Inter-generational Climate Justice for the International Court of Justice
Moot Court Workshop

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WHAT IS THE RESPONSIBILITY UNDER INTERNATIONAL LAW OF STATES TO
ADDRESS THE GLOBAL CLIMATE CRISIS FOR THE BENEFIT OF PRESENT AND
FUTURE GENERATIONS OF HUMANKIND?

WRITTEN MEMORIAL OF THE EUROPEAN PARLIAMENT
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Statement of Jurisdiction

« On January 15, 2016 the General Assembly of the United Nations adopted Resolution A/RES/70/xxx, where it decided, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the Court for an advisory opinion on the following question: "Under International Law, what is the responsibility under international law of States to address the global climate crisis for the benefit of present and future generations of humankind?"

The President of the International Court of Justice,

Having regard to Articles 48 and 66, paragraphs 2 and 4, of the Statute of the Court and to Articles 44, 61, paragraph 1, 62, 69, 92, 102 and 105 of the Rules of Court,

Having regard to the Order made by the Court on 16 March 2016 fixing 08 August 2016 as the time-limit within which written statements might be submitted to the Court by States entitled to appear before the Court, in accordance with Article 66, paragraph 2 of the Statute

Invites States to submit their written statements through regional intergovernmental organizations as an efficient way to represent the multiplicity of State interests in these proceedings. »

Therefore, the European Parliament hereby submits its memorial on the question presented.
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**Introduction**

Monday, April 4th, 2050.

After four decades of intense industrialization and the uninterrupted growth of developing countries, the world has changed. Humanity is on the edge of a new world war. Unable to coordinate their politics and to share a common vision for the future of the planet, political leaders from all countries have served only their own interests, neglecting the environmental resolutions. The Paris Agreement, in the absence of ratification from 55 countries that represent 55% of the GHG emissions, has not been implemented on a world wide scale. This failure in creating a global legal frame for climate change and environmental matters has resulted in economic, social and environmental disasters.

The power of the money, that drives multinational companies and governments to agree to environmental nonsense, has transfigured human relations and society. The economy based on fiscal performance has crushed citizen's initiatives and solidarity. The supremacy of the stock market embraces economic and social behaviors. The collapse of the environmental impetus has yielded terrible consequences.

The global temperature has risen 5%. Therefore, high population movements have started to spread. The exponential number of climate immigrants is a major issue as the countries they are trying to reach are overwhelmed by refugees. The pressure on housing or food in certain places of the world is so important that it generates internal fights within communities. Natural disasters are regular, destructive and have increased tremendously in intensity, leaving behind millions of homeless people. The cost of global warming is huge and its negative effects irreversible.

This “worst case scenario” might seem excessive, but today the world is facing a radical choice: taking drastic measures in order to protect the present and future generations or carrying on with polluting industries and environmental damages and jeopardizing our future and the future of our children.
QUESTION

WHAT IS THE RESPONSIBILITY UNDER INTERNATIONAL LAW OF STATES TO ADDRESS THE GLOBAL CLIMATE CRISIS FOR THE BENEFIT OF PRESENT AND FUTURE GENERATIONS OF HUMANKIND?

EUROPEAN COUNCIL SPECIFIC CONCERN:

Should the International Court of Justice elaborate an international binding agreement concerning the future generations and the climate change in order to make governments accountable for the environmental choices they make?
**Context**

The United Nations Framework Convention on Climate Change tends to implement a global climate regime so as to transcend national policies and initiate a strong drive towards a unified action to combat climate change. Legal provisions are being implemented in order to combine the strengths and assets of every member state. After being presented in 1992 at the Earth Summit, this convention became a challenge to the legal thinking and to the collective consciousness. It defines a new concept and a global issue which concerns the entire population. The climate change instills the idea of a world nation, of rights that would encompass not only a state but the whole humankind. Humankind becomes a legal concept.

The soft law, which seems to be its great weakness, is actually a strength, as the states define together targets to achieve and are committed to their fulfillment. In the long run, commitments are being met and signed into law.
I. The need to reassess the nature of the law

1. Thinking out the systemic character of law: a mean to go beyond the current paradigm

   It is compulsory not to think with a fixist mind but to comprehend law as a process. By definition, a process is a constant readjustment, which is the very nature of climate change and environmental matters that are endlessly reappraised acknowledging scientific developments and discoveries. The resolutions and choices draft today cannot remain unchanged.

