Editorial

The first few months of 2019 have seen further developments in several important areas, internationally with regard to the Global Pact for the Environment and the Paris Agreement, and nationally concerning movements in climate change litigation, as well as broader law and policy developments.

As part of a Resolution on negotiating the Global Pact for the Environment, passed in May 2018, the UN General Assembly commissioned a report by the UN Secretary General on ‘Gaps in International Environmental Law and Environment-Related Instruments: Towards A Global Pact for the Environment’.¹ That report, issued in November 2018,² reviewed and analysed the corpus of international environmental law and environment-related instruments as well as the governance structure and implementation of international environmental law. It revealed gaps and deficiencies at multiple levels.³ The report set out a number of detailed findings. In summary, they were that ‘there is no single overarching normative framework that sets out what might be characterized as the rules and principles of general application in international environmental law’ and that ‘international environmental law is piecemeal and reactive. It is characterized by fragmentation and a general lack of coherence and synergy among a large body of sectoral regulatory frameworks’. The Report also found that ‘the articulation between multilateral environmental agreements and environment-related instruments remains problematic owing to the lack of clarity, content-wise and status-wise, of many environmental principles’. With regard to the structure of international environmental governance, the report characterized it ‘by institutional fragmentation and a heterogeneous set of actors, revealing important coherence and coordination challenges’ and that ‘[i]nternational courts and tribunals often stress the lack of international consensus concerning environmental principles’. Finally, with regard to implementation of international environmental law, the Report noted that this is

- 1 UNGA, Res 72/277 Towards a Global Pact for the Environment (10 May 2018) UN Doc A/RES/72/277, para 1; see ‘Editorial’ CJEL 2 (2018) 127.
- 2 UN A/73/419 (30 November 2018) UN Doc A/73/419 (also published in Chinese: 国际环境法和与环境有关的文书的欠缺：制定全球环境契约) <https://wedocs.unep.org/handle/20.500.11822/27070>.
- 3 Ibid 1.

challenging at both the national and international levels. National implementation is constrained in many countries by the lack of appropriate national legislation, financial resources, environmentally sound technologies and institutional capacities. At the international level, implementation is constrained by the lack of clarity of many environmental principles.⁴

Among its recommendations, the Report advised that ‘effective implementation could be strengthened through such actions as the clarification and reinforcement of principles of international environmental law’, and importantly from the point of view of development of the Global Pact, that ‘this could be done through a comprehensive and unifying international instrument that gathers all the principles of environmental law’.⁴ The Report will no doubt be subject to a good deal of academic and practical analysis, and this is where its importance lies over the longer-term.

The latest deliberations of the Pact’s Open-Ended Working Group were held in Nairobi in May 2019. The outcome has been stated to represent a ‘clear retreat from the original proposals of the co-chairs’ with regard to the adoption of a Global Pact in the period for 2020–21, with the States opting ‘for a simple Political Declaration in 2022, in the context of the fiftieth anniversary of the Stockholm Conference’.⁵ Although the process is not, at this stage, expected to result in a legally binding document, it might be expected that a declaration would adopt a range of new principles and concepts, and assume a similar importance to that of the 1992 Rio Declaration on Environment and Development.⁶ This would include the recognition of a right for every person ‘to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment’, as set out in art. 1 of the current draft of the Global Pact.⁷ Nevertheless, the backers of the Pact have argued that its adoption ‘is still possible’. They have argued that, ‘[b]y analogy, in 2009, the

4 Ibid 2.

5 Global Pact for the Environment, ‘In Nairobi, the Global Pact for the Environment has suffered a serious setback’ <https://globalpactenvironment.org/en/third-session-of-the-working-group-on-the-pact-in-nairobi/>.

6 Rio Declaration on Environment and Development 31 ILM 874 (1992).

7 See ‘Global Pact for the Environment’ <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/global-pact-environment>; for a comprehensive analysis of the draft Pact, see Yann AGUILA and Jorge E. VIÑUALES (eds), *A Global Pact for the Environment—Legal Foundations* (Cambridge 2019); see also World Commission on Environmental Law of the International Union for the Conservation of Nature and International Council of Environmental Law and International Group of Experts for the Pact, ‘Note on the United Nations Secretary-General’s Report, “Gaps in international

failure of Copenhagen sent out a shockwave and paved the way for the adoption of the Paris Agreement in 2015.⁸ We wish them every success in these endeavours.

