Editorial

The International Law of Climate Change

This issue of the *Australian International Law Journal ('AILJ')* engages with a challenge that will dominate international law and legal institutions throughout this century — climate change. We are most grateful to the Editor-in-Chief, Dr Ben Saul, for allowing us this opportunity to solicit contributions from leading Australian scholars and practitioners working and researching in the field of international climate law for this special symposium issue of the *AILJ*.

International law has always been at the centre of responses to climate change. This began in 1988 when the United Nations General Assembly noted that 'climate change is a common concern of mankind' and encouraged the international community to agree on concrete measures to address the problem.[1] The main products of ensuing international legal responses were the 1992 *United Nations Framework Convention on Climate Change*[2] ('*UNFCCC*') and the 1997 *Kyoto Protocol*.[3] While the *UNFCCC* articulates fundamental objectives, the most important being to stabilise greenhouse gas concentrations in the atmosphere at a level which would avoid dangerous climate change, the *Kyoto Protocol* sought to make material progress towards this objective through specific emissions limitation or reduction targets for industrialised countries.

Since these foundation stones for international climate law were first laid, there has been much talk but little action in building a truly effective regime to tackle climate change. This is not least due to the United States' unwillingness, under President George W Bush, to recognise the legitimacy of international climate law,[4] a position which enjoyed Australian support until the change of government in late 2007. The world is now looking to Copenhagen in 2009 when the two-year process of negotiating a successor to the *Kyoto Protocol*, initiated at the Bali climate change summit in December 2007, will to come to a head. The dramatic disappearance of summer sea ice in the Arctic is in line with recent assessments[5] that dangerous climate change is occurring far more rapidly than anticipated by the Intergovernmental Panel on Climate Change in its *Fourth*

1 UNGA Res 43/53 (1988).

2 Opened for signature 9 May 1992, 1771 UNTS 165 (entered into force 21 March 1994).

3 Opened for signature 11 December 1997, (1998) 37 ILM 22 (entered into force 16 February 2005).

4 See Robyn Eckersley, 'Ambushed: The Kyoto Protocol, the Bush Administration's Climate Policy and the Erosion of Legitimacy' (2007) 44 *International Politics* 306.

5 See for instance the testimony of James Hansen, of Columbia University and the NASA Goddard Institute of Space Studies, to the United States House of Representatives Select Committee on Energy Independence and Global Warming <http://www.columbia.edu/~jeh1/2008/TwentyYearsLater_20080623.pdf> accessed 27 August 2008 ('the oft-stated goal to keep global warming less than two degrees Celsius (3.6 degrees Fahrenheit) is a recipe for global disaster, not salvation').

Assessment Report in 2007.[6] However, there is no guarantee that Copenhagen will produce agreement on the massive and urgent cuts in greenhouse gas emissions that are required to meet the objective of the *UNFCCC*.

In her contribution to this symposium issue, **Shirley Scott**, one of Australia's foremost scholars of international relations and law, considers whether international law is or can be up to this task. Scott begins from the premise that climate change meets any reasonable description of a crisis, rather than a confected emergency or outrage (in this respect we could cite international terrorism, a phenomenon that poses a far more modest challenge to the international order than climate change, though Scott does not single out any specific examples). Scott asks, provocatively, whether international law has in fact been complicit in the climate crisis by facilitating the growth of the global capitalist economy, and whether the capitalist system is compatible with the objective of ecological sustainability. The question for Scott then becomes whether international law can now be released from its entanglement with economic globalisation and become 'the engine of a genuinely sustainable economy?' Here she focuses on the inherent limitations in negotiating multilateral environmental agreements, which accentuate competition between states, rather than leading naturally to cooperation, even when the very future of human civilisation is at stake. Open international negotiations between sovereign states as equals appear as unsuited to achieving action on climate mitigation measures as parliamentary democracies, where craven policies appealing to domestic concerns over modest rises in fuel and other prices linked to carbon emissions rule the day.[7] Scott concludes with a call to arms for international lawyers to engage with climate change, rather than leaving discussion to economists and philosophers.