   A paradigm is according to Thomas Samuel Kuhn a reading grid based on a set of admitted beliefs. It embodies a solution which is held up as a model. The current legal paradigm orientates imperceptibly the way law is comprehended, created and enforced. It acts as a conceptional matrix for lawyers, establishing boundaries and limits to what seems legally and rationally desirable and conceivable. Most of the time, when the paradigm is commonly established, it is unspoken and inherent to the practice of law. Underlain by the strength of obviousness, its normative significance seems invincible. When a new paradigm arises, a necessary reorganization of the operating forces occurs. This new paradigm can take over the old one or coexists with it, but it unavoidably engenders a new expansion dynamic and normative creation. Concepts, notions and traditional principles are renewed. New approaches are contemplated. New logics evolve, designing unprecedented solutions that are being put into practice by every legal stakeholders.

   In order to incorporate the environmental concern and to address climate change and its disastrous impacts on the planet, the law has to take into account a new paradigm which is based on uncertainty. The intangibility of climate change and environmental impacts all over the world along with the globalization of trade make it difficult to assess precisely the amount of effort required but scientific conclusions from the GIEC are irrevocable: the climate issue needs to be addressed on a global scale and with a shared will to contain its negative effects.

   As environment does not know boundaries or walls, legal protections from all governments must merge so as to build a global legal frame to refer to. The Chernobyl nuclear disaster in 1987 demonstrates clearly the global character of the phenomena; an accident that occurred in one country does affect the neighboring states. That is the reason why the legal framework already in place under the auspices of the United Nations must be reinforced.

   The 1803 resolution of the United Nations (14 December 1962) concerning the Permanent
Sovereignty over natural resources specifies that each state must promote and provide natural resources in the interest of all citizens and of the national development. If each state is allowed to exploit natural resources in the general interest, it has to be done with mutual respect in regards to neighboring countries.

Nonetheless, it is difficult to perceive absolute national sovereignty in the light of a biosphere marked by interdependence. Our time is characterized by a new ecological vulnerability which is reaching out beyond boundaries. States need to plan their actions together because they will have effects on each other.

In order to act as a whole, the population of the earth must embrace the concept of humanity and humankind. The Declaration of Humankind Rights directed by Corinne Lepage is a new step in the Human Rights. Thus, it follows the line of the Universal Declaration of Human Rights of 1948. The statement “We are about to introduce the Humankind Rights, that is to say the right for every inhabitant of the earth to live in a world which future is not jeopardized by the current irresponsibility” gives a necessary thrust towards a new conception of the environmental law. It shows a universal aspect that encompasses the idea of future generations. Victor Hugo himself, visionary, had considered a global human community.

2. Law must be interpreted in its temporality

In the common French law, a social contract or an agreement is valid within a given period of time. If an individual has settled on a site for more than thirty years, he is considered to be the owner of the land. Likewise, after thirty years, justice cannot sue or convict a felon. The normative force is exerted directly on the stakeholders who state, enforce or solicit the law enforcement. There is no renewal or transgenerational transmission. The dominant paradigm is the following: the law is a set of rules that regulates the relations between human beings at a given time.

A third dimension outlines a new paradigm today. The existing rules remain valid but a new vision of the world is emerging, with the legal imperative of future generations. This quantum leap does not exclude the current dimension but it adds a systemic approach to the rule of law.

In order to have a legal right to act, one needs to be subject of law. The article 318 and 725 of the French Civil Code states the child has to be alive and viable to acquire a legal personality. If he wants to go to court, one shall have an interest in taking legal action. His action is restrained in time and it is linked to the legal subject.

According to this point of view, it could appear as a legal heresy to stand for future generations.
However, economic and social choices made today will be felt long into the future. The Declaration on the Responsibilities of the Present Generations Towards Future Generations of the UNESCO on November 12, 1997 embodies the responsibility of the states and the legal requirements to address the future generations, especially in regards to environmental and health hazards.

The Article 4 states:

“The [Preservation of life on Earth]:

The present generations have the responsibility to bequeath to future generations an Earth which will not one day be irreversibly damaged by human activity. Each generation inheriting the Earth temporarily should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems and that scientific and technological progress in all fields does not harm life on Earth.”

Law must be grasped along with temporality. The finitude of law is not consistent with the new challenges humankind will face and is already facing.

