

ILA COMMITTEE ON INTERNATIONAL LAW AND SEA LEVEL RISE

Minutes of the Open Session

Washington D.C., 10 April 2014

(9:00 am – 10:30 am)

Chair: *Professor Willem van Genugten* (Netherlands)

The Chair opened the session and explained that, upon the suggestion of the Chair of the Committee, the first part of the morning session will be open, whereas the second part will be closed to continue to carry out the Committee's work. He then welcomed the audience and gave the floor to the Chair of the Committee.

Professor Davor Vidas (Norway), Chair of the Committee, thanked the session Chair and expressed his pleasure to be sitting at the first open session of the Committee. He then moved on to introduce it and indicate where and when it was established, what is the Committee's mandate, and how does the Committee, at this early stage, plan to fulfil such mandate.

As to the first of these questions, Professor Vidas explained that, as far back as 1990/1991, pioneering studies on sea-level rise and the potential legal issues that could ensue were published, and pointed out that these mostly focused on aspects of the law of the sea. Fortunately, the visionary authors of those studies are today members of the Committee. More recent studies have also incorporated a range of other legal concerns surrounding the perspective of sea-level rise, including, for example, issues of forced migration, human rights and the question of statehood. Professor Vidas highlighted that, whilst this broader setting has provided for an emerging international law debate, a systematic study of this complex and increasingly important issue-area is still lacking. In this context, he reminded that the International Law Association had an important role to play, for its principal objective is the study, clarification and development of international law.

He then moved on to explain the origins of the Committee and recalled that the ILA Committee on Baselines, created in 2008, was the first to include as part of its mandate the study on the legal implications of sea-level rise. In 2012, the Final Report of the Committee on Baselines recognised that the loss of a State's territory due to rising sea levels is not primarily a baseline or law of the sea issue, but that it also encompasses other wider subject areas. This was also acknowledged at the 75th ILA Conference held in 2012 in Sofia, to the extent that, the same year, the ILA Executive Council established a new Committee for the specific purpose of addressing this broad range of concerns relating to sea-level rise. Professor Vidas went on to explain that membership of the Committee was appointed in two rounds in the course of 2013, first in May, and then in November. At the moment, the Committee counts 21 members as well as 4 alternates, most of whom were present during the open session.

Professor Vidas then introduced the relevant parts of the mandate, which tasked the Committee with the study of the possible impacts of sea-level rise and implications under international law, as well as with the development of proposals in relation to the problems identified. He stressed the need to undertake the study by inter-linking different areas of

international law. The first area to be studied in the Committee will be the law of the sea, given that, with rising sea level, the baselines from which the breadth of the territorial sea is measured are likely to move landward, thereby affecting the outer limits of various maritime zones. Ultimately, sea level rise may call into question the entire architecture of the maritime zones under today's law of the sea. The second area to fall within the scope of the Committee's study will be statehood, as the concept of a defined territory and control over it, constituent element of statehood, may have to be re-examined, in particular for some low-lying Pacific and Indian Ocean States. Finally, Professor Vidas noted that another key factor may be population, rather than territory itself, for small island States are likely to become uninhabitable long before they become physically submerged. Finally, Professor Vidas noted that the work of the Committee will focus on questions that belong to a future likely to take place within the time-span of the current century, and stated that the final objective of the Committee will be to formulate proposals for such prospective developments.

Professor Vidas thanked the audience for the interest shown in the first open session of the Committee and invited the co-rapporteurs to develop further explanations on their respective areas of study.

The Chair thanked Professor Vidas for his presentation and gave the floor to Professor David Freestone, co-rapporteur of the Committee specifically tasked with the coordination of aspects of the law of the sea.

Professor David Freestone (United Kingdom) thanked the Chair and welcomed the audience. He pointed out that, although the purpose of open sessions is generally to present to a wider audience the findings of the Committee, at this early stage it was difficult for the Committee to put forward conclusions, as it had only held its first closed session the day before. Therefore, Professor Freestone decided to make a presentation on the options to secure jurisdictional maritime claims in the face of sea level rise, as extracted from a paper co-authored by Clive Schofield and previously presented at Colombia University.

