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**Climate Change: The Human Rights Implications
for Small Island Developing States**

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For close to twenty years now, the world's leading scientists and other experts working through the Intergovernmental Panel on Climate Change (IPCC) have sent the international community a consistent and increasingly worrying message: burgeoning human activity is gradually thickening the layer of atmosphere that keeps our planet warm. Continuing the current pattern of greenhouse gas emissions will increase global average temperatures to levels and at rates previously unknown to humankind. Rising temperatures will lead to rising seas, as water expands and the ice caps recede.

The IPCC Second Assessment Report in 1995 declared that there is now strong evidence of a warming world attributable to human activities and of climatic instability likely to cause widespread economic, social, and environmental destruction over the next century. The Third Assessment Report in 2001, with comprehensive assessments of impacts, adaptation and vulnerability, provided more specific indicators pointing to vulnerable systems, natural and human, experiencing significant, even irreversible damage, from the predicted changes in the global climate system. Particularly damaging consequences will result from the projected range of global warming (1.4 to 5.8 degrees C by 2100) with consequential sea-level rise (0.09 to 0.88 metres by 2100) and by extreme events (such as droughts, floods and heat waves) which are expected to become more frequent and severe. These are unprecedented changes for at least the past 10,000 years. The impacts of such climate extremes are expected to fall disproportionately on the poor and vulnerable communities.¹

There is real fear that without urgent and radical action by governments, many of the gains of human development will be in jeopardy, if not reversed. More seriously, the chances of attaining the Millennium Development Goals (MDGs) by 2015 – the world's minimum commitment to ending the worst of global poverty, hunger, ill health, and

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¹ IPCC Working Group II: Impacts, Adaptation and Vulnerability, 2001

disease – will be seriously reduced.² But the situation could be worse.³ As it is, the 0.6 degree C temperature increase that has already occurred over the 20th century is causing severe impacts globally. According to the IPCC, global temperatures beyond 2 degrees C may trigger runaway global warming resulting in much more serious flooding, declines in food production, increase in diseases, and the extinction of plants, animals, and entire ecosystems. The fear is that with the doubling of carbon dioxide levels above pre-industrial levels to 500 parts per million, global mean surface temperatures between 2000 and 2100 could rise to 3° degrees C. Beyond that level, “few eco-systems on Earth will be able to adapt ... [and it] would be extremely difficult for world populations to manage.”⁴ Meanwhile, at the political level, there seems little prospect of achieving the ultimate objective of the Convention on Climate Change⁵ of stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

The challenge of a warming world

Human-induced climate change is thus a major, and urgent, challenge for humanity. Measurable damage is now occurring in many parts of the world, and climate change will continue to adversely affect socio-economic sectors, including water resources, agriculture, forestry, fisheries and human settlements, ecological systems (particularly forests and coral reefs), and human health (particularly diseases spread by insects), with developing countries being the most vulnerable, especially those communities with little or no capacity to react or adapt. Fundamentally, the danger of climate change is that it threatens directly humanity’s ability to ensure an equitable standard of living for present and future generations.

The international negotiations on climate change are complex, at both technical and political levels; and we know from the impasse over the Kyoto Protocol that there are difficult and divisive issues at stake. Climate change is also an issue that poses legal and political challenges to concepts of governance, sustainable development and the rights of States and their citizenship. Human rights advocates and major non-governmental organizations have raised the real and substantial risks posed to vulnerable countries and the disastrous effects on the livelihood of their populations, their cultures and security. As the former High Commissioner for Human Rights has noted⁶ the increasing threat of climate change has the potential to violate the fundamental freedoms of those living in areas most at risk, particularly those that will be forced to become environmental refugees.⁷ In this paper I want to draw attention to the impacts of climate change on

² *Up in smoke? Threats from, and responses to, the impact of global warming on human development*, 2004, a report by Andrew Simms (nef, new economics foundation), John Magrath (Oxfam) and Hannah Reid (IIED, International Institute for Environment and Development)

³ Ibid

⁴ Sir David King, UK Chief Scientific Adviser, *Independent* newspaper, 16 April 2006

⁵ Article 2, UN Framework Convention on Climate Change 1992

⁶ Mary Robinson on *Climate Change and Human Rights*, NorthSouthEastWest: A 360° View of Climate Change, 2005

⁷ The IPCC Third Assessment Report (TAR) predicts that global warming could lead to a wave of environmental refugees, as many as 150 million by 2050.

small island developing States (SIDS), which are among the most exposed to the dangers, and the human rights implications for their communities.