To illustrate this statement, the scandal of Minamata has raised awareness on the extreme noxiousness of the environmental pollution. The pollution was serious and intense. The policy makers lacked anticipation and did not succeed in managing the protection of public health in the long run, along with the protection of the environment. The key element in this catastrophe is the latency. Indeed, the noxious effects have affected the new generation, who was intoxicated in utero by the mercury contamination. This pollution will likely be passed to the next generation as well. Here, the blatant injustice of the situation calls the issue or reliability and responsibility of the state towards its citizens.

The concept of ecological footprint emerged in the club of Rome in 1970. It introduced the idea of an indelible mark that cannot be erased through time. With this notion that arrived ahead of the idea of irreversibility, the human relation to environment changed and some individuals became aware of the necessity to contain the economic growth in order to allow the future generations to prosper.

Climate change is a reality with direct consequences and long-term impacts. There is a need to consider decisions that are made today on a transgenerational scale as they will not only impact present generations but also future generations. Hence, today's governments and firms have a legal responsibility to address climate change and the resolutions and choices they make that are
somehow related to climate change.
II. A new global environmental governance: a solution to narrow disparities?

1. International principles

The Earth Summit in Rio de Janeiro in 1992 constitutes the base of common principles to build the environmental law. These common principles have progressively turned into general principles in the French environmental law as well as in many other states which have ratified the protocol. Among these principles, there are the polluter pays principle, the public participation, the prevention principle and the precautionary principle.

The right to a healthy environment

The right to a healthy environment is approached in the Stockholm Convention in 1972. The first principle states:

“Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.”

This assessment introduces a key notion, which is the intimate connection between men and nature. It recalls that the protection of the human race is unquestionably linked to the protection of the environment. It also opens the way to the concept of common good and the fundamental right of present and future generations to blossom in a healthy and thriving environment.

The Prevention principle

The Prevention Principle intends to anticipate a known risk, that is to say the consequences of a damage which concrete manifestations are known by the authorities. They can prevent the hazard from happening or find ways to contain it by implementing specific prevention measures. Doing so, they protect the present and future inhabitants of the area concerned.

The Precautionary principle

and development (Rio de Janeiro, 3-14 June 1992) is the Principle 15. It is defined as follows:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

It goes further than the prevention principle, as it tends to regulate projects on an unprecedented scale, either in time or in space. Ulrich Beck's reflection on the risk society approaches this principle. There is a responsibility to weight and ponder the consequences of the choices that are made today and to stay humble considering the current scientific state of knowledge. The major goal of the precautionary principle is to protect present and future generations and to avoid an irreversible situation that would endanger humankind. The precautionary principle implies a duty of environmental care that has been gradually admitted by the international courts.

This principle is difficult to implement, yet essential to preserve the earth. As a matter of fact, this principle may harm competition, dampen economic growth, even create a recession and undermine the development of new technologies. It may be complicated justifying such positions to the population, especially considering the fact that the effects of non-acting are not concrete and visible.

Furthermore, the fight against global warming is a long term undertaking and the political time is not suitable for a project that will take place over time. First of all, politicians think in terms of being re-elected, which does not encourage them to put in place long term resolutions but rather short term measures. Then, their electoral mandate is not long enough to follow the progress of the decision. Yet, the need to anticipate is paramount in the environmental policies. It is better to act before than enduring the consequences of non-action and thus close off the horizon of hope and future. This principle aims at avoiding a “wait and see policy” behind major tragedies.

2. **The responsibility of states to address the issue of climate change**

**Protection of the population**

The state has a duty to protect the citizens. The climate change is shattering this responsibility making certain states powerless facing a systemic and global phenomena. The Kiribati islands for instance are disappearing, which will create massive migratory movements.
Humankind is facing a major risk: the gradual disappearance of cultures, identities, roots and the disruption of global geopolitical landscape.

The notion of responsibility is sensitive, as reaching climate justice is complicated. The disasters that are caused by one nation can have impacts on another one. Moreover, it is intricate to hold a country accountable as global warming is diffuse.

Natural disasters are not necessarily taking place in the polluting country. Today, their number is already increasing, endangering the populations. These phenomena show the need to unite forces in order to fight against a global climate crisis. The Stern report in 2006 corroborates this imperative. It admits that the evidence of global warming is overwhelming. The climate change has to be taken seriously and a global mobilization is urgent. A collective action at the international level is required to initiate the transition towards a carbon-free economy.

