

ILA COMMITTEE ON INTERNATIONAL LAW AND SEA LEVEL RISE

Minutes of the Closed Session (II)

Washington D.C., 10 April 2014

(10:45 am – 12:15 pm)

Chair: *Professor Davor Vidas*

After holding its first open session earlier in the morning, the Committee continued the work in a closed session.

The Chair welcomed the participants, including also non-Committee members who were interested in attending the closed session. He recalled that, regarding the timing of the Committee's work, it has been proposed that an interim report would be produced by the 77th ILA Conference to be held in South Africa in August 2016, and a final report to be completed by the 78th ILA Conference to be held in Australia in 2018.

Professor David Freestone (United Kingdom) explained that the Committee had a very fruitful closed meeting the day before. He expressed interest in taking into account other treaty regimes, such as the Ramsar Convention on Wetlands or the World Heritage Convention, as well as their respective linkages with the climate change regime and its underlying principles. He suggested organizing a round of oral comments to then list the ideas raised.

Professor Jane McAdam (Australia) suggested that in terms of a work programme, it would perhaps be most practical to have two parallel streams in the first instance – one on the law of the sea issues, and the other on the migration/human rights issues. There was a relatively clear division of expertise in the Committee along these two lines so it could work quite naturally. Of course there would be communication between the two streams, for instance via the Co-Rapporteurs as well as at intersessional meetings. Then, since there is likely to be interest and expertise from both those groups on the statehood question, this could be a later area for examination and a point of commonality for both streams.

Professor Rosemary Rayfuse (Australia) pointed out that the work of the Committee is also connected to that of the Committee on Sustainable Development, which deals, among other issues, with coastal adaptation. She therefore suggested adding this topic to the list of linkages between the work of the Committees. Professor Rayfuse warned against 'going too far down the road' with climate change, because sea-level rise is not exactly the same issue. In her view, it does not really matter whether sea-level rise is caused by climate change or not. Rather, the Committee should take sea-level rise as a matter of fact.

Professor Alfred H A Soons (Netherlands) considered that forced migration and cultural issues are the most pressing and important in time, and asked what is the broader context in which these issues would be studied by the Committee. He suggested concentrating on the issue of forced migration, if necessary at the expense of issues related to the law of the sea and statehood. He further noted that the Committee needs to define a clear direction in which the progressive development of the issues at stake could be explored. He finally mentioned that maritime zones which may become high seas as a result of sea-level rise will constitute a great opportunity for other States.

Dr. Maria Gavouneli (Greece) considered that the issue at stake is how the ‘legal arsenal’ can address sea-level rise. Accordingly, she drew a list of issues to be taken into account. The first item she listed was a general discussion on the impacts of sea-level rise on human rights. She noted that this item does not have a linear progression, and that disaster-response or relief measures, in addition to climate change adaptation, would be important to take into account. The second item she listed was ‘sea/land’ issues, which would include matters such as the protection of the world heritage or the stability of borders. The topics of sustainable development and coastal adaptation could eventually fall within this item as well. The third item she listed was the extreme cases of State disappearance. She highlighted that this is a situation that will not occur often, and that before it ever occurs, millions of people will be forced to move. Therefore, she contended that the ‘everyday program and need of the world community will need to be addressed’. She further expressed her preference for not putting the question of statehood at the center stage of the work of the Committee, preferring to deal with it at the end of the process. Finally, as a better way to structure the Committee’s work, she considered that its task may be of pinpointing areas of concern and eventually to issue recommendations on them.

Professor Patrick Vrancken (South Africa) expressed the view that, although all the issues identified for study by the Committee were important, the Committee should first focus on the law-of-the-sea issues. It is only when those issues had been addressed, possibly in the form of recommendations for the development of the law, that the other issues could be focused upon by the Committee without running the risk of approaching those issues from too wide an angle. Otherwise, the Committee might, on the one hand, run the risk of not devoting sufficient attention to whether, and if so how, the international law of the sea should be developed in the face of sea-level rise and, on the other hand, take upon itself the study of almost any issues arising from the consequences of climate change. He considered the latter to fall outside of the Committee’s brief and something which, in any case, the Committee was likely to find to be unmanageable.

