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Michael P. Scharf

Amanda Price

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FOREWORD: CLIMATE CHANGE AND INTERNATIONAL LAW AT A CROSSROAD

Michael P. Scharf[†] and *Amanda Price*^{††}

I.

Now in its 56th year, the *Case Western Reserve Journal of International Law* is one of the oldest and most cited international law journals in the world.¹ This double issue of the *Journal* contains articles generated from the Frederick K. Cox International Law Center’s 2023 annual symposium, titled “Climate Change and International Law at a Crossroad.”

Climate change is said to be the “defining global crisis of our time.”² Recent data indicates that it is occurring more quickly than originally predicted. 2019–2022 were the four hottest years on record.³ Glaciers and ice sheets are contracting at an alarming rate.⁴ Storms are intensifying.⁵ Low lying coastal and island states face catastrophic

† Michael Scharf is Co-Dean of the Law School and Joseph C. Hostetler—BakerHostetler Professor of Law at Case Western Reserve University School of Law. He is also President of the American Branch of the International Law Association.

†† Amanda Price, J.D. Candidate, Case Western Reserve University School of Law, Cleveland, Ohio, May 2024; Editor-in-Chief, Case Western Reserve Journal of International Law, Vol. 56.

1. *W&L Law Journal Rankings*, WASH. & LEE UNIV. L. LIBR., <http://go.wlu.edu/lawjournals> [<https://perma.cc/NWT9-Y3ND>] (*Case Western Reserve Journal of International Law* ranks #23 out of 164 international law journals in the world).
2. *The Climate Crisis—A Race We Can Win*, U.N., <https://www.un.org/en/un75/climate-crisis-race-we-can-win> [<https://perma.cc/RP3H-AY39>].
3. *Id.*
4. *Ice Sheets*, NASA, <https://climate.nasa.gov/vital-signs/ice-sheets/?intent=121> [<https://perma.cc/2RRX-AUSX>].
5. See *The Climate Crisis – A Race We Can Win*, *supra* note 2.

flooding.⁶ The world's great rivers and lakes are drying up,⁷ while climate migrants are pouring across borders.⁸

With these threats and challenges as backdrop, on September 28–29, 2023, Case Western Reserve University School of Law's Cox International Law Center brought together two-dozen leading experts from the academy, the private sector, and international organizations to address four questions at the heart of the climate change crisis: (1) How should the international community enforce the newly recognized human right to a healthy environment?⁹ (2) Is “ecocide” a viable international crime? (3) Are environmental migrants entitled to refugee status? And (4) can corporations be successfully sued for climate change?¹⁰

In addition to four panels featuring leading international law experts addressing these questions, highlights of the symposium included a dinner speech by Jim Chen, former Senior Counsel of Tesla and Rivian Motors; a morning keynote address by Professor John Knox, former U.N. Special Rapporteur for Human Rights and the Environment; a lunch keynote address by Judge Chile Eboe-Osuji, the former President of the International Criminal Court; and a closing address delivered by Austin Fragomen, chairman emeritus of the world's leading immigration law firm, Fragomen, Del Rey, Bernsen & Loewy, LLP.¹¹ Following the symposium, Michael Scharf devoted the

