

# CLIMATE CHANGE AND GLOBAL JUSTICE: CRAFTING FAIR SOLUTIONS FOR NATIONS AND PEOPLES

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On March 5, 2009, the *Harvard Environmental Law Review* (“HELRL”) brought together a diverse group of professors and practitioners to discuss the pressing issue of global climate change and justice in a symposium titled “Climate Change and Global Justice: Crafting Fair Solutions for Nations and Peoples.”<sup>1</sup> It marked the first conference that HELRL had organized since 2001, and the first time since 1999 that HELRL published academic papers from a symposium. Motivating the symposium was the fact that while global climate change will have tremendous impacts on all people, its effects will not be felt evenly. Those who feel the most severe impacts may be in the worst position to address them — and may have done the least to create them. This disparity raises challenges both of national and international institutional design and of basic human rights.

The symposium consisted of two panels designed to explore these issues.<sup>2</sup> The first panel considered the equity problems that climate change raises between nations and discussed what institutional designs might allocate those costs most equitably and effectively. Moderated by Boston College Law School Professor David Wirth, the panel comprised Brooke Ackerly, a professor of political science at Vanderbilt University; Michael Vandenberg, a law professor at Vanderbilt University Law School; Jason Scott Johnston, a law professor at the University of Pennsylvania Law School; and Jonathan Wiener, a law professor at Duke University Law School. The second panel, examining the human rights implications of climate change and the potential implications of human rights law for a response to climate change, was moderated by Siobhán McInerney-Lankford, counsel in the Environmentally and Socially Sustainable Development and International Law Group at the World Bank, and was made up of Bonnie

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<sup>1</sup> Streaming video of the entire event is available at <http://www.law.harvard.edu/media/2009/03/05/enlr.mov>. This is the source of what participants said at the event for all discussions within this Introduction.

<sup>2</sup> For more information about the event, including full biographies of the panelists, see *Harvard Environmental Law Review*, Program for Climate Change and Global Justice: Crafting Fair Solutions for Nations and Peoples (Mar. 5, 2009), available at <http://www.law.harvard.edu/students/orgs/elr/images/HELRL%20Symposium%20program.pdf>. See also *Harvard Environmental Law Review*, Environmental Law Review Symposium, <http://www.law.harvard.edu/students/orgs/elr/symposium.php> (last visited May 19, 2009) (on file with the *Harvard Environmental Law Review*).

Docherty, a lecturer on law and clinical instructor at Harvard Law School; Tyler Giannini, the clinical director of Harvard Law School's Human Rights Program; John Knox, a law professor at the Wake Forest University School of Law; and Marc Limon, advisor at the Permanent Mission of the Republic of Maldives to the United Nations Office at Geneva.

While the participants approached the issue from a variety of perspectives, ranging from Johnston's economics-oriented analysis to the human rights backgrounds of the members of the second panel, and have different notions of possible solutions, nearly all share the belief that the current United Nations Framework Convention on Climate Change ("UNFCCC") approach is deeply flawed. Vandenberg and Ackerly (along with their co-author, Fred Forster, a research coordinator for the Climate Change Research Network at Vanderbilt University Law School who did not participate in the symposium) review the current leading studies of climate change problems and solutions, as exemplified by such authors as Sir Nicholas Stern and the Intergovernmental Panel on Climate Change ("IPCC"), and argue that climate change and justice must be addressed together.<sup>3</sup> Otherwise, a global instrument will not win the participation of developing nations, and without that participation it will fail. Vandenberg and his co-authors do not advocate discarding existing policy architectures, but rather complementing and supplementing them in both the short-and-long term.<sup>4</sup> They argue that current approaches are marked by major assumptions — particularly that new technology will be developed to limit emissions and that development and emissions reductions can occur concurrently<sup>5</sup> — and fail to provide sufficient protection against catastrophic climate change.<sup>6</sup> Instead, large-scale, long-term transformation is necessary. This change must be interdisciplinary and innovative; it may involve "fundamental changes" in various economic sectors, and should broaden the notion of "well-being" beyond income levels.<sup>7</sup> In the short term, they suggest the creation of equity micro-offsets, which would promote projects that increase social equity, including emissions reductions, and generate carbon credits for trading.<sup>8</sup> They note the potential for projects that would generate offsets, propose linking these offsets to microfinance, and finish their proposal with the thought that micro-offsets could be incorporated into global (or smaller scale) cap-and-trade schemes.<sup>9</sup>

Docherty and Giannini identify and address a different problem with the UNFCCC. They note the lack of remedial processes within the

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<sup>3</sup> Michael P. Vandenberg, Brooke A. Ackerly & Fred E. Forster, *Micro-Offsets and Macro-Transformation: An Inconvenient View of Climate Change Justice*, 33 HARV. ENVTL. L. REV. 303 (2009).

