Narratives of Solidarity in Times of Crisis

Tales from Africa

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We did not have the same past ... but we will have the same future, strictly speaking ... the time of singular destinies is over ... no one can live on self-preservation alone.¹

In April 2020, in the early times when the COVID-19 pandemic reached its global scale, a head of state of a West African nation published a piece in which he described the pandemic as an unprecedented crisis which revealed that efforts made in the four corners of the world exposed the limits of all national systems, even the most sophisticated ones. According to that head of state, all members of the international community, taken by surprise and overwhelmed, found themselves in a kind of rescue situation, revealing each other's shortcomings on a daily basis. The said head of state is President Macky Sall from Senegal. In the words of the latter, "the first lesson to be learned from this major crisis – where the infinitely small shakes the whole world – is that in the face of cross-border threats, big or small, rich or poor, we are all vulnerable".² President Sall's depiction of the implications of COVID-19 for the community of nations offers a blueprint of how a crisis narrative can serve as a narrative of the *existing* or *ideal* international legal order.

Sall's perception of COVID-19, as a global crisis, can be summed up as follows: it is a crisis that reminds the world of its own contradictions and paradoxes. Indeed, he observes: "The earth is certainly round, but something, somewhere, is not right. Humankind is constantly making progress in all directions,

¹ Cheikh Hamidou Kane, *L'aventure ambiguë* (Julliard 1961).

² Macky Sall, 'Africa, the world and COVID-19' (*The Africa Report*, 9 April 2020) <www.theafricareport.com/25959/africa-and-the-world-in-the-face-of-covid-19-the-perspective-of-an-african-macky-sall/> accessed 2 July 2021.

pushing back the limits of science and technology every day, including the conquest of space. Meanwhile, on earth, there is a shortage of masks, test kits, personal protective equipment, beds, ventilators; so many products, materials and equipment that are crucial for the treatment of patients and protection of health workers, true heroes engaged in a risky and potentially fatal struggle against an enemy invisible to the naked eye. It is therefore time to come back down to earth!"³ In Sall's view, the COVID-19 pandemic, just like the global environment crisis and the scourge of terrorism, confirms the objective limits of the nation-state in responding to cross-border threats. In other words, national sovereignty appears ineffective and inefficient to address the challenge of navigating global crises such as the COVID-19 pandemic. It is against this background that Sall concludes that "any nation-state, whatever its power and means, can no longer be self-sufficient and that in the face of global challenges or crises, we all need one another, especially when our common vulnerabilities are added to our individual frailties".⁴

Sall's crisis narrative is not only a narrative *on* the crisis. It is ultimately a narrative *of* the crisis. Narratives *on* crises are consequential; they focus on the effects – may they be positive or negative – of crises. Narratives *of* crises are structural; they query the causes and *raison d'être* of crises. And this is where President Sall's crisis narrative distinguishes itself from the other crisis narratives from most world leaders at the beginning of the COVID-19 pandemic. Sall's narrative of the crisis is an opportunity to engage into a broader narrative and to highlight another crisis: the crisis of the international (legal) order. Indeed, he considers that the current global crisis deriving from COVID-19 is intrinsically and extrinsically linked to the foundations upon which international cooperation has been built since the end of the Cold War. Sall's narrative *of* the crisis allowed him to call for a new international order. The new international order or the new world order he is calling for "requires mutual trust and a sincere willingness to cooperate on issues of common interest and shared values, while respecting our differences and diversities". Interestingly enough, it is through that pledge for a new world order that President Sall concomitantly addresses his criticism of the old world – if one considers of course that the COVID-19 crisis will ultimately reshape our world and with it the international community as a whole. In his view, a new international order demands above all "a new mindset that recognises that all cultures, all civilisations, are

³ *ibid.*

⁴ Sall (n 2).

of equal dignity; and that there can be no superior civilisational centre that dictates to others how to behave and how to act".⁵