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6. See, e.g., *Five Pacific Islands Lost to Rising Seas as Climate Change Hits*, THE GUARDIAN (May 10, 2016, 09:02 EDT), <https://www.theguardian.com/environment/2016/may/10/five-pacific-islands-lost-rising-seas-climate-change> [<https://perma.cc/5AEW-4Q5Y>].
 7. Euronews Green & APTN, *World's Largest Lakes Are Shrinking: Scientists Say Global Warming and Overuse of Water Are to Blame*, EURONEWS.GREEN (May 19, 2023, 13:22), <https://www.euronews.com/green/2023/05/19/worlds-largest-lakes-are-shrinking-scientists-say-global-warming-and-overuse-of-water-are-> [<https://perma.cc/4YF6-9C76>]; Natalie Croker, et al., *The World's River Are Drying up from Extreme Weather. See How 6 Look from Space*, CNN (Aug. 20, 2022, 3:30 AM EDT), <https://www.cnn.com/2022/08/20/world/rivers-lakes-drying-up-drought-climate-cmd-intl/index.html> [<https://perma.cc/GGD9-3VV7>].
 8. See *The Climate Crisis – A Race We Can Win*, *supra* note 2; see, e.g., Paula Beltran & Metodij Hadzi-Vaskov, *How Climate Shocks Are Linked to Cross-Border Migration in Latin America and the Caribbean*, IMF (Dec. 8, 2023), <https://www.imf.org/en/News/Articles/2023/12/08/cf-how-climate-shocks-are-linked-to-cross-border-migration-in-latin-america-and-the-caribbean> [<https://perma.cc/XJ2E-C2FQ>].
 9. G.A. Res. 76/300, at 3 (July 28, 2022).
 10. *Climate Change and International Law at a Cross Road*, CASE W. RES. UNIV., <https://case.edu/law/our-school/events-lectures/climate-change-and-international-law-crossroad> [<https://perma.cc/5MDM-LG8S>].
 11. See *Climate Change & International Law at a Crossroad, Conference Schedule*, CASE W. RES. UNIV., https://docs.google.com/document/d/1L7R-hOEV0LMg8Z7MMGq_hgN2WLkTOICs [<https://perma.cc/>].

November 2023 broadcast of his quarterly radio show and podcast, “Talking Foreign Policy,” to the issues covered by the symposium.¹²

II.

This volume of the *Case Western Reserve Journal of International Law* is organized around the 2023 Cox Center symposium.¹³ As a backdrop, the volume begins with **Dean Michael Scharf’s** article which explores whether the conditions are ripe for a “Grotian Moment” ushered in by the United Nations General Assembly’s recent recognition of the human right to a healthy environment. Scharf explains that application of human rights law to legal issues related to climate change by international and domestic courts would shift the international environmental law paradigm—something that may be necessary to effectively address a global phenomenon that is more immediate and consequential than had been anticipated.

Next, **Alexandra E. Koch, Nicole K. Carle, and Gregory P. Noone’s** article discusses the important nexus between climate change and national security, analyzes how the last six U.S. presidential administrations perceived and acted upon climate change as a national security issue, and considers why and how the growing threat of climate change can be further addressed in future U.S. national security discussions and strategies.

Then, this volume turns to the content stemming from the symposium itself, beginning with **James Chen’s** dinner remarks about the need to safeguard human rights in the production of electric car batteries and **John Knox’s** keynote address detailing the history behind the U.N. General Assembly’s recognition of the “right to a clean, healthy, and sustainable environment as a human right.”¹⁴

Next, the volume features articles generated from the first symposium panel discussion on the enforcement of the newly recognized international right to a healthy environment. **M. Alexander Pearl’s**

H2LX-LRKH]; *Case Western Reserve University School of Law Receives \$1 Million Gift to Establish Fragomen Distinguished Practitioner in the Immigration Law Clinic*, THE DAILY (Mar. 17, 2023), <https://thedaily.case.edu/cwru-school-of-law-receives-1-million-gift-to-establish-fragomen-distinguished-practitioner-in-the-immigration-law-clinic/> [https://perma.cc/DT3B-ENUN]; see *Fragomen Announces New Leadership Poised to Take Firm to New Heights*, FRAGOMEN (Sept. 21, 2022), <https://www.fragomen.com/insights/fragomen-announces-new-leadership-poised-to-take-firm-to-new-heights.html> [https://perma.cc/H6WE-2W97].