The situation of SIDS

Climate change is an immediate and serious threat to the long-term sustainability of small island countries. By their geography and mid-ocean location they are at the ‘front-line.’ Yet these countries are amongst the least able to adapt and to respond⁸; and the consequences they face, and already now bear, are completely disproportionate to their miniscule contributions to global emissions. We know from IPCC studies that sea-level rise poses the most critical threat, for it impacts directly on SIDS territory and their life-support systems⁹ and economic activity¹⁰. It bears repeating what SIDS have proclaimed many times before, that for their communities the issue is one of equity and of survival.¹¹

From the start, island countries have been determined to ensure their concerns were covered in the development of international regimes and standards and took every opportunity to do so. Through their Alliance of Small Island States (AOSIS), SIDS have recorded a consistent and strong presence in the international negotiations on the Climate Change Convention and the Kyoto Protocol. SIDS’ formal submissions and negotiating positions are based on fundamental principles of preventive action, the precautionary principle, the ‘polluter pays’ principle and State responsibility, duty to cooperate, equity and the principle of common but differentiated responsibility.¹²

AOSIS is an informal group of 42 small island States and observers which share fundamental concern about the threats posed by climate change. It is an essential forum that allows for common identity and strength. Thirty-seven of the AOSIS members are represented at the United Nations. That is almost 28 percent of developing countries, and close to 20 per cent of the UN membership. Established in 1990 in the context of the Second World Climate Conference, AOSIS has since worked as a negotiating group to ensure that the position of SIDS is fully represented and reflected in the provisions of the Climate Change Convention and Kyoto Protocol and their processes, as well as in other multilateral instruments like the 1992 Biodiversity Convention and the 1995 UN Fish Stocks Agreement. SIDS have also made substantive contributions to the multilateral processes like the 1992 UN Conference on Environment and Development (UNCED) in Rio de Janeiro, 1994 Barbados Conference on the development of the UN Programme of

⁸ IPCC Working Group II: Impacts, Adaptation and Vulnerability, 2001: “adaptive capacity of human systems is generally low in small island states, and vulnerability high; small island states are likely to be among the countries most seriously impacted by climate change.”

⁹ Ibid: “the projected sea-level rise of 5mm yr for the next 100 years would cause enhanced coastal erosion, loss of land and property, dislocation of people, increased risk from storm surges, reduced resilience of coastal ecosystems, saltwater intrusion into freshwater resources, and high resource costs to respond to and adapt to these changes (high confidence).”

¹⁰ Ibid: “Tourism, an important source of income and foreign exchange for many islands, would face severe disruption from climate change and sea-level rise (high confidence).”

¹¹ See, e.g., Tuiloma Neroni Slade and Jacob Werksman, 2000, *An Examination of the Kyoto Protocol from the small island perspective*, Climate Change and Development, Yale School of Forestry & Environmental Studies, 63

¹² Ibid, at p.66; see also Tuiloma Neroni Slade, *The Making of International Law: The Role of Small Island States*, 2003 Temple International & Comparative Law Journal, vol. 17, No. 2, 531

Action on the Sustainable Development of Small Island Developing States and the 2002 World Summit on Sustainable Development in Johannesburg (WSSD). With their exposure to the effects of climate change, the concerns voiced by the AOSIS countries possess the genuine quality of those facing real and immediate jeopardy. They are concerns that will become imperative around the planet in the coming years, for the dangers that threaten SIDS will, inexorably, pose threats for other and larger communities.