The increase in climate change litigation continues. Several recent decisions illustrate the growing influence of global issues on domestic environmental cases, including shaping the ways in which cases are argued and decided in other jurisdictions. One such case is *Gloucester Resources Limited v the Minister for Planning* in the Land and Environment Court of New South Wales, Australia.⁹ This was an appeal by a coal miner on the merits of a decision¹⁰ with regard to the Minister's refusal to grant consent to an open-cut coal mine at Gloucester, north of Sydney. After the filing of the appeal by Gloucester Resources, the Court allowed a local community action group, Gloucester Groundswell, to be joined as a party to the proceedings. This group was 'concerned about the impacts of the Rocky Hill Coal Project on the local community and on the local and wider environment'.¹¹ The principal issues raised by the Minister and Gloucester Groundswell included the alleged incompatibility of the proposed mine with the existing uses of land in the vicinity as well as its adverse social impacts, including noise, dust and visual impacts. On the issue of climate change, they argued that the mine was also not in the public interest because it was contrary to the principles of ecologically sustainable development and furthermore, 'because the direct and indirect greenhouse gas emissions of the mine will contribute to climate change'.¹² In confirming the Minister's refusal of consent, on the basis of detailed expert evidence, the Court held that:

The Project will be a material source of GHG emissions and contribute to climate change. Approval of the Project will not assist in achieving the rapid and deep reductions in GHG emissions that are needed now

environmental law and environment-related instruments: towards a global pact for the environment" (A/73/419, 3 December 2018) 10 December 2018 <https://www.iucn.org/news/world-commission-environmental-law/201812/wcel-announced-today-global-release-wcel-icel-igep-note>.

8 'Global Pact for the Environment' (n 8).

9 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.

10 In a merit appeal, a court examines the actual substance of the decision, as opposed to whether the decisionmaker had made a decision that was legally wrong, the latter being referred to as a judicial review. In such an appeal, the court stands in the shoes of the original decisionmaker (in this case the Minister) and can agree with, remake or modify the original decision by imposing further conditions.

11 *Ibid* para 23.

12 *Ibid* para 24.

in order to balance emissions by sources with removals by sinks of GHGs in the second half of this century and achieve the generally agreed goal of limiting the increase in global average temperature to well below 2°C above preindustrial levels.¹³

It further added:

[A]n open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.¹⁴

Although it was open to Gloucester Resources to appeal this refusal of consent, it announced in May 2019 that it would not do so. It should be noted that as a merits decision, the case does not, from a legal viewpoint, provide a direct precedent for subsequent cases, either in New South Wales or in other Australian State and Federal courts, or in foreign jurisdictions. Nevertheless, the comments quoted above will no doubt be read closely by climate change litigators in other jurisdictions. Certainly, part of the importance of the decision is the taking into account the 'downstream' or scope 3 greenhouse gas emissions¹⁵ resulting in particular from the end-use of coal, including, for example, the burning of thermal coal in power stations to generate electricity in countries other than those that supplied it.¹⁶

The *Juliana v USA* case, canvassed in the previous issue of the Journal,¹⁷ has continued its way through the US federal courts, with a hearing in June 2019

13 Ibid para 697.

14 Ibid para 699.

15 For further information on emission scopes, see Greenhouse Gas (GHG) Protocol <https://ghgprotocol.org/>.

16 In the Gloucester case, Scope 3 emissions were characterised as including 'emissions associated with the extraction, processing and transportation of diesel and the transportation and combustion of product coals' (n 15, para 428).

