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Symposium Introduction

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In recent years, the relationship between international human rights law and the environment has seen a rapid evolution. The high visibility of transnational and global environmental challenges, and the severe impacts they impose upon vulnerable groups—including women, children, and indigenous people—has led activists to bring both human rights and environmental law to bear on problems ranging from climate change to soil and water pollution from mineral exploration activities, as well as other contemporary environmental issues. Matters are being heard before domestic courts and international human rights bodies, such as the African Commission on Human and Peoples’ Rights, the European Court of Human Rights, and the Inter-American Commission and Court of Human Rights.

In a series of resolutions, the U.N. Human Rights Council has drawn attention to this interrelationship, and in 2008, it appointed an independent expert on the human right to water—a right that was explicitly recognized by the U.N. General Assembly two years later.1 In 2012, the U.N. Human Rights Council appointed John Knox, a U.S. law professor, as an Independent Expert on Human Rights and the Environment.2 These developments have raised awareness of how fundamental the environment is as a prerequisite to the enjoyment of human rights.

For Santa Clara University School of Law, developments in the fields of human rights law and environmental law are of especially great interest. Santa Clara Law’s International Human Rights Clinic has been working on international human rights litigation and advocacy projects, including those that link to environmental quality, while providing a unique educational opportunity for students to gain practical experience at the intersection of the two fields. Moreover, Professor Dinah Shelton, the preeminent scholarly voice on human rights and the environment and former member and chair of the Inter-American Commission on Human Rights, served on the faculty of Santa Clara Law while conducting some of her early seminal work on these issues.

It is in this context that on January 24-25, 2014, the Santa Clara University Center for Global Law and Policy and the Santa Clara Journal of International Law co-hosted a symposium on the “Environment and Human Rights.” The symposium included a keynote address by Professor Dinah Shelton; four main papers by Professors Rebecca Bratspies, Maxine Burkett, Carmen Gonzalez, and Rebecca Tsosie, and commentaries on these papers by a distinguished group of

leading scholars and practitioners dedicated to human rights and the environment. The event was co-sponsored by Santa Clara University’s Markkula Center for Applied Ethics and the American Society of International Law.

This Symposium issue of the Journal presents an insightful and thought-provoking collection of articles exploring and addressing the interrelationship between human rights and the environment. Professor Shelton and Professor Bratspies’ articles focus directly on the intersection of human rights and the environment, examining its development and analyzing current understandings. Articles by Professor Burkett, Professor Gonzalez, and Professor Tsosie inquire into specific topics that are profoundly affected by human rights and environmental law analysis, such as climate change compensation, the relationship between industrialized nations and the developing world, and restorative justice for radioactive contamination of the lands of indigenous people. This collection of articles directly advances a better understanding of current issues and develops solutions based on masterful insights from leading thinkers at the cutting edge of the field.

Professor Shelton’s essay, *Whiplash and Backlash—Reflections on a Human Rights Approach to Environmental Protection*, is both a reflection on the evolution of the field and an assessment of its present state and future direction. Presented as the keynote speech for the symposium, the essay provides both provocative insight into the views of the leading scholar on the jurisprudential evolution of the human rights and the environment linkage, and the personal observations of an individual directly engaged in the field’s most pressing issues. Professor Shelton’s historical perspective on the role of human rights issues in the origins of modern international environmental law gives readers crucial context for present day prospects. She informs us that while a human rights perspective on environmental problems evolved rapidly, especially through the incorporation of a right to a healthy environment into American state and foreign national constitutions, jurisprudential development slowed significantly due to political backlash, arising in significant part out of perceived conflicts of such concerns with economic development priorities of nations. Currently, evolution of a rights-based approach to the environment is continuing, but at a more measured pace. However, both environmental and human rights jurisprudence benefit from a better understanding of the interrelationship between environmental quality and human wellbeing. Professor Shelton concludes that the two fields not only overlap in their substantive concerns, but are in fact jurisprudentially interconnected and linked,

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each informing and providing form and content for the other.4

Professor Bratspies’ contribution, *Do We Need A Human Right to a Healthy Environment?*, explores the theoretical underpinnings of this topic. Specifically, her article explores why human rights norms and analyses are increasingly invoked in the environmental policy context, and finds reasons in the “unconditional normative value and immediate applicability”5 of human rights norms as well as their “timelessness, absoluteness, and universal validity.”6 Yet, the article reminds us that the lure of human rights discourse finds limitations in the substance of domestic and international environmental law. Efforts to use human rights norms to achieve environmental objectives encounter similar opportunities and challenges. Professor Bratspies posits that two premises are key to understanding the relationship between the fields: (1) environmental quality is a precondition to the fulfillment of human rights; and (2) human rights norms can be an important tool for improving and protecting the environment.7 However, she concludes that this approach is limited in its effectiveness since some environmental concerns do not even involve humans8 and the approach is “inherently fragmented and episodic.”9 Accordingly, she argues that a new approach “that recognizes the right to a safe and healthy environment as an independent substantive human right”10 is both called for and is in fact emerging.