Solidarity within the community of nations is, thus, at the cornerstone of Sall's narrative. He indeed concludes that "What is important today is to learn the lessons from the crisis and to pool our resources and our intelligence in order to confront, *in the same spirit of human solidarity*, our common enemy: a silent killer which scoffs at borders, ideologies and differences between developed and developing countries. The time has come to work together so as to bring about a world order that puts human beings and humanity at the centre of international relations".⁶ In the context of what Josep Borrell, High Representative of the European Union for Foreign Affairs and Security Policy, labelled as the "global battle of narratives",⁷ a narrative of solidarity is without doubt *the* narrative that is the most expected at least by developing countries. However, beyond developing countries, solidarity can also offer opportunities for a renewed partnership between developed and developing countries as well as international institutions. The joint statement in February 2021 by Emmanuel Macron, president of France, Angela Merkel, chancellor of Germany, Macky Sall, António Guterres, secretary general of the United Nations, Charles Michel, president of the European Council and Ursula von der Leyen, president of the European Commission is reflective of the strong potential of such a partnership.⁸ In their joint statement, the six leaders underlined that "the most serious crises call for the most ambitious decisions to shape the future (...) this one can be an opportunity to rebuild consensus for an international order based on multilateralism and the rule of law through efficient cooperation, solidarity and coordination".⁹

Crises allow, therefore, to revisit solidarity at the international level. They show that the contours of solidarity are not static at the international level. The COVID-19 crisis, in particular, has prompted the emergence of a new kind of solidarity, i.e. solidarity in legal resilience. Legal resilience refers to the ability of states to shape together legal initiatives and instruments that would

5 Sall (n 2).

6 Sall (n 2).

7 Josep Borrell, 'The Coronavirus pandemic and the new world it is creating' (*European Union External Action Service*, 23 March 2020) <eeas.europa.eu/headquarters/headquarters-homepage/76379/coronavirus-pandemic-and-new-world-it-creating_en> accessed 2 July 2021.

8 Emmanuel Macron et al, 'Multilateral Cooperation for Global Recovery' (*Project Syndicate*, 3 February 2021) <www.project-syndicate.org/commentary/multilateralism-for-the-masses-by-emmanuel-macron-et-al-2020-02> accessed 2 July 2021.

9 *ibid.*

allow them to better recover after a crisis of a magnitude such as the COVID-19 pandemic. Here again, Africa has been a laboratory to develop strategies of solidarity for legal resilience during the pandemic. The solidarity towards the risk of investor-state dispute settlement in the context of the COVID-19 pandemic constitutes a good illustration.

On 24 November 2020, the African Union (AU) Ministers for Trade adopted a “Declaration on the Risk of Investor-State Dispute Settlement with Respect to COVID-19 Pandemic Related Measures” (the AU Declaration). The AU Declaration was later endorsed by the African Heads of States at the 13th Extraordinary Session of the African Union Heads of State and Government on the African Continental Free Trade Area (AfCFTA), held in December 2020.¹⁰ With this Declaration, the AU was the first body at the international level – and till now the only one – to collectively respond to concerns that had been steadily growing since the beginning of the COVID-19 crisis – that investors could use investor-state dispute settlement (ISDS) found in almost all investment treaties to challenge states’ measures imposed to deal with the crisis.

Concerns first started being voiced regarding the issue of ISDS challenges to states’ COVID-19 related measures in or around April 2020. That month, the International Institute for Sustainable Development (IISD) published a paper calling for states to act to protect themselves against COVID-19 related ISDS claims.¹¹ The IISD paper raised the spectre of an unprecedented risk of foreign investors suing governments under the global web of international investment treaties. It called upon governments to cooperate to craft solutions to address this risk, emphasising in particular the option of a bilateral, regional, or multilateral agreement to suspend treaty-based investor–state arbitration for all COVID-19 related measures. IISD later published indicative language for a suspension agreement, developed in consultation with states, academics, and international investment law experts.¹² The publication of the IISD paper

10 ‘Thirteen Extra Ordinary Session on the African Continental Free Trade Area (AfCFTA): The Assembly of the Union adopts decision on the start of trading’ (*Africa News*, 6 December 2020) <<https://www.africanews.com/2020/12/06/thirteen-extra-ordinaty-session-on-the-african-continental-free-trade-area-afcfta-the-assembly-of-the-union-adopts-decision-on-the-start-of-trading/>> accessed 14 May 2021.