17 Brian J PRESTON, 'The Evolving Role of Environmental Rights in Climate Change Litigation' CJEL 2 (2018) 131–164 and 'Editorial', CJEL 2 (2018) 127, 128.

in the Court of Appeals of the 9th Circuit focused on the question of whether young people can claim a constitutional right to be protected from climate change. As part of an ongoing set of hearings, the judges must now decide on whether the case can go to trial. A striking statement made in closing by counsel for the plaintiffs reads: 'If we look back on the 20th century, we can see that race and sex discrimination were the constitutional questions of that era, and when our great-grandchildren look back on the 21st century, they will see that government-sanctioned climate destruction was the constitutional issue of this century'.¹⁸ We will continue to monitor this and other climate cases in future issues of our Journal.

With respect to progress concerning intergovernmental negotiations on climate change, we note that at the Katowice Climate Change Conference (COP 24) in December 2018,¹⁹ State Parties successfully produced a series of decisions that have significantly advanced the content of the Paris Agreement (PA) Rulebook.²⁰ In its current form, the Rulebook comprises more than 100 pages of text that set out detailed treaty implementation guidance, modalities, functions, work and programmes. As noted by the UNFCCC Executive Secretary, Patricia Espinosa, this has only been achieved after extensive 'in-depth technical discussions and political compromise'.²¹ In successfully advancing the completion of the PA Rulebook, the decisions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) provide detailed advice on the transparency framework's operational rules, administration and management of the global stocktake, and the requisite information on post-2020 climate actions to be taken at national levels to be provided by State Parties in their nationally determined contributions (NDCs) etc. Other

18 Submission by counsel Julia Olsen, as reported in 'Scale of landmark youth climate case compared to *Brown v. Board* as judges weigh trial' <https://thinkprogress.org/scale-of-landmark-youth-climate-case-compared-to-brown-v-board-as-judges-weigh-trial-dfocfifa38f7/>

19 For full details of this conference, including relevant decisions and documentation, see <https://unfccc.int/process-and-meetings/conferences/katowice-climate-change-conference-december-2018/katowice-climate-change-conference-december-2018>.

20 Conference of the Parties (COP), 'Report of the COP on its 24th session, held in Katowice from 2 to 15 December 2018' (19 March 2019) UN Doc FCCC/CP/2018/10/Add.1, esp Decision 1/CP.24; COP serving as the meeting of the Parties to the Paris Agreement (CMA), 'Report of the CMA at the 3rd part of its 1st session held in Katowice from 2 to 15 December 2018' (19 March 2019) UN Doc FCCC/PA/CMA/2018/3/Add.1, which sets out, relevantly, Decisions 3–20/CMA.1.

21 Full details of these decisions are available on the UNFCCC website: UNFCCC, 'The Katowice climate package: Making the Paris Agreement work for all' <https://unfccc.int/process-and-meetings/the-paris-agreement/katowice-climate-package>.

matters dealt with in the CMA's decisions concern the communication of national adaptation efforts (NACS) and the operation and use of public registries for NDCs and NACS. Guidance is also provided on the establishment of the PA's implementation compliance committee, approaches to providing advice on financial support to developing countries, as well as establishing post-2025 finance targets. Notably, the CMA was unable to reach an outcome on Article 6 of the Paris Agreement. As such, Article 6, often referred to as the international carbon markets provision, remains a source of ongoing negotiations between State Parties. The detail and complexity of evidence in these decisions clearly demonstrate that the reality of negotiating and reaching agreement on the PA Rulebook to date has been a task of monumental proportions and endurance.

Such demands appear to be characterising the continuing discussions taking place at the Bonn Climate Change Conference at the time of this writing.²² Matters currently under consideration include further development of modalities, programmes, and guidelines for the transparency framework,²³ common tabular formats and other methodological issues under the PA,²⁴ and for Article 6. In addition to considering the possible draft texts for Article 6(8) and non-market mechanisms, the ongoing challenges of ITMOS' definition and governance, the connections between Articles 6(2) and 6(4), and how to overcome the problem of double counting (art 6(5)), were slated for further negotiation in Bonn.²⁵ As we go to press, progress on these matters has been limited.²⁶ Lastly, the issue of common timeframes was also scheduled for further consideration by the Subsidiary Body for Implementation (SBI) at

22 UNFCCC, Bonn Climate Change Conference—June 2019 <https://unfccc.int/process-and-meetings/conferences/bonn-climate-change-conference-june-2019/bonn-climate-change-conference-june-2019>.