His illustrative and explanatory presentation began by briefly recalling the different maritime zones, the rules on baselines that apply to different coastal scenarios, as well as the main causes of sea-level rise (from natural shift in earth's crust to melting glaciers). He then reviewed the prospective estimates of global average sea level rise, as accepted by the Intergovernmental Panel on Climate Change in its 2007 4th Assessment Report, as well as in the more recently released 2014 5th Assessment Report, and considered that there are ranges of uncertainty. As to the question of ambulatory baselines, Professor Freestone pointed out that coastal recession may have uneven impacts in the jurisdictional claims of the States concerned. Sea-level rise does not necessarily nor automatically trigger the recession of the baselines, given that the location of the relevant base points may well remain unaffected.

He then moved on to tackle the implications of sea-level rise on islands and the prospect that some features may be re-categorised as rocks that cannot sustain human habitation or economic life of their own. In this context, he noted the response options available to States to hold the line and recalled the extensive and extremely expensive efforts undertaken by Japan to protect the insular feature known as Okinotorishima and even building up the reef around it. As to the legal and policy options available to States affected by sea-level rise, Professor Freestone mentioned the possibility of fixing ambulatory baseline and boundaries through the conclusion of treaties.

The Chair thanked Professor Freestone for his presentation and gave the floor to Professor Jane McAdam, co-rapporteur of the Committee specially tasked with the coordination of aspects relating to human rights and forced migration in the context of sea-level rise.

Professor Jane McAdam (Australia) began by presenting some images on how Kiribati is affected by increased tides and severe storm charges and recalled how this corrupted fresh water resources, to the extent that, for instance, Tuvalu once had to declare the state of emergency. She then explained that climate change impacts affect the enjoyment of a wide range of human rights, including the right to health, shelter, life, culture and potentially also of self-determination.

Professor McAdam pointed out that the most drastic impacts of climate change are likely to be felt in the poorest parts of the world, where human rights protection is often weak. Noting that long before the worst case scenario of sea level rise becomes real, people will be forced to move, she clarified that sea level rise itself will not be the trigger of forced migration. Rather, climate change acts as a threat multiplier. It interacts with pre-existing socio-economic issues. Climate change may ultimately act as a tipping point making people unable to remain in their homes. Professor McAdam also noted that poor levels of education, technical capacity, resource availability, and institutional support hamper responsive capacities, and make lobbying for assistance and adaptation difficult.

She explained that most migration will occur within borders, and stated that international law only recognizes small categories of people that have the right to be protected by foreign countries: refugees, stateless people, and those eligible for complementary protection. She further explained that refugee law is not helpful because it requires the existence of a well-founded fear of being persecuted for reasons relating to race, nationality and religion, among others. Likewise, the statelessness regime is poorly ratified and provides for a very legalistic definition of a stateless person (which would be inapplicable here). Finally, she noted that the human rights regime is important in this context, for it sets out minimum standards of treatment that States must afford to individuals within their territory or jurisdiction. It may also provide a legal basis on which protection may be sought (and granted) in another State (known as ‘complementary protection’), and, if relocation occurs, human rights law requires minimum standards of treatment to be observed in the host State. Professor McAdam considered that there is a need for jurisprudential developments if complementary protection is to assist people seeking to escape the slow-onset impacts of climate change, since complementary protection currently only protects against relatively imminent risks of harm. She further highlighted the existence of a strong belief on self-help among Pacific communities, and stressed the need to raise awareness and preparedness among populations, and well as to develop voluntary migration policies.

The Chair thanked Professor McAdam for her presentation and opened the floor for questions and comments from the audience.

Professor Itzhak Kornfeld (Israel) inquired if international law permitted third states to intervene to protect a World Heritage Site threatened by sea level rise. He mentioned the Great Barrier Reef in Australia as an illustration of this point.

Professor David Freestone replied that under the UNESCO World Heritage Convention, there is a World Heritage Committee that reviews the condition of WHC sites and can provide

funds to help states maintain such sites. However, there is no *erga omnes* right allowing third parties to intervene. He thought the only consequence of irreparable damage is deletion from the list of WH sites.