11 Nathalie Bernasconi-Osterwalder, Sarah Brewin and Nyaguthii Maina, ‘Protecting Against Investor-State Claims Amidst COVIS-19: A call to action for governments’ (*International Institute for Sustainable Development*, 14 April 2020) <www.iisd.org/articles/protecting-against-investor-state-claims-amidst-covid-19-call-action-governments> accessed 14 May 2021.

12 International Institute for Sustainable Development, ‘Draft Agreement for the coordinated Suspension of Investor-State Dispute Settlement With Respect to COVID-19-Related Measures and Disputes’ (*International Institute for Sustainable Development*, 18

was followed by a call for a moratorium on ISDS during the pandemic from a number of civil society organizations in May,¹³ and in June an open letter to governments was signed by 600 national and international NGOs in more than 90 countries.¹⁴

By mid-2020, scores of private international law firms had published client bulletins explaining how such claims could be crafted under the terms of most investment treaties.¹⁵ Towards the end of 2020 and into early 2021, reports of threatened ISDS claims or notices of disputes (under both treaty and contract) started to emerge,¹⁶ while commercial arbitration centres started to report that 2020 had been a record year for new case filings,¹⁷ despite much of the global economy grinding to a halt.

June 2020) <www.iisd.org/publications/suspension-investor-state-dispute-settlement-covid-19> accessed 14 May 2021.

- 13 Columbia Center on Sustainable Investment, 'Call for ISDS Moratorium During COVID-19 Crisis and Response' (*Columbia Center on Sustainable Investment*, 6 May 2020) <ccsi.columbia.edu/content/call-isds-moratorium-during-covid-19-crisis-and-response> accessed 14 May 2021.
- 14 'Open Letter to Governments on ISDS and COVID-19' (*Seattle to Brussels Network*, June 2020) <s2bnetwork.org/wp-content/uploads/2020/06/OpenLetterOnISDSAndCOVID_June2020.pdf> accessed 14 May 2021.
- 15 See the many examples in this paper: Corporate Europe Observatory, 'Cashing in on the pandemic: how lawyers are preparing to sue states over COVID-19 response measures' (*Corporate Europe Observatory*, 18 May 2020) <corporateeurope.org/en/2020/05/cashing-pandemic-how-lawyers-are-preparing-sue-states-over-covid-19-response-measures> accessed 14 May 2021.
- 16 Lisa Bohmer, 'Chile is put on notice of treaty-based airport concession dispute' (*Investment Arbitration Reporter*, 20 January 2021) <www.iareporter.com/articles/chile-is-put-on-notice-of-treaty-based-airport-concession-dispute/> accessed 14 May 2021; Lisa Bohmer, 'Highway concessionaire initiates contract-based ICSID arbitration against Peru' (*Investment Arbitration Reporter*, 11 June 2020) <www.iareporter.com/articles/highway-concessionaire-initiates-contract-based-icsid-arbitration-against-peru/> accessed 14 May 2021; Lisa Bohmer, 'Zimbabwe's State-owned pharmaceutical company is threatened with contract-based arbitration over cancellation of COVID-19 kit contract' (*Investment Arbitration Reporter*, 14 July 2020) <www.iareporter.com/articles/zimbabwes-state-owned-pharmaceutical-company-is-threatened-with-contract-based-arbitration-over-cancellation-of-covid-19-kit-contract/> accessed 14 May 2021; Lisa Bohmer, 'Changes to Mexico's electricity regulation in light of pandemic prompt threats of investment arbitration claims' (*Investment Arbitration Reporter*, 18 May 2020) <www.iareporter.com/articles/changes-to-mexicos-electricity-regulation-in-light-of-pandemic-prompt-threats-of-investment-arbitration-claims/> accessed 14 May 2021; Lisa Bohmer, 'Chile Round-up: three threats, and one arbitration drawing to an end' (*Investment Arbitration Reporter*, 20 November 2020) <www.iareporter.com/articles/chile-round-up-three-threats-and-one-arbitration-drawing-to-an-end/> accessed 14 May 2021.
- 17 KC Vijayan, 'Singapore arbitration centre opens office in NY' (*The Straits Times*, 12 December 2020) <www.straitstimes.com/singapore/singapore-arbitration-centre-opens-office-in-ny>

