Conference Report: The African Society of International Law 9th Annual Conference on Africa and Covid-19

By:

Munia El Harti Alonso

November 12, 2020

The African Society of International Law (AfSIL) held its 9th Annual Conference on Africa and COVID-19 virtually, on 30 October 2020. AfSIL aims *inter alia* to promote international law on the continent and to contribute to the development of an international law that expresses the point of view of African States and specialists. The Conference was sponsored by law firms Foley Hoag LLP, Shikana Law Group and Asafo & Co.

Summary

AfSIL convened to explore the themes of solidarity and Africa's economic recovery plan in the context of COVID-19. Following the welcome by AfSIL President Makane Moïse Mbengue, Ms. Tafadzwa Pasipanodya, Vice President of

AfSIL, chaired the first session on “Solidarity and International Law”. Dr. Dire Tladi and Ambassador Dr. Namira Negm delivered keynote addresses, underscoring the necessity for solidarity in international law. Dr. Tladi questioned the emergence of an international law based on solidarity, evidenced by international law's responses to current challenges. He emphasized the importance of marine genetic resources for medical discoveries. Ambassador Naimra Negm introduced the African Union COVID-19 Response Fund, instrumental in curbing the COVID-19 spread in the continent. She concurred in the call to tackling socio- economic challenges, protecting of the marine biological diversity and benefit-sharing among African countries.

The second session moderated by Ms. Isabelle Rouche concerned Africa's economic recovery in the context of COVID-19. Minister Djacoba Tehindrazanarivelo introduced the African Union Recovery Plan, with an emphasis on socio-economic cultural rights, capitalizing on the idiosyncrasy of African law. He also highlighted the central place of states, debunking the concept of "failed state". Dr. Falou Samb analyzed the pandemic through the prism of doctrine, jurisprudence and legislation in Africa. He stressed the importance of harnessing and disseminating knowledge in Africa, suggesting a symposium of the AfSIL conference. Mr. Stephen Karingi and Ms. Chantal Ononaiwu discussed the African Continental Free Trade Area (AfCFTA) negotiation process, suggesting areas to focus on to unleash the Agreement's potential for recovery. Professor Olabisi D. Akinkugbe reflected on the pre-pandemic international economic relations in Africa, and how the asymmetries and inequalities exacerbated by the pandemic. He noted that the informal sector in Africa although neglected, had proven to be resilient. Touching upon the international investment protocol negotiations under the AfCFTA, he expressed hope that the Agreement would build on the Pan African Investment Code model agreement and in particular the sustainability and economic development orientation that centers Africa's interest vis-à-vis balancing the interests of investors and host states. Ms. Amne Suedi focused on the impact of COVID-19 on the East African Community, particularly on Kenya and Tanzania. She pointed to considerations regarding investor state-dispute settlement regimes, the important margin for states to regulate, as well as how the regulatory actions taken in response to the pandemic may engender claims by investors. The Conference ended with closing remarks delivered by **Judge**

Raymond Ranjeva, **Professor Maurice Kamto**, and **Professor Yenkong Ngangjoh Hodu**.

Opening remarks were delivered by Professor Makane Moïse Mbengue, (University of Geneva, Sciences Po; President, AfSIL). He recalled AfSIL was founded in Brazzaville in 2012, thanks to the vision of Professor Maurice Kamto. He thanked the organizers and sponsors of the conference, noting in particular the efforts of AfSIL Board Member Karim M'ziani. Professor Mbengue also brought attention to the fact that Africa has been the most proactive region in taking the COVID-19 pandemic as an opportunity to rethink international law. He cited to two illustrative examples: the first one relates to I.E. President Macky Sall of Senegal's publication of a paper in the Financial Times calling for a new world order based on more solidarity, the rule of law and fairness. The second example concerns the recent African Union ("AU") adoption of the first and only declaration on COVID-19 and Investor-State Dispute Settlement ("ISDS"), in which delegates are calling for a reform of the international investment regime that would take into account health protection, as well as states' right to regulate.

Ms. Tafadzwa Pasipanodya (Partner, Foley Hoag LLP; Vice-President, AfSIL) chaired the first panel discussions on COVID-19, solidarity and international law. She recalled Judge Mohammed Bedjaoui words on the evolution of international law: "the resolutely positivist voluntarist approach of international law still current at the beginning of the 20th century, has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of states organized as communities". Ms. Tafadzwa praised Africa as a region that has been able to take advantage of the juridical conscience of international law. She gave the floor to Dr. Dire Tladi and Ambassador Namira Negm to explain how the pandemic has helped to understand the extent to which international law is operating on the basis of solidarity.

