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## **Human Rights Guidance for Environmental Justice Attorneys**

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**- DRAFT -**

**Human Rights Guidance for Environmental Justice Attorneys**

**By Lauren E. Bartlett<sup>1</sup>**

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**Abstract**

*People of color in the United States face worsening environmental conditions and disproportionate environmental harms. Climate change is causing hurricanes to ravage our coasts with increasing intensity and frequency, tornados to sweep across our plains even in the “off” season, and severe flooding that threatens to wipe out entire towns. Moreover, people of color must disproportionately deal with heat and air pollution, toxic waste dumps, contaminants in drinking water, failing aged sanitation systems, negative health effects, and the lack of access to a true remedy, outside of their own pockets, for these injustices. While there is a robust environmental movement in the United States, widespread environmental racism persists. Focusing on recent developments in environmental human rights law, this article provides encouragement, guidance, and practical tips to environmental justice attorneys looking to add additional advocacy tools to their tool box to expand environmental human rights protections for people of color in the United States.*

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## I. Introduction

Climate change and environmental degradation are some of the greatest threats to human rights of our time. Extreme weather events are occurring more often and are more severe when they do occur, such as floods, hurricanes, tornados, drought, and fires. Pollution, oil spills, toxic waste, garbage, and more, affect our land, rivers, oceans, and the air we breathe every day. People face serious and widespread harm in the face of climate change and environmental degradation, including: asthma;<sup>2</sup> nutritional deficits;<sup>3</sup> water and mosquito-borne diseases (cholera,<sup>4</sup> malaria,<sup>5</sup> yellow fever<sup>6</sup>, zika virus,<sup>7</sup> flu<sup>8</sup>, etc.); psychological harms related to trauma;<sup>9</sup> cancer;<sup>10</sup> decreased life expectancy;<sup>11</sup> and lack of access to a remedy, outside of their own pockets,<sup>12</sup> and more.

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<sup>2</sup> See e.g., INTERDISCIPLINARY ENVIRONMENTAL CLINIC AT WASHINGTON UNIVERSITY SCHOOL OF LAW, ENVIRONMENTAL RACISM IN ST. LOUIS 1 (2019), <https://assets.documentcloud.org/documents/6367937/2097-STL-EnvirRacism-Report-04-Web.pdf> (hereinafter “ENVIRONMENTAL RACISM IN ST. LOUIS”).

<sup>3</sup> See e.g., *id.*

<sup>4</sup> See e.g., Guillaume Constantin de Magny and Rita R. Colwell, *Cholera and Climate: A Demonstrated Relationship*, 120 TRANS. AM. CLIN. CLIMATOL. ASSOC. 119–128 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2744514/>.

<sup>5</sup> See e.g., World Health Organization, *Climate change and human health*, <https://www.who.int/globalchange/climate/summary/en/index5.html>.

<sup>6</sup> See e.g., Arran Hamlet et al., *The seasonal influence of climate and environment on yellow fever transmission across Africa*, 12 PLOS NEGLECTED TROPICAL DISEASES 3 (2018), <https://journals.plos.org/plosntds/article?id=10.1371/journal.pntd.0006284>.

<sup>7</sup> See e.g., Hina Asad and David O. Carpenter, *Effects of climate change on the spread of zika virus: a public health threat*, 33 REV. ENVIRON. HEALTH 31-42 (2018), <https://www.ncbi.nlm.nih.gov/pubmed/29500926>.

<sup>8</sup> See e.g., Sherry Towers et al., *Climate change and influenza: the likelihood of early and severe influenza seasons following warmer than average winters*, PLOS CURRENTS (2013), <http://currents.plos.org/influenza/article/climate-change-and-influenza-the-likelihood-of-early-and-severe-influenza-seasons-following-warmer-than-average-winters/>.

<sup>9</sup> See e.g., ENVIRONMENTAL RACISM IN ST. LOUIS, *supra* note 2 at 18.

<sup>10</sup> See e.g., Paul K. Mills et al., *Cancer in migrant and seasonal hired farm workers*, 14 J. AGROMEDICINE 185-91 (2009), <https://www.ncbi.nlm.nih.gov/pubmed/19437276>; THE ASSOCIATION OF FARMWORKER OPPORTUNITY PROGRAMS’ (AFOP), DANGEROUS EXPOSURE: FARMWORKER CHILDREN AND PESTICIDES (2011), [http://afop.org/wp-content/uploads/2010/07/Annual\\_Publication\\_FINAL\\_English1.pdf](http://afop.org/wp-content/uploads/2010/07/Annual_Publication_FINAL_English1.pdf).

<sup>11</sup> See e.g., *id.*

<sup>12</sup> See e.g., Michele Munz, *In Centreville: A plea for help: Centreville’s sewage and drainage problems pose health, safety risks*, ST. LOUIS DISPATCH (February 23, 2020), [https://www.stltoday.com/news/local/illinois/a-plea-for-help-centreville-s-sewage-and-drainage-problems/article\\_3d6d22c7-8c57-5d1a-8af3-a6e6ee6ea2ee.html#tracking-source=home-top-story-1](https://www.stltoday.com/news/local/illinois/a-plea-for-help-centreville-s-sewage-and-drainage-problems/article_3d6d22c7-8c57-5d1a-8af3-a6e6ee6ea2ee.html#tracking-source=home-top-story-1).

People of color bear the brunt of these threats. Today, environmental conditions are worse, even within individual cities, block to block, where people of color are concentrated.<sup>13</sup> Racism, and racist legal procedure and government policies, continue to exacerbate the disparate effects of climate change and environmental degradation on people of color.<sup>14</sup> Moreover, the system of environmental protection in the United States perpetuates and facilitates a polluted and unhealthy environment for people of color.<sup>15</sup>

It is well-documented that people of color face environmental harms and corresponding negative health effects at higher rates.<sup>16</sup> For example, native communities, such as the Standing Rock Sioux Tribe, have suffered floods, oil spills, and other environmental harms at disproportionate rates.<sup>17</sup> In Flint, Michigan, whose residents are predominantly black and forty-one percent low-income, the water is so contaminated with lead that it meets the U.S. Environmental Protection Agency's definition of "toxic waste".<sup>18</sup>

Moreover, polluting industrial facilities and toxic waste sites are disproportionately located in communities of color.<sup>19</sup> In Cancer Alley, a series of predominantly black communities surrounded by chemicals companies along the Mississippi River between Baton Rouge and New

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<sup>13</sup> See e.g., ENVIRONMENTAL RACISM IN ST. LOUIS, *supra* note 2 at 18.

<sup>14</sup> See Michael K. Dorsey, *Environmental (In)justice: Race, Poverty, and Environment*, 22 LEGAL STUD. FORUM 501, 501-02 (1998).

<sup>15</sup> Monique Harden et al., *Acting on Principle: Opportunities and Strategies for Achieving Environmental Justice through Human Rights and Standards* in BRINGING HUMAN RIGHTS HOME 265 (Cynthia SooHoo et al. eds., 2008).

<sup>16</sup> *Id.*; ENVIRONMENTAL RACISM IN ST. LOUIS, *supra* note 2.

<sup>17</sup> See e.g., Christine Graf, *The Water Protectors*, 35 FACES 28-31 (March 2019).

<sup>18</sup> Steve Almasy and Laura Ly, *Flint water crisis: Report says 'systemic racism' played role*, CNN (Feb. 18, 2017), <https://www.cnn.com/2017/02/18/politics/flint-water-report-systemic-racism/index.html>; Julia Craven and Tyler Tynes, *The Racist Roots Of Flint's Water Crisis*, HUFFPOST (Feb. 3, 2016), [https://www.huffpost.com/entry/racist-roots-of-flints-water-crisis\\_n\\_56b12953e4b04f9b57d7b118](https://www.huffpost.com/entry/racist-roots-of-flints-water-crisis_n_56b12953e4b04f9b57d7b118). See also Courtney Anderson, *Taking Flint*, 17 HOUS. J. HEALTH L. & POL'Y 107, 112-115 (2017).

<sup>19</sup> See Harden, *supra* note 15.

Orleans in Louisiana, cancer rates are fifty times the national average.<sup>20</sup> In the Central Valley in California, latinx farmworkers and their children face shockingly high rates of leukemia and cancer.<sup>21</sup> Children living in predominately black neighborhoods in St. Louis have higher rates of asthma.<sup>22</sup> In fact, children in communities of color bear the brunt of these disparate environmental effects—around the world, air pollution causes approximately 600,000 deaths and water pollution another 350,000 deaths of small children every year.<sup>23</sup>

Across the river from the Saint Louis University School of Law, the community of Centreville, Illinois, whose residents are 98% black, faces severe flooding on a regular basis, a lack of safe drinking water, and a failing sanitation system.<sup>24</sup> In recent years, these problems are growing worse, likely due at least in part to climate change.<sup>25</sup> The residents have made complaints and have spent a great deal of their own money trying to remedy the water and sanitation problems, but the government is unwilling to help.<sup>26</sup> Even though nearby municipalities have received federal funds to complete entire overhauls of sanitation and water systems, the community of Centreville has been left out.<sup>27</sup>

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<sup>20</sup> Jamiles Lartey and Oliver Laughland, *Cancer Town: 'Almost every household has someone that has died from cancer'*, THE GUARDIAN (May 6, 2019), <https://www.theguardian.com/us-news/ng-interactive/2019/may/06/cancertown-louisiana-reserve-special-report>; Wesley James et al., *Uneven Magnitude of Disparities in Cancer Risks from Air Toxics*, 9 INT. J. ENVIRON. RES. PUBLIC HEALTH, 4365–4385 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3546767/>. See also LSU Health New Orleans, School of Public Health, Louisiana Cancer Data Visualization, based on November 2018 submission data (2012-2016), <https://sph.lsuhsu.edu/louisiana-tumor-registry/data-usestatistics/louisiana-cancer-data-visualization-dashboard/>.

<sup>21</sup> Paul K. Mills et al., *supra* note 10; AFOP, *supra* note 10.

<sup>22</sup> ENVIRONMENTAL RACISM IN ST. LOUIS, *supra* note 2.

<sup>23</sup> John H. Knox, *Introduction: The Past, Present, and Future of Human Rights and the Environment*, 53 WAKE FOREST L. REV. 649, 662 (2018).

<sup>24</sup> See Munz, *supra* note 12; EQUITY LEGAL SERVICES, OUR WORK IN CENTREVILLE, <https://www.equitylegalservices.org/centreville>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See *id.*

The Human Rights at Home Litigation Clinic at St. Louis University School of Law is partnering with the community of Centerville to fight for what they deserve—protection against flooding, safe drinking water, a functioning sanitation system, reparations for the physical damage, emotional distress, and discriminatory policies they have endured. This article is designed to provide encouragement, guidance, and practical tips for environmental justice attorneys in the United States looking to adopt the human rights framework to help communities of color fight environmental racism, like the environmental justice<sup>28</sup> attorneys working in Centerville, Illinois.

Section II of this article examines the history of environmental racism, the environmental justice movement, and the movement for environmental human rights<sup>29</sup> in the United States. Section III provides an overview of environmental human rights law, including state and local law and policy. Section IV provide arguments for why environmental justice attorneys should

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<sup>28</sup> The U.S. Environmental Protection Agency (“EPA”), defines “environmental Justice” as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. *See* ENVIRONMENTAL PROTECTION AGENCY (EPA), ENVIRONMENTAL JUSTICE, LEARN ABOUT ENVIRONMENTAL JUSTICE, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>. The term “environmental justice” describes “the disproportionate impacts that environmental pollution has on the health and well-being of low-income communities and communities of color as compared with other populations...[E]nvironmental justice communities are those communities bearing the greatest share of environmental and social problems associated with polluting industries.” Rose Francis & Laurel Firestone, *Implementing the Human Right to Water in California's Central Valley: Building a Democratic Voice Through Community Engagement in Water Policy Decision Making*, 47 WILLAMETTE L. REV. 495, 500 (2011) (internal quotations and citation omitted). The three major concepts of environmental justice are that no community should bear a disproportionate burden of environmental hazards, all communities should have access to environmental benefits, and decision-making processes need to be transparent and include community voices. Amy Vanderwarker, *Water and Environmental Justice*, in A TWENTY-FIRST CENTURY U.S. WATER POLICY 54 (Juliet Christian-Smith et al. eds., 2012). *See also* Tamar Meshel, *Environmental Justice in the United States: The Human Rights to Water*, 8 WASH. J. ENVTL. L. & POL’Y 264, 265 (2018).

<sup>29</sup> The term “environmental human rights” used in this article is not commonly used and has not been adopted by the UN Special Rapporteur on human rights and the environment, for example. This article uses the term “environmental human rights” to refer to the human right to a safe, clean, healthy, and sustainable environment, as well as additional portions of the human rights framework that are interrelated to and interconnected with the right to a healthy environment, including but not limited to non-discrimination obligations. The use of the term “environmental human rights” is also a nod to the hard work and terrific successes of attorneys Monique Harden and Nathalie Walker, co-founders of Advocates for Environmental Human Rights (AEHR), <http://www.ehumanrights.org/>.



consider using environmental human rights in advocacy before U.S. courts and policymakers. Lastly, Section V provides guidance and advice for using environmental human rights in litigation, policy work, or to bring an environmental justice complaint to a United Nations human rights mechanism or the Inter-American Commission on Human Rights.

## II. Historical Context

The environmental movement in the United States is robust and was well-established over a century ago.<sup>30</sup> Environmental racism is not new either, and many of the biggest environmental stories of our time are due to racist laws and policies established years ago.<sup>31</sup> Environmental justice advocates have been fighting against environmental racism for decades and the environmental justice movement has broadened the scope, character, and tactics of the U.S. environmental movement, tying together environment, economic, and social justice concerns.<sup>32</sup> Comparatively, the environmental human rights movement is much newer, only picking up steam in the last couple of decades.<sup>33</sup>

This section of the article will look at the successes and challenges of the environmental movement in the United States. This section of the article is divided into two parts. Part i. below discusses the rise of the environmental justice movement, as well as tensions between environmental justice advocates and the white-dominated environmental movement in the United

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<sup>30</sup> See e.g., Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122 (2010) (describing the history of the environmental movement in the United States).

<sup>31</sup> See Section I, *supra*; Robert Kuehn et al., *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN'S J. LEGAL COMMENT 625, 640 (1994) (“Racist attitudes, lack of economic and political clout, and lack of participation in government decision making all play a causal role”).

<sup>32</sup> See Harden, *supra* note 15; DAVID V. CARRUTHERS, ENVIRONMENTAL JUSTICE IN LATIN AMERICA: PROBLEMS, PROMISE, AND PRACTICE 1 (2008). See also Dorsey, *supra* note 14.

<sup>33</sup> See e.g., Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013), <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx> (hereinafter “Mapping Report”).

States. Whereas Part ii. below discusses the burgeoning environmental human rights movement, with a critical focus on the separation—until recently—between environmental justice and human rights groups in the United States.

### **i. Environmental Justice Movement**

The United States has a long history of environmental protection and nature conservancy, as well as dedicated environmental advocates.<sup>34</sup> John Muir was a powerful and early advocate for nature conservancy and wilderness preservation.<sup>35</sup> His writings on nature inspired presidents and Congress to preserve large natural areas, and to establish national parks such as Yosemite.<sup>36</sup> The Sierra Club was established by John Muir and others in 1892, and that group continues to influence state and federal environmental policy across the United States today.<sup>37</sup> Rachel Carson, a Pennsylvania-born marine biologist, is credited with launching the modern environmental movement with her book *Silent Spring*<sup>38</sup> and other writings in the 1960s.<sup>39</sup> Cesar Chavez, well known for his farmworkers' rights work in California, spent the last decades of his life exposing the effects of pesticides on human health and the environment.<sup>40</sup>

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<sup>34</sup> See e.g., MARTIN HOLDGATE, *THE GREEN WEB: A UNION FOR WORLD CONSERVATION* 6-9 (2013) (describing how U.S. presidents have acted to preserve land and wildlife throughout the United States, particularly, President Theodore Roosevelt who “was the first leader of a major nation to put conservation at the heart of a national agenda”).

<sup>35</sup> See Purdy, *supra* note 30 at 1147-50. See also Sierra Club, *Who Was John Muir?*, [https://vault.sierraclub.org/john\\_muir\\_exhibit/about/](https://vault.sierraclub.org/john_muir_exhibit/about/).

<sup>36</sup> See SIERRA CLUB, *LIFE AND CONTRIBUTIONS OF JOHN MUIR* (October 23, 2019).

<sup>37</sup> See Purdy, *supra* note 30 at 1143-45. See also Sierra Club, *supra*.

<sup>38</sup> RACHEL CARSON, *SILENT SPRING* 39-83 (1962).

<sup>39</sup> Jill Lepore, *The Right Way to Remember Rachel Carson*, *THE NEW YORKER* (Mar. 19, 2018), <https://www.newyorker.com/magazine/2018/03/26/the-right-way-to-remember-rachel-carson>.

<sup>40</sup> Keith Cunningham-Parmeter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Failure*, 28 N.Y.U. REV. L. & SOC. CHANGE 431, 439 (2004); NRDC, *The Environmental Justice Movement*, <https://www.nrdc.org/stories/environmental-justice-movement>; Kary L. Moss, *Environmental Justice at the Crossroads*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 35, 39, note 15 (2000).

Moreover, seminal U.S. environmental groups include the National Resources Defense Council (“NRDC”) and the U.S. Environmental Protection Agency (“EPA”), both of which were founded in the 1970s. The Green Party is the third most recognized political party in the United States behind the Democratic and Republican parties, whose four main values include peace, ecological sustainability, social justice, and democracy.<sup>41</sup>

The successes of the U.S. environmental movement are not small and include: decreasing emissions and the hole in the ozone layer; a ban on DDT, PCBs, and CFCs; lead-free gasoline; and recent clean energy policies promoting wind and solar energy.<sup>42</sup> The United States has strong environmental law and policy as compared to many countries across the globe,<sup>43</sup> yet the U.S. has focused on regulation and a “command and control approach” that has had little to do with the human rights or civil rights frameworks.<sup>44</sup>

And yet, despite a growing number of complaints that communities of color were being disproportionately exposed to environmental hazards, both in terms of proximity to sources of pollution and different levels of enforcement,<sup>45</sup> white-dominated U.S. environmental

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<sup>41</sup> See Green Party, Platform, <https://www.gp.org/>.

<sup>42</sup> See e.g., *The Modern Environmental Movement*, PBS.ORG, <https://www.pbs.org/wgbh/americanexperience/features/earth-days-modern-environmental-movement/>; Lin Feng, *Emissions Trading Across China: Incorporating Hong Kong and Macau into an Urgently Needed Air Pollution Control Regime under “One Country, Two Systems,”* 19 J. TRANSNAT’L L. & POL’Y 123 (2009) (describing Title IV of the Clean Air Act Amendments of 1990 set a goal of reducing SO<sub>2</sub> emissions by ten million tons from 1980 emission levels); Robert M. Simon and David J. Hayes, *America’s Clean Energy Success, by the Numbers*, CENTER FOR AMERICAN PROGRESS (Jun. 29, 2017), <https://www.americanprogress.org/issues/green/reports/2017/06/29/435281/americas-clean-energy-success-numbers/> (claiming several Obama administration policies and initiatives played a key role in the remarkable growth of wind and solar electric power).

<sup>43</sup> See e.g., World Resources Institute, *Best and Worst Countries for Environmental Democracy*, <https://www.wri.org/blog/2015/05/best-and-worst-countries-environmental-democracy> (U.S. ranks 4<sup>th</sup> in the world).

<sup>44</sup> Knox, *supra* note 23 at 659.

