international law matters at hand, and asked which direction the Committee was heading to, and whether there was agreement or not on such direction.

**Professor David Freestone (United Kingdom)** commented that, indeed, the Committee is ‘a child’ of the Committee on Baselines under the International Law of the Sea, since the need for this Committee was first stated in the 2012 (Sofia) report of the Baselines Committee.

**The Chair** added that, regarding interaction, it is important that some Members of the Committee on Baselines under the International Law of the Sea are at the same time also Members of this Committee on International Law and Sea Level Rise. The Chair further recalled that, beyond the open sessions at the biennial ILA Conferences, there may be other opportunities for facilitating interaction between the two Committees, such as joint workshops – an option already proposed by the officers and some members of the Baselines Committee at their session held the previous day.

**Professor Rosemary Rayfuse (Australia)** commented on the mandate of the Committee. She remarked that the Committee not only risked repeating the findings of previous Committees, but also that one stream of work risked getting overwhelmed by aspects of another stream, if developed in parallel. She then raised the possibility of integrating in the work of the Committee, in addition to the three streams or as part of them, wider related matters, such as sustainable development, climate change adaptation, or the impact of sea-level rise on other international environmental regimes – for instance, on the Ramsar

Convention on Wetlands or on the World Heritage Convention. In this context, principles such as common but differentiated responsibilities and respective capabilities, or equity, may be worth of analysis by the Committee. Professor Rayfuse pointed out that, although the mandate of the Committee seems narrow, it is capable of a broader interpretation. She finally wondered how the product of the different streams could be eventually merged.

**Professor Walter Kaelin (Switzerland)** considered that identifying a short list of key issue-areas and organising the work of the Committee around them was a good entry point, and that these could perhaps be later supplemented by other issue-areas. He remarked that, although a lot of work has already been done in each of the three issue-areas, putting them together is something that has not been done yet. Therefore, he highlighted that elaborating inter-linkages as well as enabling a synthesis of the different streams is what would constitute a real contribution that the Committee could make. As to the question of how should the work of the Committee be undertaken, he noted that some additional guidance could be useful. Professor Kaelin proposed that, in each of the three issue-areas identified, a list of questions to be addressed could be identified. After identifying the key issues at stake, the Committee could move on to identifying the legal gaps. Professor Kaelin further observed that some ILA Committees study not only the current state of the issues at stake, but also their progressive development so as to eventually develop international principles in this area. He queried what approach the present Committee might take. He then made reference to the ‘Nansen Initiative’, indicating that further information was available in a leaflet available for distribution among the present Members of the Committee. The leaflet summarised the activities within the Initiative, as well as the report of the first Intergovernmental Consultation in the Pacific. In 2015, the Nansen Initiative’s work will conclude with a global consultation and the release of a ‘protection agenda’ (not a soft law instrument but a ‘toolbox’ of principles and guidelines, based on the findings of the Initiative).

**Professor Alfred H A Soons (Netherlands)** thanked the Co-Rapporteurs and Members taking part in the preparation of the Initial Discussion Paper, as well as previous oral interventions by other Members of the Committee. He raised the question of whether it would be possible for the Chair to consider inviting additional ‘corresponding’ members, in particular those located in the areas most likely to be affected by sea-level rise and potential victims of the prospective changes. Their views would probably greatly affect the results of the work of the Committee. Professor Soons pointed out that there are already many publications on the issue-areas to be dealt with by the Committee and that *de lege ferenda* proposals are where the Committee could make a difference. Professor Soons also pointed out that issues of statehood and forced migration relate to unique situations, in the foreseeable future more seriously affecting only four States in the world, thus likely to raise case-to-case solutions. Regarding the Committee’s timeline, he considered that aiming at producing a Final Report by the next, 77<sup>th</sup> ILA Conference in 2016 was too optimistic. Therefore, he suggested that the time horizon of the Committee to present a Final Report should be the 78<sup>th</sup> ILA Conference, to be held in Australia in 2018, while an interim or preliminary report could be considered as a target for the 77<sup>th</sup> ILA Conference in 2016.

**The Chair** welcomed Professor Soons' suggestion to invite special corresponding members located in the Pacific and Indian Ocean regions, and noted that some exploration of the possibilities in that respect has already been conducted by the Co-Rapporteurs of the Committee. The Chair supported the suggestion by Professor Soons regarding the optimal timing of the interim and final reports of the Committee, for 2016 and 2018 ILA Conferences, respectively, and confirmed that an early discussion of the Committee officers with the ILA Director of Studies was held the previous day, during which such options were also indicated. The Chair moreover agreed with Professor Soons' remarks about the unique situation of several Pacific and Indian Ocean island States, and reiterated that in *all* cases of sea-level rise to be dealt with by the Committee, issues of the law of the sea will be present, while in only *some* of the cases there will be *additional* aspects of forced migration beyond national borders and the questions of statehood under international law.

**Ambassador Marie Jacobsson (Sweden)** congratulated the Chair on the successful preparation for the launch of the Committee and its work so far. She acknowledged that the 'Nansen Initiative' could provide for very useful information on the track history of these matters. Ambassador Jacobsson raised the question of what will be the goal of the work that the Committee intends to produce: an analysis, list of suggestions, or synthesis with commentaries, among other possibilities; and considered that a synthesis should be the preferred goal. She suggested that the work of the Committee might be more centred on the identification of loopholes in the relevant legal areas, and encouraged the Committee to dare to explore the issue-areas within its mandate 'outside the box'. Ambassador Jacobsson agreed on the identification made by the Chair of the three issue-areas, as well as with the proposal of integrating in the membership of the Committee special corresponding members from the Pacific region. On the latter point, she explained that while participating in the preparation of the referendum in Palau, she noted that the country in question hired people especially for cooperating with this task. She therefore suggested that the Committee could turn to the Permanent Missions of the United Nations in New York, which have shown a great deal of interest in this topic and where the Committee could find people specially nominated by the interested States. She also mentioned the relevance of indigenous people's rights in the context of the issues dealt with by the Committee, and considered that it should not be 'high jacked by climate change factors'.