_Principle of common but differentiated responsibility._

The principle 7 of the Rio Declaration states that « States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command. »

According to their development and the role they have played in polluting the planet, states should not have to bear the same burden or legal environmental obligations. The principle of equity implies a gradation of the responsibility.

Nevertheless, this conception has perverse effects. Many developing countries are not really developing countries anymore and have become major polluters. Their economic growth prevails on the climate change issue, which goes against the Convention itself. Moreover, the article 17 of the Kyoto protocol puts forward the idea of an international emission trading system. It engenders a right to pollute, which also has down effects. For example, developed countries have the possibility to avoid their responsibilities by not investing themselves a lot into limiting the greenhouse gas emissions, buying their way out with the trading system.

However, despite its side effects, the principle of common but differentiated responsibility has kept current, as it appears multiple times in the Paris Agreement, here in the Article 2 : “This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”. This
principle needs to be constantly reassessed so as to preserve equity. It could easily be lacking this notion.

**The necessity of a global environmental governance.**

In October 30, 1980, the United Nations General Assembly adopted a resolution which declared the historic responsibility of the states in preserving the nature in the interest of present and future generations. The World Charter for Nature adopted by the General Assembly of the United Nations in 1982 reinforces this statement, especially with this sentence: “Conscious of the spirit and terms of its resolutions 35/7 and 36/6, in which it solemnly invited Member States, in the exercise of their permanent sovereignty over their natural resources, to conduct their activities in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations.

So as to enforce the environmental principles and restore an environmental justice, an international neutral environmental entity should be shaped. It will gather every conventions, protocols, decisions made about environmental and climate change matters and will act as a legal authority, in charge of monitoring and sanctioning the states. This global governance concerning a global subject will perfectly make sense as it would standardize and synchronize the national policies.

**A motion that will ensure continuity with prior opinions of the International Court of Justice**

Created by the Charter of Nations in 1945, which also underlines “the general principles of cooperation in the maintenance of international peace and security” in the Article 11, the International Court of Justice is the appropriate organ to emit an opinion on the subject. The environmental line followed by the ICJ as shown in the Costa Rica v. Nicaragua judgment reflects the growing concern of the Court for environmental matters and the predominant place the Court has and will assume(d) in arbitrating these issues.

The 87 Motion “Revisions for Request for an Advisory Opinion of the International Court of Justice on the principle of sustainable development in view of the needs of future generations” states that “Sustainable development is generally defined as development that balances social, economic and environmental interests in order to meet the needs of the present generations without compromising the ability of the future generations to meet their own needs.” Hence, the idea of sustainable development, commonly accepted among the international community and highlighted in The Rio Declaration on Environment and Development calls for the preservation of the future as a
whole. The International Court of Justice, by implementing these principles in its decisions and defending the 17 sustainable development goals (2015), already acts as a pioneer in addressing the future generations through the law. For this very reason, the International Court of Justice should initiate the reflection on states’ responsibility towards present and future generations.
Conclusion

The European Parliament on behalf of the European Union is going beyond the international prescriptions to stand as an example for environmental justice. The climate change is a top priority and in its resolution adopted before the Warsaw conference on climate change organized by the United Nations in 2013, The European Parliament has taken a strong posture. It envisages the phasing-out of the greenhouse gas emissions in the world by 2050 and places its hope in a unique global and consistent regime to which all countries would be bound.

The states are interdependent in the fight against global warming and facing the ecological damage. Edgar Morin extols this complexity and praises the systematization of the mind. A radical change has to be implemented and the power of fundamental rights stands in their capacity to be legally sanctioned.

The Paris agreement must federate the ambitions and the responsibilities to achieve environmental justice. The notions of “common heritage of humankind” and “crime against humanity” imply obligations towards not only individuals but humankind. Hans Jonas defines responsibility as the basis of humankind. States have the potential to act so they have a moral obligation to protect the earth.

Finally, Vaclav Havel said in 1991: “Without a global revolution of the sphere of human consciousness, nothing can change favorably in the sphere of human existence, and the march of our world towards social, ecological and cultural catastrophe is irreversible”. We are already the future generations. A global change needs to happen now.
Index of authorities

**Legal texts**


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European Parliament, article of Tina Olhiger, *Climate change and environment*, 2016.


**Books**