Finally, Professor Bratspies identifies private actors, such as transnational corporations, as raising important concerns in this context. Her article identifies the nature of corporations as creations of the state, pointing to the authority of states to extend human rights obligations to such non-state actors, and creating a path for holding them accountable in the international legal framework.11 She concludes that the human right to a healthy environment approach is already making impacts in “legal, constitutional, and political cultures of many states, and of international institutions.”12

In his commentary on Professor Bratspies’ article, Dr. Marcos Orellana offers the perspective of a leading practitioner in international human rights and environmental law. He notes that Professor Bratspies’ article identifies one of the fundamental tensions between the two fields: that human rights law establishes

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4. *Id.* at 27-28.
6. *Id.* at 42.
7. *Id.* at 50-55.
8. *Id.* at 55.
9. *Id.* at 57.
10. *Id.*
12. *Id.* at 67.
limits “on state sovereignty by affirming the international community’s interest in their promotion and effective enjoyment,” while “environmental policy is premised on the sovereign rights of states.” This and other differences impose significant limitations on existing approaches to human rights and the environment, making a free-standing right to a healthy environment a necessity. He also calls for answers to questions about the fundamental content of such a right, as well as for more effective implementation of the environmental dimension of existing human rights. Dr. Orellana believes that the synthesis of the two fields will eventually give rise to a “rights-based approach to environmental policy” that can serve as a valuable tool for overcoming “the global politicization of the environment.”

His commentary advises that even though progress of the field continues, including through calls for recognition of the right to a healthy environment at the recent Rio+20 conference, meeting outcomes have failed to establish a framework for a rights-based approach to sustainable development—the ultimate prize for a synthesis of the two fields. Nevertheless, Dr. Orellana advises that further progress in human rights and the environment will be likely, given the support of various countries and in light of the field’s ultimate value for achieving sustainable development.

Professor Burkett’s paper, Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States, examines the proposal for a Small Islands Compensation and Rehabilitation Commission (CRC). Championed by the Alliance of Small Island States (AOSIS) to address the special adverse impacts of climate change on small island developing states, the CRC has been proposed as a multi-pronged insurance mechanism to the United Nations Framework Convention on Climate Change (UNFCC). Its structure would consist of: (1) an insurance component that would “manage financial risk from increasingly frequent and severe extreme weather events in a timely manner;” (2) a rehabilitation and compensation component that “would address ‘progressive negative impacts of climate change;’” and (3) a risk management component that “would facilitate and inform the prior two components by supporting and

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14. Id. at 73-74.
15. Id. at 76-77.
16. Id. at 77-78.
18. Id. at 94.
19. Id.
promoting risk assessment and management tools.”

Professor Burkett’s paper carefully examines the proposal, which was originally based on a life-insurance model, but ultimately concludes that an insurance-based approach may not be workable. Instead, she submits that the mechanism will need to resemble a compensation mechanism, much like the one found in the United Nations Compensation Commission (UNCC), a commission set up to address the claims against Iraq for its invasion of Kuwait and the resulting environmental damage.

The CRC would ideally rely on the experiences and lessons learned from the UNCC as a guide for the establishment of such a new institution. Professor Burkett’s article closes with a discussion of guiding principles, questions of how substantive compensation decisions would be made, and potential structural arrangements for the mechanism.

Both Professor Randall Abate’s and Dr. Damilola Olawuyi’s responses agree with Professor Burkett’s CRC as a valuable conceptual tool for achieving climate justice; however, the commentators contend that such a proposal would encounter significant implementation difficulties. Professor Abate’s commentary approaches the topic by raising issues such as (1) which nations should be able to take advantage of the compensation mechanism, (2) how should damages be quantified for compensation purposes, and (3) how should the practical difficulties of ensuring funding and political support for a new international institution be overcome.

Dr. Olawuyi’s commentary engages the challenges of establishing and administering the CRC through a set of four similar questions: (1) would the current set of professionals and organizations involved in climate change policy have the capacity to implement a compensation mechanism; (2) how should one manage or limit the number of claimants to the fund, so as not to overwhelm available resources; (3) what is its relationship with existing climate change institutions such as the Kyoto compliance mechanism; and (4) how can one ensure the integrity and accountability of the claims process. In the end, the two respondents arrive at differing conclusions about the practicality of a compensation mechanism. Professor Abate believes that the UNCC is not likely to work as a model for designing a climate change compensation mechanism, and suggests instead, that funding for small island nations be directly channeled to adaptation

20. Id.
21. Id. at 96-98.
22. Id. at 99-103.
and relocation efforts. Dr. Olawuyi also acknowledges great challenges to making the compensation mechanism a reality, but concludes that its strategic importance should prompt a fine-tuning of the approach to address the practical implementation challenges presented.