Dr. Dire Tladi (Member, International Law Commission & Institut de Droit International) opened the dialogue on the theme of COVID-19, Solidarity and International law. He recalled solidarity and international law have been concerns of African international law thinkers for a long time, mentioning thought leaders Georges Abi Saab, John Dugard, Abdul Koroma and Taslim

Olawale Elias. Dr. Tladi questioned the emergence of an international law based on solidarity, a theory posed by Judge Bruno Simma of a displacement of the classic international law towards a "much more socially conscious legal order". He also evoked Professor John Dugard's premise of the emerging international law as "a brave new world". Instead, Dr. Tladi construed international law as "a vehicle through which the outcomes of bargain are reflected. It is neutral. It does not seek to harm the poor and the vulnerable, it as a system, is simply indifferent".

He noted the lack of solidarity in international law was evidenced by international law's deficient response to poverty. Pertinent to tackling poverty are international human rights and socio-economic rights. Socio-economic rights although set to play an important role in poverty eradication, are limited by several factors: (i) treaties, in concerning socio-economic rights apply only to states parties; (ii) treaty provisions are drafted as not immediately enforceable obligations, and (iii) the limited intra-territorial application of socio-economic rights.

Dr. Tladi underlined that marine genetic resources ("MGR") in areas beyond national jurisdiction, are pertinent for the availability of medicine. He noted the current process at the United Nations towards a new treaty on biodiversity in areas beyond national jurisdiction provides an opportunity to enhance solidarity in one of the most important areas of international law. The MGR are tied to the human heritage of mankind, whereby African states have led the way to a comprehensive solidarity-based approach to the common heritage and mankind principle.

He concluded his address by reflecting on the existence of an international community, expressed in *jus cogens* norms, or the responsibility to protect. Dr Tladi posed the question to be answered: "whether international law, as a rule, contributes to the establishment of an international community and thus a sense of solidarity". Dr. Tladi indicated that " [i]f, it does in good times, then it will surely be able to do so in bad times, including during pandemics".

I.E. Ambassador Namira Negm (Legal Counsel, African Union Commission) contemplated the necessity of solidarity in the current global crisis. Concretely as regards vaccine distribution, she concurred with WHO Director General, Dr.

Tedros Adhanom who had warned against "vaccine nationalism". She introduced the African Union ("A.U.") Response Fund and explained that the AU has initiated force majeure rules to enable the A.U. Assembly to issue a Decision by circulation based on silent procedures, to circumvent waiting for a Summit. She also noted that wealthier African states had contributed generously to the Fund. With the states' contributions, the A.U. notably managed to support pool procurement of diagnostics and other medical commodities that were distributed to the Member States by Africa CDC. The CDC was instrumental in ensuring the success of the A.U.'s efforts to curb the continental spread of COVID-19, an example of solidarity as envisioned by Professor Dugard.

She reported on the progress of the negotiations for a biodiversity international agreement, where the A.U. is closely involved with the African Group at UN Head Quarters in New York. She noted a growing interest among African states in protection and preservation, in particular, the over-exploitation of the marine biological resources in the high seas that eventually affect the livelihood of the marine species in our waters.

Agreeing with Dr. Tladi, she concluded that tackling socio-economic challenges will allow for access to sanitation, eventually leading to less infections; the advancement of science leading to means to counter the virus; and the use of the marine resources assisting in bringing medicine and vaccines. A lesson learned through COVID-19 is that solidarity among states to enhance the rules to the real benefit of humankind is of paramount importance.

Isabelle Rouche (Partner, Asafo & Co; Secretary-General AfSIL) moderated the second panel on "Africa's economic recovery in the context of COVID-19."

Minister Djacoba Tehindrazanarivelo (Minister of Foreign Affairs, Republic of Madagascar) reflected on the legal angle of the measures taken by the African Union to tackle the pandemic, during and in the aftermath of the COVID-19 pandemic. He introduced the A.U.'s Recovery Plan published last month, essentially centered around 4 goals: (1) food security (2) poverty reduction, education, youth support, health care, women inclusion (3) boost commerce and avail assistance cooperation notably via infrastructure upkeep (roads) (4) economic recovery to avoid a 100 billion tax deficit as well as protecting labor,

a tax justice for businesses and the democratization of universal health care.