Ethical dimensions

The desire to preserve the environmental integrity of home and territory runs deeply in every human community. The dilemma for SIDS is that in the face of global climate change they have little ability to control the actions of others; worse, without global response measures and assistance, the impact of climate change diminishes the ability of SIDS to adapt.

For some two decades SIDS have acted to express their fear of the risks and to underscore the ethical dimensions. President Gayoom of the Maldives addressing the United Nations on issues of the environment and development in 1987 called on the world community to unite in global effort against climate change and to save his country from the consequences, especially of sea level rise. Otherwise, for the Maldives, as he said, it would be “the death of a nation”.¹³ In September 1988, Malta sought inclusion of a UN General Assembly agenda item entitled “declaration proclaiming climate as part of the common heritage of mankind.”¹⁴ The Assembly adopted a resolution, though it amended the reference to climate as the “common concern of mankind.”¹⁵ Leaders and representatives of many other AOSIS countries¹⁶ have expressed similar concerns before the United Nations and elsewhere, some suggesting that industrialised countries responsible for the major share of global emissions have failed in their moral responsibility to take global action to protect countries like SIDS now facing the devastating consequences of climate change.¹⁷

¹³ Statement by the President of the Republic of Maldives, 42nd session of UN General Assembly in the special debate on Environment and Development, 19 October 1987; copy available at <http://www.undp.org/missions/maldives/unga42a.htm>

¹⁴ As in 1967 when Professor Arvid Pardo of Malta had first spoken of his vision of the oceans as the “common heritage of mankind”

¹⁵ 43rd GA, Res. 53, UN Doc.A/Res/43/53 (1988)

¹⁶ In 2002 Prime Minister Sopoaga of Tuvalu said that for his country the threat of climate change is “real and serious, and is of no difference from a slow and insidious form of terrorism”; www.tuvaluislands.com/warming.htm

¹⁷ See, e.g., Lionel Hurst of Antigua and Barbuda, *The moral dimensions of global climate change*, 2000, available at www.openDemocracy.net. Ambassador Hurst notes that between 1920 and 1940, a twenty-year period, the Caribbean islands experienced 70 storms and hurricanes, or an average of 3.5 events per year. Between 1944 and 1980, a thirty-six year period, there were 196 storms and hurricanes, and the average climbed to 5.5 events per year. In the decade of the 1990s, the Caribbean experienced on average more than 13 storms and hurricanes each year; and in 2002, 13 storms and hurricanes were expected.

Based on observable impacts in their countries and regions, SIDS are seeing a clear connection between their chances for sustainable livelihood and the negative effects of global warming; indeed, in their perception of climate impacts as a genuine threat to physical and cultural survival. There is also frustration with the pace and direction of the international negotiations on climate change, in particular the failure of major emitting States having the greatest responsibility to commit to the Kyoto Protocol and what SIDS consider the comparatively modest reduction targets of the Protocol (an average of 5% from 1990 levels by 2012) compared to the 60% global reduction called for by the IPCC. These factors were likely to have been of influence on the low-lying Pacific State of Tuvalu which is reported to have considered taking legal proceedings against the United States (the largest single emitter of greenhouse gases) and regional neighbour Australia (one of the largest per capita producers).¹⁸

It is of interest that other vulnerable communities are taking action to protect their interests and to enforce their rights. The written intervention by the International Indian Council (IITC) and its affiliate, the Indigenous Environment Network (IEN) now before the UN Commission on Human Rights points to the disproportionate impacts on indigenous communities and others, including SIDS, and stresses the need to address climate change as a human rights issue, including through mandating a Special Rapporteur to examine the matter. A principal claim of the intervention is that the refusal of major industrialised countries most responsible for human-induced climate change and the failure of international financial institutions to force corporations to phase out the use of fossil fuels is contributing to social and environmental injustice and the violation of human rights.