<sup>4</sup> *Id.* at 309, 332-34.

<sup>5</sup> *Id.* at 322-24.

<sup>6</sup> *Id.* at 312-20.

<sup>7</sup> *Id.* at 333-37, 344.

<sup>8</sup> *Id.* at 341-44.

<sup>9</sup> *Id.*

UNFCCC framework<sup>10</sup> and, citing predictions that climate change will contribute to the emergence of a vast number of refugees,<sup>11</sup> offer a broad, but very detailed, proposal for a new convention to address this potentially huge problem. They acknowledge that the UNFCCC process already encompasses a broad set of very complex issues even without the added responsibility of resolving the climate change refugee problem, and that it has yet to address these effectively.<sup>12</sup> Their proposal, like Vandenberg and Ackerly's, complements existing global frameworks, in this case the UNFCCC and the Refugee Convention.<sup>13</sup>

Examining the issue through the lens of economics, rather than human rights, Johnston uses a very different analytical approach to arrive at a conclusion somewhat similar to that of Docherty and Giannini: that new proposals are necessary. He considers how the symposium's basic premise — differential impacts — raises significant difficulties for the creation of a global cap-and-trade system for greenhouse gas emissions. He finds two basic problems with such an institution: (1) enforcement of the cap and verification of emissions reductions are necessary for a cap-and-trade system to function, but there exists no effective enforcement system;<sup>14</sup> and (2) if the scope of activities covered by the system is increased to improve equity by allowing more transfers of money to poorer nations through offsets and credit trades, then the efficiency of the system suffers, for enforcement and verification become still more difficult.<sup>15</sup> He concludes that a global cap-and-trade system will not work, and that different policies, specifically those promoting the development and adoption of new technologies, especially in the developing world, will be necessary to address climate change and fairness.<sup>16</sup>

In his remarks at the symposium, Wiener also applied an economic analysis, but came to a strikingly different conclusion: a cap-and-trade system is a “comparatively attractive” way to reconstruct markets to internalize the costs of climate change. Because climate change is a global problem, and policies that cover only some nations will create leakages that may actually increase global greenhouse gas emissions, effective solutions require full participation and, thus, collaboration among nations. He explained that because of the structure of international law, where treaties only bind signatories, a policy architecture must be attractive both to the collective of na-

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<sup>10</sup> Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 394-96 (2009).

<sup>11</sup> *Id.* at 353-54.

<sup>12</sup> *See id.* at 396-97.

<sup>13</sup> *Id.* at 350; *see also id.* at 401 (suggesting that because a climate change refugee convention would be distinct from the problem of regulating emissions and, thus, development, such a convention could be more easily passed).

<sup>14</sup> Jason Scott Johnston, *Problems of Equity and Efficiency in the Design of International Greenhouse Gas Cap-and-Trade Schemes*, 33 HARV. ENVTL. L. REV. 405, 422-24, 428-29 (2009).

<sup>15</sup> *See id.* at 406, 428.

<sup>16</sup> *Id.* at 429-30. At the symposium, Johnston also took a more skeptical view of climate change science than the other participants.

tions and to individual nations. Insofar as this means that climate change responses must be seen as — and actually be — just, his position is similar to Vandenberg and Ackerly's. All solutions will suffer from the enforcement and verification problems Johnston highlights, but, Wiener concluded, a cap-and-trade system is the most attractive because, compared with other options, it can draw participation, promote trade and monetary flows to the developing world, and be both efficient and just, as well as effective at reducing emissions.