12. “Talking Foreign Policy” Broadcast, THE DAILY (Nov. 16, 2023), <https://thedaily.case.edu/talking-foreign-policy-broadcast/> [https://perma.cc/Q874-5ZRM].
13. The summaries of the articles below include direct text from the abstracts and text of the articles themselves.
14. G.A. Res. 76/300, *supra* note 9.

article examines the right to a healthy environment as it relates to Indigenous peoples worldwide, with a particular focus on Native Nations in the United States. His article argues that successful implementation of the right from the perspective of many Indigenous peoples depends upon the right's ability to give those communities a legitimate voice in the processes of identifying solutions and executing them. Next, **Michael J. Kelly's** article examines both the COVID-19 pandemic and the international response to climate change through the Paris Climate Accords as they relate to the right to a healthy environment. **Craig Martin's** article examines several recent climate-rights cases and explores how such rights-based cases may exercise greater influence than is typically understood to enforce climate change law obligations. Closing out the first panel, **Victoria J. Haneman's** article explores the climate costs of dirty luxuries, considers the current and proposed international efforts to address the climate impact of these luxuries, and proposes structures by which these luxuries may be taxed to either reduce consumption or compensate for negative externalities.

Building on the first panel, the next set of articles from the second panel examines whether ecocide is a viable international crime. This set begins with **Milena Sterio's** article which discusses the history of the crime of ecocide, whether and how ecocide can be investigated and prosecuted as a war crime, crime against humanity, or a separate crime under the Rome Statute, and briefly discusses ecocide and other crimes against the environment in the context of the Ukraine war. Next, **Giovanni Chiarini's** article analyzes potentially prosecutable cases of alleged global ecocide and proposes targeted amendments to Articles 36(3) and (5) of the Statute of the International Criminal Court by examining the environmental pollution caused by the Russian invasion of Ukraine and the Japanese government's decision to dispose of radioactive treated water from the wrecked Fukushima-Daiichi nuclear site. Finally, **Paul R. Williams and Sindija Beta's** article examines the dynamics of negotiating environmental justice in Ukraine amid pressure from international actors for an amnesty for peace swap.

The volume continues to the third panel articles which explore legal mechanisms and strategies to enhance the protection of climate displaced peoples in the Americas. **Kate Jastram's** article examines seven existing and potential legal and policy options to improve the U.S. response to people fleeing across international borders in the context of the adverse effects of climate change and disasters. Her article argues that a more realistic and less constricted conception of both international protection and the national interest of the United States will not only provide life-saving refuge to those in need while resuscitating the asylum system but will also serve as a model to other countries in the Americas and beyond. Next, **Julia Neusner's** article raises critical legal questions regarding U.S. obligations under international and domestic law to protect asylum seekers, mitigate

climate-related risks, and uphold the rights of noncitizens within its borders and probes the extent to which U.S. policies may subject impacted individuals to the risk of refoulement to places where their lives and safety are at risk. It also examines the extraterritorial reach of U.S. immigration enforcement efforts and underscores the urgent need for safe and regular migration pathways to protect people on the move from the intensifying effects of climate change. Rounding out the third panel articles, **Camila Bustos's** article explores the disaster management framework in Colombia by conducting a case study of the town of Gramalote and discusses the obligations that states like Colombia owe to their internally displaced populations in the context of climate change. Her article argues that states have an obligation to recognize climate displacement, plan ahead to protect their populations' rights, and implement best practices under international human rights law throughout relocation and resettlement processes.

Finally, the fourth panel articles examine whether corporations can be sued for global warming. **Wes Henricksen's** article outlines how impersonal frauds aimed at millions, like that carried out by the fossil fuel industry, often fall outside the parameters of fraud law, and argues that legislatures and courts should close the gap in the law that deprives those harmed by climate change of the opportunity to seek redress for injuries caused by the fossil fuel companies' purposeful deceit of the public. Finally, **James R. May, Marcelo Buzaglo Dantas, and Luciana Bauer's** article compares "climate rights" in the United States and Brazil and concludes that courts can play an instrumental role in addressing and redressing climate change by directing governments to enact and implement policies requiring corporations and individuals to address the effects of climate change in ways not accomplished through existing international and national laws. It additionally argues that courts can impel action by enforcing these provisions.