<sup>45</sup> *Id.* at 661; Robert D. Bullard & Beverly Wright, *Disastrous Response to Natural and Man-Made Disasters: An Environmental Justice Analysis Twenty-Five Years After Warren County*, 26 UCLA J. ENVTL. L. & POL’Y 217, 219 (2008).

organizations (including the Sierra Club, NRDC, World Wildlife Federation, Audubon Society, EPA, and others) made no room for these issues or people of color generally.<sup>46</sup>

Dr. Michael Dorsey has argued that the U.S. environmental movement's whiteness "was premised and fortified upon a legacy of overt racism which evolved into institutionalized racism."<sup>47</sup> Mr. Dorsey has pointed out that well into the 1960s, the Sierra Club excluded black, Jewish, and other minority members through its policy of requiring "sponsorship" and allowing established members to exclude non-whites and non-Christians.<sup>48</sup> In addition, national parks and public beaches, created through the efforts of early environmental campaigns, banned access to non-whites.<sup>49</sup> It took the rise of a separate movement—the environmental justice movement—to bring national attention to environmental racism.<sup>50</sup>

The birthplace of the environmental justice movement is said to be in Warren County, North Carolina, where, in 1982, the National Association for the Advancement of Colored People ("NAACP") and others helped stage a massive protest against a decision to bury sixty thousand tons of soil contaminated with hazardous waste in a landfill in a small, predominantly African

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<sup>46</sup> Dorsey, *supra* note 14 at 501-02.

<sup>47</sup> *Id.* at 502.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 210 (2005) ("Rechtschaffen and others trace the roots of the environmental justice movement to the civil rights movement and the traditional environmental movement, as well as 'organizing efforts of Native Americans and labor . . . [and] the local grass roots anti-toxics movement of the 1980s.'") (citing to Bunyan Bryant, *History and Issues of the Environmental Justice Movement*, in OUR BACKYARD: A QUEST FOR ENVIRONMENTAL JUSTICE 3 (Gerald R. Visgilio & Diana M. Whitelaw eds., 2003); Robert D. Bullard, *Environmental Justice for All*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 1 (Robert D. Bullard ed., 1994); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001); Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENVTL. L. 211, 213-22 (1994)).

American community.<sup>51</sup> More than five hundred protesters were arrested, including Dr. Benjamin F. Chavis, Jr., from the United Church of Christ, and Walter Fauntroy, then a member of the U.S. House of Representatives from Washington, D.C. The protest made national headlines and brought national attention to the problem of environmental racism in the United States.<sup>52</sup>

Walter Fauntroy returned to Washington, D.C. after his arrest and requested that the U.S. General Accounting Office (“GAO”) “determine the correlation between the location of hazardous waste landfills and the racial and economic status of the surrounding communities in EPA’s Region IV.”<sup>53</sup> In 1983, the GAO released a report concluding that “Blacks make up the majority of the population in three of the four communities where an off-site hazardous waste landfill is located in EPA’s Region IV.”<sup>54</sup> That GAO report was then the basis for a national report *Toxic Wastes and Race in the United States* by the United Church of Christ (“UCC”),<sup>55</sup> which was released in 1987.<sup>56</sup> The UCC report found that race was the most significant factor in locating hazardous-waste facilities nationwide, even when they controlled for income and geographic area.

In 1990, Dr. Robert Bullard, one of the seminal figures of the U.S. environmental justice movement, released his book *Dumping in Dixie: Race, Class, and Environmental Quality*.<sup>57</sup> In his

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<sup>51</sup> U.S. Department of Energy, Office of Legacy Management, Environmental Justice History, <https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history>; Vann R. Newkirk II, *Fighting Racism in North Carolina*, THE NEW YORKER (Jan. 16, 2016), <https://www.newyorker.com/news/news-desk/fighting-environmental-racism-in-north-carolina>; Knox, *supra* note 23 at 659.

<sup>52</sup> *See id.*

<sup>53</sup> Dorsey, *supra* note 14 at 505.

<sup>54</sup> *See* U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (GAO/RCED-83-168) (1983), <https://www.gao.gov/products/rced-83-168>.

<sup>55</sup> UNITED CHURCH OF CHRIST, COMMISSION FOR RACIAL JUSTICE, TOXIC WASTE AND RACE IN THE UNITED STATES (1987), <http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf> (research conducted by Vernice Miller-Taylor and others).

<sup>56</sup> *Id.*

<sup>57</sup> ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990).

book, Dr. Bullard tells the stories of several African American communities fighting against environmental injustices and underscores race as the key factor in the siting of toxics producing facilities near those communities.<sup>58</sup>

Regardless of mounting evidence of environmental racism and growing national attention, environmental justice advocates continued to struggle to get a foothold in the large environmental organizations in the United States.<sup>59</sup> In 1990, more than 100 Latino, African-American, and Native American activists sent a series of letters to the ten largest mainstream environmental organizations arguing that "racism and 'whiteness' of the environmental movement" had become its "Achilles' heel."<sup>60</sup>

In addition, pivotal environmental justice organizations were established by the early 1990s, including the Deep South Center for Environmental Justice by Beverly Wright,<sup>61</sup> the Center for Health, Environment and Justice by Lois Johnson,<sup>62</sup> and We Act by Vernice Miller-Taylor.<sup>63</sup> These groups provided space for environmental justice advocates to come together, pool resources, and organize communities to fight for change together.

Those challenges prompted environmental justice advocates to hold the First National People of Color Environmental Leadership Summit in October 1991.<sup>64</sup> The Summit brought together the grassroots community, indigenous peoples organizations, civil rights groups, religious and spiritual organizations, youth advocates, labor coalitions, health workers, lawyers,

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<sup>58</sup> *Id.* at 37-74.

<sup>59</sup> Dorsey, *supra* note 14 at 509.

<sup>60</sup> *Id.*

<sup>61</sup> Deep South Center for Environmental Justice, <http://www.dscej.org/>.

<sup>62</sup> Center for Health, Environment, & Justice, <http://chej.org/about-us/story/>.

<sup>63</sup> We Act for Environmental Justice, <https://www.weact.org/>. We Act was co-founded by Vernice Miller-Taylor by 1991. *See* Dorsey, *supra* note 14 at 508-09.

<sup>64</sup> *See* Dorsey, *supra* note 14 at 510.

and academics, who agreed to build an environmental justice movement to effect change in white-dominated environmental groups, governments, and polluting industries.<sup>65</sup>

Pressure by environmental justice advocates led to some of the big U.S. environmental nonprofit organizations taking notice. A couple of these environmental organizations made some key changes in hiring and structure in the early 1990s. For example, the Sierra Club adopted an Environmental Justice policy in 1993.<sup>66</sup> The National Resource Defense Council established a director of environmental justice, and the position was first held by Vernice Miller-Travis, whose research contributions formed the basis of the 1987 report *Toxic Wastes and Race in the United States* by the UCC.

U.S. civil rights organizations also began establishing projects and offices dedicated to environmental justice. Deohn Ferris, who has dedicated her career to environmental justice, established the environmental justice project at the Lawyers' Committee on Civil Rights Under Law in the late 1980s.<sup>67</sup>

With all this movement and pressure in the public sector, it may be no surprise that the federal government began to address environmental justice head-on in 1994, when President Bill Clinton signed Executive Order 12898.<sup>68</sup> Executive Order 12898 established environmental justice offices within the EPA and the Department of Justice, and established an Interagency

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<sup>65</sup> Harden, *supra* note 15 at 265; Dorsey, *supra* note 14 at 511.

<sup>66</sup> The Sierra Club, Environmental Justice, <https://www.sierraclub.org/policy/environmental-justice>. The Sierra Club's Board of Directors also adopted Environmental Justice Principles in 2003. *See id.*

<sup>67</sup> Audobon, Deohn Ferris, <https://www.audubon.org/content/deeohn-ferris>. Today, the environmental justice project no longer exists at the Lawyers' Committee, but their work on environmental justice continues to advance rights to this day. Lawyers' Committee on Civil Rights Under Law, History, <https://lawyerscommittee.org/history/>. In full disclosure, the author of this article was an intern with the Environmental Justice project at Lawyers' Committee in 2005.

<sup>68</sup> Executive Order No. 12,898, 59 (32) Federal Register 7629 (February 11, 1994); President William J. Clinton, Washington, DC, to Heads of All Departments and Agencies, February 11, 1994, Copy of Original White House Memorandum.

Working Group on Environmental Justice and the National Environmental Justice Advisory Council.<sup>69</sup>

However, Executive Order 12898, did not, unfortunately, help environmental justice advocates make much headway with the EPA.<sup>70</sup> There are many critiques of the Executive Order and the EPA that have since emerged.<sup>71</sup> First, the Executive Order did not provide for private enforcement and second, the EPA has a poor record of responding to civil rights complaints.<sup>72</sup> Environmental justice advocates also argue that the EPA has not vetoed or blocked a single pollution permit of any kind on environmental justice grounds.<sup>73</sup> In addition, the EPA has a poor record of enforcement against polluting industrial facilities based on permit violations that cause disproportionate impacts on communities of color.<sup>74</sup> Right to water advocates also have pointed out that water problems have rarely been the focal point of environmental justice analysis within the EPA.<sup>75</sup> Continuing research and the recent reports on environmental racism in the United States only confirm that there has been little to no

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<sup>69</sup> *Id.*

<sup>70</sup> See e.g., Brian J. Gerber, *Administering Environmental Justice: Examining the Impact of Executive Order 12898*, POLICY AND MGMT REV 41, 47-49 (2002).

<sup>71</sup> See e.g., *id.* at 47; Bullard, *supra* note 57 at 138.

<sup>72</sup> See Knox, *supra* note 23 at 660 (“the U.S. Commission on Civil Rights found that EPA had never made a formal finding of discrimination or denied financial assistance from recipients, despite receiving more than three hundred complaints between 1993 and 2016.”); THE CENTER FOR PUBLIC INTEGRITY, ENVIRONMENTAL RACISM PERSISTS, AND THE EPA IS ONE REASON WHY (Aug. 3, 2015), <https://publicintegrity.org/environment/environmental-racism-persists-and-the-epa-is-one-reason-why/>.

<sup>73</sup> See THE CENTER FOR PUBLIC INTEGRITY, EPA DRAFT PLAN WOULD PERPETUATE RACISM, CRITICS SAY (Oct. 9, 2015), <https://publicintegrity.org/environment/epa-draft-plan-would-perpetuate-environmental-racism-critics-say/>.

<sup>74</sup> See *id.* See also Meshel, *supra* note 28 at 276.

<sup>75</sup> See Meshel, *supra* note 28 at 277-8.



progress made towards reducing the disproportionate impact of environmental harms on communities of color in the last few decades.<sup>76</sup>

Today, the environmental justice movement in the United States focuses not only on the struggle against polluting industrial facilities, federal, state, and local governments, and white-dominated environmental groups, but also on climate justice and the disproportionate effects of climate change on minority groups. For example, the Deep South Center for Environmental Justice has organized a Historically Black College and University (“HBCU”) Climate Change Consortium, as well as seven annual HBCU Climate Change conferences.<sup>77</sup> The Peoples Climate Movement,<sup>78</sup> which has organized climate marches and more since 2014, has attempted to put climate justice for indigenous people and people of color at the foreground and in leadership positions.<sup>79</sup> Civil rights groups such as the NAACP have established programs for climate justice.<sup>80</sup>

In addition, in July 2019, environmental justice groups in the United States came together and signed a National Climate Platform that calls for national climate change action

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<sup>76</sup> See e.g., Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism Is Real*, THE ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/>. See also UNIVERSAL CHRIST CHURCH, TOXIC WASTES AND RACE AT TWENTY 25 (2007), <https://www.ucc.org/environmental-ministries-toxic-waste-20>; Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENVTL. L. 371 (2008); Uma Outka and Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393 (2019).

<sup>77</sup> See Deep South Center for Environmental Justice, HBCU Climate Change Consortium, <http://www.dscej.org/our-work/hbcu-climate-change-consortium>.

<sup>78</sup> Peoples Climate Movement, <https://peoplesclimate.org/>.

<sup>79</sup> See Julia Dehm, *Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a Twail Perspective*, 33 WINDSOR Y.B. ACCESS JUST. 129, 154 (2016).

<sup>80</sup> NAACP, Environmental & Climate Justice, <https://www.naacp.org/issues/environmental-justice/>.

to confront “racial, economic, and environmental injustice” and accelerate a “pollution-free energy future that benefits all communities.”<sup>81</sup>

The environmental justice movement has also begun to embrace human rights as an additional tool for advocates to fight environmental racism, as discussed in the section below. While the human rights framework has been engaged at times by historically white-dominated environmental groups, minority and indigenous-led groups started this trend and continue to engage heavily with the United Nations and the Inter-American human rights mechanisms, and more.<sup>82</sup>

## ii. Movement for Environmental Human Rights

There is a burgeoning environmental human rights movement in the United States that has grown in strength in the last couple of decades.<sup>83</sup> Dr. Robert Bullard has pointed out that historically, neither the white-dominated environmental groups nor environmental justice advocates in the United States were looking to the human rights framework as an advocacy tool.<sup>84</sup> Moreover, environmental justice issues had not registered on human rights groups’ radar for the most part.<sup>85</sup> This all slowly changed in the United States, due to a large amount of effort and

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<sup>81</sup> The Center for American Progress, Environmental Justice Groups Advance Historic Joint Climate Platform, <https://www.americanprogress.org/press/release/2019/07/18/472265/environmental-justice-national-environmental-groups-advance-historic-joint-climate-platform/>.

<sup>82</sup> See Bullard, *supra* note 76 at 375.

<sup>83</sup> See Harden, *supra* note 15; Richard Moore, *Acknowledging the Past, Confronting the Present: Environmental Justice in the 1990s* in TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE 118-127 (Richard Hofrichter ed., 1993) (claiming that after the 1980s, the term “environment” changed to mean social justice, when environmental activists or “environmentalists” began to see the relationship between the impoverished living conditions of poor communities of color and environmental harm. Movements boomed where organizations challenged the EPA publicly, seeking recourse for environmental racism.); Bullard, *supra* note 57 at 138 (discussing how environmental movements have expanded in the U.S.).

<sup>84</sup> See Bullard, *supra* note 76 at 375.

<sup>85</sup> See *id.* See also Kevin Bundy, *Accounting for Race in Environmental Thought*, 30 ECOLOGY. L. QUARTERLY 377 (2003)

work put in by a handful of environmental justice advocates.<sup>86</sup> This section of the article discusses the historical use of the human rights framework by environmental justice advocates and the burgeoning environmental human rights movement in the United States.

Historically, the United States was an early adopter of—and an advocate at the international level for—environmental human rights. For example, in 1971, Pennsylvania became the first government in the world to amend its constitution to include environmental rights.<sup>87</sup> In 1972, U.S. officials advocated for the inclusion of the right to a healthy environment in the Declaration of the United Nations Conference on the Human Environment (the “Stockholm Declaration”).<sup>88</sup>

Early iterations of the right to a healthy environment focused on clean water and air, and the preservation of nature.<sup>89</sup> Almost two decades passed before the right to a healthy environment

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<sup>86</sup> Bullard, *supra* note 57 at 137-38.

<sup>87</sup> See Knox, *supra* note 23 at 650.

<sup>88</sup> Marcos Orellana, *Habitat for Human Rights: Environmental Degradation and Human Rights*, 40 VT. L. REV. 417, 420-21 (2016). See Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), Principle 1, U.N. Doc. A/Conf.48/14/Rev.1 (1972), <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>. The 1972 Declaration of the UN Conference on the Human Environment (Stockholm Declaration) contains a first attempt at a universal definition of the right to a healthy environment, stating that “man 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 he bears a solemn responsibility to protect and improve the environment for present and future generations”. *Id.* Not surprisingly, the U.S. government later reversed course on the right to a healthy environment. See Orellana, *supra*. This is typical behavior of the United States Government. See EXPLANATION OF POSITION: THE HUMAN RIGHT TO SAFE DRINKING WATER AND SANITATION RESOLUTION: STATEMENT OF THE DELEGATION OF THE UNITED STATES OF AMERICA (September 25, 2014), <https://geneva.usmission.gov/2014/09/25/explanation-of-position-the-human-right-to-safe-drinking-water-and-sanitation/> (“We are pleased that preambular paragraph 8 of this resolution refers to the 2014 Sanitation and Water for All High-Level Meeting. The United States participated actively in that meeting, at which participants made commitments concerning access to safe drinking water and sanitation. Those commitments were made in support of achieving universal access to safe drinking water and sanitation and not explicitly to advance a human right to water”).

<sup>89</sup> See e.g., PA. CONST. art 1, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”). See also David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENVIRONMENTAL MAGAZINE (July-August 2012), <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>.

began to feature principles of non-discrimination both in the United States and at the international level.<sup>90</sup>

The First National People of Color Environmental Leadership Summit held in 1991,<sup>91</sup> included speeches, workshops, and strategy sessions connecting environmental justice to human rights.<sup>92</sup> The human rights influence at the Summit is reflected in the Principles of Environmental Justice that were developed and adopted by Summit participants: “Environmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration on Human Rights, and the United Nations Convention on Genocide.”<sup>93</sup> Monique Harden<sup>94</sup>, Nathalie Walker<sup>95</sup>, and Vernice Miller-Travis<sup>96</sup>, all respected environmental justice advocates, have argued that these principles made a “profound impact on environmental justice advocacy in the United States,” shifting focus to the harm caused by environmental decision-making on the lives of people.<sup>97</sup>

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<sup>90</sup> See Knox, *supra* note 23 at 652-3. In 1989, an independent expert on the Sub-Commission on Prevention of Discrimination and Protection of Minorities, a subsidiary body to the United Nations Human Rights Commission, presented draft principles on human rights and the environment that included “the right to a secure, healthy and ecologically sound environment.” Special Rapporteur Fatma Zohra Ksentini, Human Rights and the Environment: Final Report, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994), annex I. However, the Commission did not adopt the draft declaration. See Knox, *supra* note 23 at 653.

<sup>91</sup> Harden, *supra* note 15 at 266.

<sup>92</sup> *Id.*

<sup>93</sup> First National People of Color Environmental Leadership Summit, “Principles of Environmental Justice”, Principle 10 (1991) <https://www.ejnet.org/ej/principles.html>. Vernice Miller-Taylor helped draft the principles. See Brentin Mock, *Fight the funk: This woman’s fight against garbage fumes became a national crusade*, GRIST (Feb. 26, 2014), <https://grist.org/cities/fight-the-funk-this-womans-fight-against-garbage-fumes-became-a-national-crusade/>.

<sup>94</sup> See Deep South Center for Environmental Justice, Monique Harden, Esq., <http://www.dscej.org/our-story/our-team/monique-harden-esq.>

<sup>95</sup> See Advocates for Environmental Human Rights, About, <http://www.ehumanrights.org/about.html>

<sup>96</sup> <https://www.metgroup.com/team/vernice-miller-travis/>.

<sup>97</sup> Harden, *supra* note 15 at 267.

The First National People of Color Environmental Leadership Summit was ahead of its time, with regards to connecting environmental justice and human rights.<sup>98</sup> While the United Nations (“UN”) had been contemplating the right to a healthy environment since the 1970s,<sup>99</sup> there was no infrastructure or programs within the UN focused on the right to a healthy environment established until much later. In addition, it was not until the late 1980s and early 1990s, that courts across the globe began to take the right to a healthy environment seriously.<sup>100</sup> The first UN human rights treaty to include environmental rights was the Convention on the Rights of the Child, adopted in 1989.<sup>101</sup> Similarly, the greening of the Inter-American Human Rights System did not take place until much later as well.<sup>102</sup>

The human rights mechanisms established to examine environmental human rights at the international level are much newer. The UN Human Rights Commission established a special rapporteurship on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes in 1995.<sup>103</sup> The UN Human Rights Council then established the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation in 2008, which was changed to a special rapporteurship in

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<sup>98</sup> However, the African Charter of Human and Peoples Rights, adopted in 1981, including a justiciable right to a healthy environment. *See* African Charter of Human and Peoples Rights, art. 24, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (1982) (hereinafter “African Charter”).