The three other contributions to the climate change symposium narrow our focus from the meta-questions posed by Shirley Scott to the weaknesses of specific areas of international law when it comes to matters of climate change. **Will McGoldrick**, of the Climate Institute, and formerly an advisor to the Independent State of Samoa, provides an insider's perspective on the inadequacy of the climate regime in funding adaptation measures in Pacific island countries that are exceptionally vulnerable to climate change. McGoldrick identifies the substantial adaptation needs of small island states in the Pacific, which span a range of vulnerable sectors including food production, water resources, human health and coastal infrastructure. He argues that several hundred million US dollars is urgently required to fund adaptation needs, and compares this with the modest sums that have so far flowed through donor institutions such as the Global Environment Facility (which has only distributed around US$5 million in this region for adaptation). McGoldrick examines the reasons for this failure of adaptation policy, despite the language of the *UNFCCC* regarding the need to assist developing states in

6 Intergovernmental Panel on Climate Change, *Climate Change 2007 — The Physical Science Basis: Working Group I Contribution to the Fourth Assessment Report of the IPCC* (2007).

7 For an account of the 'parallel universes' of climate science and climate policy in Australia see Robert Manne, 'The Nation Reviewed' *The Monthly* (August 2008) at 10.

coping with a changing climate.[8] He advocates specific provisions that could be inserted into a successor to the *Kyoto Protocol* to direct a proportion of revenue from carbon market transactions to vulnerable Pacific communities.

In her article, **Illona Millar**, a Senior Associate at Baker & McKenzie Sydney and previously a Staff Lawyer at the London-based Foundation for International Environmental Law and Development, considers how international law might respond to climate-induced displacement if mitigation and adaption policies fail in regions like the Pacific. Millar acknowledges the reality that climate change will drive mass movements of people across borders and within states, and that international law has no clear category for recognising people displaced as a consequence of environmental factors. The 'refugee' definition articulated in the 1951 *Convention Relating to the Status of Refugees*[9] simply does not fit, despite popular use of the term 'environmental refugee.' The reason for this is that there is no relevant persecution on account of race, religion, nationality, membership of a particular social group, or political opinion. Millar's analysis confirms that any expansion of the term 'refugee' to encompass those threatened by climate change would come at a substantial cost in terms of weakening the force of the refugee regime. Instead, Millar argues that other legal constructs, such as an additional agreement under the umbrella of the *UNFCCC*, must be looked to in addressing the growing problem of human displacement from climate change.

The final article is provided by **Robin Warner**, Senior Research Fellow at the Australian National Centre for Ocean Resources and Security at the University of Wollongong. Warner redirects our attention to mitigation policies, and specifically attempts to sequester carbon dioxide and other greenhouse gases in ocean space. The oceans are a natural sink for greenhouse gases, but there are proposals to enhance further their take-up of human carbon wastes through processes such as injection of carbon dioxide into the deep sea bed, or 'ocean fertilisation' that would promote the growth of phytoplankton that could absorb additional carbon from the atmosphere. What is clear from Warner's description is that these are developing and untested technologies that pose immense risks to the ocean ecosystem, not least being the prospects that they would lead to the progressive acidification of the oceans, and an accompanying incapacity for organisms such as corals to form calcite structures. On the other hand, such geoengineering schemes are likely to be attractive to governments when it becomes apparent that the world is on the way to runaway climatic change. Warner undertakes a detailed analysis of the legal framework applicable to high seas climate mitigation activities, with particular reference to the *1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*[10] (*'1996 London Protocol'*). She assesses the recent amendments to Annex I of the *1996 London Protocol* to allow storage of carbon dioxide under the seabed, and welcomes them as providing a 'burst of

8 See for instance *UNFCCC,* Art 4 which provides that industrialised states must assist 'developing country parties that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation'.

9 Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

10 Open for signature 7 November 1996, 36 ILM 1 (entered into force 24 March 2006).

colour and detail' in an otherwise spartan and drab international regulatory landscape. Nonetheless, Warner maintains that much more needs to be done to achieve a holistic and integrated regulation of mitigation activities in ocean areas beyond national jurisdiction.

Though international law remains at the forefront of conceptualising, steering and regulating the impacts of climate change on all aspects of human society, international lawyers cannot afford to be complacent. As this special issue makes clear, the effects of climate change traverse and cut across a whole range of legal sub-disciplines in an unprecedented way and require new ways of thinking about the function of law and the role of the state. Climate law is inherently multidisciplinary, and while international law alone cannot provide all the answers, it plays a vital role in circumscribing state activity and developing common goals.

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