In December 2005 the Chair of the Inuit Circumpolar Conference, for herself and on behalf of the Inuit of the arctic regions of the United States and Canada, filed a petition against the US with the Inter-American Commission on Human Rights. The petition alleges that the US, through its failure to restrict greenhouse gas emissions and the resulting global warming, has violated Inuit's human rights, including their rights to their culture, to property, to the preservation of health, life and physical integrity. It is argued that the climate change impacts violates the US's obligation to protect Inuit human rights by virtue of it being a member of the Organization of American States (OAS) and its acceptance of the American Declaration of Rights and Duties of Man; and that this obligation is supported by other international agreements to which the US is a signatory like the International Covenant on Economic, Social and Cultural Rights.

No doubt the SIDS will be following these endeavours on behalf of the Inuit people with great interest and support, in particular the small States of the Caribbean which are part of the OAS system.

World Summit reaffirmation of development and human rights

¹⁸ See Richard S J Tol and Roda Verheyen, *State responsibility and compensation for climate change damages – a legal and economic assessment*, Energy Policy 32 (2004) 1109; Cf. Akiko Okamatsu, *Problems and Prospects of International Legal Disputes on Climate Change*, Centre for Global Environment Research, vol. 13, No.8, 2002

The protection of the environment, development and human rights are the fundamental values of our time. They are values which have been developed and nurtured in the framework of important global processes on the human environment since 1972 involving all levels of human society, governmental, civil and corporate. It is not possible to contemplate a modern world order without giving effect to these values and the principles that underpin them. They are values and principles that took root in the watershed conferences in Stockholm in 1972 and Rio de Janeiro in 1992 and were highlighted and reaffirmed in the high-level political context of the UN World Summit in 2005. Peace and security, development and human rights were acknowledged as interlinked and mutually reinforcing and being the “pillars” of the United Nations system; sustainable development in its economic, social and environmental aspects constituting a key element of the overarching framework of United Nations activities (paragraphs 9 and 10, Outcome); and the commitment to the sustainable management and protection of our “common environment” was reaffirmed (paragraph 48).¹⁹

Environmental law and human rights

The development of environmental law is a response to global environmental problems. It is taking place at a time of remarkable growth and maturing in scientific knowledge, and with the near universal engagement of every level of society in all parts of the world. The contribution of civil society in raising human rights issues has been particularly significant. It is necessary to be concerned with human rights because while there is distinction in the human rights and environmental approaches, the close connection and interaction of human rights and environmental law is undeniable. In our ever interdependent world today, the language and framework of human rights provides another tool – an essential one, it is submitted – in the global endeavour to protect the environment. The fact is that environmental degradation, in all its forms, has significant, often critical, impact on the enjoyment of human and individual rights, for those living today and for future generations.

The principles of environmental law developed in Stockholm²⁰ and Rio²¹ are the bedrock for sustainable development. As proclaimed in the Stockholm Declaration (paragraph 1) the environment is “essential to ... well-being and to the enjoyment of basic human rights and the right of life itself”; and, in Principle 1, that the human person has the “fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and ... bears a solemn responsibility to protect and improve the environment for present and future generations”. The formulation of these principles, at a formative stage, was in general terms, perhaps vague. But it gave recognition to the existence of certain human rights with respect to environmental protection – rights which could be construed as deriving from internationally accepted norms and the “common principles” that were considered and adopted in Stockholm.

¹⁹ World Summit Outcome, UNGA, A/RES/60/1, 24 October 2005

²⁰ United Nations Conference on the Human Environment, Stockholm, 1972

²¹ United Nations Conference on Environment and Development, Rio de Janeiro, 1992

The Rio Declaration, which builds on the Stockholm Declaration, with the goal of establishing a new and “equitable” global partnership, puts human beings at “the centre” of sustainable development (Principle 1); and Principle 3 confirms that the right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations.

