

ILA COMMITTEE ON INTERNATIONAL LAW AND SEA LEVEL RISE

Minutes of the Open Session

Johannesburg, 10 August 2016

(2:00 pm – 4:00 pm)

Chair: *Professor Aziz Tuffi Saliba* (Brazilian)

The Chair welcomed attendees and introduced the reporters after which he invited the Chair of the Committee, Professor Davor Vidas, to outline aspects of the Committee and its work towards the draft Interim Report that is presented at today's session.

Professor Davor Vidas (Norway), Chair of the Committee on International Law and Sea Level Rise, thanked the session Chair for the opportunity and said that the main purpose of today's open session of the Committee was to present and discuss its draft Interim Report.

He reminded the delegates that while this Committee has the reference to 'sea-level rise' in its name, it is in fact not the first International Committee of the ILA set to study international legal implications of sea-level rise, rather that it was the Committee on Baselines under the International Law of the Sea (hereinafter: Baselines Committee) which was formed in 2008 with a part of its original mandate stating that: "the need to identify, and possibly clarify or develop, the existing law concerning the normal baseline *arises in response to possible sea level rise* that has been predicted to accompany the phenomenon of climate change, and the effects this may have in particular upon low-lying, small island developing states".

He also reminded that in 2012, when the Baselines Committee adopted its first Report at the Sofia Conference, it concluded that: "the loss of a State's territory to rising sea levels is *not primarily a baseline or law of the sea issue*. Substantial territorial loss is a much broader issue encompassing concerns of statehood, national identity, human rights, refugee status, state responsibility, access to resources, and international peace and security". The ILA Conference at Sofia acknowledged that this array of issues would require consideration by a committee to be set up for the specific purpose of addressing such a broad range of concerns.

Professor Vidas stated that this Committee on International Law and Sea Level Rise in a way evolved from part of the original mandate of the Baselines Committee, however with a mandate that is a far broader one than limited to baselines and the law of the sea only, since it includes the tasks to "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".

He added that the establishment of the Committee was prompted by current natural science concerns about the profound changes on-going in the Earth system (including, but not limited to, climate change) – and the possible ramifications of those changes for international law.

Although the exact figures are uncertain, even for this century, he reminded the meeting that scientists agree that one major feature of a warmer world will be rising sea levels and that scientific literature on this aspect is quickly growing. The matter is highly relevant for several areas of international law and requires a study inter-linking different parts of it, he said.

One such part, he stated, is directly related to the sea: to the law of the sea, regulating maritime entitlements of states and delimitation of their maritime zones. Ultimately, he continued, sea-level rise may call into question the conceptual architecture of the maritime zones under today's law of the sea. While this is a complex matter in its own right, the issue of sea-level rise may – in certain special situations, in particular of some low-lying Pacific and Indian Ocean states – extend far beyond the law of the sea and the determination of baselines and maritime zones of the coastal states, he stated.

He explained that this gives rise to fundamental questions regarding aspects of state territory and statehood under international law, such as the way that the concept of a defined territory is seen as a constituent criterion of statehood in international law. Aspects like that, he considered, may have to be re-examined in a perspective of profound changes in natural conditions. However, he held that the key factor may be population, rather than territory itself, as small island states are likely to become uninhabitable for other reasons long before they become physically submerged. Do people then resettle as individuals only, or as a community? And, indeed, when would a state cease to exist – given the criterion of population in defining statehood. These questions, he pointed out, have far-reaching implications.

Professor Vidas went on to explain that the Committee was faced with a rather comprehensive mandate, and that at the first meeting, at the Washington ILA Conference in 2014, it had already decided to address this mandate through two main phases – and accordingly, to produce an Interim Report first (the one presented today), and a comprehensive Report thereafter, for the next ILA Conference to be held in Australia in 2018, at which stage the Committee will also formulate some recommendations.

He explained that main issue-areas to be dealt with by the Committee were identified as:

- the law of the sea;
- forced migration and human rights; and
- issues of statehood and international security.

Although each of these issue-areas has already attracted a lot of research and publications, he further explained that the Committee considered that it could make a useful contribution, within the framework of its mandate, by:

- synthesising these various issues,
- elaborating interlinkages; and
- considering options for proposals *de lege ferenda*.