The AU Declaration represented the consensus view of the 55 AU Member States that the risk of ISDS posed a tangible threat to the ability of African governments to deal with the public health and economic fallout from COVID-19. Going one step further than simply acknowledging the risks, the AU Declaration provided clear guidance to help Member States respond to those risks. The AU Declaration is yet another example of the investment law and policy innovations originating in the continent, following in the footsteps of such progressive and ground-breaking instruments as the Pan-African Investment Code (PAIC),¹⁸ the Southern African Development Community (SADC) Model BIT,¹⁹ the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area Agreement,²⁰ and the Nigeria-Morocco Bilateral Investment Treaty (BIT).²¹

But it is first and foremost, an important momentum of solidarity among African nations on how to build legal resilience in times of crises. Although concise, the Declaration's recommendations address short term and immediate steps that AU Member States can take in response to the COVID-19 crisis while providing a clear framework for longer term, broader reforms to the investment protection regime to enable states to act in future crises. The Declaration offers another tale from Africa which reveals that crises can serve as critical junctures for the shaping of new visions within the international legal order.

It also signals that narratives in times of crises should not be about hegemony. Precedent crises have often led to hegemony at the international level – i.e. one state or one limited group of states deciding on the new world order. The COVID-19 crisis allows the creation of new paradigm shifts in terms of narratives and the shaping of a world order “based on cooperation, the rule of

accessed 14 May 2021; 'ICSID Releases 2020 Caseload Statistics' (*ICSID*, 28 January 2021) <icsid.worldbank.org/news-and-events/news-releases/icsid-releases-2020-caseload-statistics> accessed 14 May 2021.

18 African Union, 'Pan-African Investment Code' (*African Union*, 31 December 2016) <au.int/en/documents/20161231/pan-african-investment-code-paic> accessed 14 May 2021.

19 Southern African Development Community Model BIT Template with Commentary, July 2012 <www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> accessed 14 May 2021.

20 Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area, May 2007 <investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3225/comesa-investment-agreement> accessed 14 May 2021.

21 Nigeria-Morocco Bilateral Investment Treaty, December 2016 <investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/3711/morocco---nigeria-bit-2016-> accessed 14 May 2021, (hereinafter Nigeria-Morocco BIT).

law, collective action, and shared principles”²² and which “rather than pitting civilizations and values against one another (...) must build a more inclusive multilateralism, respecting our differences as much as our common values”.²³

President Sall’s piece might have been overlooked by many international lawyers and international policy-makers. Yet, his crisis narrative offers a window to rethink what a narrative of international law should be not only during a crisis but also in a post-crisis context. Referring to an old African saying according to which “The rainbow owes its beauty to the varied shades of its colours”, Sall took the opportunity of his narrative *of* the crisis to emphasize that the new world order, in particular with respect to global health issues, “will have to exclude all forms of discrimination, stigmatisation and prejudice, especially towards our continent. Africa, as the cradle of humanity and a land of old civilisation, is not a no-man’s land. Nor can it offer itself as a land of guinea pigs. Gone are also the doom scenarios that try to draw an apocalyptic future for the continent. This continent has undergone far more perilous and crueller trials. It has remained resilient and is standing stronger than ever!” It is, thus, to be hoped that the COVID-19 crisis will truly lead to a sustainable narrative of international law for all and from all.

²² Emmanuel Macron et al (n 8).

²³ Macky Sall (n 2).