**Dr. Alejandra Torres Camprubí (Spain)** thanked the Chair and Co-Rapporteurs for the work on the establishment of the Committee and the successful preparation of its initial session. She suggested that the concepts of *time* and *gravity* could be used as two factors creating inter-linkages between the three issue-areas and forming a common umbrella. Then, she expressed support for the suggestion that additional corresponding members located in the Pacific region, or people nominated by the States involved, should be invited to become members of the Committee. In this regard, she noted that, in addition to the Permanent Missions of the United Nations, the Committee could also turn to the Commonwealth Secretariat, which in 2012 was tasked by the Commonwealth Assembly with the preparation of a report on security, statehood and access to water in Pacific Island States.

**Dr. Maria Gavouneli (Greece)** noted that the Committee faces an incremental situation, according to which it will be called to deal with sea-level rise impacts in the law of the sea, first; then in human rights law as the second level; and, finally, in the most extreme cases, it will also deal with the question of statehood as the third level. She then considered that it will be necessary for the Committee to identify the legal loopholes, and adapt to the ‘new world’ opened to the Committee by the case-scenarios and issues it will explore.

**Dr. Alejandra Torres Camprubí (Spain)** further added that, in cases where statehood might be in question, the Committee will first of all need to take a normative position on whether it will wish to support, or not, the continuation of the States affected. Given that this preliminary issue will most likely be one of the most challenging points to be dealt with by the Committee, and that its resolution will strongly depend on the findings made in the law of the sea and human rights issue-areas, she recommended to deal with the question of statehood at a later stage, instead of in parallel to, the two other issue-areas.

**Professor Jane McAdam (Australia)** expressed her appreciation for Professor Rayfuse’s suggestion to integrate questions of climate change adaptation and sustainable development into the Committee’s mandate. She noted that consideration of these issues is already integrated into a lot of the research relating to displacement and migration, since movement may only be necessary in cases where *in situ* adaptation is not possible. These issues are also closely related to the human rights analysis, since the absence of adaptation and development may in fact lead to violations of particular rights. She further considered that it would indeed be wise to delay the examination of the question of statehood, for it will likely be of interest to all Members of the Committee (and be a way of unifying and drawing together the work of the law of the sea/migration themes/working groups). This would also prevent the Committee from duplicating efforts while working in parallel groups.

**The Chair** highlighted that, in undertaking its task, the Committee will in many respects not be able to use the apparatus with which the lawyers are otherwise trained to proceed – that is, reliance on *precedents* and the use of *analogies* with previous comparable situations. The Chair stated that there are no ‘precedents’ for a serious sea-level rise since the ‘invention’ of international law and that, likewise, there could be no analogies with the comparable earlier situations. In that context, he remarked that, for instance, a phenomenon of possible future State ‘extinction’, as currently termed and understood by part of the international law doctrine, is not just an opposite picture in a mirror to that of State ‘creation’, although this might be the first instinct of an international lawyer to approach the issue.

**Professor Maureen Williams (Headquarters)** referred to the value of satellite data, already used by some international courts and tribunals, and suggested that it could serve as the topic of one discussion paper, possibly on the role of space technology in the context of sea-level rise. In particular, she mentioned how in the *Qatar vs. Bahrain* case, the International Court of Justice used space technology to draw the boundaries between the two States. She explained that some judges rejected the application of this technology, an opposition which made the case last for ten years. She then asked whether the references to forced migration exclusively

involved human migration, or whether other species could also be included in the scope of the Committee's work.

**The Chair** explained that there are four complementary and mutually supporting methodological ways of reaching scientific knowledge about the sea-level rise: modelling, semi-empirical studies, observations enabled by the remote sensing technology, and insights of geology/stratigraphy about the earlier sea-level rises in the Earth's history.

**Ambassador Marie Jacobsson (Sweden)** expressed her satisfaction that the issue of satellite data had been raised. She noted that UNITAR is currently leading a project on this matter which could be useful for the Committee to know about.

**Dr. Alex Oude Elferink (Netherlands)** wondered as to how the Committee would deal with this type of scientific data.

**Professor Maureen Williams (Headquarters)** added that, since the issue of sea-level rise is inter-disciplinary, the Committee should work hand in hand with natural scientists.

**The Chair** replied that while the Committee, composed of international lawyers, could not venture in the various segments of natural and technical sciences, the awareness of these must be nonetheless present in the work of the Committee. The Chair also added that there is an opportunity for the Committee to interact with the Anthropocene Working Group of the International Commission on Stratigraphy, for instance at the planned international conference in Oslo in 2017, as well as through the already mentioned new research project supported by the Research Council of Norway.

**Professor Alfred H A Soons (Netherlands)** considered that the question of how to use scientific data should not constitute a problem for the work of the Committee, since it could rely on existing predictions and simply take aspects of natural science as a given.

**Professor David Freestone (United Kingdom)** thanked the participants for such a fruitful exchange of ideas, which shall be continued the day after in the open session. He added that he intends to hire a research assistant to compose a bibliography on the issues related to the Committee's mandate.

**The Chair** thanked the participants for their contributions to discussion and announced that the next day the Committee would meet, first, in an open session from 9:00 to 10:30 am; and then in a closed session, from 10:45 am to 12:15 pm.

\*Session Reporter: *Dr. Alejandra Torres Camprubí*