Human rights obligations

There is evidence to suggest that since the Rio Conference in 1992 there is now a greater appreciation at every level, international, regional and national, of the nexus between human rights and environmental themes, especially when considered in the context of sustainable development.²² At the international level a number of important human rights treaties like the Convention on the Rights of the Child and the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, take into account the environmental dimensions of human rights. Regionally, the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters puts emphasis on procedural rights to information and participation to help protect human rights and the environment at the same time. Mention is also made of the experience of the European and Inter-American human rights systems which have interpreted environmental degradation in human rights terms. At the national level, it was found that the right to a healthy environment has been recognized formally in over 90 national constitutions enacted since 1992. Often the right is made expressly justiciable. In some countries, especially in South Asia and Latin America, constitutional rights to life, health and family life have been interpreted as embracing environmental factors. These developments suggest that the role of the judiciary and lawyers in elaborating links between human rights and the environment has become a significant one. One conclusion of the Expert seminar underlined the need to sensitise and provide further training to judges, lawyers and public officials.

The effects of climate change also need to be assessed in the light of obligations under international human rights instruments like the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child. The consequences of climate change impacts on agriculture and the reduction of crop yields and food production, the destruction of shelters and displacement of populations through flooding and sea-level rise. The resulting exposure of people to disease would significantly impinge on, for instance, the right to an adequate standard of living under the ICESCR (Article 11) and the right to health (Article 12). Furthermore, there are obligations to respect and protect these rights (Article 1) and to achieve progressively their full realisation (Article 2.1). In this context there would be basis to argue that States responsible for unsustainable levels of greenhouse gas emissions are failing to *respect* and to *protect* economic, social and cultural rights of persons adversely affected by climate change, in particular the most vulnerable. Viewed from this perspective, it might accordingly be said that the Covenant serves to underscore the essential message from the IPCC that in order effectively to

²² See, e.g., the findings and conclusion of an Expert Seminar on Human Rights and the Environment, organized by the Office of the UN High Commissioner for Human Rights and UNEP, 14-15 January 2002

address climate change at the global level, there is need for significant reductions in greenhouse gas emissions below 1990 levels.²³

Climate Change Convention

The Climate Change Convention, now ratified by 189 countries, has been in force since March 1994. Under the Convention (Article 3), Parties are committed to be *guided* by the principles of inter-generational equity, common but differentiated responsibilities, duty to cooperate, precaution and sustainable development. Under Article 4, there is a more explicit commitment on all Parties to “tak[e] into account their common but differentiated responsibilities”.

The principle of common but differentiated responsibilities reflects two main elements: the common responsibility of States to protect the global environment; and the need to take account of differing circumstances of States, particularly regarding their respective historic contribution to climate change and the respective abilities of States to prevent, reduce and control the causes and impacts of global warming. Essentially it is a measure of equity, placing greater responsibility on wealthier and more able countries and those most responsible for causing specific global environmental problems. The two elements provide the basis for international cooperation in the fields of environment and development. It is a basis that allows the characterisation of the transfer of resources from developed to developing countries as ‘obligation’ rather than as ‘aid’ or ‘assistance’ and provides a theoretical basis to justify different environmental standards, in view of the different capacities of States and their different contributions to environmental degradation. The principle has its origin in the Stockholm Declaration (Principle 23)²⁴, and is reflected more specifically in the Rio Declaration (Principle 7)²⁵.

As noted earlier, the AOSIS countries based their negotiating positions solidly on the principles covered in Article 3 of the Climate Change Convention. They viewed the principle of equity as being closely associated not only with the principle of common but differentiated responsibilities, but also as underscoring the need for international cooperation and for fairness in the provision of assistance (including financial, technical, information and capacity building), to enable developing countries to participate effectively in international negotiations and in the implementation of climate change commitments. In particular, the principle of equity was seen as encompassing the

²³ See also the Climate Change Convention, Articles 2. (a) and (b), as to the aim to return emissions to their 1990 levels by the ‘end of the present decade’

²⁴ *Principle 23*: “... the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.”