<sup>99</sup> Stockholm Declaration, Principle 1, *supra* note 88.

<sup>100</sup> *See* Knox, *supra* note 23 at 652.

<sup>101</sup> *United Nations Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 24, U.N. Doc. A/RES/44/25 (1989), *reprinted in* 28 I.L.M. 1448 (1989).

<sup>102</sup> For example, the Protocol of San Salvador was adopted in 1988. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador,” O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989). *See also* Knox, *supra* note 23 at 652.

<sup>103</sup> *See* United Nations Human Rights Office of the High Commissioner, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, <https://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx>.

2011.<sup>104</sup> The UN Special Rapporteur on human rights and the environment was established in 2012,<sup>105</sup> and the first person to serve as the UN Special Rapporteur on human rights and the environment was John H. Knox, a U.S. law professor at Wake Forest University School of Law.<sup>106</sup>

Within the Inter-American Human Rights System, a special rapporteurship on economic, social, cultural, and environmental rights was established in 2017. The Inter-American Court on Human Rights also released a landmark advisory opinion in 2018 on environment and human rights, reaffirming that “human rights depend on the existence of a healthy environment” and requiring states to take measures to prevent significant environmental harm inside and outside of their territory.<sup>107</sup>

Also of note is the *M.E.A.N. v. United States* petition and request for precautionary measures brought before the Inter-American Commission on Human Rights<sup>108</sup> complaining of environmental human rights violations in the United States. That petition was filed by Monique Harden and Nathalie Walker of Advocates for Environmental Human Rights (“AEHR”) on behalf

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<sup>104</sup> See United Nations Human Rights Office of the High Commissioner, Special Rapporteur on the human rights to safe drinking water and sanitation, Overview of the mandate, <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Overview.aspx>.

<sup>105</sup> See United Nations Human Rights Office of the High Commissioner, Special Rapporteur on human rights and the environment, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>

<sup>106</sup> Wake Forest Law, Faculty, John H. Knox, <https://law.wfu.edu/faculty/profile/knoxjh/>.

<sup>107</sup> Maria L. Banda, *Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights*, 22 AM. SOC. INTL. L. INSIGHTS (May 10, 2018). The Inter-American Court on Human Rights does not have jurisdiction over the United States, however. The United States signed, but has never ratified the American Convention on Human Rights, which would grant the Inter-American Court jurisdiction. See Organization of American States, Multilateral Treaties, American Convention on Human Rights, Signatories and Ratifications, [https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

<sup>108</sup> The United States signed and ratified the Charter of the Organization of American States, which established the Inter-American Human Rights System. See Organization of American States, Department of International Law, Charter of the Organization of American States, Signatories and Ratifications, [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-41\\_charter\\_OAS.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp).

of Mossville Environmental Action Now (“M.E.A.N.”).<sup>109</sup> AEHR was a not-for-profit environmental justice law firm based in New Orleans, Louisiana, that pursued environmental justice claims through human-rights legal avenues.<sup>110</sup> AEHR’s client, M.E.A.N., was a community group in Mossville, Louisiana, where residents suffered or were put at risk of various health problems caused by toxic pollution released from fourteen chemical-producing industrial facilities that were granted permits to operate in and around that city.<sup>111</sup>

In its petition and request for precautionary measures, M.E.A.N. argued that the United States had failed to protect the rights to life, health, and private life and inviolability of home, as well to equal protection and freedom from racial discrimination.<sup>112</sup> The U.S. Government responded to M.E.A.N. in 2008, arguing that the petition failed to show a breach of duty and that the petitioners had failed to exhaust domestic remedies.<sup>113</sup> In March 2010, the Inter-American Commission on Human Rights issued a report on the admissibility of the petition, and concluded that the case was admissible, with respect to the allegations concerning a possible violation of Articles II and V of the American Declaration.<sup>114</sup> Unfortunately, in the intervening years, the

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<sup>109</sup> Second Amended Petition and Petitioners’ Observations on the Government’s Reply Concerning the United States Government’s Failure to Protect the Human Rights of the Residents of Mossville, Louisiana, United States of America, Submitted to the Inter-American Commission on Human Rights on behalf of Petitioners Mossville Environmental Action Now et al., Petition No. P-242-05 (Jun. 23, 2008), <https://grist.org/article/louisiana-environmental-racism-case-gets-hearing-from-inter-american-commis/> (hereinafter “Petition”). See also Veronica Eady, *1982 Warren County Protests: Environmental Justice Twenty-Five Years Later*, 1 GOLDEN GATE U. ENVTL. L.J. 41, 49, FN 33 (2007); Sue Sturgis, *Louisiana environmental racism case gets hearing from Inter-American Commission on Human Rights*, GRIST (Apr. 2, 2010), <https://grist.org/article/louisiana-environmental-racism-case-gets-hearing-from-inter-american-commis/>.

<sup>110</sup> See Advocates for Environmental Human Rights (“AEHR”), [www.ehumanrights.org](http://www.ehumanrights.org). In full disclosure, the author of this article was a summer associate at AEHR in 2006.

<sup>111</sup> Petition, *supra* note 109 at 1-4.

<sup>112</sup> Petition, *supra* note 109 at 8. AEHR’s petition also does a terrific job of detailing the failures of U.S. environmental protection law and policy to deal with environmental racism. See *id.*

<sup>113</sup> Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Mossville Environmental Action Now, Petition No. 242-05, Precautionary Measure 2505 (Sept. 2006), <https://grist.files.wordpress.com/2010/04/us-response-to-mossville-petition-09-06.pdf>.

<sup>114</sup> Admissibility, Mossville Environmental Action Now, United States, Petition 242-05, Report No. 43/10 (Mar. 17, 2010), <http://www.cidh.org/annualrep/2010eng/USAD242-05EN.doc>.



residents of Mossville have either all passed or moved away and this case is moot.<sup>115</sup> Yet, the M.E.A.N. petition continues to be instrumental for environmental justice advocates, establishing clear recourse at the Inter-American Commission for Human Rights for individual claims of environmental harms.<sup>116</sup>

There are a few additional, but not many, nongovernmental groups which have been working to expand environmental human rights in the United States. The U.S. Human Rights Network, a national network of organizations and individuals working to strengthen a human rights movement and culture within the United States, has had working groups focusing on environmental human rights since its founding in 2003.<sup>117</sup> The Center for International Environmental Law (“CIEL”), a nonprofit law firm focused on protecting the environment and promoting human rights that usually works globally.<sup>118</sup> However, at times, CIEL’s environmental human rights advocacy focuses on communities in the United States.<sup>119</sup>

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<sup>115</sup> Notes from conversation with Monique Harden, formerly with Advocates for Environmental Human Rights (AEHR), attorney for Petitioners, on file with author.

<sup>116</sup> See Jeannine Cahill-Jackson, *Mossville Environmental Action Now v. United States: Is a Solution to Environmental Injustice Unfolding*, 2012 PACE INT’L L. REV. ONLINE COMPANION [v] (2012) (arguing that the *Mossville Environmental Action Now* case is of great significance for both the United States and other countries in the Inter-American system, as it is the first of its kind to be deemed admissible). See also Natalia Gove, *A Proposal for Addressing Violations of Indigenous Peoples’ Environmental and Human Rights in the Inter-American Human Rights System*, 4 J. ANIMAL AND ENVIRONMENTAL L. 184, 187 (2013). (states could not be held directly accountable for environmental degradation or contamination in Inter-American jurisprudence).

<sup>117</sup> See U.S. Human Rights Network (USHRN), About Us, <https://ushrnetwork.org/about-us/>; U.S. Human Rights Network (USHRN), Working Groups, <https://ushrnetwork.org/membership/working-groups>.

<sup>118</sup> Center for International Environmental Law (CIEL), Our Mission, <https://www.ciel.org/about-us/our-mission/>. CIEL has a human rights program. See Center for International Environmental Law (CIEL), Human Rights, <https://www.ciel.org/issues/human-rights-2/>

<sup>119</sup> See e.g., Center for International Environmental Law (CIEL), *Methanex vs. US: Amicus Briefs Allowed in International Investment Arbitration*, <https://www.ciel.org/project-update/methanex-vs-united-states-amicus-curiae-briefs-allowed-in-international-investment-arbitration/>.



U.S. law school clinics and projects have also emerged focusing on environmental justice and advancing human rights protections in U.S. communities of color.<sup>120</sup> For example, the Human Rights in the United States Project at the Human Rights Institute at Columbia Law School has advocated for the human rights to water and sanitation in the United States for over a decade.<sup>121</sup> American University Washington College of Law’s Human Rights Impact Litigation Clinic and Center for Human Rights and Humanitarian Law both also completed important environmental human rights advocacy.<sup>122</sup>

Given the relative newness of the environmental human rights infrastructure and developing law, it is important now more than ever to consider the law and best practices that are developing in this area. The next section of this article provides an overview of environmental human rights law and frames the discussion, which is continued in Sections IV and V, of why and how environmental human rights law can be useful to environmental justice attorneys in practice in the United States.

### **III. Environmental Human Rights Law: An Overview**

Treaties, state statutes and constitutional law, case law, and reports from human rights mechanisms, such as the recently established UN Special Rapporteur on human rights and the

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<sup>120</sup> Many more clinics focus not only on environmental law, but specifically on environmental justice work in the U.S. See Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1338 (2016).

<sup>121</sup> See e.g., THE ALABAMA CENTER FOR RURAL ENTERPRISE (ACRE), COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC, AND THE INSTITUTE FOR THE STUDY OF HUMAN RIGHTS AT COLUMBIA UNIVERSITY, MAY FLUSHED AND FORGOTTEN: SANITATION AND WASTEWATER IN RURAL COMMUNITIES IN THE UNITED STATES (May 2019), <http://www.humanrightscolumbia.org/news/flushed-and-forgotten-sanitation-and-wastewater-rural-communities-us> (hereinafter “ACRE report”).

<sup>122</sup> See e.g., American University Washington College of Law, Office of Public Interest, Ali Beydoun, <https://www.wcl.american.edu/impact/initiatives-programs/publicinterest/advisory-board/ali-beydoun/>; AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, CENTER FOR HUMAN RIGHTS & HUMANITARIAN LAW, HUMAN RIGHTS IN THE U.S.: A HANDBOOK FOR LEGAL AID ATTORNEYS 245-261 (last updated in 2014), <https://www.wcl.american.edu/impact/initiatives-programs/center/programs/past-initiatives/lawyering/> (hereinafter “LHRL Handbook”).

environment and UN Special Rapporteur on the rights to safe drinking water and sanitation, can provide powerful recommendations and good guidance for governments. Environmental human rights law offers standards and norms for courts and policy makers in the United States interested in expanding environmental protections and increasing enforcement of non-discrimination laws in communities of color. Environmental human rights reports can also be used by environmental justice attorneys as evidence of environmental harms and help to establish patterns of abuse by the government and private industry.

Before discussing specific examples of environmental human rights documents and language that may be useful to environmental justice attorneys, this section first provides a brief comparison of environmental law and human rights law, as well as an overview of the sources of environmental human rights law.

Environmental law, including international environmental law, focuses on constraining environmentally harmful behavior, rather than preventing injuries to people.<sup>123</sup> In contrast, human rights law focuses on human impacts of government actions or inaction and, until recently, had less concern for the environmental dimensions of a problem.<sup>124</sup> According to Professor

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<sup>123</sup> Gove, *supra* note 116 at 186; Sofia Yazykova & Carl Bruch, *Incorporating Climate Change Adaption into Framework Environmental Laws*, 48 ENVTL. L. REP. NEWS & ANALYSIS 10334 (2018) (“Historically, national environmental laws have sought to prevent substantial changes to the environment – for example, maintaining air quality, habitats, and species for current and future generations...Environmental laws now need to consider how to manage the environment, public health, and human activities in a realm of continuous (and often substantial) change”); Thomas Ng, *Environmental Rights: Progressive Development or Obfuscation of International Human Rights Law*, 7 ORIGINAL L. REV. 72 (2011) (“in recent years the world has seen a growing concern for the preservation of the environment both at government level and individual awareness” adding that in addition to addressing climate change, “urgent action is required to alleviate the scale of environmental damage to the planet and its impact on the individual, of his well-being, and consequently on the enjoyment of fundamental rights such as the right to life”).

<sup>124</sup> Gove, *supra*; Karrie Wolfe, *Greening the International Human Rights Sphere – Environmental Rights and the Draft Declaration of Principles on Human Rights and the Environment*, 9 APPEAL: REV. CURRENT L. & L REFORM 45

Dinah Shelton, a leading expert at the intersection of international environmental law and human rights law, human rights and environmental protection represent “overlapping social values with a core of common goals.”<sup>125</sup> Both seek to achieve the highest quality of human life.<sup>126</sup> Human rights depend on environmental protection and environmental protection depends on human rights.<sup>127</sup>

Christopher Weeramantry, Vice-President of the International Court of Justice, pointed out the important link between environmental protection and human rights in a precedent-setting opinion, declaring that the “protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself.”<sup>128</sup> While still relatively a new part of human rights law, environmental human rights have clearly become a focal point for human rights systems at this point<sup>129</sup> and nearly all global human rights bodies have considered the links between environmental concerns and human rights.<sup>130</sup>

Important sources of environmental human rights law include: both universal and regional treaties; customary international law; domestic statutory law and constitutions; case law from

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(2003) (“The linkage between the environment and human rights has been recognized internationally in numerous human rights instruments. It formed the basis of a United Nations (“UN”) sub-commission study on human rights and the environment in the early 1990s”); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103 (1991).

<sup>125</sup> Shelton, *supra*.

<sup>126</sup> Gove, *supra* note 116 at 195-6.

<sup>127</sup> *Id.*

<sup>128</sup> Gove, *supra* note 116 at 197-98 (citing to *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 7, 88 at 91 (Sept. 25)).

<sup>129</sup> See Svitlana Kravchenko, *Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted*, 7 FLA. A & M U. L. REV. 163, 179 (2012).

<sup>130</sup> Gove, *supra* note 116 at 184-85 (citing to Dinah Shelton, *Rainforests and Regulation: New Directions in Brazilian Environmental Law and Legal Institutions, Environmental Rights and Brazil's Obligations in the Inter-American Human Rights System*, 40 GEO. WASH. INT’L. L. REV. 733 (2009) (citing ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW ch. 15 (4th ed. 2005)).

both human rights systems and domestic courts; soft law, including reports and other documents published by human rights mechanisms;<sup>131</sup> and the “teachings of the most highly qualified publicists of the various nations.”<sup>132</sup> This section of the article provides examples of each of these types of environmental human rights law sources, with a focus on environmental racism and relevant U.S. law and U.S.-based cases and recommendations.

### i. Treaties

Environmental human rights are referenced only in a handful of human rights treaties.<sup>133</sup> The right to a healthy environment is specifically mentioned in the African Charter on Human and Peoples’ Rights,<sup>134</sup> the Additional Protocol to the American Convention on Human Rights in the

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<sup>131</sup> For the purposes of this article, “soft law” includes international declarations, resolutions, guiding principles, and other international documents, all of which that are not legally binding, but are thought to impact nation-states decision-making because of their quasi-legal nature. See T. Guzman and Timothy L. Meyer, *International Soft Law*, 2 J. OF LEGAL ANALYSIS 171, 172 (2010); Section III.v., *infra*.

<sup>132</sup> See e.g., Citation: U.N. Charter art. 2, ¶ 4; Statute of the International Court of Justice, Art. 38(1)(d), 1945, 1946 UKTS 67 (hereinafter “Statute of the ICJ”). See also Sondre Torp Helmersen, *Finding ‘the Most Highly Qualified Publicists’: Lessons from the International Court of Justice*, 30 European Journal of International Law 502, 509-535 (May 2019), <https://doi.org/10.1093/ejil/chz031> (defining ‘teachings’ as “books and articles, purporting to answer legal questions, being used when ascertaining the content of international law”).

<sup>133</sup> Shelton, *supra* note 124 at 103-4; Kravchenko, *supra* note 129 at 167. See also Mapping Report, *supra* note 33 at 8-21.

<sup>134</sup> African Charter, art. 24, *supra* note 98 (“All peoples have the right to a generally satisfactory environment favorable for their development.”).

Area of Economic, Social and Cultural Rights (the “San Salvador Protocol”),<sup>135</sup> and the UN Convention on the Rights of the Child.<sup>136</sup>

However, the United States has not ratified any of these treaties.<sup>137</sup> Therefore, these treaties not binding as a matter of domestic law in the United States.<sup>138</sup> While the United States has not ratified these treaties, it has, however, signed the UN Convention on the Rights of the Child, which means that under international law, the United States is therefore required to refrain from “acts which would defeat the object and purpose” of the Convention on the Rights of the Child.<sup>139</sup>

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<sup>135</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), art.11, O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989), <https://www.refworld.org/docid/3ae6b3b90.html> (“Article 11 Right to a Healthy Environment, 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.”). *See also* Kravchenko, *supra* note 129 at 167 (“Despite the strong language, the Protocol has no provision allowing individuals to bring claims of violation of Article 11’s right to a healthy environment to the Inter-American Commission on Human Rights. This leaves only the process of annual reporting requirements and Commission commentary on such reports as a means to address human rights violations.”); Gove, *supra* note 116 at 187-188 (“Although the San Salvador Protocol acknowledges the right to a healthy environment, it does not provide effective means to remedy environmental harm to indigenous people, as there is no mechanism to enforce this right.” And “Since the San Salvador Protocol is not an enforceable instrument, Inter-American human rights litigation focuses instead on general infringements on human rights, such as the rights to property, life, health, and personal integrity in an attempt to remedy environmental harm.”).

<sup>136</sup> United Nations Convention on the Rights of the Child, art. 24, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25 (1989), *reprinted in* 28 I.L.M. 1448 (1989) (“States Parties... shall take appropriate measures... to combat disease and malnutrition...through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution...”).

<sup>137</sup> The United States has signed the Convention on the Rights of the Child. However, the United States is now the only nation-state of the 193 members recognized by the United Nations that has not ratified the Convention on the Rights of the Child. *See* United Nations Treaty Collection, Convention on the Rights of the Child, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en). In addition, the United States has neither signed nor ratified the San Salvador Protocol. *See* Organization of American States, Multilateral Treaties, Signatories and Ratifications, Additional Protocol of San Salvador, <https://www.oas.org/juridico/english/signs/a-52.html>.

<sup>138</sup> *See* U.S. CONST. art. VI, § 2. When the United States does sign and ratify a treaty, under the Supremacy Clause of the U.S. Constitution it is the “supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding”. *Id.*

<sup>139</sup> Vienna Convention on the Law of Treaties, art. 18, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (hereinafter “Vienna Convention”). While the U.S. is not a party to the Vienna Convention, the U.S. recognizes that many of the Convention’s provisions have become customary international law. *See, e.g.,* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before U.S. Courts*, 28 VA. J. INT’L L. 281, 299-300 (1988) (discussing how the U.S. has demonstrated that it considers itself bound by the provisions of the Vienna Convention).