Limon returns to the theme of UNFCCC problems,<sup>17</sup> and looks at the role international human rights law might play in redressing them. With his background working for the Republic of Maldives on linking climate change and human rights, Limon approaches the Human Rights Council's and Office of the U.N. High Commissioner for Human Rights's ("OHCHR's") recent work on these issues from a more political angle. He explains the complexities of linking climate change and human rights,<sup>18</sup> observing that both developed and developing nations have concerns about human rights language being wielded against them.<sup>19</sup> Nevertheless, he believes that a human rights approach can shift people's thinking about climate change, refocusing the terms of debate from science to human impacts.<sup>20</sup> In this regard, recent Human Rights Council resolutions and OHCHR's recent report,<sup>21</sup> by clarifying the link between human rights and climate change, can serve a valuable role.<sup>22</sup>

Knox also looks at the issue of linking climate change and human rights, but focuses more on its legal aspects. He analyzes the OHCHR report, finding that its major contribution is its endorsement of international cooperation, with extraterritorial duties, in the fight against climate change.<sup>23</sup> These conclusions are well-grounded in human rights law.<sup>24</sup> The precise nature of the obligations is unclear, but they are an advancement from the thorny causation issues that characterize much of the climate change de-

<sup>17</sup> Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439, 449-50 (2009).

<sup>18</sup> See *id.* at 445, 455.

<sup>19</sup> *Id.* at 460-61. Similarly, at the symposium, Limon noted that small island states are politically hesitant to sign onto refugee conventions because they see them as giving large emitters permission to keep emitting.

<sup>20</sup> *Id.* at 440, 459, 462-63.

<sup>21</sup> U.N. Human Rights Council Res. 10/4, in U.N. Human Rights Council, *Draft Report of the Human Rights Council on Its Tenth Session* 13, U.N. Doc. A/HRC/10/L.11 (Mar. 31, 2009); U.N. Human Rights Council Res. 7/23, in U.N. Human Rights Council, *Report of the Human Rights Council on Its Seventh Session* 65, U.N. Doc. A/HRC/7/78 (July 14, 2008); OHCHR, *Report of the OHCHR on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

<sup>22</sup> See Limon, *supra* note 17, at 444-45, 467.

<sup>23</sup> John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL. L. REV. 477, 478, 491-94 (2009).

<sup>24</sup> *Id.* at 491.

bate.<sup>25</sup> As with the other human rights-oriented participants, Knox's analysis shares with Wiener's an explicit emphasis on cooperation.<sup>26</sup>

The conversations at the symposium and the articles that have subsequently taken shape<sup>27</sup> demonstrate clearly that climate change raises fundamental issues of justice that significantly affect the viability of any solution to this critical problem. Current assumptions about how responses to climate change can take shape are flawed, and the UNFCCC's past work and approaches must be supplemented if they are to be effective in the future. Without addressing the interplay between climate change and justice, no response to climate change will succeed. This symposium and the articles it has produced take important first steps toward doing so, whether identifying problems, like Johnston and Vandenberg and Ackerly do, or proposing concrete programs, as Vandenberg and Ackerly and Docherty and Giannini do. The participants, particularly Wiener in his remarks and Limon, Knox, and Docherty and Giannini in their articles, highlight the importance of international cooperation, and Knox and Limon in particular discuss how human rights law may help pressure the international community into actually realizing such cooperation. But, most of all, the symposium demonstrates the importance of interdisciplinary approaches to climate change responses. A global problem requires a global solution, and that solution can only result from new interactions that blend the experience of those working directly on the responses to climate change with innovative thinking from academics in law, economics, human rights, political science, and other fields. The *Harvard Environmental Law Review* hopes that this symposium makes an initial contribution toward that end, and looks forward to participating as the conversation develops.

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<sup>25</sup> *Id.* at 491-92; *see also, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 543-45 (2007) (Roberts, C.J., dissenting) (arguing that state lacked standing because of complex causation of global climate change).

<sup>26</sup> Knox, *supra* note 23, at 478, 494; Limon, *supra* note 17, at 452-53; *see also* Docherty & Giannini, *supra* note 10, at 373.

<sup>27</sup> In addition to those discussed above, McInerney-Lankford, a panel moderator, draws on her work at the World Bank and contributes a brief introduction to legal issues involved with the climate change-human rights linkage. Siobhán McInerney-Lankford, *Climate Change and Human Rights: An Introduction to Legal Issues*, 33 HARV. ENVTL. L. REV. 431 (2009).

