Problem: Clarifying Future Generations’ Legal Interests in Relation to the Climate Crisis

Introduction

This has been a momentous year in the history of international environmental law and policy. In early December 2015, the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) met in Paris for their 21st Meeting, informally referred to as COP21, and adopted an ambitious climate agreement (Paris Agreement) that aims to ensure that Member-States continue to reduce their greenhouse gas (GHG) emissions while providing aid to those countries who would be unable to finance this new agenda on their own. Previously, the United Nations General Assembly (UNGA) adopted the Sustainable Development Goals (SDGs) at the beginning of its 70th Session in September 2015, creating a new framework by which Member States’ progress toward poverty eradication, social and economic equality, and environmental sustainability may be evaluated. More recently, the 1st Session of the Preparatory Committee established by UNGA Resolution 69/292 began discussions concerning the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction.
This “ICJ4ICJ” Moot Court workshop is premised upon a hypothetical UNGA resolution that requests an advisory opinion from the International Court of Justice (ICJ) on the 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?”

I. The International Court of Justice

The International Court of Justice (ICJ) was created as the judicial organ of the United Nations in 1945, at the organization’s beginning. It is located in The Hague, Netherlands, and has 15 sitting elected judges.¹ The Court has two main functions: to resolve legal disputes between States, and, when requested by authorized bodies (UN organs and specialized agencies), to issue advisory opinions on legal issues. Advisory opinions are usually on general or specific questions of international law and custom that states are either unable to or struggling to resolve between themselves, or through other channels. The decisions are not binding on any party, but are customarily accepted as law, and at the very least, afforded the highest level of deference. For example, in 1995, the ICJ issued an opinion entitled “Legality of the Threat or Use of Nuclear Weapons,” a case in which it was asked to determine Member-States’ legal obligation to in good faith pursue total disarmament in relation to nuclear weapons.² In that case, the Court decided that there was indeed such an obligation. UN Member-States took that to heart, and began to work toward nuclear nonproliferation, a process that ultimately resulted in the drafting of the Treaty on the Non-Proliferation of Nuclear Weapons, or the Non-Proliferation Treaty (NPT).³ To date, no advisory opinions have been released on topics relating to climate change and, more specifically, to preventing environmental harm through acknowledging future generations’ legal interests.⁴

II. Procedure

The Statute of the ICJ and the Rules of Court state that when a question of international law has been referred to the ICJ, it has the right to ask for oral arguments on the issue, and all states and organizations considered to be involved parties in the matter are entitled to weigh in on the question, presenting their positions in front of the court.⁵ After the ICJ has concluded its deliberation of the issue, its opinion is presented in open court.⁶

The ICJ4ICJ workshop is premised upon UNGA adoption of a fictitious resolution A/RES/70/xxx, on January 15, 2016, requesting the ICJ for an advisory opinion on the following 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?” The resolution was shortly thereafter sent to the ICJ by the Secretary-General. Upon reviewing the referral, the ICJ decided that it would invoke its right to hear oral arguments, and invited all interested State

³ Id.
⁵ ICJ Statute, Ch. IV, Art. 66; ICJ Rules, Pt. IV, Art. 105.
⁶ ICJ Statute, Ch. IV, Art. 67.
parties to submit written statements (Memorials) through regional intergovernmental organizations as an efficient way to represent the multiplicity of State interests in the proceedings – e.g., the Association of Small Island States (AOSIS), the European Union (EU), the African Union (AU), the Commonwealth of Independent States (CIS), the Arab League, the Organization of American States (OAS), and the Asian Infrastructure Investment Bank (AIIB).

The ICJ suggested further that Memorials submitted through these regional intergovernmental organizations should specially address general principles of international law relating to the interests of succeeding generations that pertain to implementation of the Paris Agreement, the SDGs and UNCLOS.

In preparation for oral arguments, the Court requests submission of Memorials from all interested parties, whether through one of the regional intergovernmental organizations referenced above, or otherwise. A Memorial is a position paper prepared by the Advocates/Agents on behalf of the group or nation that he/she is representing. Pursuant to Article 49 of the ICJ Rules, it contains “a statement of the relevant facts, a statement of law, and the submissions,” or requests for relief. All Memorials must be in the hands of the Court by August 8, 2016. (To assist in the finalization of these Memorials, the workshop organizers request submission of draft Memorials by July 1, 2016. Constructive feedback from international environmental law experts will be returned to the drafters on or about July 15, 2016.) Each organizational participant will be allotted ten minutes to present its Memorial, to be presented by a single Advocate/Agent. Oral arguments have been scheduled for September 5, 2016 in Honolulu, Hawai‘i, USA (preceded by a practice round on September 1, 2016, where the organizational presenters will secure additional constructive feedback from international environmental law experts).

III. Conclusion

Taking into consideration the accumulated buildup of events leading up to this historic year, one must conclude that there could be no better time to seek clarification from the ICJ on issues relating to the climate crisis, an issue that could define our capability to defend future generations against current unsustainable choices. Memorials submitted to the ICJ for consideration will have to weigh the benefits of legal precedent in the fight against the negative impacts of climate change, against the potential costs to individual States as a result of subsequent clarification of the ability to litigate non-compliance with environmental accords and agreements.