Some international environmental treaties include specific provisions relevant to human rights as well. For example, the Aarhus Convention states that “[e]very person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”<sup>140</sup> Many environmental treaties also require environmental information to be provided to the public, furthering the human right to information, and for environmental impact statements to be completed.<sup>141</sup> However, the United States has not signed or ratified these environmental treaties either.<sup>142</sup>

In addition to the three human rights treaties that specifically mention the right to a healthy environment, other international treaties have been interpreted by courts and human rights mechanisms, such as treaty bodies and special rapporteurs, to include the right to a safe, clean, healthy, and sustainable environment.<sup>143</sup> For example, the United States has signed and ratified both the UN Convention on the Elimination of Racial Discrimination (“CERD”) and the International Convention on Civil and Political Rights (“ICCPR”), both of which have been interpreted to prohibit environmental racism.<sup>144</sup>

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<sup>140</sup> See e.g., Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, Preamble, Oct. 30, 2001, 2161 UNTS 447; 38 ILM 517 (1999).

<sup>141</sup> See Mapping Report, *supra* note 33 at 12 (citing to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (art. 15), the Stockholm Convention on Persistent Organic Pollutants (art. 10), and the United Nations Framework Convention on Climate Change (art. 6(a))). See also Rio Declaration principle 19).

<sup>142</sup> United Nations Treaty Collection, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-13&chapter=27&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=en).

<sup>143</sup> See Mapping Report, *supra* note 33. John Knox also drafted fourteen individual reports on treaty bodies, human rights council, and more, compiling any mention of environment and human rights. See United Nations Human Rights Office of the High Commissioner, Special Rapporteur on human rights and the environment, Mapping Report, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx>.

<sup>144</sup> See LHRL Handbook, *supra* note 116 at 245-261 (providing a list of human rights instruments, article by article, that are relevant to the right to a healthy environment).

In fact, each of the UN treaty bodies have made statements on environmental human rights, as well as climate change, at this point.<sup>145</sup> The UN Special Rapporteur on human rights and the environment has published detailed individual reports mapping when, where, and how each of the UN human rights mechanisms, as well as the European, Inter-American, and African human rights systems, have discussed environmental human rights and climate change.<sup>146</sup> These reports are useful and clearly lay out the interpretation of environmental human rights within each human rights system.

Treaties signed and ratified by the United States can be incredibly helpful for environmental human rights advocacy, as illustrated in Section V below. However, unfortunately human rights treaties are not directly enforceable in U.S. courts, when ratified by the U.S. Senate.<sup>147</sup> When the Senate ratifies human rights treaties it typically enters “reservations”, “understandings”, and “declarations” (called “RUDs” for short) stating that the treaty is not self-executing and requires separate implementing legislation, as well as stating that there is no private right of action created under the treaty.<sup>148</sup> These RUDs make it impossible for U.S. environmental justice attorneys to enforce the relevant provisions of human rights treaties as direct claims in a U.S. court. Yet, there are other ways that treaties can be helpful in U.S. advocacy and Section V below describes human rights strategies designed around these challenges.

## ii. Customary International Law

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<sup>145</sup> See Kravchenko, *supra* note 129 at 167; Mapping Report, *supra* note 33.

<sup>146</sup> See United Nations Human Rights Office of the High Commissioner, Special Rapporteur on human rights and the environment, Mapping Report, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx>.

<sup>147</sup> See LHRL Handbook, *supra* note 116 at 11. See also Oona A. Hathaway, et al., *International Law at a Crossroads*, 7 YALE J. INT’L AFF. 54 (2012).

<sup>148</sup> *Id.*

Customary international law is defined as a general practice among nation-states and a general acceptance of the practice is required by law.<sup>149</sup> When a practice rises to the level of customary international law, it must be followed by nation-states regardless of their domestic law.<sup>150</sup> In order for a practice to become customary international law, nation-states must follow it out of a sense of legal obligation, not as a matter of policy or self-interest, and enough nation-states must follow it so that it can be considered “general practice.”<sup>151</sup> The meanings of each of the terms used above—“general,” “practice,” and “acceptance”—have been the subject of much debate in the international law community, as is which “general practices” have risen to the level of customary international law.<sup>152</sup> Some practices, however, such as the prohibition on the juvenile death penalty are widely accepted as customary international law.<sup>153</sup>

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<sup>149</sup> See Statute of the ICJ, *supra* note 132 at art. 38(1)(b). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”). For a great contemporary discussion of customary international law generally, but also focused arguments that the UDHR has not become customary international law as of yet. See Rossana Deplano, *Is the Universal Declaration of Human Rights Customary International Law? Evidence From an Empirical Study of US Case Law* (2019),

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3518106&dgcid=ejournal\\_html\\_email\\_human:rights:the:global:economy:ejournal\\_abstractlink](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3518106&dgcid=ejournal_html_email_human:rights:the:global:economy:ejournal_abstractlink) (great recent discussion of customary international law generally, but also focused arguments that the UDHR has not become customary international law as of yet).

<sup>150</sup> See *e.g.*, *id.*; John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 286-287 (2000); Neil A.F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUMAN RIGHTS L. REV. 487, 603 (1996).

<sup>151</sup> See, *e.g.*, *North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.)*, I.C.J. Reports 1969 41-44, <http://courses.kvasaheim.com/ps376/briefs/ojf38491brief4.pdf>. See also LHRL Handbook, *supra* note 116.

<sup>152</sup> See generally, Emily Kadens & Ernest A. young, *How Customary is Customary International Law*, 54 WM. & MARY L. REV. 885 (2013); Paul B. Stephan, *Disaggregating Customary International Law*, 21 DUKE J. COMP. & INT’L L. 191 (2010).

<sup>153</sup> For an overview of customary international law, see LOUIS HENKIN, SARAH H. CLEVELAND, LAURENCE R. HELFER, GERALD L. NEUMAN & DIANE F. ORENTLICHER, HUMAN RIGHTS 193-97 (2d. ed. 2009). See also *Roper v. Simmons*, 125 S. Ct. 1183, 1199 (2005).



U.S. courts have long recognized that customary international law is a part of U.S. law.<sup>154</sup> In 1900, the U.S. Supreme Court in *The Paquete Habana* held that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice...as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations....”.<sup>155</sup> This case is still good law today and attorneys can use this case to cite to customary international law in U.S. courts.

The U.S. Supreme Court has also held that the practices of other nations are relevant even if they do not rise to the level of customary international law. For example, in a 1997 decision concerning the constitutionality of a state law banning assisted suicide, the U.S. Supreme Court cited the practices of other nation-states.<sup>156</sup> The U.S. Supreme Court at times also cites to the practices of other nation-states, as well as international agreements and treaties that the U.S. has not yet signed or ratified as evidence of the general practices of other nation-states.<sup>157</sup>

The human right to a safe, clean, healthy, and sustainable environment is likely not yet be considered customary international law.<sup>158</sup> However, some human rights mechanisms have

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<sup>154</sup> See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice...as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations....”).

<sup>155</sup> 175 U.S. 677, 700 (1900).

<sup>156</sup> *Washington v. Glucksberg*, 521 U.S. 702, 710 n.8 (1997).

<sup>157</sup> *Roper v. Simmons*, *supra* note 147 at 1199 (Justice Kennedy looked to the practices of the international community in his landmark decision abolishing the death penalty for juveniles).

<sup>158</sup> There is no mention of customary international law in John Knox’s mapping report. Mapping Report, *supra* note 33. See also Sarah Morris, *The Intersection of Equal and Environmental Protection: New Direction of Environmental Alien Tort Claims After Sarai and Sosa*, 41 COLUM. HUMAN RIGHTS L. REV. 275, 309 (2009); Boaz Green, *Drawing a Green Line: On the Potential for an Environmental Challenge to Israel’s Separation Barrier*, 10 UCLA J. INT’L L. & FOR. AFF. 503, 524 (2005) (“ Only the practices of states that undertake protection of the

recognized the obligation to ensure that polluting activities within their jurisdiction or control do not cause serious harm to the environment or peoples of other nation-states or to areas beyond their jurisdiction as customary international law.<sup>159</sup> This “no harm” rule of customary international law has been applied to climate change and environmental degradation generally by human rights mechanisms.<sup>160</sup> Scholars have also argued that at some point soon the right to a safe, clean, healthy, and sustainable environment may reach the level of customary international law as well, so long as it is an “independent, internationally-recognized right, that is narrowly and rigorously defined”<sup>161</sup> and nation-states undertake the protection of the right out of a sense of international obligation.<sup>162</sup> The more laws that are passed and the more cases that cite to environmental human rights, the closer the right to a healthy environment will get to rising to the level of customary international law.

### iii. Constitutions and Statutes

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environment out of a sense of international obligation to recognize a right to a healthy environment can give rise to such a rule of customary international law”); Lee, *supra* note 150 at 286-287; Popovic, *supra* note 150 at 603; *Flores v. S. Peru Cooper Corp.*, 414 F.3d 233, 240 (2d Cir. N.Y. 2003) (Peruvian plaintiffs brought suit against a U.S. copper mining corporation operating in Peru, alleging that pollution resulting from the defendant’s operations caused their severe lung disease. Plaintiffs claimed that the defendant’s conduct violated customary international law by infringing on their “right to life”, “right to health”, and “right to sustainable development” After an examination of the sources and evidence of these rights as customary international law, the Court held that the asserted rights were insufficiently definite to constitute rules of customary international law.); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5<sup>th</sup> Cir. La. 1999) (A citizen of Indonesia brought suit under the Alien Tort Claims Act against a U.S.-owned cooperation operating in Indonesia, alleging that their mining activities caused damage to human health and to the environment in violation of customary international law. The plaintiff relied on several resolutions of the United Nations, an affidavit of an international law professor, and the Rio Declaration on Environment and Development. The Fifth Circuit held that the plaintiff had not demonstrated that these treaties and agreements enjoy universal acceptance in the international community and therefore had not shown the existence of customary international law around rights to human health and the environment.)

<sup>159</sup> See e.g., David Boyd, Special Rapporteur on environment and human rights, U.N. Doc. A/74/161 (Jul. 15, 2019); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010; Hague Court of Appeal, *Urgenda Foundation v. Netherlands*, Case No. 200.178.245/01, Decision, 9 October 2018.

<sup>160</sup> *Id.*

<sup>161</sup> Lee, *supra* note 150 at 286.

<sup>162</sup> Green, *supra* note 158 at 524.

The right to a healthy environment, as well as the subsidiary rights to clean water and clean air, appear in constitutions and statutory law both in the U.S. and across the globe. These rights appear not only in federal (national-level) constitutions and federal statutes, but also state constitutions, state statutes, and even local ordinances. Enforcing state and local rights is an obvious strategy for environmental justice attorneys, but what might not be realized is the extent to which sister states, and even towns here in the United States, have begun enhancing environmental rights using human rights language and principles focusing on the government's obligations to the people. State and local environmental human rights laws in the United States can be used as a model for environmental justice attorneys thinking about lobbying for constitutional amendments, state statutes, or local ordinances, as well as in litigation.

While the U.S. constitution does not include the right to a healthy environment,<sup>163</sup> nine out of the fifty U.S. state constitutions already mention environmental rights.<sup>164</sup> The state

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<sup>163</sup> As early as 1968, United States' Senator Gaylord Nelson proposed a constitutional amendment providing "[e]very person has the inalienable right to a decent environment." Luis E. Rodriguez-Rivera, *The Human Right to Environment in the 21st Century: A Case for its Recognition and Comments on the Systemic Barriers it Encounters*, 34 AM. U. INT'L L. REV. 143, 182-83 (2018); Earthjustice, *Environmental Rights Report* (2007), <http://www.earthjustice.org/news/press/007/earthjustice-presents-2007-environmentalrights-report-to-un.html> (containing constitutional provisions concerning the environment from 118 countries).

<sup>164</sup> See Meshel, *supra* note 28 at 286-87.

constitutions of Hawaii,<sup>165</sup> Illinois,<sup>166</sup> and Montana<sup>167</sup> all include the right to a healthy(ful)<sup>168</sup> environment and all provide for a private right of action to enforce those rights. In addition, the

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<sup>165</sup> HAW. CONST. art. 11, § 9 (1978) (“Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”). It appears there is a private right of action for individuals to enforce these rights. *See e.g., Pele Def. Fund v. Paty*, 837 P.2d 1247, 1257 (Haw. 1992) (allowing a native rights advocacy group to challenge a land exchange on state constitutional grounds by adopting a broad interpretation of standing requirements under Hawaii’s constitution. The court noted that its expansive view of standing would apply “in cases in which the rights of the public might otherwise be denied hearing in a judicial forum.”).

<sup>166</sup> ILL. CONST. art. 11, § 1. (1972) (“The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of the public policy. Section II. Rights of the individuals: Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceeding subject to reasonable limitation and regulation as the General Assembly may provide by law.”). It appears there is a private right of action for individuals to enforce these rights. *See Glisson v. City of Marion*, 188 Ill. 2d 211, 214, 720 N.E.2d 1034, 1036 (1999) (holding that while there is a private right of action under Ill. Const. 11, § 1, plaintiff’s interest in preserving the lamprey and the crayfish was not cognizable).

<sup>167</sup> MONT. CONST. art. 2, § 3, art. 9, § 1 (“All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment...Protection and improvement (1) the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.”). It appears there is a private right of action for individuals to enforce these rights. *See MEIC v. Dept. of Environ. Quality* at 1249 (holding there is a private right of action for the right to a healthful environment under the MT constitution). *But see Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1092 (D. Mont. 2006) (declining to rule on whether Montana’s constitutional right to a clean environment was self-executing and could support a jury verdict holding a refinery liable for environmental restoration costs).

<sup>168</sup> Some states refer to a right to a “healthy” environment and others to a “healthful” environment. This article treats these as identical and therefore refers to the right to a healthy(ful) environment to capture both wording choices.

state constitutions of Massachusetts,<sup>169</sup> Pennsylvania,<sup>170</sup> and Virginia<sup>171</sup> include the right to clean air and clean water. The state constitutions in New Mexico,<sup>172</sup> North Carolina<sup>173</sup> and Rhode Island<sup>174</sup> contain more amorphous environmental rights, but those rights are tied to the benefit and

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<sup>169</sup> MASS. CONST. XCVII. (2014) (“The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be public purpose”). It appears there is a private right of action for individuals to enforce these rights. *See* MASS. GEN. LAWS ch. 214, § 7A (2011) (expanding standing for citizens for environmental claims).

<sup>170</sup> PA. CONST. art 1, § 27. (1971) (“Environmental Rights Amendment”) (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”). It appears there is a private right of action for individuals to enforce these rights. *See e.g., Clean Air Council v. Sunoco Pipeline L.P.*, 185 A.3d 478, 2018 Pa. Commw. LEXIS 145 (Pa. Commw. Ct. 2018) (holding property owners and an advocacy group of which the owners were members had standing to raise an Environmental Rights Amendment claim contesting a pipeline company’s condemnation because the owners alleged the company’s project was on or in proximity to the owners’ property and created an increased likelihood of injury to the owners’ property).

<sup>171</sup> VA. CONST. art. 11, § 1 (1970) (“To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources its public lands, and its historical sites and buildings, further, it shall be the Commonwealth’s policy to protect its atmosphere lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.”). However, there does not seem to be a private right of action to enforce these constitutional rights in Virginia. *See James River v. Richmond Metro. Auth.*, 359 F. Supp. 611 (E.D. Va.), *aff’d*, 481 F.2d 1280 (4th Cir. 1973) (dismissing the plaintiffs constitutional claim under article 11 and stating that whether this section creates substantive rights enforceable by private individuals is a “difficult question of constitutional law and one on which the state courts have not ruled.”).

<sup>172</sup> N.M. Const. Art. XX, §21 (1971) (“The protection of the state’s beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.”). There does not appear to be a recognized private right of action for individuals to enforce these rights, however. *See Forest Guardians v. Powell*, 2001-NMCA-028, ¶¶ 8-9, 13, 130 N.M. 368, 24 P.3d 803 (concluding that plaintiff school children did not have standing to sue to enforce these rights).

<sup>173</sup> N.C. CONST. art. 14, § 5 (1973) (“It shall be the policy of this state to conserve and protect its lands and waters for the benefit of all its citizenry). It appears there is a private right of action for individuals to enforce these rights. *See BSK Enters. v. Beroth Oil Co.*, 246 N.C. App. 1, 783 S.E.2d 236 (2016) (holding that Landowner had standing to sue an oil company for contaminating the groundwater under the landowner’s land because: (1) while the landowner did not own the water, the landowner had the right to use the waters on the landowner’s land, and (2) G.S. 143-215.94B(b3) gave the landowner a private right of action).

<sup>174</sup> R.I. CONST. art. 1, § 17 (“ . . . Shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by

welfare of the people. In addition to those nine state constitutions, there are also pending amendments to the state constitutions of New York,<sup>175</sup> Washington,<sup>176</sup> and West Virginia,<sup>177</sup> which would provide for environmental human rights.

States have also been busy passing statutes to expand environmental human rights. In 2012, California passed a state statute making it the first state to recognize a human right to

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providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.”). It appears there is a private right of action for individuals to enforce these rights. *See Berberian v. Avery*, 99 R.I. 77, 205 A.2d 579 (1964) (holding that a bill seeking to enjoin city officials from spraying to control mosquitoes contains nothing relating to a threatened interference with complainant's fishery rights or shore privileges and it is those rights and privileges as they existed at the time of the adopting of the constitution which are preserved by this article).

<sup>175</sup> There is a pending “Green Amendment” in New York State stating that “each person shall have the right to clean air and water, and a healthful environment”. *See e.g.*, Environmental Advocates of New York, Legislators, Advocates Call for Green Amendment in State’s Constitution (Apr. 9, 2019), <https://eany.org/our-work/press-release/legislators-advocates-call-green-amendment-state%E2%80%99s-constitution-0>.

<sup>176</sup> Washington State Constitutional Amendment [Bill 5489] is pending that would include an extended public trust doctrine that provides broad environmental protection and incorporates an affirmative right to a healthy environment will add a layer of environmental protection and provide the impetus for politically difficult environmental action. *See* Washington State Legislature, Bill Information, Bill 5489, <https://app.leg.wa.gov/bills/summary?BillNumber=5489&Year=2019>.

<sup>177</sup> Democrats in West Virginia's house of Delegates have proposed an amendment to state constitution's Bill of Rights that would specify a clean environment as a constitutional right. *See* Lynis Board, W.Va. Delegates Introduce Environmental Constitutional Amendment, VIRGINIA PUBLIC RADIO (Feb. 11, 2019), <https://www.wvpublic.org/post/wva-delegates-introduce-environmental-constitutional-amendment#stream/0>.

water.<sup>178</sup> A statute in Washington state<sup>179</sup> also provides for the right to a healthy(ful) environment.<sup>180</sup> In addition, there are statutes pending in New Jersey<sup>181</sup> and South Carolina<sup>182</sup> that would provide for the right to a healthy environment. At the local level, many cities across the U.S have also passed local ordinances providing for environmental human rights.<sup>183</sup>

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<sup>178</sup> On September 25, 2012, Governor Edmund G. Brown Jr. signed Assembly Bill 685, making California the first state in the nation to legislatively recognize the human right to water. See California Water Boards, State Water Resources Control Board, Human Right to Water Portal, [https://www.waterboards.ca.gov/water\\_issues/programs/hr2w/](https://www.waterboards.ca.gov/water_issues/programs/hr2w/). “While the statute does not require California to provide water, it establishes that “[a]ll relevant state agencies... shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria....” See ACRE report, *supra* note 121 (citing UNIV. OF CAL., BERKELEY, SCH. OF LAW INT’L HUMAN RIGHTS LAW CLINIC, THE HUMAN RIGHT TO WATER BILL IN CALIFORNIA: AN IMPLEMENTATION FRAMEWORK FOR STATE AGENCIES 3 (2013)), [https://www.law.berkeley.edu/files/Water\\_Report\\_2013\\_Interactive\\_FINAL.pdf](https://www.law.berkeley.edu/files/Water_Report_2013_Interactive_FINAL.pdf)). See also *Johnson v. City of Atwater*, 2017 U.S. Dist. LEXIS 59188 (E.D. Cal., Apr. 18, 2017) (court states *in dicta* “The United Nations General Assembly has resolved that the right to water and sanitation is an integral component of the realization of all human rights. California has recognized that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking and sanitation purposes. Governor Brown enacted the Low Water Rate Assistance Program to develop a plan to fund and implement a program to ensure that all California residents have access to water.”).

