Symposium Introduction: The 2023 Climate Change Advisory Opinions & the Global South

By:

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August 25, 2023

The Centre for International Legal Studies of Jindal Global Law School and Kabarak University Press, in association with the African Society for International Law (AfSIL) commenced the two-part panel series around the 2023 climate change advisory opinion requests over a virtual conference held on 13 June 2023. The conversation took place between convenors Professor Rashmi Raman and Humphrey Sipalla, moderator Isabelle Rouche, and an expert panel comprising professor of international law at the University of Geneva, Makane Moïse Mbengue, Kenyan lawyer and professor of public international law at Queen Mary University of London, Phoebe Okowa, former member of the International Tribunal for the Law of the Sea ("ITLOS") and professor at Jindal Global Law School, Gudmundur Eirikkson, and international human rights law Attorney Ms. Patricia Tarre Moser (hereinafter, the "**Panel**").

Introducing the Problem: The Climate Change Advisory Requests

Three advisory opinions regarding the impending implications of climate change are pending before the ITLOS [1], the Inter-American Court of Human Rights ("**IACHR**") [2] and the International Court of Justice ("**ICJ**") via UNGA Resolution A/77/256 in March 2023 [3]. These advisory opinions, Ms. Tarre contended, are very different from the contentious disputes presently being heard by the European Court of Human Rights [4]. The Panel deliberated over two broad questions; first – what is at stake for the Global South in the clarification of these legal obligations, bearing in mind that these nations are least responsible yet most affected by climate change; and second – whether the regime interaction between public international law, international environmental law, and international human rights law would be in line with the interests of the Global South or contrary to them.

The Big Question: Global South Participation in International Legal Proceedings

Sipalla, through his empirical study, demonstrated how Global South participation in requests for advisory opinions before the ICJ was historically poor in the written and oral stages of proceedings. Prof. Mbengue, on the contrary, remarked that there was a rising trend of Global South countries triggering advisory opinions in questions of common interest on the environment.

A New Era in the Fragmentation Discourse: Procedural Cross-Fertilisation

Prof. Mbengue deemed the COSIS Agreement "a vector of 'procedural cross-fertilisation'", where approaching ITLOS for an advisory opinion, has impacted our understanding of appropriate procedure with regards to advisory requests. This was unlike 'substantive cross-fertilisation', as seen in the Pulp Mills case before the ICJ in 2010, which spurred new ideas regarding environmental protection; ideas that were subsequently also adopted by the ITLOS Seabed Chamber.

In 2017, the Inter-American Court issued an advisory opinion at the request of Colombia on legal obligations related to environmental damage and the impact on human rights. All of this, Prof. Mbengue suggested, shows that we are moving into a harmonisation of international law, and not fragmentation. Prof.

Mbengue then proposed a sequential exercise of jurisdiction or ‘procedural coordination’, which he believed could allow these different fora to organise a cohesive stance that would not stray from one another. Opportunities for the Global South would now be to seize this momentum of harmonisation. On that note, he mentioned that the African Union would participate in the advisory opinion before the ICJ, assuring a unified stance of fifty-five member states.

Political Lacunae & Global South Participation

In her remarks, Prof. Okowa, too, rebutted Sipalla’s introductory findings on limited participation of Global South, arguing that the Global South has (largely) taken the initiative in requesting for these opinions. However, she remarked that in contentious cases and advisory opinions, the participation of Global South states has been low. She credits this discrepancy to the limited resources present in domestic ministries to fund foreign counsels and sustain these proceedings. Prof. Okowa focuses on the ease of access to some court processes over others, noting that the reason for COSIS’ success in bringing forth the request before ITLOS is owing to this simplicity — unlike that of the ICJ. Prof. Okowa found that the advisory opinions offer a good opportunity for States to seek clarity about their legal obligations without the winner-takes-all risks of contentious cases. However, she felt it a gamble seeking conclusive answers from international courts when actions (collective adoption, mitigation measures, drawing up a cohesive agreement, etc.) depended on political processes and resources of individual States.

Prof. Okowa agreed with Prof. Mbengue that fragmentation is not that big a risk in the climate change advisory opinions. She clarified that the question posed to the ITLOS related more to lex specialis and was defined by ITLOS’ own narrow jurisdiction. The request allowed ITLOS to interpret UNCLOS and consider it a living document with nuanced interpretation. Prof. Okowa’s comments were in line with the idea of ‘procedural coordination’ that Prof. Mbengue had proposed. According to her, the ICJ should, therefore, be deferential in their interpretation to ITLOS’ interpretation with regards to UNCLOS based obligations arising from the climate change emergency. The ICJ could then focus instead on broader questions, and so the tribunals and courts could support one another to benefit the interpretation of the law.

Prof. Eiriksson offered brief comments on the matter, suggesting that the vast diversity of courts could only enhance the discussion on the matter and provide important contributions to the jurisprudence. He also acknowledged the inadequacy of the political processes, as Prof. Okowa noted and hoped that the judges would act positively to resolve the discrepancies.

Ms. Tarre, familiar with the procedural workings of the IACHR, pointed out how everybody before the Court had standing, be they individuals, civil society organisations, or other actors. This emphasises the universal implications of the decision before the IACHR. Moreover, the questions for consideration by the IACHR have been drafted in excruciating detail, leaving very few stones unturned — emphasising the importance of this Court's decision even further.

Concluding Remarks

To answer whether the efforts to negate climate change were inherently disadvantageous to the Global South, Prof. Mbengue was hopeful and remarked that developing countries have been at the forefront of climate change adaptation and facilitation of financial flows. The Panel set the ball rolling, concluding with an acknowledgement of the imminence of the question and compelled us to think further on aspects of "procedural cross fertilisation".

The entire panel discussion can be viewed here. Over the course of the next few weeks, we will take these ideas forward through a series of blogposts addressing the different implications of these opinions in the jurisprudence of international law from the Global South, inviting further contributions from scholars in law, climate change, or other relevant fields to add to the discussion.

Footnotes

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[1] Request before the ITLOS is available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_CC

[2] Request before the IACHR is available at https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf

[3] Request before the ICJ is available at https://www.icj-cij.org/sites/default/files/case-related/187/187-20230419-PRE-01-00-EN.pdf; The UNGA Resolution is available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230301_18913_na.pdf

[4] These are Verein KlimaSeniorinnen Schweiz and Ors. v. Switzerland (Application no. 53600/20), Carême v. France (Application no. 7189/21), and Duarte Agostinho and Ors. v. Portugal and 32 Other States (Application no. 39371/20).

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