The Chair explained that the Committee's work should be based on two premises: first, the identification of the foreseeable legal consequences of sea-level rise, which do include the law of the sea aspects in *all* cases; and, in addition, aspects of human rights law and the law on statehood, for *some* cases; and second, the use of 'time' and 'gravity' as concepts organizing the list of questions drawn. He stressed that he would expect an active engagement of the members of the Committee, each of whom could participate in different ways, for instance, by sending draft papers, proposals, questions with elaborations or commentaries, etc.

Professor Elisabeth Burleson (United States) pointed out that parallel discussions that are taking place not only in other ILA Committees but also in the Conference of the Parties of international environmental regimes should be followed closely, and used as opportunities to make the work of the Committee reach those communities. She explained that the language in the context of Conferences of the Parties changes very quickly, giving, for example, the recent incorporation of the stream of 'loss and damage' as part of the climate change regime. She encouraged the Committee to identify its audience, as well as reminded of the rapid developments in other fora.

Professor Walter Kaelin (Switzerland) explained that in today's session, the three big issue-areas that had been previously identified have been expanded, because the topic to be addressed by the Committee is a phenomenon, rather than just a legal institution. He considered it important for the Committee to remain realistic and suggested to proceed in four stages: first, map the foreseeable consequences of sea-level rise; second, identify gaps and areas where there is sufficient work already produced on this matters; third, analyse and propose international law developments that are needed; and fourth, organise the work of the Committee in sub-committees, accordingly.

The Chair welcomed Professor Kaelin's proposal.

Dr. Marcos Orellana (Chile), currently not a member of the Committee, raised two ideas for consideration by the Committee. First, he referred to the question of the resolution of disputes relating to sea-level rise, and questioned whether Part XV of the United Nations Convention on the Law of the Sea would be inadequate for these case-scenarios. Secondly, operating in the interface between the law of the sea and human rights, he remarked that the law on self-determination had a great potential in the context of endangered statehood and access to natural resources.

Professor Jane McAdam (Australia) considered that the task of mapping would be useful, if applied in a targeted way. She suggested operating in two distinct groups corresponding to two distinct strands of expertise, and stressed the interest of exploring how the scope of the two groups would intersect. She noted, as an example of possible intersection, the question of whether an income generated from the Exclusive Economic Zone of a submerged State could eventually be put in a Trust Fund for the benefit of the affected population.

Dr Alex Oude Elferink (Netherlands) considered that the idea that the law of the sea and the law of baselines have so far operated in the context of stability does not entirely reflect the status so far, as in the case of the Netherlands, both regimes have often operated in an uncertain context. He thus considered that it would be difficult for the Committee to justify diversions from these regimes, except from the cases of low-lying island States whose continuation is threatened.

Professor Jacqueline Peel (Australia), non-member of the Committee, expressed concern for not taking into account too many issues, and suggested that a middle-ground could be found, which would integrate a spectrum of different issues, including climate change adaptation, disaster-response and sustainable development.

Mrs Rahima Ansar Musaliax (unknown branch), non-member of the Committee, who had participated at the 2013 Jessup Moot Competition on a team of the Kuwait International Law School, pointed out that in the context of loss of statehood or State sovereignty due to sea-level rise, the question of the responsibility of neighbour States and/or of the international community would merit thorough consideration by the Committee.

Professor Rosemary Rayfuse (Australia) noted that human rights law creates obligations of States to their nationals, and therefore considered that the Committee should also explore the obligations of other States in cases of forced migration.

Professor David Freestone (United Kingdom) considered that the Committee now had accumulated an extensive list of issues, some of which cross the boundaries of the originally identified issue-areas in the mandate of the Committee, and that perhaps it would be useful to develop a matrix so as to move the agenda of work forward.

The Chair indicated that the record of the meetings will be sent to all Members of the Committee and their responses will be sought.

Professor Jane McAdam (Australia) further added that from responses of the Committee members, a framework would be drawn up, on the basis of which specific points would be used to structure the June 2015 Oslo inter-sessional meeting of the Committee.

The Chair agreed with this way of moving forward.

Dr. Maria Gavouneli (Greece) agreed as well with this procedure, for it ensures that the Committee will produce a collaborative work.