²⁵ *Principle 7*: “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

concepts of allocation of burdens and of access to scarce natural resources among present generations (intra-generational equity) and of protecting the environment for future generations (inter-generational equity). Small island countries took to heart the moral imperatives. As expressed by Professor Edith Brown Weiss, the “starting proposition is that each generation is both a custodian and a user of our common natural and cultural patrimony. As custodians of this planet, we have certain moral obligations to future generations which we can transform into legally enforceable norms”.²⁶

Responsibility for environmental damage

Principle 2 of the Rio Declaration, which reflects Principle 21 of the Stockholm Declaration, reiterates the rule of customary international law that States have “... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction”. The rule was stated in the *Trail Smelter* case²⁷ and emphasized by the International Court of Justice in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.²⁸ It is now part of the corpus of international law relating to the environment. The rule is also reflected in the Convention on Climate Change (8th paragraph, Preamble and Article 3.3) and the Kyoto Protocol of 1997 (Article 2.3). As with the Declarations of Stockholm and Rio, the rule is phrased in general terms in the Convention and the Protocol without explicit provision regarding State responsibility. During the negotiations of the Convention, AOSIS tabled a formal submission²⁹ suggesting that the polluter pays principle (that “those responsible for causing damage to the environment bear the responsibility for rectifying that damage”) could serve as an appropriate legal framework to address issues of liability and compensation, but this was not acceptable to the industrialised countries.

As a result, AOSIS countries like Fiji, Nauru, Papua New Guinea and Tuvalu, when signing the Convention filed the declaration that signature “shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change ...”. A provision to this effect was proposed by AOSIS for inclusion in the Convention text but this, too, was not found acceptable.

While there is no explicit provision in the Climate Change Convention regarding State responsibility for environmental damage there is, however, obligation on all Parties to the Convention to formulate and implement regional programmes and measures to mitigate climate change and to “facilitate adequate adaptation to climate change” (Article 4.1 (b)). For developed country Parties (Annex II countries) there is a related commitment to assist developing countries in meeting the costs of adaptation under certain circumstances (Articles 4.3, 4.4, 4.8, 4.9 and 11), and especially those that are particularly vulnerable to the adverse effects of climate change (19th paragraph, Preamble, and Articles 3.2 and

²⁶ E. Brown Weiss, *In fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, 1989, p. 21

²⁷ Reports of International Arbitral Awards (RIAA), 1938 & 1941, vol. III, p. 1905

²⁸ ICJ Reports (1996) at 241, paragraph 29

²⁹ Report of the Intergovernmental Negotiating Committee (INC), 1st session 4-14 February 1991, UN Doc. A/AC.237/6, 6f and UN Doc. A/AC.237/Misc.1/Add.3 at 24, submission by Vanuatu on behalf of AOSIS.

4.8). Small island countries fall within the group listed in these provisions of the Convention as being particularly vulnerable.

Closing remarks

This study has looked at the situation of SIDS and their endeavours in dealing with the challenge of climate change. Whatever the achievements gained in their contribution to the international regime and standards, this has not responded fully to the sense of apprehension felt by their communities about the threats of global warming and the physical impacts being experienced in their territories. While there has been focus on the human rights implications, this paper has also touched briefly on other possible options available to vulnerable communities, including the use of procedural and institutional mechanisms before international and regional organisations for the examination and application of human rights standards and, ultimately, resort to the Courts (domestic, regional and international) for clarification of the law and the role judicial systems need to play in a matter of such urgent and global importance.³⁰

It would be clear from what has been said that respect for human rights and fundamental freedoms is essential for achieving sustainable development. Developments since Stockholm and Rio amount to international acknowledgement of the inter-dependence of human rights, environmental protection and sustainable development. Sustainable development, the overarching goal, cannot be achieved without also respecting human rights and protecting the environment. Each is mutual in association and supports the other. The twin challenges of protecting the Earth for future generations and of ensuring the dignity of those living at the present time are inextricably linked. Human rights is integral to sustainable development because the concerns about poverty, health, food and the rights of communities that are central to sustainable development are also central to the Universal Declaration of Human Rights.

³⁰ An increasing number of legal advisers and practitioners in a number of countries are reacting to the potential for climate change and its consequences as the subject of litigation: see, e.g., Robert Meltz, *Global Warming: The Litigation Heats Up*, Congressional Research Service report, 2006; and Michael Kerr, *Tort Based Climate Change Litigation in Australia*, Australian Conservation Foundation, 2002