Professor Akm Emdadul Haque (Bangladesh) thanked the co-rapporteurs for their respective presentations. He commented that regarding sea level rise and its impacts, according to the Intergovernmental Panel on Climate Change, the most vulnerable State is Bangladesh. He inquired as to what would happen if baselines were submerged due to sea level rise in cases when the outer boundaries had already been established by a bilateral treaty or by a judgment.

Professor David Freestone responded that in his view boundaries fixed by judicial decision are binding under customary international law in this regard.

Professor Davor Vidas further clarified that the task of the Committee at this stage is to identify questions and problems, rather than to think of possible pre-formed solutions.

Professor Jane McAdam pointed out that there are frequent population movements due to urbanization, creating large slum populations. International law imparts upon States an obligation to comply with international human rights treaties, among them a duty to ensure that people are not residing in dangerous areas. She further recalled the existence of soft law instruments which provide guidance for situations of internal displacement, and considered that the development of further measures by the international community will be needed to support preparedness for relocation.

Professor David Caron (United States) urged the Committee to consider the theory of boundaries, which fundamental purpose is to create an expectation of certainty, and therefore also of stability. He then asked Professor McAdam how to re-establish certainty on these issues.

Professor Jane McAdam remarked that while there have been some calls for a treaty, they are premature and problematic because they tend to suggest that climate change is the cause of movement, when we know that movement is triggered by a variety of causes. Further, there is an absence of political will to create any new protection instrument. She explained that States are reluctant to set a precedent by accepting a certain number of climate-induced migrants.

Professor Davor Vidas opined that, indeed, the theory of boundaries relies on the notions of stability and predictability. However, he considered that the increasing reality of climate change has put this into question, as geography could in a perspective become a less stable factor.

Professor Barbara Bean (United States) requested the Committee to take into consideration the range of possible international law responses to scenarios involving entire nation States – as opposed to individuals or small family groups- relocating as a result to climate change.

Professor Jane McAdam explained Kiribati had recently purchased land in Fiji for food security. In future, it might be possible for some people from Kiribati to move there, with the permission of the Fijian government.

Professor Catherine Redgwell (United Kingdom) drew attention to recently adopted Articles and Commentaries of the ILA Committee on Legal Principles Relating to Climate Change, and asked whether the Committee would be considering the applicability and adequacy of these and other principles to the situations covered by its work. She also confirmed Professor Freestone's understanding of the working of the World Heritage Convention.

Professor Davor Vidas thanked Professor Redgwell for her comment and stated the Committee would be addressing these issues in the second part of the closed meeting.

Dr. Hao Phan (Singapore) asked Professor Freestone whether judicial decisions really make the maritime boundary permanent despite sea level rise and, in the affirmative, whether this means that judicial decisions trump treaty obligations. Professor Phan also questioned whether judicial decisions bind states that are not Parties to the dispute.

Professor Davor Vidas reiterated Professor Caron's point on certainty as the principal purpose of the law on maritime boundaries, and then indicated that this consideration was an upcoming theme of discussion within the Committee. A fundamental question raised by this issue is whether a State disappears once its land territory gets submerged.

Professor Jacqueline Peel (Australia) posed a question regarding the scope of the Committee's work, and asked to what extent is the Committee going to engage with the general international regime on climate change, and in particular with the aspects of adaptation measures and sustainable development.

Professor Davor Vidas responded that, while the Committee will focus on issues of, inter alia, law of sea, migration, human rights and statehood, this list was not necessarily exhausted by that and other legal issues might emerge and need to be integrated in the future work of the Committee.

Mr. Leonard Bernard (Singapore) commented on the possibility of freezing the outer maritime boundaries of disappearing island nations. He considered this option as constituting a poor form of compensation to States losing their land or statehood, and stressed that it would, in addition, greatly contravene the fundamental law of the sea principle holding that the land dominates the sea.

Professor David Freestone thanked Mr. Bernard for his insightful comment, and indicated that many scenarios suggest that, if the Karibati Islands were to disappear, its residents could eventually migrate to Fiji. There are a number of innovative approaches that could be taken to this issue including perhaps the suggestion that migrant population nevertheless retains ownership and generates income of their maritime zones.

The Chair thanked the audience and the Committee Officers once again for their participation. The Committee continued after a break in closed session.

**Session Reporters:*

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