23 Paul WATKINSON, Reflections note by the Chair of the Subsidiary Body for Scientific and Technological Advice (24 May 2019) <https://unfccc.int/sites/default/files/resource/SBSTA50reflectionsnote.pdf>.

24 See Subsidiary Body for Scientific and Technological Advice (SBSTA), 'Provisional agenda and annotation. Note by the Executive Secretary' (8 April 2019) UN Doc FCCC/SBSTA/2019/1, Sec I [10], Sec II [10].

25 See conference documentation, Bonn Climate Change Conference—June 2019 (n 5); SBSTA, *Ibid* Sec I [11], Sec II [11].

26 See for e.g., the following decisions of the SBSTA, where most of the draft text remains in square brackets (undecided): 'Draft CMA decision on the work programme under the framework for non-market approaches referred to in Article 6, paragraph 8, of the Paris Agreement' (Version 1, 25 June 07:00 hrs); 'Draft CMA decision on the rules, modalities and procedures for the mechanism established by Article 6, paragraph 4, of the Paris Agreement' (Version 1, 25 June 07:00 hrs); 'Draft CMA decision on guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement'.

the Bonn CC Conference, with an expectation that consensus-driven deliberations by State Parties will result in an agreed approach being prepared for adoption by the CMA at COP25 in December 2019.²⁷ However, in a draft text, the SBI appears to have deferred further discussion of this contentious issue, for a meeting and time yet to be determined.²⁸ Further advancement of the Paris Agreement's Rulebook will be recorded in coming issues of this Journal.

We are pleased to see the publication in May 2019 by the Chinese Ministry of Ecology and Environment of its latest *Report on the State of the Ecological Environment*.²⁹ Such reports have been generated annually in China since the mid-1990's,³⁰ mandated under the Environment Protection Law.³¹ A point of particular interest in this comprehensive report is the observation that the Fourth Session of the Standing Committee of the 13th National People's Congress 'made a comprehensive push to strengthen the ecological environment protection', particularly concentrating on pollution discharges in both natural and urban areas, and establishing 'an integrated law enforcement team for ecological environmental protection to enhance the unity, independence, authority and enforcement of law enforcement effectiveness'.³² This bolsters the breadth and strength of the new Ministry's power since the institutional reforms of early 2018.³³ Also of interest in the report is its recording of the incorporation of the concept of 'ecological civilization' into the Chinese Constitution (having already been included in art. 1 of the 2014 Environmental

27 UNFCCC, 'Provisional agenda and annotation. Note by the Executive Secretary' (8 April 2019) UN Doc FCCC/SBI/2019/1, sec II (5), paras 34–35.

28 SBI Chair, 'Draft Text on SBI 50 agenda item 5, Common time frames for nationally determined contributions referred to in Article 4, paragraph 10, of the Paris Agreement' (21 June 2019) https://unfccc.int/sites/default/files/resource/SBI50.DT_i5.pdf.

29 China's Ecological Environment Report 中国生态环境状况公报 2018, as reported in *China Water Risk*, http://www.chinawaterrisk.org/resources/analysis-reviews/2018-state-of-ecology-environment-report-review/?utm_source=China+Water+Risk&utm_campaign=cb2607f90e-China_Water_Risk_Jan_2018_Newslette07_15_2017_COPY&utm_medium=email&utm_term=0_cae821f95-cb2607f90e-290811749.

30 For reports from 1996 to 2017, see Ministry of Ecology and Environment, Peoples' Republic of China, <http://english.mee.gov.cn/Resources/Reports/soe/index.shtml>.

31 See Environment Protection Law 2014, art. 11; we also observe that special reports on climate change policies and actions have been published by the Ministry since 2016: Ministry of Ecology and Environment, Peoples' Republic of China China's Policies and Actions for Addressing Climate Change 2018 <http://english.mee.gov.cn/Resources/Reports/reports/>.

32 China's Ecological Environment Report (n 29) 1.

33 See WANG Jinpeng, 'Reform of China's Environmental Governance: the Creation of a Ministry of Ecology and Environment', *CJEL* 2 (2018) 112–117.