<sup>179</sup> WA. REV. CODE § 43.21C.020 (2) (“it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may... (b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.”). The Washington State Supreme Court has also found there is a private right of action under this statute. See *Save a Valuable Env’t (save) v. Bothell*, 89 Wn.2d 862, 576 P.2d 401, 1978 Wash. LEXIS 1385, 8 ELR 20379 (1978).

<sup>180</sup> See also W. VA. GEN. STAT. § 22-1-1 (2014) (legislative findings) (“(a)(1) Restoring and protecting the environment is fundamental to the health and welfare of individual citizens and our government has a duty to provide and maintain a healthful environment for our citizens.”); OR. GEN. STAT. § 3 (“Article XV Miscellaneous Section 3, Preamble, “The people of the State of Oregon also find that renewal of the Parks and Natural Resources Fund will support voluntary efforts to: (1) Protect and restore water quality, watershed and habitats for native fish and wildlife that provide a healthy environment for current and future generations of Oregon”).

<sup>181</sup> There is a pending state constitutional amendment in New Jersey that would ensure right to clean air, a stable climate and a healthy environment would be given the same high priority in decision making as protecting property rights, civil rights and advancing sustainable industries, energy and development. See State of New Jersey, 218<sup>th</sup> Legislature, Senate Concurrent Resolution No. 134, [https://www.njleg.state.nj.us/2018/Bills/SCR/134\\_11.HTM](https://www.njleg.state.nj.us/2018/Bills/SCR/134_11.HTM).

<sup>182</sup> Bill H. 3416 in South Carolina provides “The people of the State of South Carolina have a right to South Carolina’s environment. The people of this State have the authority and legal standing to enforce this right. As trustees of this resource, the State and local governments shall conserve South Carolina’s environment, including its clean air, pure water, and natural and scenic values for the benefit of all people. This section applies to the State of South Carolina and to every city, town, and county in the State.” See South Carolina General Assembly, 122 Session, 2017-18, H. 3416, [https://www.scstatehouse.gov/sess122\\_2017-2018/bills/3416.htm](https://www.scstatehouse.gov/sess122_2017-2018/bills/3416.htm).

<sup>183</sup> See e.g., City of Santa Monica Sustainability Rights Ordinance, Apr. 9, 2013, [http://www.smgov.net/departments/council/agendas/2013/20130409/s20130409\\_07A1.htm](http://www.smgov.net/departments/council/agendas/2013/20130409/s20130409_07A1.htm); Northhampton Massachusetts, R-17-311, A

Internationally, Portugal was the first country to adopt a right to a healthy environment in its constitution in 1976.<sup>184</sup> Today, of the 193 nations that are recognized by the UN, 130 nations' constitutions contain language on the protection of the environment or natural resources phrased as either a human entitlement or a state duty.<sup>185</sup>

While much of the constitutional law in this area was passed in the 1970s, much of the successful environmental human rights statutory and local law discussed above, in both the United States and abroad, has been passed in the last decade. It appears that environmental human rights legislation, which places the responsibility for ensuring adequate access to clean water and sanitation, clean air, and more—with accompanying sanctions for violators—is both politically feasible and that providing for the human rights to a healthy environment and safe drinking water and sanitation is far from beyond the capabilities of the politicians here in the United States.<sup>186</sup>

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Resolution to Have Northampton Become a Blue Community in Support of Clean and Safe Water in Massachusetts (2018), <https://www.northamptonbluewater.org/blue-communities>; Oberlin Ohio, An Ordinance Establishing a Community Bill of Rights for the People and Natural Communities of the City of Oberlin; Protecting Those Rights by Prohibiting Gas and Oil Extraction and Related Activities; and Subordinating the Privileges Bestowed on Certain Corporations to the Rights and Governance of the People (2012), <http://ohcommunityrights.org/wp-content/uploads/2015/02/Oberlin-Community-Bill-of-Rights.pdf>.

<sup>184</sup> Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, Preliminary Report, UN Doc. A/HRC/22/43 (Dec. 24, 2012), [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43_en.pdf).

<sup>185</sup> See United Nations Human Rights Office of the High Commissioner on Human Rights and United Nations Environment Programme, Human Rights and the Environment Rio+20: Joint Report OHCHER and UNEP 12 (2004), [http://wedocs.unep.org/bitstream/handle/20.500.11822/9970/JointReport\\_OHCHR\\_HRE.pdf?sequence=1&isAllowed=y](http://wedocs.unep.org/bitstream/handle/20.500.11822/9970/JointReport_OHCHR_HRE.pdf?sequence=1&isAllowed=y). The right to a healthy environment appears in 92 constitutions around the world. See DAVID S. LAW AND MILA VERSTEEG, *THE DECLINING INFLUENCE OF THE US CONSTITUTION* (2012).

<sup>186</sup> See also Meshel, *supra* note 28 at 288.



#### iv. Case Law

Case law interpreting and citing to environmental human rights law exists in every human rights system across the globe, as well as in U.S. courts and foreign courts.<sup>187</sup> For the sake of time and space, this section of the article discusses just a sampling of court cases from across the globe regarding the right to a healthy environment. Many more such cases exist in most of the systems and courts discussed below.

This section of the article begins with a discussion of cases before the Inter-American, European, and African Human Rights Systems interpreting the right to a healthy environment, right to water and sanitation, and non-discrimination in the environmental human rights context. Next, supreme court cases finding a constitutional right to a healthy environment in Costa Rica, the Philippines, and Pakistan are discussed. Lastly, a sampling of both successful and unsuccessful U.S. cases interpreting constitutional and statutory rights to a healthy environment are discussed.

##### 1. Inter-American Human Rights System

The Inter-American Human Rights System has slowly begun to grapple with the issue environmental human rights in the last decade and has yet to issue a decision on the merits finding a violation of the right to non-discrimination regarding environmental harms.<sup>188</sup>

The seminal U.S. environmental human rights case in the Inter-American Human Rights System is *M.E.A.N. v. U.S.*,<sup>189</sup> which was mentioned in Section II.ii. above. The M.E.A.N.

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<sup>187</sup> See Mapping Report, *supra* note 33.

<sup>188</sup> However, the Inter-American Court's Advisory Opinion on the Environment and Human Rights discussed non-discrimination in relation to environmental harms in depth. See Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017 by Colombia, The Environment and Human Rights, [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171115\\_OC-2317\\_opinion-2.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171115_OC-2317_opinion-2.pdf).

<sup>189</sup> See Petition, *supra* note 109.

Petition to the Inter-American Commission on Human Rights made the argument that the U.S. Constitution provides no remedy for the violation of human rights to life, health, non-discrimination, and privacy as it relates to the inviolability of the home, in the case of environmental justice.<sup>190</sup> On the right to non-discrimination in the environmental justice context, the Petitioners further argued that in the United States, a “remedy for the violation of the right to equal protection requires proof of intent. Evidence of *de facto* unequal protection, which Petitioners present to this Commission, is not a legally cognizable claim of a constitutional violation in U.S. courts.”<sup>191</sup>

The M.E.A.N Petition also points out that the “EPA has no legal obligation to deny permits in order to prevent, or even to ameliorate harmful pollution burdens”<sup>192</sup> and that the EPA’s Office of Environmental Justice has admitted that “denying a permit based on environmental justice grounds, such as preventing increased disproportionate pollution burdens, is beyond the scope of their legal authority.”<sup>193</sup>

In addition, the Petition also argues that Title VI of Civil Rights Act of 1964, as amended, United States Code title 42, section 2000d *et seq.*, only prohibits an act of intentional discrimination based on race, color, or national origin, and not an act that results in a discriminatory effect. Further, it argues that in the case of Mossville, Louisiana, it was “virtually impossible to prove intentional discrimination, notwithstanding the fact that such facilities are

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<sup>190</sup> Petition, *supra* note 109 at 18-21.

<sup>191</sup> *Id.* at 16-17.

<sup>192</sup> *Id.* at 27.

<sup>193</sup> *Id.* at 28.

disproportionately located in communities that are predominantly African American, Latino, Native American, or Asian American.”<sup>194</sup>

The M.E.A.N. Petition to the Inter-American Commission on Human Rights also cites to *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,<sup>195</sup> a U.S. court case in which an African American community brought a Title VI civil rights lawsuit against a state environmental agency for issuing an air pollution permit that would increase existing levels of industrial pollution in their community, claiming that this constituted a discriminatory effect. Dismissing the lawsuit, the Third Circuit ruled that “Title VI proscribes only intentional discrimination, [and thus] plaintiffs do not have a[n] . . . enforceable [right].”<sup>196</sup> The Inter-American Commission on Human Rights accepted M.E.A.N.’s arguments as proof that the petitioners met their burden of proving that domestic remedies had been exhausted in its Admissibility decision, issued in 2010.<sup>197</sup> However, unfortunately, the M.E.A.N. case never reached the merits stage.

The case of *The Mayagna (sumo) Awas Tingni Community v. Nicaragua*<sup>198</sup> is a case of major significance in the Inter-American Human Rights System. The *Awas Tingni* case represents the first time the Inter-American Court issued a judgment in favor of an indigenous community’s right to ancestral land. In *Awas Tingni*, the court found that Nicaragua had violated the American Convention on Human Rights by failing to guarantee the right to an effective

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<sup>194</sup> *Id.* at 29.

<sup>195</sup> 274 F. 3d 771 (3rd Cir. 2001).

<sup>196</sup> 274 F. 3d 771 (3rd Cir. 2001).

<sup>197</sup> Admissibility, *supra* note 114. For both the La Oroya and Awas Tingni cases discussed below, Peru and Nicaragua are signatories to the San Salvador Protocol and therefore were obligated to protect the right to a healthy environment in the Protocol. That the U.S. was not a signatory to the Protocol did not stop the Inter-American Commission in *M.E.A.N. v. U.S.* case from finding admissibility, however. *See id.*

<sup>198</sup> *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

remedy for the indigenous community's claims to 62,000 hectares of tropical rainforest that were to be commercially developed. The Court also found that that the State had to refrain from any acts that might affect the existence, value, use or enjoyment of the property located in the geographic area where the indigenous community lived and carried out activities. Although the court did not find violations of right to life, right to health, or right to a healthy environment, this case opened the door in the Inter-American Human Rights System to indigenous rights claims based on environmental degradation.<sup>199</sup>

Another important environmental human rights case in the Inter-American System is that of *La Oroya Community v. Peru*.<sup>200</sup> The Inter-American Commission on Human Rights admitted the case in August 2009 but has yet to issue a judgment.<sup>201</sup> The *La Oroya* case was the first to be admitted by the Inter-American Commission that alleged environmental degradation caused by the activities of a company could violate the rights to health, life, and personal integrity.<sup>202</sup>

The Inter-American Court of Human Rights also released an Advisory Opinion on the environment and human rights in 2017.<sup>203</sup> This Advisory Opinion recognized that environmental damage is experienced with greater force by people in vulnerable situations—giving the examples of indigenous peoples, children, people living in extreme poverty, minorities, and people with disabilities, among others—and explaining that “States are legally obliged to confront these

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<sup>199</sup> Paula Spieler, *The La Oroya Case: the Relationship Between Environmental Degradation and Human Rights Violations*, 18 HUM. RTS. BR. 19, 21 (2010).

<sup>200</sup> *La Oroya v. Peru*, Petition 1473-06, Inter-Am. Comm'n H.R., 73-74 (2006).

<sup>201</sup> *La Oroya v. Peru*, Case 1473-06, Inter-Am. Comm'n H.R., Report No. 76/09, P 77(1) (2009).

<sup>202</sup> *See id.* *See also* Spieler, *supra* note 199 at 21-23. The *M.E.A.N. v. U.S.* case was admitted the following year, in March 2010. Admissibility, *supra* note 114.

<sup>203</sup> *See* Advisory Opinion, *supra* note 188. An Advisory Opinion in the Inter-American human rights system is similar to an Attorney General's opinion at the state-level in the United States. The Advisory opinion interprets human rights law in the Inter-American Human Rights system and is binding on member states who have accepted jurisdiction of the Inter-American Court. *See e.g.*, Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J INT'L L. 241, 242 (2002).

vulnerabilities based on the principle of equality and non-discrimination”.<sup>204</sup> The Court seems to be signaling its intent to expand remedies for environmental racism in years to come.

## 2. European Human Rights System

As early as 1985, the European Human Rights System began recognizing nation-states’ obligations to ensure non-discrimination in environmental protection. The Court of Justice of the European Union in the case of *Procureur de la République v. Association de défense des brûleurs d’huiles usagées (ADBHU)*<sup>205</sup> found that environmental protection is one of a community’s “essential objectives” and that care must be taken “to ensure that the principles of *proportionality and non-discrimination* will be observed if certain restrictions should prove necessary.”<sup>206</sup>

In addition, while the European Convention on Human Rights does not specifically include the right to a healthy environment or rights to water and sanitation, the European Court has robust environmental human rights jurisprudence.<sup>207</sup> The European Court has held that States have a duty to protect against and respond to infringements of the right to life as a result of natural disasters and of dangerous activities, including the operation of chemical factories and waste-collection sites.<sup>208</sup> In addition, the European Court has held that serious problems with waste

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<sup>204</sup> See Advisory Opinion, *id.* at ¶67.

<sup>205</sup> *Procureur de la République v. Association de défense des brûleurs d’huiles usagées (ADBHU)*, 7 February 1985, C-240/83

<sup>206</sup> *Procureur de la République v. Association de défense des brûleurs d’huiles usagées (ADBHU)*, 7 February 1985, C-240/83, §§ 12 – 13 (emphasis added).

<sup>207</sup> See generally Mapping Report, *supra* note 33.

<sup>208</sup> Mapping Report, *supra* note 33 at ¶48 (citing to Council of Europe, *Manual*, pp. 18, 36–40. See e.g., *Öneryıldız v. Turkey*, No. 48939/99 (Nov. 30, 2004) *Budayeva and others v. Russia*, No. 15339/02, (Mar. 20, 2008). The European Court has also derived such an obligation from the right to private and family life. See *Tatar v. Romania*, No. 67021/01 ¶88 (Jul. 6, 2009).

collection, disposal and treatment are a violation of the right to respect for private and family life.<sup>209</sup>

### 3. African Human Rights System

In 2012, the Economic Community of West African States (“ECOWAS”) Court of Justice in *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. The Federal Republic of Nigeria*,<sup>210</sup> found a violation of the right to a healthy environment enshrined in article 24 of the African Charter on Human Rights.<sup>211</sup> The ECOWAS Court found that despite “all of the laws” that Nigeria adopted and “all of the agencies” it has created to protect the environment, it could not point to any action that had been taken to hold accountable any of the perpetrators of oil spills and other environmental harms caused by private companies in the Niger Delta Region.<sup>212</sup> This is an important decision that specifically affirms the right to a healthy environment in a human rights treaty, focusing on a nation-state’s human rights obligation to protect against harms caused by private actors such as transnational polluting industrial facilities.

### 4. Foreign Courts

Many courts in other countries have also dealt with the right to a healthy environment.<sup>213</sup> Due to time and space constraints, as well as usefulness and applicability limits, this article provides an analysis of three cases, from Costa Rica, the Philippines, and Pakistan, as sample of

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<sup>209</sup> See *Affaire di Sarno et Autres v. Italia*, App. No. 30765/08 Eur. Ct. H.R. (2012). See also *Lopez-Ostra v. Spain*, App. No. 16798 Eur. Ct. H.R. (1994) (holding severe environmental pollution may affect an individual’s well-being and prevent that person from enjoying his or her home and right to privacy even though the pollution does not seriously endanger that person’s health).

<sup>210</sup> *SERAP v. Nigeria*, No. ECW/CCJ/JUD/18/12 (ECOWAS Court of Justice 2012)

<sup>211</sup> *SERAP v. Nigeria*, No. ECW/CCJ/JUD/18/12 (ECOWAS Court of Justice). The Court also found a violation of Article 1 Right to Life. *Id.*

<sup>212</sup> *SERAP v. Nigeria*, No. ECW/CCJ/JUD/18/12, decision at ¶110-112 (ECOWAS Court of Justice 2012).

<sup>213</sup> See Mapping Report, *supra* note 33; LHRL Handbook, *supra* note 116 at 254-256.

the case law available from foreign courts across the globe interpreting the right to a healthy environment.

In 1993, in the case of *Carlos Roberto Mejía Chacón* the Constitutional Chamber of the Supreme Court of Costa Rica recognized that the use of a neighborhood cliff as a dump violated the rights to life and to a healthy environment of the plaintiff and his neighbors.<sup>214</sup> In addition, the local municipality had tried to argue that it lacked financial resources to do anything about the dump.<sup>215</sup> The Court here held that not only is the right to a healthy environment a fundamental human right but that the lack of resources cannot be used to justify a violation of fundamental human rights and ordered that the dump be closed.<sup>216</sup>

Also in 1993, the Supreme Court of the Philippines recognized a constitutional right of intergenerational equity as part and parcel of the constitutional right of the people to a "balanced and healthful ecology" in *Minors Oposa v. Factoran*.<sup>217</sup> In that "taxpayers' class suit", the class was made up of minors representing "their generation as well as generations yet unborn".<sup>218</sup> The case was brought against the Secretary of the Department of Environment and Natural Resources and the class demanded that the secretary cancel all existing timber license agreements in the country and cease and desist from acting regarding new timber license agreements.<sup>219</sup> The court in *Minors Oposa v. Factoran* ruled that the minors could file a class action on behalf of their generation and for succeeding generations, based on the "concept of intergenerational

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<sup>214</sup> *Carlos Roberto Mejía Chacón Case*, Voto No. 3705, July 30, 1993 (Costa Rica).

<sup>215</sup> *Id.*

<sup>216</sup> TSEMING YANG, ANASTASIA TELESITSKY, LIN HARMON-WALKER, ROBERT V. PERCIVAL, COMPARATIVE AND GLOBAL ENVIRONMENTAL LAW AND POLICY 390 (2020).

<sup>217</sup> Judgment of July 30, 1993, Phil. Sup. Ct., G.R. No. 101083, 33 I.L.M. 173 (1993), [https://www.lawphil.net/judjuris/juri1993/jul1993/gr\\_101083\\_1993.html](https://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html).

<sup>218</sup> *Id.* at 2.

<sup>219</sup> *Id.* at 2-3.

responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right... considers the ‘rhythm and harmony of nature.’ Nature means the created world in its entirety.”<sup>220</sup> After this ruling, the Philippine government inventoried its old growth forests and restricted logging.<sup>221</sup>

In 1994, in *In the Human Rights Case* the Supreme Court of Pakistan interpreted the Pakistani constitutional right to security of person to include the right to a clean environment.<sup>222</sup> The Supreme Court of Pakistan had been alerted via a news article to a plan to dump nuclear waste from “developed countries” on coastal land in Baluchistan.<sup>223</sup> The Court issued a *suo moto*<sup>224</sup> order preventing the dumping of nuclear waste stating that to dump nuclear waste “would not only be a hazard to the health of the people but also to the environment and the marine life in the region. In my view, if nuclear waste is dumped on the coastal land of Balochistan, it is bound to create environmental hazard and pollution. This act will violate Article 9.”<sup>225</sup>

These cases help show how different foreign courts treat environmental human rights, but also show a growing recognition of the human impacts of environmental decisions. A human rights approach to environmental protection demands not only environmental regulation and enforcement of those regulations, but policies and practices focused on protecting the rights of humans as opposed to conserving nature.