He explained that the Committee agreed to divide its work thematically into two main stages. The first stage involved two parallel streams of study: one on the law of the sea issues, and the other on the migration and human rights issues. That stage was now completed with the Interim Report. The second stage, as he explained, will from now on involve the study of the statehood question and of subjects of international law, but also other issues of international law and broader issues of international security, as the common elements of both streams.

Finally, he added that the Committee had discussed impacts of sea-level rise on other areas of international law, such as cultural heritage law and environmental law (for instance, in the context of biodiversity protection regimes), but that it was suggested that these issues might be relevant in the possible later stages of the Committee's work.

Before inviting Professor David Freestone, Co-Rapporteur of the Committee, to present the main issues and findings in the Interim Report, Professor Vidas added that the themes dealt with by the Committee have so far attracted 29 Members and 6 Alternates from a total of 19 different ILA branches (and from six continents) to join the work of the Committee.

Professor David Freestone (United Kingdom), Co-Rapporteur of the Committee specially dealing with the law of the sea aspects of the Committee's mandate, introduced his presentation by underscoring the importance of the issue of sea-level rise and he alluded to the Intergovernmental Panel on Climate Change's Fifth Assessment Report which noted that projections of sea-level rise are larger than in the Fourth Assessment Report, primarily because of improved modelling of land-ice contributions. He then moved on to address the potential impacts of sea-level rise on maritime zones. In this regard, he noted that the Baselines Committee 2012 Sofia Report drew important conclusions, namely that:

- the normal baseline is ambulatory;
- under extreme circumstances ... [a] change could result in total territorial loss and the consequent total loss of baselines and of the maritime zones measured from those baselines;
- the existing law of the normal baseline does not offer an adequate solution to this potentially serious problem;
- the existing law of the normal baseline applies in situations of significant coastal change caused by both territorial gain and territorial loss. Coastal states may protect and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line.

In relation to maritime boundaries, he then stated that there may be problems associated with maritime boundaries negotiated in reliance on normal baselines in existence at the time of delimitation and the outer limits of a state's maritime zones proclaimed in reliance upon a normal baseline. He noted that under these circumstances, a question arises as to whether the existing law of normal baselines would or should apply.

He then summarised the issues for the Committee's Interim Report. He said first and foremost the Committee will not second guess the findings of the Baselines Committee but it is considering advantages of ambulatory or fixed baselines or of fixed outer limits of maritime zones as well as how such lines might be fixed *de lege ferenda*. He added that the Committee is also seeking to answer the question whether or not maritime boundary treaties are affected by the rule generally known as *clausula rebus sic stantibus* despite Article 62(2) of the Vienna Convention on the Law of Treaties and that this also includes the question whether or not sea-level rise does or should qualify as a fundamental change of circumstance for the purpose of *clausula rebus sic stantibus*.

The Chair invited questions and comments and none were forthcoming at this stage.

Professor David Freestone (United Kingdom) proceeded to present the third part of the Committee's Interim Report which was on migration and human rights. He acknowledged

that this part was prepared by Professor Jane McAdam (Australia), Co-Rapporteur specially dealing with the aspects of migration and human rights, who unfortunately was unable to attend. The third part of the report had three sections. Section A focused on how sea-level rise may affect human rights, including people's ability to remain in their homes. Section B focused on 'tools' to address the impacts of sea-level rise on human mobility and the assistance of affected people to remain *in situ* or to move either within their own country or abroad. The last section dealt with key areas for future study.

He then reported that the key findings are that:

- displacement linked to climate change is a multi-causal phenomenon;
- climate change impacts interact with other economic, social, and political drivers (or stressors) which themselves affect migration;
- most movement will occur within states, not across borders;
- slow-onset processes like sea-level rise can also have more immediate impacts (e.g. stronger storm surges, flooding);
- people may be displaced by a sudden-onset event (cyclone) or may migrate in anticipation of longer-term changes to their environment (erosion, saltwater intrusion);
- people have different 'tipping points', related to such things as underlying socio-economic conditions, environmental exposure, vulnerability, resilience, and access to resources;
- governance will impact significantly on how disasters are experienced and responded to;
- building codes, disaster risk reduction, climate change mitigation and adaptation, development, etc. help to shape community resilience;
- legal and other measures are needed to help people to remain at home, where possible and desirable, to move elsewhere, before disaster strikes and to be protected and assisted if displaced.