Protection Law).³⁴ This concept seems likely to assume broader importance internationally, perhaps in particular in the context of the debate over the Global Pact (see above), the language of which is consistent with the broad thrust of ecological civilization.³⁵

This issue of the Journal publishes three research articles on disparate topics. The first, 'Marine Plastic Pollution in Asia: All Hands on Deck!' by Beatriz GARCIA, Meng FANG and Joline LIN, explores the alarming problem of marine plastics pollution (MPP), focusing particularly on the Asia-Pacific region. The authors demonstrate that this pollution is generated mostly from land-based sources, and that five Asian countries have been identified as the largest sources of MPP. The article includes case studies of the two most significant polluters, China and Indonesia. The authors indicate that these countries face similar legal and institutional challenges in dealing with MPP, but they also show that creative and effective measures have been taken at the domestic level by local governments and by non-state actors. The article argues that governance efforts to address MPP require what they characterize as an 'all hands-on deck' approach, involving multi-level and multi-actor strategies and targeted regulatory and non-regulatory measures, but that most efforts should be directed at the subnational level, local government level. Legal and policy recommendations derived from the case studies are proposed to address the global MPP crisis.

The second article, by Michael ADDANEY, Michael Gyan NYARKO and Elsabe BOSHOF, is entitled 'Protection of the Environment and Natural Resources during Armed Conflict in Africa'. The authors argue that the scarcity of natural resources, such as minerals and water, is often the origin of armed conflicts in Africa. Current trends towards environmental degradation will only intensify resource scarcity, in turn contributing to increases in armed conflict. They show that some governments in Africa overexploit valuable natural resources such as diamonds, oil and timber in order to finance war, without paying due regard to environmental protection. The authors

34 Article 89 of the Constitution, as amended in 2018, now reads: "The State Council exercises the following functions and powers, ... (6) to direct and administer economic affairs and urban and rural development, *as well as the building of an ecological civilization*" (emphasis added), NPC Observer, Annotated Translation: 2018 Amendment to the P.R.C. Constitution (Version 2.0) <https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/>.

35 China supported the Global Pact when it was first introduced at the United Nations in 2017: Hong Xiao, 'China lauds UN environment pact' *China Daily* 20 Sept 2017, http://www.chinadaily.com.cn/newsrepublic/2017-09/20/content_32266201.htm.

explore how current regional instruments could fill gaps in the legal frameworks for the protection of the environment and natural resources with regard to armed conflicts in Africa. The article looks at the extent that the enforceable content of regional and international norms can apply to reduce environmental damage during armed conflict. They assess the weaknesses of current frameworks in order to come up with reform suggestions. The article argues that the 2003 African Convention on the Conservation of Nature and Natural Resources should be used to provide strong and direct protection to the natural environment in times of armed conflict, and that a lower threshold is required for its application than Additional Protocol I to the Geneva Conventions. The article concludes by providing recommendations on durable solutions to protection of the environment during resource-fuelled armed conflicts in the African region.

Shawkat ALAM and Sheikh Noor MOHAMMAD are the authors of the third article, 'The Ecosystem Approach and Environmental Justice Nexus in Natural Resource Management'. They argue that the ecosystem approach has emerged in recent years in the international environmental realm to promote equity and justice for both people and nature using a set of mechanisms, including equitable benefit sharing; conservation and sustainable use; adaptive management; and participatory practices. The article explores how the ecosystem approach shares synergies with notions of environmental justice; these, they argue, include distributional justice, procedural justice and justice-as-recognition. Further, they record that the ecosystem approach involves two additional principles of environmental justice, namely intergenerational equity and the precautionary principle. The complementarity between the ecosystem approach and environmental justice is demonstrated by practical examples. They conclude that the concept of environmental justice can be promoted by utilizing the ecosystem approach as a vehicle for policy makers.

This issue also includes a note on recent developments from Andy RAINE and Emeline PLUCHON on the recent and prospective environmental law work of UN Environment in the Asia-Pacific region and a review prepared by Bingyu LIU of the book by Sébastien JODOIN of *Forest Preservation in a Changing Climate: REDD and Indigenous and Community Rights in Indonesia and Tanzania*.

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