## 5. U.S. Courts

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<sup>220</sup> *Id.* at 7.

<sup>221</sup> See Nicholas A. Robinson, *Attaining Systems for Sustainability through Environmental Law*, 12 NATURAL RESOURCES & ENVIRONMENT 86, 140 (Fall 1997).

<sup>222</sup> *In the Human Rights Case* (Environment Pollution in Baluchistan), P.L.D. 1994 S.C. 102 (Pak.).

<sup>223</sup> *Id.* at ¶1.

<sup>224</sup> For more on the Pakistan Supreme Court’s *suo moto* power, see Yang, *supra* note 216 at 298.

<sup>225</sup> *In the Human Rights Case*, *supra* note 222 at ¶1.



A few U.S. courts have also grappled with the enforceability of the human right to a healthy(ful) environment under state statutes and constitutions. For example, in *MEIC v. Dept. of Environ. Quality*,<sup>226</sup> plaintiff environmental groups were concerned about a massive open-pit gold mine being given a license by the Montana Department of Environmental Quality (“Montana DEQ”) to discharge groundwater containing high levels of arsenic and zinc into the Blackfoot and Landers Fork Rivers.<sup>227</sup>

The plaintiffs in *MEIC* argued that the Montana DEQ was violating the right to a clean and healthful environment guaranteed by Montana Constitution, by not requiring a “nondegradation review”.<sup>228</sup> The Montana Supreme Court stated that “[t]he right to a clean and healthful environment guaranteed by [Montana Constitution] art. II, § 3....were intended by the constitution's framers to be interrelated and interdependent and state or private action which implicates either, must be scrutinized consistently. Therefore, courts will apply strict scrutiny to state or private action which implicates either constitutional provision.”<sup>229</sup> The court held that to the extent the DEQ was excluding these activities from nondegradation review without regard to the nature or volume of the substances being discharged, it violated the fundamental state constitutional right to a "clean and healthful" environment.<sup>230</sup> Other successful U.S. cases arguing

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<sup>226</sup> 988 P.2d 1236 (1997).

<sup>227</sup> *Id.* at 1237-38.

<sup>228</sup> *Id.* at 1238.

<sup>229</sup> *Id.* at 1246.

<sup>230</sup> *Id.* at 1249.

a right to a healthy(ful) environment have based in state law, as opposed to U.S. constitutional law, as well.<sup>231</sup>

The case of *Atalig v. Mobil Oil Mariana Islands, Inc.* is significant as it establishes a private right of action for the state constitutional right to a healthy environment in the Northern Mariana Islands, which is a U.S. Commonwealth.<sup>232</sup> In *Atalig*, the court held that under article I, § 9 of the Constitution of the Northern Mariana Islands that “private parties may, as a result of environmental pollution, bring an action to enjoin, recover damages, or both against a state actor for significant environmental injuries sustained or probable to occur.”<sup>233</sup>

The plaintiffs in *Tanner v. Armco Steel* were not so lucky.<sup>234</sup> In *Tanner*, the plaintiffs were a husband and wife who lived in Harris County, Texas, and brought an action to recover for injuries sustained as a result of the exposure to air pollutants emitted by defendants' petroleum refineries and plants located along the Houston Ship Channel.<sup>235</sup> Plaintiffs argued, among other claims including due process under the Fifth Amendment of the U.S. Constitution and 42 U.S.C. § 1983, that they had a right to a healthy and clean environment under the Ninth Amendment of the U.S. Constitution.<sup>236</sup> The court in *Tanner* held that “[t]he Ninth Amendment, through its “penumbra” or otherwise, embodies no legally assertable right to a healthful environment.”<sup>237</sup>

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<sup>231</sup> See e.g., *Save a Valuable Env't (save) v. Bothell*, 89 Wn.2d 862, 871, 576 P.2d 401, 406 (Wash. 1978). (holding that it “is the policy of this state, expressed in the State Environmental Policy Act of 1971 “that each person has a fundamental and inalienable right to a healthful environment . . .” RCW 43.21C.020(3). This right has been threatened in the community directly affected by the environmental consequences of Bothell's zoning decision. The welfare of people living in this area must be served.”).

<sup>232</sup> *Atalig v. Mobil Oil Mariana Islands, Inc.*, 2013 MP 11 (2013). See also U.S. Department of Interior, Office of Insular Affairs, Commonwealth of the Northern Mariana Islands, <https://www.doi.gov/oia/islands/cnmi>.

<sup>233</sup> *Id.* at 24.

<sup>234</sup> *Tanner v. Armco Steel*, 340 F. Supp. 532 (S.D.Tex. 1972).

<sup>235</sup> *Id.* at 534.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

There are several additional cases like *Tanner* where plaintiffs argued that the right to a healthy(ful) environment or the right to clean water should be read into the U.S. Constitution, or read into a state constitution or a statute that did not overtly contain those rights.<sup>238</sup> Those penumbra claims have been unsuccessful.<sup>239</sup> The lesson to take away here is that it is best to assert claims under state constitutions and statutory law that explicitly, on its face, provides for environmental rights.<sup>240</sup> Even better is when the state allows for the direct claims or a private right of action, under the relevant law.<sup>241</sup>

#### v. Soft Law

Turning back to the six sources of environmental human rights law, the fifth source is soft law. Soft law includes international declarations, resolutions, guiding principles, and other international documents, all of which that are not legally binding, but are thought to impact

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<sup>238</sup> See e.g., *Johnson v. City of Atwater*, 2017 U.S. Dist. LEXIS 59188 (E.D. Cal., Apr. 18, 2017) (no human right to water and sanitation); *In re Agent Orange Product Liability Litigation* (E.D.N.Y. 1979) 475 F. Supp. 928, 934 (no right to healthful environment); *Glisson v. City of Marion*, 188 Ill. 2d 211, 214, 720 N.E.2d 1034, 1036, 1999 Ill. LEXIS 979, \*1, 242 Ill. Dec. 79, 79, 49 ERC (BNA) 1708 (1999) (holding plaintiff's interest in preserving the lamprey and the crayfish was not a legally cognizable interest to confer standing under the Illinois Endangered Species Protection Act, nor was it included in plaintiff's constitutional right to a "healthful environment" under Ill. Const. 1970, art. XI.); *Pinkney v. Ohio EPA*, 375 F. Supp. 305, 310, 1974 U.S. Dist. LEXIS 12741, \*11, 6 ERC (BNA) 1625, 4 ELR 20460 (1974) (holding that there no "guarantee of the fundamental right to a healthful environment implicitly or explicitly in the Constitution. Therefore, in light of the prevailing test of a fundamental right, the Court is unable to rule that the right to a healthful environment is a fundamental right under the Constitution.") (citing to *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971)); *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061, 1065, 1973 U.S. Dist. LEXIS 12169, \*9, 5 ERC (BNA) 1755 (finding no constitutional right to a healthy environment under the U.S. constitution or the W. Va. constitution, citing to *Tanner*); *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1430 (9<sup>th</sup> Cir. Haw. 1989) (refusing to recognize a right to a healthy environment under the U.S. Constitution in the context of equal protection. In doing so the court noted that "it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources. The centrality of the environment to all of our undertakings gives individuals a vital stake in maintaining its integrity.").

<sup>239</sup> See *id.*

<sup>240</sup> Hawaii, Illinois, Massachusetts, Montana, North Carolina, Pennsylvania, or Rhode Island. See Section III.iii., *infra*.

<sup>241</sup> See e.g., MONT. CONST. art. 2, § 3, art. 9, § 1, *supra* FN 167.

nation-states decision-making because of their quasi-legal nature.<sup>242</sup> There is a tremendous amount of soft law<sup>243</sup> on the right to a healthy environment, as well as on the rights to water and sanitation.<sup>244</sup> International declarations have included articles relevant to these rights. The UN General Assembly, UN Human Rights Council, Treaty Bodies, and Special Procedures have drafted resolutions and reports providing guidance and recommendations, and they have compiled documents from treaty bodies and other human rights mechanisms across the globe on these rights.<sup>245</sup> There is no need to repeat the entirety of the soft law compiled by others on these rights. Therefore, this article will narrow its discussion to a sampling of international soft law with a focus on environmental racism and will highlight soft law directed specifically to actions by the U.S. government.

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<sup>242</sup> See FN 131, *supra*.

<sup>243</sup> See FN 131, *supra*.

<sup>244</sup> See e.g., Mapping Report, *supra* note 33.

<sup>245</sup> See e.g., United Nations Human Rights Office of the High Commissioner for Human Rights, Environmental Human Rights documents compilation, [https://ap.ohchr.org/documents/dpage\\_e.aspx?m=199](https://ap.ohchr.org/documents/dpage_e.aspx?m=199).

## 1. International Declarations and Other Joint Instruments

The Stockholm Declaration, which the U.S. helped draft in 1972, proclaims that “man 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 that there is a

solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.<sup>246</sup>

At the World Summit for Social Development in 1995, government officials from across the globe—including the United States—gathered and discussed global problems of poverty, unemployment and social exclusion.<sup>247</sup> Governments at the Summit agreed to make it a priority “to promote democracy, human integrity, social justice and solidarity at all levels by ensuring tolerance, non-violence, pluralism, and non-discrimination with full respect for diversity within and among societies.”<sup>248</sup>

Similarly, at the Second United Nations Conference on Human Settlements (“Habitat II”) in 1996, UN members and others discussed ensuring adequate shelter for all, and making human settlements safer, healthier and more liveable, equitable, sustainable and productive. The United States attended this conference and helped draft the Habitat II Agenda which recognizes that ‘equitable human settlements’ are those in which

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<sup>246</sup> Stockholm Declaration, principle 1, *supra* note 88.

<sup>247</sup> United Nations Department of Economic and Social Affairs, Social Inclusion, World Summit for Social Development 1995, <https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995.html>

<sup>248</sup> United Nations Report of the World Summit for Social Development, A/CONF./199/6 (1996), <https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995.html>.

all people, without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, have equal access to housing, infrastructure, health services, adequate food and water, education and open spaces. In addition, such human settlements provide equal opportunity for...equal opportunity for participation in public decision-making; equal rights and obligations with regard to the conservation and use of natural and cultural resources; and equal access to mechanisms to ensure that rights are not violated.<sup>249</sup>

## 2. UN General Assembly Resolutions

The General Assembly, which is the main policymaking and representative organ of the UN,<sup>250</sup> adopted a resolution in 2015 on the human rights to safe drinking water and sanitation.<sup>251</sup> In the 2015 Resolution, the General Assembly recognized that

the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and that the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides

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<sup>249</sup> Habitat Agenda, A/CONF.165/14 at 18 (1996), [https://www.un.org/en/events/pastevents/UNCHS\\_1996.shtml](https://www.un.org/en/events/pastevents/UNCHS_1996.shtml) (emphasis added). In 2001, the UN General Assembly created UN-Habitat, a subsidiary organ of the UN whose primary role is to implement the Habitat Agenda. *See* United Nations, Conferences, Meetings, and Events, Second United Nations Conference on Human Settlements (HABITAT II) (3-14 June 1996, Istanbul, Turkey), [https://www.un.org/en/events/pastevents/UNCHS\\_1996.shtml](https://www.un.org/en/events/pastevents/UNCHS_1996.shtml).

<sup>250</sup> United Nations, General Assembly of the United Nations, <https://www.un.org/en/ga/about/index.shtml>. Each member state of the UN, including the United States, has one vote at the General Assembly. *See id.*

<sup>251</sup> Resolution adopted by the General Assembly, A/RES/70/169 (Dec. 17, 2015), <https://www.un.org/en/ga/70/resolutions.shtml>.

privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living...<sup>252</sup>

In the 2015 Resolution, the General Assembly also called upon nation-states to

To ensure the progressive realization of the human rights to safe drinking water and sanitation for all in a non-discriminatory manner while eliminating inequalities in access, including for individuals belonging to groups at risk and to marginalized groups, on the grounds of race, gender, age, disability, ethnicity, culture, religion and national or social origin or on any other grounds, with a view to progressively eliminating inequalities based on factors such as rural-urban disparities, residence in a slum, income levels and other relevant considerations.<sup>253</sup>

The General Assembly also adopted a resolution in 2017 on the right to safe drinking water.<sup>254</sup> In the 2017 Resolution, the General Assembly recognized that “the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use”.<sup>255</sup> The 2017

Resolution also called upon nation-states to

identify patterns of failure to respect, protect or fulfil the human rights to safe drinking water and sanitation for all persons without discrimination and to address their structural causes in policymaking and budgeting within a broader framework, while undertaking holistic planning aimed at achieving sustainable universal access.<sup>256</sup>

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<sup>252</sup> *Id.* at 4.

<sup>253</sup> *Id.*

<sup>254</sup> Resolution adopted by the General Assembly, U.N. Doc. A/RES/72/178 (Dec. 19, 2017), <https://www.un.org/en/ga/72/resolutions.shtml>.

<sup>255</sup> *Id.* at 4.

<sup>256</sup> *Id.* at 5.

### 3. Treaty Body Opinions and Recommendations

UN Treaty Bodies have had some—but arguably not enough—to say on combatting environmental racism.<sup>257</sup> The UN Committee on the Rights of the Child has interpreted the Convention on the Rights of the Child to prohibit environmental racism.<sup>258</sup> The Committee on the Rights of the Child clarified that the obligation to ensure the equal enjoyment of the human rights relating to a safe, clean, healthy and sustainable environment apply not only to direct discrimination but also to indirect discrimination, such as “when facially neutral laws, policies or practices have a disproportionate impact on the exercise of human rights as distinguished by prohibited grounds of discrimination”.<sup>259</sup>

The Committee has also stated that the Convention “also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.”<sup>260</sup> In addition the Committee on the Rights of the Child has stated that

States and business enterprises should require that their children’s rights impact assessment procedures take fully into account the impacts of proposed policies, programmes and projects on the most vulnerable...States should collect disaggregated data to identify disparate impacts of environmental harm on different groups of children...States should ensure that girls, children with disabilities and children from

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<sup>257</sup> Treaty Bodies are committees of independent experts that monitor the implementation of UN human rights treaties. See United Nations Human Rights, Office of the High Commissioner for Human Rights, Treaty Bodies, <https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.

<sup>258</sup> See Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment for the Thirty-Seventh session, Human Rights Council, U.N. Doc. A/HRC/37/58 (24 January 2018), <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/environmentandrightschild.aspx>

<sup>259</sup> *Id.* at ¶64.

<sup>260</sup> *Id.*



marginalized communities are able to voice their views and that their views are given due weight...Children at particular risk and their caretakers should be provided with assistance in accessing effective remedies.<sup>261</sup>

The UN Committee on the Elimination of Racial Discrimination (the “CERD Committee”) has addressed environmental harm as affecting the rights of indigenous peoples to own, develop, control and use their communal lands, territories, and resources.<sup>262</sup> In addition, the CERD Committee has stated that “policies, practices and the lack of enforcement of certain laws perpetuate racial discrimination, ‘environmental racism’ and other forms of oppression which violate the rights to freedom, equality and adequate access to basic needs such as clean water, food, shelter, energy, health and social care”.<sup>263</sup>

The CERD Committee has also called upon States to recognize that diversity is an essential precondition for sustainable development, encouraged the World Summit on Sustainable Development to ensure the inclusion of human rights and the prohibition of racial discrimination in its final documents, and welcomed the opportunity to cooperate with State parties and other UN bodies in upholding those human rights norms and standards relevant to sustainable development and set forth in CERD.<sup>264</sup>

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<sup>261</sup> *Id.* at ¶66.

<sup>262</sup> Report of the Committee on the Convention on the Elimination of All Forms of Racial Discrimination for the Sixty-eighth and Sixty-ninth sessions, Prevention of Racial Discrimination, Including Early Warning and Urgent Procedures: Decision 1(68) on the United States, U.N. Doc. A/61/18, ¶¶ 7-10 (Oct. 1, 2006).

<sup>263</sup> Report of the Committee on the Convention on the Elimination of All Forms of Racial Discrimination for the Sixtieth and Sixty-first session, Decisions, Statements and General Recommendations: Statement by the Committee to the World Summit on Sustainable Development, U.N. Doc. A/57/18 (Nov. 1, 2002).

<sup>264</sup> *Id.*

The CERD Committee also made specific recommendations to the United States regarding environmental racism in 2014. In its Concluding Observations in response to the United States' reports, the CERD Committee first expressed its concern that

individuals belonging to racial and ethnic minorities, as well as indigenous peoples, continue to be disproportionately affected by the negative health impact of pollution caused by the extractive and manufacturing industries.<sup>265</sup>

Then, the CERD Committee called upon the United States to:

- (a) Ensure that federal legislation prohibiting environmental pollution is effectively enforced at state and local levels;
- (b) Undertake an independent and effective investigation into all cases of environmentally polluting activities and their impact on the rights of affected communities; bring those responsible to account; and ensure that victims have access to appropriate remedies.
- (c) Clean up any remaining radioactive and toxic waste throughout the State party as a matter of urgency, paying particular attention to areas inhabited by racial and ethnic minorities and indigenous peoples that have been neglected to date;
- (d) Take appropriate measures to prevent the activities of transnational corporations registered in the State party which could have adverse effects on the enjoyment of human rights by local populations, especially indigenous peoples and minorities, in other countries...<sup>266</sup>

#### 4. Universal Periodic Review Recommendations

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<sup>265</sup> United Nations International Convention on the Elimination of All Forms of Racial Discrimination, Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of the United States of America, U.N. Doc. CERD/C/USA/CO/7-9 ¶10 (Sept. 25, 2014).

<sup>266</sup> *Id.* at ¶10.

The UN Human Rights Council makes specific recommendations to the United States on human rights through its Universal Periodic Review Process.<sup>267</sup> The United States' entire human rights record has been reviewed twice by the Human Rights Council and during each review Council members made recommendations regarding environmental human rights.

In 2010, the Council's recommendations included to "[i]mplement concrete measures consistent with the Covenant on Civil and Political Rights, to ensure the participation of indigenous peoples in the decisions affecting their natural environment, measures of subsistence, culture and spiritual practices"<sup>268</sup> and to "[p]ut an end to its actions against the realization of the rights of peoples to a healthy environment, peace, development and self-determination."<sup>269</sup> In 2015, the UN Human Rights Council recommended that the U.S.

[r]egularly consult with indigenous peoples on matters of interest to their communities, to support their rights to traditionally owned lands and resources and to adopt measures to effectively protect sacred areas of indigenous peoples against environmental exploitation and degradation.<sup>270</sup>

## 5. Special Procedures

UN Special Rapporteurs and Independent Experts have also weighed in and provided recommendations to fight environmental racism. John Knox, the first UN Special Rapporteur on

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<sup>267</sup> The Universal Periodic Review Process involves a review by the United Nations Human Rights Council of the human rights records of all U.N. member states. The review includes all human rights treaties, regardless of whether or not a member state has ratified the treaty and happens every four and a half years. See United Nations Human Rights Council, Universal Periodic Review, <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>.

<sup>268</sup> United Nations General Assembly, Human Rights Council, Report of the Working Group on the Universal Periodic Review of the United States of America, U.N. Doc. A/HRC/16/11 ¶92.83 (Jan. 4, 2011), [https://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=18060](https://ap.ohchr.org/documents/alldocs.aspx?doc_id=18060).