Having outlined the preliminary findings he noted that in addressing the question of the impact of sea-level rise on human rights the needs and rights of affected individuals must be central to all responses and the principles of human dignity, non-discrimination and international cooperation must be paramount. Regarding displacement he stated that the guiding principles on internal displacement must address needs and rights before, during and after displacement but these need to be strengthened normatively and operationally.

He stated that, in sea-level rise induced displacements, people will not necessarily be rendered stateless as a matter of law if their state becomes uninhabitable. He also explained that generally, international refugee law will be inapplicable. In relation to migration he stated that current legal frameworks do not facilitate the movement of people across borders in anticipation of future climate change-related harm. He added, however, that migration can be a form of adaptation by building long-term resilience hence states should consider mechanisms to enable people to move from particularly affected areas and this can be achieved through an expansion of existing visa categories, e.g., by special visas for at-risk areas. He then highlighted the significance of planned relocations as a response to forced migration noting that these would mostly be within states as opposed to cross-border movements.

Regarding human rights, he addressed the issue through questions, namely:

- What are States' obligations under international and regional human rights law to respect, protect and fulfil specific rights to protect people from foreseeable harm, including sea-level rise?
- Drawing on emerging jurisprudence in relation to disaster relief, to what extent are such duties inherent in states' existing human rights obligations? What is their content in specific situations?
- What are states' obligations under international and regional human rights law to take action to adapt to and address the impacts of sea-level rise on their populations, including in relation to displacement, migration and planned relocation?
- Which state(s) bear legal duties in this context (especially if sea-level rise challenges contemporary understandings of state responsibility)?
- What responsibilities does the duty bearer have with respect to adaptation, including mobility?
- Is there a right to a healthy environment? To disaster relief?

Similarly, he stated that the question of the international community's responsibility must be answered through the following questions:

- What is the role and responsibility of the international community to assist states vulnerable to sea-level rise?
- How should the international community's collective responsibility to adapt to the impacts of climate change be translated into more specific obligations, and discharged in specific situations?
- What is the meaning and content of the duty to cooperate (in light of the principle of common but differentiated responsibilities), especially when it comes to states taking joint and separate action to protect human rights in the context of sea-level rise?
- Can elementary considerations of 'humanity' and 'dignity' serve as overarching normative concepts to guide strategies to respond to the impacts of sea-level rise?

In conclusion, he stated that there was work underway to collate and compare states' understandings of international cooperation and international responsibility-sharing in the context of climate change law and refugee law, which might be used as a springboard for further research and analysis by the Committee. Also underway was work on the implications of sea-level rise on the protection of cultural heritage, and how international law should protect cultural heritage and identity as a human right if communities are displaced from their homes. He then concluded the presentation and thanked delegates for their attention.

The Chair invited questions and comments.

Professor Makoto Seta (Japan) asked why the Committee is concerned that freezing the outer limits of the maritime zones would challenge a fundamental principle of the law of the sea known as 'the land dominates the sea'. In his opinion, it is indeed possible to consider 'the land dominates the sea' as a general principle, but, in certain exceptional circumstances caused by sea-level rise, it will be so that, in effect, 'the sea dominates the land'; and in such situations an exception from the general principle should be allowed.

Professor David Freestone (United Kingdom) thanked Professor Seta for this comment and added that, with sea-level rise, the world will be facing some major changes in current natural conditions, due to which the Committee will have to contemplate proposals as to how to take

geographical features into account in interpreting the provisions of the Law of the Sea Convention and also in progressively developing the law of the sea.

Dr Vasco Becker-Weinberg (Portugal) suggested that accepting that path might also have implications for maritime delimitation itself, including for the methodology developed thus far by international judiciary. He was therefore interested to hear views on whether raising the questions indicated in the discussion above might not entail implications beyond the issue of sea-level rise.