Next, the symposium's closing remarks written and prepared by **Austin T. Fragomen, Jr. and Nancy H. Morowitz** emphasize the importance of migration policy reforms in the face of demographic changes and underscore the urgency that climate change adds to this challenge. Their remarks clarify the importance of States working together to develop a governance system, a binding global agreement, and funding to answer the challenge of human mobility.

Lastly, the content related to the symposium concludes with a transcript from a **Talking Foreign Policy** broadcast hosted by Dean Michael Scharf and joined by guests John Knox, Paul Williams, Shannon French, Milena Sterio, and Michael Kelly. The broadcast aired on November 20th, 2023, and examines questions such as, is it too late to stop climate change and what can the international community do to respond to this existential global crisis.

This volume of the *Journal of International Law* also features **the 2023 Klatsky Lecture** where distinguished lecturer, **Leila Nadya**

Sadat, was presented with the Frederick K. Cox International Law Center Humanitarian Award for Advancing Global Justice for her decades of work to persuade the international community to adopt a treaty on crimes against humanity. Sadat’s lecture explores what crimes against humanity are, why the crimes themselves and their victims have been forgotten, and why it is important not only that they be remembered, but that a new specialized convention dedicated to their prevention and punishment be adopted.

Finally, this volume of the *Journal of International Law* concludes with four Student Notes covering a wide range of topics relevant to international law today. **Nicholas Abraksia’s** Note examines the legality of the Biden Administration’s targeted killing of al-Qaeda leader Ayman al-Zawahiri in Kabul, Afghanistan via drone strike by implementing the “Deeks Factors Test” of “unable or unwilling.” His Note advocates for a U.N. Resolution to establish a robust “unable or unwilling” framework to provide states with a standard to consider when assessing the use of force against non-state actors. Next, **Caitlyn Herlihy’s** Note argues that while establishing domestic laws that protect the unique intellectual property of Indigenous groups is important, true protection cannot exist without joint efforts to ensure that provided protections can be enjoyed by all members of a community, regardless of which side of the border they reside on. Her Note further argues that to fulfill the obligations accepted by the United States and Mexico through the United Nations Declaration on the Rights of Indigenous Peoples, the two nations must develop an international agreement that establishes a cooperative system that provides transnational protection for their shared Indigenous populations. **Amanda Price’s** Note, which won the Outstanding Note of the Year Award, examines whether certain acts of ecocide may be prosecuted by the International Criminal Court under Article 7(1)(k) of the Rome Statute, proposes a definition for ecocide in a crimes against humanity context, and analyzes whether former Brazilian President Jair Bolsonaro’s destruction of the Amazon as alleged by the 2021 AllRise Complaint can be prosecuted in the ICC as a crime against humanity. Finally, **Lauren A. Turner’s** Note explores the recently implemented EU and U.K. Anti-Money Laundering (AML) regulations and suggests that not only is there a justification for expanding AML regulations in the United States to include the art industry due to the vulnerabilities of the market, but also that the art market should have an active role in helping to develop regulations that suit the art market and players.

III.

Many students, scholars, practitioners, and supporters made this Symposium issue possible. We would like to thank all participants and organizers of the “Climate Change and Environmental Law at a Crossroads” Symposium for helping to make the event such a success.

This Symposium and publication were made possible by a special endowment by our patron Bruce J. Klatsky. We also thank the Law School's Frederick K. Cox International Law Center and the American Branch of the International Law Association for co-sponsoring the Symposium. Last but certainly not least, we thank the student editors of the *Case Western Reserve Journal of International Law*, who worked tirelessly to make this publication possible.

Plans are already underway for the 2024 Cox Center Conference, which will commemorate the 75th Anniversary of the 1949 Geneva Conventions¹⁵ and focus on whether there is a need for a new Geneva Convention for the challenges of the 21st century. Articles generated from that conference will appear in Volume 57 of the *Case Western Reserve Journal of International Law* in 2025.

15. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention Relative for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