The third article in this collection, Professor Gonzalez’s *Environment Justice, Human Rights, and the Global South*, presents the historical and economic context of environmental injustice between nations and articulates the limitations of human rights discourse for providing a satisfactory solution. Explaining the colonial roots of current economic and environmental injustice, Professor Gonzalez argues that traditional international law discourse has been used both to justify colonial relationships in the past, as well as to continue unequal economic relationships, especially the international dominance by industrialized nations, into the present. Even though human rights jurisprudence holds significant potential for advancing environmental objectives and vice versa, she contends that human rights law contains significant limitations for achieving environmental justice. In her exploration of these issues, Professor Gonzalez expands on some of the points raised by Professor Bratspies, but also notes, for example, how the existing human rights discourse has failed to address historic injustices and economic inequity or reign in the role of transnational corporations in human rights abuses. Instead of accepting these problems as deficiencies that render the combination of environment and human rights ineffective, she suggests accepting the utility of the human rights framework for environmental analysis, adding that local visions of human dignity can inform the right to a healthy environment and help overcome such limitations. Ultimately, Professor Gonzalez concludes that “human rights law and institutions are embedded in power relations that replicate colonial discourses,” but they also possess “tremendous emancipatory potential . . . to advocate for a more equitable and sustainable society.”

Professor Sumudu Atapattu’s commentary on Professor Gonzalez’s article echoes the scholar’s key assertions. However, she highlights additional issues that could have been raised by the article, especially whether the critique of human rights discourse applies uniformly to all forms of human rights norms despite their

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29. *Id.* at 172-73.
30. *Id.* at 172-83.
31. *Id.*
32. *Id.* at 194.
33. *Id.*
multifaceted nature, ranging from the procedural to the substantive. Other issues that Professor Atapattu raises include the growing relevance of matters such as the Ruggie Principles and the rights of nature.

With *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, Professor Tsosie explores the ramifications of achieving reparative justice for native peoples seeking redress for environmental harms to themselves and their lands. Her paper focuses on the legacy of radioactive contamination associated with uranium mining affecting the Navajo Nation and parallels in the experiences of indigenous people on the Marshall Islands with the consequences of nuclear weapons testing. Professor Tsosie’s comparative examination of these two native experiences examines not only the limitations of available legal tools to the Navajo Nation, but also shows the significant disparity in ultimate outcomes. Even though both native peoples have had analogous trust relationships with the United States government, the people of the Marshall Islands were ultimately able to obtain a far more generous and appropriate reparations package than what was provided to the Navajo Nation. Her comparative analysis reveals important parallels of attaining individualized justice in such situations.

Based on the deficiencies of contemporary legal remedies, the special status of native peoples, and their unique trust relationship with the federal government, Professor Tsosie develops a framework for reparative justice due to indigenous people that seeks to capture both material compensation needs as well as the “intangible, psychological” component of grave injustices. This framework, “ethics of remediation,” looks not only to the past as relevant, but also to the present and future, and the attendant moral relationship between the parties. In other words, she argues that an ethics of remediation requires not only the redress of physical harms, but also the repair of moral, spiritual, and dignitary injuries, as well as acknowledgment of the interconnectedness of the past to the present and future. Looking to the remediation efforts in the South Pacific suggests an intercultural component for the Navajo, meaning that “an ethics of remediation should be based on a platform of mutual respect, honoring Indigenous self-
determination and the protective aspects of the federal trust responsibility.”

Professor Kronk Warner’s essay *Working to Protect the Seventh Generation: Indigenous Peoples as Agents of Change* builds on and extends Professor Tsosie’s ethics of remediation framework to climate change issues. Through Professor Kronk Warner’s exploration, indigenous people can play a special role in implementing climate solutions through their special sovereign status, connection to the environment, and distinct experiences. She proposes that these special characteristics can allow indigenous peoples to serve as agents of change with a unique view on environmental issues from a human rights perspective. Professor Kronk Warner also asserts that the indigenous people’s role in human rights and the environment can showcase that restorative justice requires legal as well as moral redress that tells their stories for the achievement of justice.

Professor Robert Coulter’s *The Situation of the Indigenous People of Rapa Nui and International Law: Reflections on Indigenous Peoples and the Ethics of Remediation* applies Professor Tsosie’s ideas to the people of Rapa Nui, a small island west of Chile. Their difficulties have included not only lack of self-determination and rapid immigration from Chile, but also disintegration of their access to sacred and protected sites. Professor Coulter suggests that environmental protection concerns can be used as a tool for achieving an ethics of remediation in international human rights law, including in the struggles of the people of Rapa Nui for self-determination and redressing of wrongs.

Overall, the Symposium articles illustrate the broad range of issues found at the intersection of human rights and the environment. The expert scholarship challenges us to be ambitious and engage in further inquiry and research. Policy-makers, activists, and scholars will have to work hard to integrate the legal frameworks, core values, and objectives of environmental law and international human rights law effectively. Although the appropriate relationship and role of politics vis-à-vis legal principles remains to be identified, institutions in both fields must become more effective in implementing existing law. The potential contribution toward advancing human rights and environmental quality could be great.

40. *Id.* at 270.
42. *Id.* at 287-91.
44. *Id.* at 302.