Dr Alex Oude Elferink (Netherlands) pointed out that, although it is important to involve the members of the Committee in the work towards producing the reports, there are limits to expectations and it is necessary that the Co-Rapporteurs take the lead.

The Chair stressed the importance of ensuring that the reports of the Committee represent the collective work of its membership and recalled the ILA guidelines in that respect. The Chair pointed out that each Committee Member can collaborate through different modes of input but than an active involvement of all Members in various phases of the preparation of the committee reports is an important consideration.

Professor David Freestone (United Kingdom) acknowledged that the task of the Rapporteurs in drafting a report on such a complex issue was not going to be simple, but he suggested that encouraging Members to develop papers and contributions on issues of particular interest for the inter-sessional meeting could provide a very useful examination of the wider landscape of issues – which would be invaluable to the Co-Rapporteurs in distilling key issues and approaches. Although he accepted the rapporteurs' task was to draft the report, he suggested that this “bottom-up” approach would be more fruitful and stimulating than for the Co-Rapporteurs to draft reports for the Committee members to comment upon.

Professor Elisabeth Burleson (United States) asked how the Committee could integrate external experts to work on some concrete issues facing the Committee.

The Chair replied that there are various options, for instance a joint meeting of the members of the Committee on Baselines with the members of the present Committee.

Dr Anita Halvorssen (United States), non-member of the Committee, but member of the ILA Committee on Legal Principles Relating to Climate Change, explained how the latter organized its work. After the main issues to be tackled were identified, Committee members chose which one they wanted to work on, forming sub-groups which would then each produce a part. The rapporteur then put all the contributions from the sub-groups together and prepared a common presentation. She indicated that each sub-group had strict deadlines for submission of their respective contributions.

Dr. Alejandra Torres Camprubí (Spain) asked whether the issue of international security, which appears in the mandate of the Committee, but has not been raised so far in its discussions, would be studied as well.

Professor María Teresa Infante (Chile), non-member of the Committee, considered that the issue of natural disasters is not directly an international law question, but rather a question calling for examination from an international relations perspective. She nonetheless wondered whether a certain form of obligation to cooperate could arise so as to give a legal response to cases of endangered statehood.

Professor Jane McAdam (Australia) noted that the International Law Commission is currently working on draft articles the protection of persons in the event of natural disasters, and the Committee might find its deliberations useful.

Professor David Freestone (United Kingdom) suggested developing a select bibliography that could be posted at the Committee's website. He moreover indicated the usefulness of a website for the Committee purposes.

The Chair explained that the ILA committee webpages provide very limited opportunities. As part of the outreach strategy, the Chair suggested that the Committee may include a link to a further website elaborated specifically for its own purposes and related to the website of the research project led by the Fridtjof Nansen Institute.

Dr. Anita Halvorsen (United States) suggested also the use of dropbox. She further mentioned the relevance of the track history of the governments in exile during the Second World War, when dealing with the issue of Pacific islands' governments forced to relocate abroad.

Professor Rosemary Rayfuse (Australia) expressed her satisfaction that a bibliography would be composed, but stressed that it would be important to identify the relevant issues before undertaking such task.

Professor Jane McAdam (Australia) warned that the Committee could find itself overwhelmed by resources, and thus agreed that it would be important to have a focused database.

Dr. Maria Gavouneli (Greece) stressed the need to establish deadlines, and to make the allocation of papers well in advance in order to secure an adequate response from the Members for the inter-sessional Committee meeting to be held in Oslo in June 2015.

The Chair agreed with Dr. Gavouneli and explained that within a short time, the records of the sessions will be circulated among the Members of the Committee, along with an accompanying letter where the deadlines of the inputs will be set. A second circular will then follow, proposing tasks for those who may have expressed their interests. He thanked all participants for a stimulating session and invited the Co-Rapporteurs to make their final remarks.

Professor Jane McAdam (Australia) thanked all participants and looked forward to the continuation of the work of the Committee.

Professor David Freestone (United Kingdom) stressed that the Committee will need a continuation of an active involvement of its Members and thanked all participants for a great discussion which has made the work of the Committee very promising.

*Session Reporter: *Dr. Alejandra Torres Camprubí*