<sup>269</sup> *Id.* at ¶92.215.

<sup>270</sup> United Nations General Assembly, Human Rights Council, Report of the Working Group on the Universal Periodic Review of the United States of America, U.N. Doc. A/HRC/30/12 ¶176.324 (Jul. 20, 2015).

human rights and the environment from 2012-2015,<sup>271</sup> stated that “[i]n addition to a general requirement of non-discrimination in the application of environmental laws, States may have additional obligations to members of groups particularly vulnerable to environmental harm.”<sup>272</sup>

Catarina de Albuquerque, the former UN Special Rapporteur on the human right to safe drinking water and sanitation from 2008-2014,<sup>273</sup> emphasized that equality and nondiscrimination, not equity, are the "most correct terms for describing the objective of ensuring access to water and sanitation for all according to the needs of each person and for gaining a better understanding of human rights.”<sup>274</sup>

In 2014, the UN Special Rapporteurs on the human right to safe drinking water and sanitation, Léo Heller,<sup>275</sup> and on adequate housing as a component of the right to an adequate

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<sup>271</sup> See U.N. Office of the High Commissioner on Human Rights, John Knox, Former Special Rapporteur on human rights and the environment, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/JohnKnox.aspx>. See also *John Knox finished historic mandate as Special Rapporteur on the Environment and Human Rights*, IUCN.ORG (Aug. 5, 2018), <https://www.iucn.org/news/world-commission-environmental-law/201808/john-knox-finishes-historic-mandate-special-rapporteur-environment-and-human-rights>.

<sup>272</sup> Mapping Report, *supra* note 33. One of the fourteen individual mapping reports drafted by John Knox was on the UN Committee on the Elimination of Racial Discrimination, which did speak to non-discrimination but only touched environmental racism. See John Knox, Individual Report on the International Convention on the Elimination of All Forms of Racial Discrimination, <https://www.ohchr.org/Documents/Issues/Environment/Mappingreport/3.CERD-25-Feb.docx>.

<sup>273</sup> United Nations Human Rights Office of the High Commissioner, Catarina de Albuquerque, Special Rapporteur on the right to safe drinking water and sanitation, <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/CatarinaDeAlbuquerque.aspx>

<sup>274</sup> See CATARINA DE ALBUQUERQUE, ON THE RIGHT TRACK: GOOD PRACTICES IN REALISING THE RIGHTS TO WATER AND SANITATION 145 (2012), [http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices\\_en.pdf](http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf); United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant) ¶13 (“the obligation of States parties to guarantee that the right to water is enjoyed without discrimination”).

<sup>275</sup> United Nations Human Rights Office of the High Commissioner, Mr. Léo Heller, Special Rapporteur on the human rights to safe drinking water and sanitation, <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/LeoHeller.aspx>.

standard of living, Leilani Farha,<sup>276</sup> visited Flint, Michigan.<sup>277</sup> After their visit, the special rapporteurs issued a joint statement declaring that

...we would like to underline that the United States is bound by international human rights law and principles, including the right to life as well as the right to non-discrimination with respect to housing, water and sanitation and the highest attainable standard of health. These obligations apply to all levels of Government – federal, state and municipal. Moreover, they also extend to the various functions of State, including the judiciary. The rights to non-discrimination and equality are core principles of international human rights law. Governments are obliged not only to refrain from discrimination in the design and implementation of laws and policies, but must strive to ensure substantive equality for all. The United States has ratified the United Nations Convention on Elimination of Racial Discrimination which explicitly prohibits and calls for the elimination of racial discrimination in relation to several human rights directly affected by water disconnections, including the right to housing and the right to public health.<sup>278</sup>

The special rapporteurs further recommended that the

Federal and state agencies with relevant authority should require water and sanitation utilities, as a condition for funding and permits, to collect data and report annually on water shut-offs by age, income level, disability, race, and chronic illness. This information

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<sup>276</sup> United Nations Human Rights Office of the High Commissioner, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Ms. Farha, <https://www.ohchr.org/EN/Issues/Housing/Pages/LeilaniFarha.aspx>.

<sup>277</sup> See Joint Press Statement by Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and to right to non-discrimination in this context, and Special Rapporteur on the human right to safe drinking water and sanitation Visit to city of Detroit (United States of America) 18-20 October 2014 (October 20, 2014), <https://www.ohchr.org/en/NewsEvents/Pages/displaynews.aspx?newsid=15188>.

<sup>278</sup> *Id.*

should be made publicly available. Any practice that has a discriminatory impact must be addressed and discontinued.<sup>279</sup>

Margaret Sekaggya, the former UN Special Rapporteur on human rights defenders from 2008-2014,<sup>280</sup> discussed the obligations rooted in equality and non-discrimination toward communities impacted by large-scale development projects.<sup>281</sup> She also pointed out that the principles of equality and non-discrimination imply that the human rights of these groups should not be violated at any stage during the process.<sup>282</sup> Further, Ms. Sekaggya stated that

this means that defenders working on behalf of or as part of populations affected by such projects should be fully and meaningfully involved in their design, implementation and evaluation. Particular attention has to be paid to those who traditionally have been marginalized and excluded from decision-making processes to ensure that their concerns are heard and that the impacts of such projects do not violate their rights.<sup>283</sup>

S. James Anaya, the former UN Special Rapporteur on the rights of indigenous peoples from 2008-2014,<sup>284</sup> emphasized that “extractive industry activities generate effects that often infringe upon indigenous peoples’ rights” and detailed many examples of such infringement, including on their rights to life, health and property.<sup>285</sup> In addition, John Knox, former Special Rapporteur on human

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<sup>279</sup> *Id.*

<sup>280</sup> United Nations Human Rights, Office of the High Commissioner, Special Rapporteur on the situation of human rights defenders, <https://www.ohchr.org/en/issues/srhrdefenders/pages/srhrdefendersindex.aspx>.

<sup>281</sup> United Nations General Assembly, Report of the Special Rapporteur on human rights defenders to the General Assembly, Large-scale development project and human rights defenders, U.N. Doc. A/68/262 ¶ 39 (2013).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> United Nations Human Rights Office of the High Commissioner, Special Rapporteur on the rights of indigenous peoples, <https://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx>.

<sup>285</sup> See United Nations Human Rights, Office of the High Commissioner for Human Rights, Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable

rights and the environment, submitted the following guidelines for States making decisions regarding extractive activities and indigenous peoples' rights:

States have a duty to recognize the rights of indigenous peoples with respect to the territory that they have traditionally occupied, including the natural resources on which they rely. Secondly, States are obliged to facilitate the participation of indigenous peoples in decisions that concern them.... extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent, subject only to narrowly defined exceptions... Thirdly, before development activities on indigenous lands are allowed to proceed, States must provide for an assessment of the activities' environmental impacts. Fourthly, States must guarantee that the indigenous community affected receives a reasonable benefit from any such development. Finally, States must provide access to remedies, including compensation, for harm caused by the activities.<sup>286</sup>

#### **vi. Scholarship**

The sixth source of environmental human rights law discussed herein is “teachings of the most highly qualified publicists of the various nations”. This phrase has been interpreted to mean books and articles answering legal questions and being used to ascertain the content of international law.<sup>287</sup> In terms of how these books and articles are selected to represent the “most highly qualified publicists”, it is generally agreed that the quality of a work, the expertise of a

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Environment, Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Individual Report on the Rights of Indigenous Peoples, Report No. 8, U.N. Doc. A/HRC/18/35 ¶26 (2014), <https://www.ohchr.org/Documents/Issues/Environment/Mappingreport/8.Indigenous-10-April-2014.docx>.

<sup>286</sup> Mapping Report, *supra* note 33 at 21.

<sup>287</sup> Helmersen, *supra* note 132 at 509.

writer, the official authority of a writer, and agreement among multiple writers should all should come into play.<sup>288</sup> While this source of international law is not used as often as the others,<sup>289</sup> scholarship on environmental human rights law still provides an important resource for practitioners.

In 2013, Burns H. Weston and David Bollier published an expansive list of approximately sixty books, book chapters, articles, and draft papers, written during the last five decades which they said represented both the amount and quality of the debate regarding the existence of a human right to environment under international law.<sup>290</sup> Scholarship on environmental human rights law has only grown since 2013.<sup>291</sup>

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<sup>288</sup> *Id.* at 515.

<sup>289</sup> *See e.g., id.* at 510-11.

<sup>290</sup> *See* BURNS H. WESTON & DAVID BOLLIER, GREEN GOVERNANCE – ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS 30 (2013) (listing, for example, DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS (2011); DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT (2012); ALAN E. BOYLE & MICHAEL R. ANDERSON, HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (1996); W. PAUL GORMLEY, HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION (1976); RICHARD P. HISKES, THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE (2009); PHILLIPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 291-307 (2d ed. 2003); Alan E. Boyle, *Human Rights of Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471 (2008); W. Paul Gormley, *The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms*, 3 GEO. INT'L ENVTL. L. REV. 85 (1990); W. Paul Gormley, *The Right to a Safe and Decent Environment*, 28 INDIAN J. INT'L L. 1 (1988); W. Paul Gormley, *The Right of Individuals to be Guaranteed a Pure, Clean and Decent Environment: Future Programs of the Council of Europe*, 1 LEGAL ISSUES EUR INTEGRATION 23 (1975); Gunther Handl, *Human Rights and Protection of the Environment: A Mildly Revisionist View*, in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND ENVIRONMENT 117 (Antonio Cancado Trindade ed., 1992); R.S. Pathak, *The Human Rights System as a Conceptual Framework for Environmental Law*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 205 (Edith B. Weiss ed., 1992); Melissa Thorne, *Establishing Environment as a Human Right*, 19 DEN. J. INT'L L. & POL'Y 301 (1991).

<sup>291</sup> *See e.g.,* Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization*, 31 BERKELEY J. INT'L L. 89 (2013); Martha F. Davis, *Let Justice Roll Down: A Case Study of the Legal Infrastructure for Water Equality and Affordability*, 23 GEO. J. POVERTY LAW & POL'Y 355 (2016); Jim Salzman, *Thirst: A Short History of Drinking Water*, 18 YALE J.L. & HUMAN 94 (2006) (detailing the history of the right to water); LHRL Handbook, *supra* note 116 at 261. *See also* ACRE report, *supra* note 121; THE THURGOOD MARSHALL INSTITUTE AT THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., WATER/COLOR: A STUDY OF RACE & THE WATER AFFORDABILITY CRISIS IN AMERICAN'S CITIES (2019), <https://www.naacpldf.org/our-thinking/issue-report/economic-justice/water-color-a-study-of-race-and-the-water-affordability-crisis-in-american-cities>. In addition, a quick search on LexisNexis for “human rights and the environment” yields thousands of law review articles and a search for “environmental human rights” yields several hundred law review articles that contain those terms.





#### IV. Why U.S. Environmental Justice Attorneys Should Consider Using Environmental Human Rights in Practice

Human rights scholars and practitioners have offered numerous persuasive arguments as to why human rights law should be used by U.S. attorneys in practice.<sup>292</sup> For example, human rights law offers precedent and models that are more on point than anything in the U.S. domestic system.<sup>293</sup> Further, the U.S. Supreme Court has held that where there is no controlling U.S. law, courts should look to customary international law for guidance.<sup>294</sup> Moreover, the federal government, as well as state and local governments, have a formal obligation to comply with human rights law,<sup>295</sup> and to not defeat the object and purpose of any human rights treaty signed by the United States.<sup>296</sup> Courts are also bound to interpret U.S. law as consistent with international law whenever possible.<sup>297</sup>

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<sup>292</sup> See e.g., Deena Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 524 (2003); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1627–29 (2006); Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 469 (2008); Martha F. Davis, *Human Rights in the Trenches: Using International Human Rights Law in "Everyday" Legal Aid Cases*, 41 CLEARINGHOUSE REVIEW 414 (Nov.–Dec. 2007). See also STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 280–81 (2015) (discussing the U.S. Supreme Court increasing trend towards consideration of foreign activities and international law).

<sup>293</sup> See Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006); LHRL Handbook, *supra* note 116.

<sup>294</sup> See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that “International law is part of our law, and must be ascertained and administered by the courts of justice...as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations....”). See also LHRL Handbook, *supra* note 116.

<sup>295</sup> See U.S. Const. Art. IV §2. See also *id.*

<sup>296</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). While the U.S. is not a party to the Vienna Convention, the U.S. recognizes that many of the Convention's provisions have become customary international law. See, e.g., Maria Frankowska, *The Vienna Convention on the Law of Treaties Before U.S. Courts*, 28 VA. J. INT'L L. 281, 299–300 (1988) (discussing how the U.S. has demonstrated that it considers itself bound by the provisions of the Vienna Convention).

<sup>297</sup> See e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) (“[T]he laws of the U.S. ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.”).

In addition to these substantive arguments, specific types of cases that might be appropriate for human rights arguments have been identified, including reports of successful human rights arguments made in U.S. courts and before U.S. policymakers.<sup>298</sup>

Practice guides and handbooks have also been created for U.S. attorneys looking to use human rights in practice.<sup>299</sup> There is an entire library of sample briefs, guides, and handbooks available on the Bringing Human Rights Home Lawyer' Networks' website.<sup>300</sup> Moreover, human rights arguments are increasingly being used in U.S. courts.<sup>301</sup> At this point in time, attorneys, judges, and policymakers are more familiar with human rights than ever before, and some might be waiting for human rights arguments to be made.<sup>302</sup>

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<sup>298</sup> See LHRL Handbook, *supra* note 116; NAT'L JUV. DEFENDER CTR., INTERNATIONAL HUMAN RIGHTS: LAW & RESOURCES FOR DEFENDERS & ADVOCATES 3–6 (2012), <https://njdc.info/wp-content/uploads/2013/11/International-Human-Rights-Law-and-Resources-for-Juvenile-Defenders-and-Advocates.pdf>; COLUM. L. SCH. HUM. RIGHTS INST., HUMAN RIGHTS, SOCIAL JUSTICE, AND STATE LAW: A MANUAL FOR CREATIVE LAWYERING, 30–31 (2008), <https://dignityandrights.org/resources/human-rights-social-justice-and-state-law-a-manual-for-creative-lawyering/>.

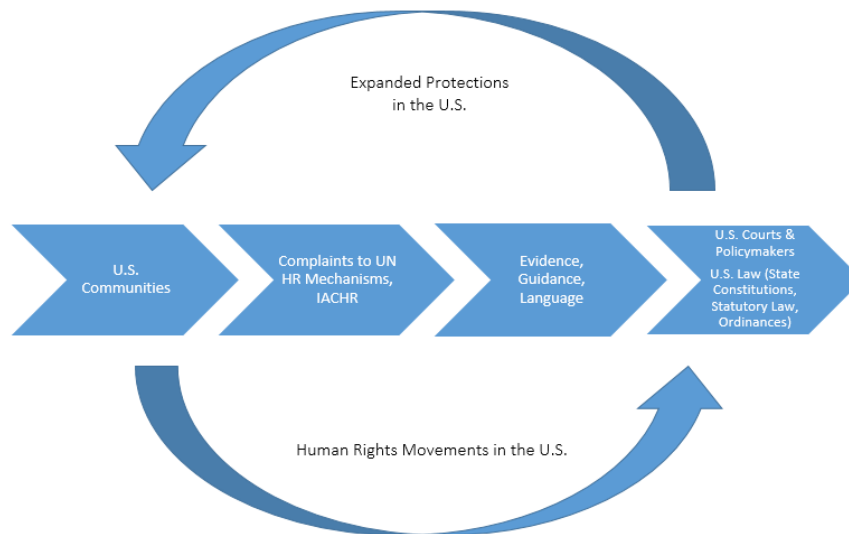
<sup>299</sup> See FORD FOUNDATION, CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES (2004); BRINGING HUMAN RIGHTS HOME, *supra* note 15 at 130-31.

<sup>300</sup> See *U.S. Human Rights Online*, COLUM. L. SCH. HUM. RIGHTS INST., <http://www.law.columbia.edu/human-rights-institute/us-human-rights-online>.

<sup>301</sup> See *e.g.*, OPPORTUNITY AGENDA & THE PROGRAM ON HUMAN RIGHTS AND THE GLOBAL ECONOMY, HUMAN RIGHTS IN STATE COURTS 6–12 (2016) (detailing U.S. court decisions that have considered and interpreted human rights law); LHRL HANDBOOK, *supra* note 116 (providing examples of briefs and descriptions of cases where legal aid attorneys used human rights arguments).

<sup>302</sup> See *e.g.*, AMERICAN SOCIETY OF INTERNATIONAL LAW, BENCHBOOK ON INTERNATIONAL LAW (2014), <https://www.asil.org/benchbook>; COLUMBIA LAW HUMAN RIGHTS INSTITUTE, HUMAN RIGHTS RECOMMENDATIONS TO THE UNITED STATES: A DESK REFERENCE FOR STATE AND LOCAL HUMAN RIGHTS AGENCIES (April 2016), [https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/desk\\_reference.pdf](https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/desk_reference.pdf); COLUMBIA LAW HUMAN RIGHTS INSTITUTE & THE INTERNATIONAL ASSOCIATION OF OFFICIAL HUMAN RIGHTS AGENCIES, USING HUMAN RIGHTS ASSESSMENTS IN LOCAL GOVERNANCE: A TOOLKIT FOR STATE AND LOCAL HUMAN RIGHTS AND HUMAN RELATIONS COMMISSIONS (August 2014), [https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/iaohra\\_toolkit\\_9.11.14\\_reduced.pdf](https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/iaohra_toolkit_9.11.14_reduced.pdf).

What is more, communities across the United States are pushing human rights agendas and forming human rights movements.<sup>303</sup> When more U.S. complaints are filed with United Nations human rights mechanisms and the Inter-American Commission on Human Rights, those groups produce more reports and guidance applicable to the United States. That evidence and



guidance can then be used in more arguments before U.S. courts and U.S. policymakers by U.S. attorneys. In turn, with each new law that is passed referencing human rights and with each decision citing to human rights law, the choice of legal precedent increases.<sup>304</sup> This self-

<sup>303</sup> Law schools are increasingly offering international law courses and international human rights law clinics are flourishing across the U.S. See, e.g., Farida Ali, *Globalizing the U.S. Law School Curriculum: How Should Legal Educators Respond?*, 41 INT'L J. LEGAL INFO. 249, 266–69 (2013); Hurwitz, *supra* note 272 at 507. Martha F. Davis, Johanna Kalb, and Risa E. Kaufman have published a casebook on human rights in the U.S. for law students, as well. MARTHA F. DAVIS ET AL., *HUMAN RIGHTS ADVOCACY IN THE UNITED STATES* (2014). The Aspen Institute has held seminars for U.S. judges on international law. *Justice and Society Program*, ASPEN INST., <https://www.aspeninstitute.org/programs/justice-and-society-program/>.

<sup>304</sup> See COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, *BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY* 5, 13–16 (2012); Joann Kamuf Ward & Sarah Paoletti, *Human Rights Developments at the State and Local Level in the United States: A Bird's-Eye View*, 87 PA. BAR ASS'N. Q. 63, 63–66 (2016). See also *List of Freedom from Domestic Violence Local Resolutions*, CORNELL L. SCH. GLOBAL GENDER JUSTICE CLINIC, <http://www.lawschool.cornell.edu/womenandjustice/DV-Resolutions.cfm>.

perpetuating system moves us closer towards the end goal of expanding human rights protections here in the United States.

This system relies on human rights complaints being brought on behalf of U.S. communities, both to human rights mechanisms and before U.S. courts and policymakers, by U.S. attorneys. The more human rights arguments that are made on behalf of U.S. communities, mean that more human rights arguments can be made in the future and the more likelihood human rights protections will be expanded here in the United States.