The current pandemic shows the importance of human rights, specifically socio-economic cultural rights. In Africa there are legal instruments to protect those rights, which are even more important in the context of the pandemic. Socio economic cultural rights should be reinforced, taking stock of the idiosyncrasy of African law in that regard. Securing the land for land-workers is of paramount importance, investors are welcome but a clarification on land rights has to be envisaged.

All those measures will need a strong state to bolster those measures. Echoing the thoughts of Professor Kamto, he placed the importance of "puissance publique" at the center of international law. He noted the pandemic has also shaken the concept of failed states, an interesting evolving topic worth researching in light of the pandemic.

Dr. Falou Samb (Special Advisor to the President on Trade & Investments, Republic of Senegal) provided a sectorial perspective on three components of law in Senegal and at the African continental level; the first component is doctrine, the second component is jurisprudence, and the third is legislation and policy.

Regarding doctrine, Dr. Samb urged for the development of a "COVID-19 syllabus" focusing research efforts towards the pandemic. Dr. Samb took the example of this conference and encouraged the dissemination of analyses regarding Africa and COVID-19. Health has to be analyzed intersectionally with other fields such as trade, even if challenging. Access to medicine, for instance, is for paramount importance. An emphasis also has to be put on the rule of law and dispute settlement. He also mentioned the issue of debt, suggesting debt cancellation.

As regards the second component of jurisprudence, in the imbalance in the ISDS system ought to be addressed. In the WTO realm the issue of poverty (i.e. the issue of the GATTS 24) has to be reformed to take account of poverty. The WTO undertook positive steps such as the Doha declaration, but further efforts should be considered.

As to the third component of legislation, Dr. Samb pointed to the domestication of international law. In 2015 a full-blown package was designed; this roadmap should be implemented. Finally, he restated the importance of public relations and called for the recording of the discussions taking place today for the sake of developing know-how and accountability.

Mr. Stephen Karingi (Director of Regional Integration and Trade, United Nations Economic Commission for Africa) focused on integration and trade, highlighting that the African Continental Free Trade Area (AfCFTA) is a potent catalyst for recovery. Mr. Karingi added that the AfCFTA will be an accelerator to deal with the pandemic. He noted the breakdown on supply chains has had a particularly negative impact on the continent, proving the need to strengthen supply chains, which the Agreement will potentiate. He emphasized there is business and demand in the African continent, therefore it is a concrete reality that the AfCFTA will meet the demand in the market.

Mr. Karingi noted that investor-state contracts are still at issue; he posed the question: what does the pandemic mean for investment agreements? In that regard, he foresees the AfCFTA Investment Protocol being able to bring a solution to the ISDS challenges.

Ms. Chantal Ononaiwu (Trade Policy & Legal Specialist, CARICOM) observed the implementation of the AfCFTA will boost inter-regional trade, strengthening Africa's supply chain. Although there has been disruption in supply chains and dependence on imports during the pandemic, the disruption has made the AfCFTA even more relevant. She clarified that negotiations for the Agreement are currently proceeding online, adding that the delay should not be seen as a set-back, rather the continent is well positioned to take into account the lessons that the pandemic is underscoring.

She highlighted specific components of the Agreement worth taking into account in the negotiations, even in Phase I of the talks. Tariff reduction commitments for instance provide for a scope to align the commitments with the broader resilience goal. In the area of rules of origin, she stressed the importance of crafting product origin rules, avoiding unduly restrictive rules. The national level regulatory frameworks should also support the liberalization of services.

She signaled the Investment Protocol should be used as an opportunity to continue the trend lead by African Investment Agreements to take into account sustainability. Competition law and consumer protection will be equally important to ensure that the liberalization is not undercut by anticompetitive practices.

As to the decision taken earlier this year (Phase III of the AfCFTA negotiations) to foster e-commerce, it is an important development but considerations on digital trade should be infused in the existing discussions in the rules of origins, services liberalization, and providing an enabling environment for digital economy to be supported. Dedicated discussions on e-commerce could also encourage compatible regulatory frameworks for e-commerce to ensure there is trust in trading in an online environment.