Professor Davor Vidas (Norway) responded that there are no readymade answers to a change of such proportions as presented in scientific predictions of sea-level rise in the long run. However, he went on to note, that the primary issue before the Committee in this respect concerns the specific situation, of a *sui generis* nature, of several low-lying island states. This is likely to require specially-tailored solutions to which the Committee will try to contribute by identifying options for practical solutions as regards this unprecedented situation. He acknowledged that the Committee will have to look into the fundamental principles as currently embodied in the law of the sea, and agreed that, even though the Law of the Sea Convention does not explicitly state as a principle that ‘the land dominates the sea’, its architecture of maritime zones is largely based on that approach. He added that, in a longer-term perspective, the consequences of a profound change in the current geographical circumstances due to rising sea levels will give rise to fundamental considerations for the law of the sea, and that the Committee is still in a position to analyse options for possible legal solutions in theory, whereas the broader aspects of the law of the sea will remain among core issues in the work of the Committee.

Dr Vasco Becker-Weinberg (Portugal) pointed out, with reference to the geographic situation of Bangladesh, that the sea is already ‘dominating the land’ there in some respects; and that, if current predictions as referred to in the report are accurate, the situation is only going to get worse. With this in mind, he was interested in views regarding the predictability and certainty of maritime boundaries, like those between Bangladesh and Myanmar in the Bay of Bengal, which is a matter related to maritime boundary delimitation and is therefore a process in its own right.

Professor David Freestone (United Kingdom) responded that, as the Law of the Sea Convention does not offer solutions here, the Committee will have to devise proposals *de lege ferenda*, and also recognise some principles as more important than others. He added that it is unclear whether these proposals might entail challenges to the current law of the sea, but in any case, the Committee will need to present concise arguments for and against the different approaches suggested. He further noted that some changes in the current regime may be inevitable.

Pham Trang (ILA Scholar, Vietnam) was interested to know how sea-level rise might impact the practice of international courts and tribunals. She referred to the recent arbitral award in the South China Sea case in which the legal status of some maritime features was addressed, and pointed out that the evidence referred to dated from the 1930s to 1950s. She therefore wondered about the impact of sea-level rise since then, and whether this might have changed the characteristics of some maritime features, resulting, e.g., in islands becoming rocks or low-tide elevations. In her view, the Tribunal did not mention this issue in its award.

Professor David Freestone commented that the award in the South China Sea arbitration fleshes out and clarifies the meaning of some provisions of the Law of the Sea Convention, and that we can expect an evolution of legal thinking in the future, as the natural conditions are increasingly becoming subject to change – which is also a key issue for this Committee.

Professor Clive Schofield (Australia), Member of the Committee who also acted as an expert witness before the Arbitral Tribunal in the South China Sea case, commented that the Tribunal in the South China Sea arbitration did consider issues related to tidal conditions in its assessment of the relevant insular features, and concluded, as evident in its award of 12 July 2016, that it had sufficient information concerning historical observations of tidal conditions in the South China Sea, and was confident in the consistency of the hydrographic information before it regarding tidal levels.

Gawie Kanjemba (ILA Scholar, Namibia) asked about the most likely courses of action for maintaining statehood for low-lying island states and citizenship of their affected people, who will at some point be forced to migrate. He wished to know what international law provides in this regard and what can be done in terms of proposals for legal development in order to ensure smooth transitions in this respect.

Professor David Freestone (United Kingdom) responded that this is an issue that international law has not really had to address up until now; the Interim Report has identified some issues, and the Committee will in its further work aim at offering workable proposals in this regard.

Professor Davor Vidas (Norway) concurred with Professor David Freestone and added that this will be another important aspect of the Committee's work for the next two years, also noting that this inquiry might not necessarily be limited to the statehood question but could encompass broader considerations of international legal personality and subjects of international law.

The Chair asked if there were any further questions and thereafter invited the Chair of the Committee, Professor Davor Vidas, to add any closing remarks.

Professor Davor Vidas (Norway) thanked attendees for their participation and interest in the work of the Committee, and explained that the draft Interim Report of the Committee presented today will, pending minor updates, be forwarded to ILA Headquarters for publication.

The Chair thereafter thanked the Committee Chair, Professor Davor Vidas (Norway), Co-Rapporteur Professor David Freestone (United Kingdom), congratulated the Co-Rapporteurs and the Committee on their excellent work, and declared the session closed.

** Session reporters:*

Swikani Ncube (ILA reporter)

Tracey Kanhanga (ILA reporter)

Martin Ratcovich (Committee reporter, Sweden)