Ms. Amne Suedi (Founding Partner, Shikana Law Group; Commissioner, AfSIL) focused on the impact of the COVID-19 pandemic on the East African Community ("EAC"), particularly Kenya and Tanzania. In the EAC, the pandemic effects have been felt in different ways, thus the measures between EAC member states have differed. She recalled that the pandemic had an important negative impact on GDP and FDI. Accordingly, the EAC members which also depend on other affected economies such as the US have been deeply affected by COVID-19.

She explained that Kenya enforced a partial lock-down and closed airports incurring a drastic drop in revenue collection, decline in tourism and exports from China. Tanzania, contrary to Kenya, had a late response in closing airports and hotels. In concrete figures, the export in goods in Tanzania declined to 5.1. billion USD.

She noted states still have a margin of discretion in taking regulatory action; however, those measures cannot be exercised in a discriminatory or arbitrary manner weather during the pandemic or after the pandemic. The *Philip Morris v. Uruguay* ICSID case is paradigmatic as it recognizes that there is room for wide measure of deference. As regards debt restructuring, she recalled the *Postova Banka v. Greece* during the 2008 crisis whereby Greece restructured its debt at the detriment of investors. She recalled that BITs have broad definitions of investment including bonds, which could trigger disputes based

on debt restructuring measures during the pandemic.

Reverting to the concept of solidarity discussed in the first panel, from the perspective of the EAC, the member states did not foster solidarity, with each country taking measures individually. The example of Kenya and Tanzania is striking as they were respectively standing at total opposites.

She indicated that when the pandemic started there was a timely opportunity to show leadership as a regional block. Another point on solidarity she evoked is the need for more solidarity on the continent. For instance, regarding Tanzania's amendments on the nature resources law and arbitration law, Tanzania raised issues regarding inequities in the international system and proceeded to amend its legislation. It would have been an opportunity for other states in Africa to follow suit. Finally, she addressed the question of how to develop value chains in pharmaceutics in line with the African Union.

Professor Olabisi D. Akinkugbe (Professor, Dalhousie University; Founding Editor, Afronomicslaw) articulated three axes of reflection revolving around the pre-pandemic era in Africa; how the pandemic has impacted international economic law in Africa; and the future of Africa post-pandemic drawing on the AfCFTA to illustrate his intervention. His presentation contrasted overlapping moments and developments at the national, regional/sub-regional and international level contextually. As to the pre-pandemic era, at the national macroeconomic level African states remain primarily commodities producers. In the regional and subregional context the African Union and the eight Economic Organizations have completed modest steps, but not much has moved in the formal economic integration sector. However, there has been a neglect of the informal sector which represents a core feature of African regional trade regimes.

In the international realm, one of the areas in which the actions of the Bretton Broods institutions have impacted African countries relates to sovereign debt. Another dimension he reflected upon relates to the role of external actors in the financing of the AU and projects in the continent and the implications for economic development in Africa. In a nutshell, the pre-pandemic Africa was reflected a lot of asymmetries and inequalities and enduring colonial legacies.

What the COVID-19 pandemic did was exacerbate those inequalities, not only vis-à-vis the African Community and South-South, but also within the African Union. Looking forward, one of the areas of note was the resilience of the informal sector in the face of the pandemic. Rather than fetishize formal regimes, he argued that Africa's informal sector, which is predominantly female, should be praised for its resilience during the pandemic.

Going back to the discussions about the AfCFTA negotiations, he pointed out that the sustainability and development model is critical to Africa's economy. In that regard, the model should be considered in the AfCFTA investment protocol negotiation. He expressed hope that some of the innovative provisions of the PAIC model will be the basis for a bold investment protocol. He concluded on an optimistic note that the AfCFTA is not an end in itself, it has triggered an important process. As such, the symbolic achievement for Africa deserves to be acknowledged.

The conference ended with closing remarks, delivered by Judge Raymond Ranjeva, Professor Maurice Kamto, and Professor Yenkong Ngangjoh Hodu.

Professor Yenkong Ngangjoh Hodu (Professor, University of Manchester Law School; Treasurer, AfSIL) commended the work of AfSIL towards this Conference. He shared two comments on the idea of solidarity, he pointed out international law is based on solidarity because international is the outcome of solidarity. Looking at the UN Charter, the text contains an expression of solidarity "we the people" analogous to the WTO use of "contracting parties" as an expression of solidarity. He addressed the idea of a COVID-19-specific instrument to deal with the pandemic. Thus far rules are being crafted separately, at the WHO for health, the WTO in the area of trade. Regarding the WTO he mentioned the issue of the compulsory license under the TRIPS agreement, entailing a flexibility for patenting.

He noted that problematically most of Africa's trade is based on commodities, with commodities price going down. In the context of the AU agenda on industrialization, there should be more efforts at the government level to demonstrate that industrialization endeavors are not just on paper. He emphasized that industrialization will be critical for recovery from the pandemic.

Professor Ngangjoh Hodu stressed that solidarity is also needed towards designing and developing testing and treatments. In May, Senegal remarkably developed a testing kit with the result delivered in 10 minutes. Developments for treatment in Madagascar and Cameroon deserve to be mentioned. There should be a way to share this scientific knowledge in the African Union, with a possibility of cross financing those advancements. Finally, he concluded his remarks with a call for genuine solidarity, which is going to be needed, rather than reactionary positions.

Professor Maurice Kamto (Member of the Curatorium, The Hague Academy of International Law; Professor, Yaoundé II University) stated COVID-19 is throwing a challenge at the international community, forcing us to rethink international law. Whilst Africans can foster solidarity at the community level as a value and even a dream, internationally it remains difficult to envision solidarity. Professor Kamto although not adhering to solidarity as a concept, indicated that cooperation is now a reality for both small and big states, dictated by necessity. He cautioned African law students should not be misguided in the ideal of solidarity, as in treaty practice states have put interests above with tactics such as late amendments or not ratifying.

He examined the COVID-19 pandemic not as a war nor a peace situation, it is rather an in-between. In pragmatic terms, he asked "the law of international transport is necessarily affected by the pandemic, how do we deal with this?" Answering that this is only possible if there are exchanges. He suggested the introduction of the notion of cooperation for exchanges to be better articulated, coupled with specific mechanisms to deal with them. This would allow for states to organize themselves to allow trade to flow in the context of a pandemic.

Professor Kamto cited to another example by looking at the African Charter on Democracy Elections and Governance, an instrument that emanated from a good intention. Yet since the adoption of the Charter, and now with COVID-19, we have to rethink the Charter to compliment it with mechanisms and instruments. For instance, the A.U. sends electoral observers, but there is no concrete mechanism to take account if those elections are in line with the Charter. He stressed the need for control mechanisms with accountability. He concluded his address by underscoring that the COVID-19 pandemic is a real

challenge, to which today's international law has to be adapted.

I.H. Judge Raymond Ranjeva (Former Judge and Vice President, International Court of Justice) remarked this year's Conference has brought us together to rethink the fundamental truths that molded lawyers. He agreed that solidarity is not the intrinsic trait of international law, which is why now is the time to reflect on solidarity. Judge Ranjeva assessed that the real question is what happens to solidarity, once petitio principi are affirmed and the declarations redacted? It is not COVID-19 per se that is the cause of scandal; it is rather the very idea of solidarity that is problematic in the international community. He put into question the mechanisms in place, which are alibis in disguise; what is rather needed is for consequences.

Judge Raymond Ranjeva noted that the fundamentals of solidarity are called into question during the pandemic. Reflecting on states practices, there are two ideas relative to the ambiguity surrounding the international community: on the one hand sovereignty, and on the other, the issues related to globalization, casting doubts on the viability of this new form of economic governance. COVID-19 revealed mercantile ambitions, which impacted the strategies to face the pandemic. He called for lawyers to revert back to the fundamental doctrine: the spirit of solidarity of the United Nations, embodied in the Charter.

Judge Ranjeva also criticized the management of the pandemic geared towards security concerns, to the detriment of a profound reflection on the global management of the COVID-19 crisis and the right to public health. It is up to us lawyers, in the COVID-19 momentum, to dig into those questions in order to find the United Nations spirit, for the emergence of global solidarity.

Professor Mbengue closed the Conference with an invitation to join AfSIL in Addis-Ababa for the 10th annual Conference at the headquarters of the African Union. The 10th conference will be themed on Africa and International Trade Law. He concluded reflecting on the words from Senegalese novelist Hamidou Kane:

"We did not have the same past, but we will have the same future, the time of singular destinies is over. No one can live on self-preservation alone".

View online: Conference Report: The African Society of International Law 9th Annual Conference on Africa and Covid-19

Provided by Afronomicslaw