The reasons for using human rights in practice in the U.S. discussed above apply to U.S. attorneys generally, who are looking to advance protections in the U.S. for people living in poverty and communities of color, regardless of the legal issue that is being worked on. In terms of arguments as to why environmental justice attorneys, in particular, should use human rights in their work, the M.E.A.N. Petition, discussed in Section III.iv.1 above, lays out these arguments well.<sup>305</sup> First, U.S. law—constitutional, statutory, and administrative—is ill-equipped to fight environmental racism, especially where there are no clear bad acts, but inaction instead.<sup>306</sup> Second, human Rights law is much more clear that the right to non-discrimination is interrelated and interconnected to the right to health, right to life, right to safe drinking water, and right to sanitation.<sup>307</sup>

Environmental human rights law is newer, but has developed a great deal over the last decade, providing clear recommendations for governments to confront environmental racism head on. In addition, environmental human rights law offers U.S. attorneys additional tools,

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<sup>305</sup> Section III.iv.1, *supra*.

<sup>306</sup> *See* Petition, *supra* note 109 at 14-31.

<sup>307</sup> *See generally, id.*

arguments, and strategies for combatting environmental racism, above and beyond what is available in the domestic legal system, and it absolutely should not be ignored. Strategies for using environmental human rights in advocacy in the U.S.—specifics as to when and how—are provided in Section V. below.

#### **V. Guidance for Environmental Justice Attorneys Looking to Use Environmental Human Rights Law in Everyday Practice**

It may seem daunting for a U.S. environmental justice advocate previously unfamiliar with human rights law to figure out how to begin applying it in practice. The Environmental Human Rights Law section, above, provided specific examples of human rights language that can be used in briefs or drafting legislation, human rights documents that can be used as evidence of ongoing harm and of widespread problems, law and/or cases that can be cited as persuasive authority, and more. However just knowing that this law is out there may be overwhelming, and it may be difficult to see how and when to use which source of law.<sup>308</sup>

This section of the article provides concrete guidance and advice on when and how to use environmental human rights law in U.S. environmental justice advocacy. This section will also provide examples of where human rights strategies that have been successful in U.S. advocacy. This section starts with the best or most effective strategies for using environmental human rights arguments before courts or policymakers, discussing what types of environmental human rights law sources might work best in certain situations, while at the same time noting some ineffective or downright counterproductive strategies. This section then moves on to how and when to take environmental justice complaints to UN mechanisms and the Inter-American Commission on Human Rights.

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<sup>308</sup> See LHRL HANDBOOK, *supra* note 116 at 7 (explaining why the Handbook was published).

### **i. Making Environmental Human Rights Arguments Before U.S. Courts and Policymakers**

The best or most effective way to use environmental human rights in U.S. courts is to cite to state constitutions or statutory law that provide for the right to a healthy(ful) environment or right to water. Even better is where there is a recognized private right of action under those state rights that allow for direct claims. Therefore, if your case is being brought in Hawaii,<sup>309</sup> Illinois,<sup>310</sup> Massachusetts,<sup>311</sup> Montana,<sup>312</sup> North Carolina,<sup>313</sup> Pennsylvania,<sup>314</sup> or Rhode Island,<sup>315</sup> cite to the relevant human rights in that state's constitution and bring a direct claim under those rights. In addition to state constitutions, state statutes that provide for environmental human rights, such as in Washington state,<sup>316</sup> should also be cited to, as well as local ordinances.<sup>317</sup> Also consider using these state constitutional provisions, statutes, and/or local ordinances as models for draft legislation and constitutional amendments to push policymakers to adopt new laws in jurisdictions where no such environmental human rights exist.<sup>318</sup>

Another great option to consider is using UN Special Rapporteur and treaty body reports and recommendations as evidence to help build a case. A great example of this is in the case of *Rivero v. Montgomery County*.<sup>319</sup> In *Rivero*, the owners of a farm called the police after finding Ms. Rivero, a farmworker outreach worker for Maryland Legal Aid, and her legal intern, on their

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<sup>309</sup> HAW. CONST. art. 11, § 9, *supra* note 165.

<sup>310</sup> ILL. CONST. art. 11, § 1, *supra* note 166.

<sup>311</sup> MASS. CONST. XCVII, *supra* note 169. *See also* MASS. GEN. LAWS ch. 214, § 7A (2011).

<sup>312</sup> MONT. CONST. art. 2, § 3, art. 9, § 1, *supra* note 167.

<sup>313</sup> N.C. CONST. art. 14, § 5, *supra* note 173.

<sup>314</sup> PA. CONST. art 1, § 27, *supra* note 170.

<sup>315</sup> R.I. CONST. art. 1, § 17, *supra* note 174.

<sup>316</sup> WA. REV. CODE § 43.21C.020 (2), *supra* note 179.

<sup>317</sup> *See* FN 183, *supra*.

<sup>318</sup> *See* Davis, *supra* note 293. *See also* NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY AND HUMAN RIGHTS AT HOME, HUMAN RIGHTS TO HUMAN REALITY: A 10 STEP GUIDE TO STRATEGIC HUMAN RIGHTS ADVOCACY 19 (2014), [http://www.nlchp.org/documents/Human\\_Rights\\_to\\_Human\\_Reality](http://www.nlchp.org/documents/Human_Rights_to_Human_Reality).

<sup>319</sup> *Rivero et al. v. Montgomery Cty., Md. et al*, 259 F.Supp.3d 334 (D. Md. 2017).

property.<sup>320</sup> The Montgomery County police officer who responded issued trespassing tickets against Ms. Rivero and the legal intern.<sup>321</sup> Maryland Legal Aid subsequently filed a complaint in federal court against both the farm and Montgomery County, and alleged violations of the First and Fourteenth Amendments of the U.S. Constitution, as well as the Maryland Declaratory Judgment Act.<sup>322</sup>

Maryland Legal Aid cited two human rights reports in its complaint. The first report was submitted to the U.N. Special Rapporteur on Extreme Poverty and Human Rights and the second report was submitted to the Inter-American Commission on Human Rights, and both reports detailed the nationwide issue of access to migrant camp workers for legal aid attorneys and other service providers.<sup>323</sup>

When the defendants in *Rivero* filed a motion to dismiss arguing that that Ms. Rivero lacked standing to seek declaratory relief because she lacked a “personal stake” in the outcome of the case and had only plead an “abstract injury”, the federal court denied the motion. In its decision, the Court cited to the U.N. Special Rapporteur on Extreme Poverty report—the report that Maryland Legal Aid had cited in its complaint—as evidence of the practice of denying migrant farmworker access, stating that “the likelihood of future controversies of a similar ilk is

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<sup>320</sup> Complaint ¶3, *Rivero et al. v. Montgomery Cty., Md. et al*, 259 F.Supp.3d 334 (D. Md. 2017) (8:16-cv-01186-PWG).

<sup>321</sup> *Id.* at ¶3.

<sup>322</sup> *Id.* ¶¶51-57, ¶58-64.

<sup>323</sup> See Report to U.N. Special Rapporteur on Extreme Poverty and Human Rights (Dec. 13, 2012), <http://www.coloradofarmworkers.org/wp-content/uploads/2017/11/Migrant-Farmworker-Camp-Access-Human-Rights-Complaint-Dec-13-2012.pdf>; Report to Exec. Sec’y of the Inter-American Comm’n on Human Rights (Jan. 20, 2014), <http://www.wjcnj.org/wpcontent/uploads/2014/01/Denial-of-Migrant-Labor-Camp-Access-in-the-US-20Jan2014.pdf>. For more on special rapporteurs and international mechanisms, see LHRL HANDBOOK, *supra* note 116, at 27–28.



far from speculative or abstract.”<sup>324</sup> The court held that Maryland Legal Aid had demonstrated that this camp access problem was likely to occur again, that it had been happening across the county, and that Ms. Rivero had standing.<sup>325</sup>

A third great option is to use the human rights argument as a cherry on top of strong arguments based in state or federal law. This “cherry on top” approach can help to educate judges and opposing counsel on human rights law, and to draw attention to your case and/or legal issue as well. This strategy was implemented in *Belanger v. Mulholland*.<sup>326</sup> The *Belanger* case established that the warranty of habitability in Maine includes the right to water and sanitation.<sup>327</sup> In that case, the plaintiffs made arguments based in state law, then did a national comparison of the warranty of habitability laws across state lines, and then, as a “cherry on top”, argued that under international human rights law, there is a clear right to water and sanitation.<sup>328</sup> The court in the *Belanger* case did not cite to human rights law or the human rights argument, but the plaintiffs in *Belanger* won their case nonetheless.<sup>329</sup>

In addition to these strategies, there are also a few cautionary notes to be emphasized when considering using human rights in litigation in U.S. courts. First, do not make direct claims under human rights treaties, even if that treaty has been ratified by the United States. As explained above, human rights treaties are not directly enforceable in U.S. courts and should only be used as persuasive authority. Second, try to cite first to strong U.S.-based human rights law,

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<sup>324</sup> *Id.* at 342. For more on this case, see Lauren E. Bartlett, *Local Human Rights Lawyering*, 62 ST. LOUIS U. L.J. 887 (2018).

<sup>325</sup> *Rivero*, *supra* note 319.

<sup>326</sup> *Belanger v. Mulholland*, 30 A.3d 836 (Me. 2011). See also *Local Human Rights Lawyering*, *supra* note 324 at 896-900.

<sup>327</sup> *Id.* at 838.

<sup>328</sup> *Belanger*, *supra* note 326, Brief for Appellants at 16-18.

<sup>329</sup> See *Local Human Rights Lawyering*, *supra* note 324 at 899.

then consider citing to regional and UN environmental human rights law. The weaker or less persuasive human rights law will likely be from human rights systems and courts outside of our region.<sup>330</sup> Third, be careful about using environmental human rights arguments when the facts of the case are weak or the state or federal law used is not strong. Fourth, be sure to think carefully about who the judge or decision-maker is when deciding to make a human rights argument. Some judges are known to be friendlier to novel arguments and international law than others.<sup>331</sup>

## **ii. Taking Environmental Justice Complaints to United Nations Human Rights Mechanisms**

Taking complaints to UN special procedures, treaty bodies, and other human rights mechanisms can be beneficial to environmental justice attorneys on many levels. Human rights mechanisms have the unique ability to highlight human rights concerns, open channels of communications between civil society and government, and provide specific guidance on possible solutions offered within the human rights framework.<sup>332</sup>

UN human rights mechanisms can also help bring international attention to a case, and international attention can make a big impact, especially in small towns and rural areas, and sometimes in big cities as well.<sup>333</sup> In addition, advocacy before human rights mechanisms can help local human rights campaigns connect with international human rights movements, with

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<sup>330</sup> For example, from the African System or the European Union.

<sup>331</sup> See *Local Human Rights Lawyering*, *supra* note 324 at 900-901.

<sup>332</sup> See COLUMBIA LAW SCHOOL, HUMAN RIGHTS INSTITUTE, ENGAGING U.N. SPECIAL PROCEDURES TO ADVANCE HUMAN RIGHTS AT HOME: A GUIDE FOR U.S. ADVOCATES 12 (July 2015), [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/special\\_rapporteurs\\_report\\_final.pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/special_rapporteurs_report_final.pdf).

<sup>333</sup> See *e.g.*, Inga T. Winkler & Catherine Coleman Flowers, *America's Dirty Secret: The Human Right to Sanitation in Alabama's Black Belt*, 49 COLUM. HUM. RTS. L. REV. 181, 204-221 (2017) (discussing Alabama community's interactions with UN mechanisms); ENGAGING U.N. SPECIAL PROCEDURES, *supra* note 332 at 11 (discussing interactions with human rights mechanisms after Flint water crisis); <http://homelessnesslaw.org/2012/02/un-to-sacramento-youre-violating-human-rights-of-homeless-people/>. See also LHRL Handbook, *supra* note 116 at 28; National Law Center, *supra* note 318.

others facing similar problems around the world.<sup>334</sup> These transnational connections can allow groups to share best practices, helpful strategies, and connect over frustrations.

UN human rights mechanisms can also issue reports and other documents that can then be cited as evidence later, such as the plaintiffs did in the *Rivero* case, above. In other words, human rights mechanisms can help build the record and “generate or disclose evidence and other information about rights violations, which can be instrumental in laying the foundation for future advocacy efforts.”<sup>335</sup> Interacting with human rights mechanisms can also help strengthen international norms, such as pushing the right to a healthy environment that much closer to being recognized as customary international law.<sup>336</sup>

In terms of specifics on how and when to bring complaints to human rights mechanisms, the Columbia Law School Human Rights Institute has published a handbook, *Engaging with U.N. Special Procedures to Advance Human Rights at Home: A Guide for U.S. Advocates*.<sup>337</sup> This extensive and practical handbook provides great guidance on methods of engagement, how to cultivate relationships, advice on follow-up with special procedures, and specific case studies.<sup>338</sup>

### **iii. Taking Environmental Justice Complaints to the Inter-American Commission on Human Rights**

The Inter-American Commission on Human Rights is very accessible to U.S. environmental justice attorneys. Its breadth of issue coverage, flexibility, and informality help

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<sup>334</sup> See e.g., ENGAGING U.N. SPECIAL PROCEDURES, *supra* note 332 at 15.

<sup>335</sup> *Id.* at 14.

<sup>336</sup> For more on Customary International Law, see Section III.ii, *supra*.

<sup>337</sup> ENGAGING U.N. SPECIAL PROCEDURES, *supra* note 332.

<sup>338</sup> See *id.* See also Benjamin Mason Meier and Yuna Kim, *Human Rights Accountability Through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation*, 26 DUKE J. COMP. & INT'L L. 141, 143 (2015) (arguing how streamlined reporting could be more conducive to accountability for the realization of the human rights to water and sanitation, through an analysis of state reports to the UN Committee on Economic, Social and Cultural Rights this article considers).

make it a great place for U.S. advocacy.<sup>339</sup> In addition, the Commission is in Washington, D.C.,<sup>340</sup> making it easier to travel to than other international human rights forums.

U.S. attorneys can interact with the Inter-American Commission on Human Rights in a variety of different ways. First, attorneys can bring individual cases to the Commission for adjudication, which is what Advocates for Environmental Human Rights did with the *M.E.A.N.* petition discussed above in Section III.iv.1. Second, attorneys can seek precautionary measures, which are a lot like an injunction and are meant to prevent harm in urgent or serious situations.<sup>341</sup> Third, attorneys can request thematic hearings on a particular issue, or set of issues.<sup>342</sup> Fourth, attorneys can request that the Commission conducts on-site investigations and issue reports.<sup>343</sup> Finally, attorneys may seek Inter-American Court advisory opinions.<sup>344</sup>

Not unlike advocacy before UN human rights mechanisms, advocacy before the Inter-American Commission can help bring international attention to local issues and cases, build cross-cutting coalitions, and help to clarify regional human rights norms and government

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<sup>339</sup> See Caroline Bettinger-Lopez, *Primer on the Inter-American Human Rights System*, *Clearinghouse Review*, 42 J. POV. L. & POL'Y 582 (2009), <https://ssrn.com/abstract=1550865>.

<sup>340</sup> Inter-American Commission on Human Rights Website, <http://www.oas.org/en/iachr/>.

<sup>341</sup> See Inter-American Commission on Human Rights Website, About Precautionary Measures, <http://www.oas.org/en/iachr/decisions/about-precautionary.asp>.

<sup>342</sup> See COLUMBIA LAW SCHOOL, HUMAN RIGHTS INSTITUTE, USING THEMATIC HEARINGS AT THE INTER-AMERICAN HUMAN RIGHTS COMMISSION TO ADVANCE U.S. HUMAN RIGHTS ACCOUNTABILITY: A RESOURCE FOR THE BRINGING HUMAN RIGHTS HOME LAWYERS' NETWORK (March 2016), [https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/iachr\\_thematic\\_hearings\\_resource\\_1\\_0.pdf](https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/iachr_thematic_hearings_resource_1_0.pdf) (hereinafter "USING THEMATIC HEARINGS").

<sup>343</sup> Inter-American Commission on Human Rights Website, Activities and Initiatives, Country Visits, <http://www.oas.org/en/iachr/activities/countries.asp>; See also Inter-American Commission on Human Rights Website, Special Procedures, <http://www.oas.org/en/iachr/mandate/rapporteurships.asp>

<sup>344</sup> See Caroline Bettinger-Lopez, *supra* note 339 at 591-592.

obligations.<sup>345</sup> Moreover, the “Commission can be particularly powerful places for victims to have their “day in court”—a luxury that is often denied them in domestic fora.”<sup>346</sup>

There are some possible drawbacks to advocacy before the Inter-American Commission. The Commission takes a long time, sometimes more than 10 years, to issue merits decisions in individual cases.<sup>347</sup> In addition, the Commission’s decisions and recommendations are not enforceable on the U.S. government.<sup>348</sup> Moreover, the U.S. government also often refuses to participate in hearings and other proceedings before the Commission.<sup>349</sup>

Much practical guidance has already been written for U.S. advocates seeking to interact with the Inter-American system. Professor Carrie Bettinger-Lopez wrote a primer on the Inter-American Human Rights System for poverty law attorneys.<sup>350</sup> The Columbia Human Rights Institute has also published a handbook on thematic hearings at the Inter-American Commission on Human Rights for U.S. lawyers.<sup>351</sup>

There are also examples of U.S. advocacy successes in interacting with the Inter-American Commission on Human Rights. For example, Jessica Lenahan, whose case was won before the Inter-American Commission on Human Rights after losing at the U.S. Supreme Court, has spoken

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<sup>345</sup> USING THEMATIC HEARINGS, *supra* note 342 at 8.

<sup>346</sup> Caroline Bettinger-Lopez, *supra* note 339 at 585. *See also* Margaret B. Drew, *Truth Seeking: The Lenahan Case and the Search for a Human Rights Remedy*, 62 ST. LOUIS UNIV. L. J. 903 (2018).

<sup>347</sup> *See* Section III.iv.1., *supra*.

<sup>348</sup> *See* Caroline Bettinger-Lopez, *supra* note 339 at 581.

<sup>349</sup> According to the Commission’s Rules of Procedure, government officials are not obligated to participate in hearings. *See* USING THEMATIC HEARINGS, *supra* note 342 at 6. The U.S. government’s participation in the Commission proceedings between 2008-2016 was robust, however, and there is hope that this would be the case again under a different president.

<sup>350</sup> *See* Caroline Bettinger-Lopez, *supra* note 339.

<sup>351</sup> *See* USING THEMATIC HEARINGS, *supra* note 342.

extensively about her case and the successes that she and her advocates have had in getting government officials to change domestic violence and policing policies in light of her case.<sup>352</sup>

## **VI. Conclusion**

Widespread environmental racism persists in the United States and disproportionate harms in communities of color are worsening due to climate change. While the environmental human rights law and strategies discussed in this article are relatively new, this framework can offer advice, guidance, and encouragement to environmental justice attorneys. In addition, human rights mechanisms offer environmental justice attorneys additional advocacy avenues and chances to bring attention to their issues. Environmental justice attorneys should consider using environmental human rights in their advocacy work and bringing a complaint to the Inter-American Commission on Human Rights or a UN human rights mechanism to help fight environmental racism and expand human rights protections for communities of color in the United States.

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<sup>352</sup> Lenora M. Lapidus, *Jessica Lenahan Lived Through a Domestic Violence Nightmare and Emerged as a Heroic Advocate for Police Reform*, ACLU Blog (June 9, 2017), <https://www.aclu.org/blog/womens-rights/violence-against-women/jessica-lenahan-lived-through-domestic-violence-nightmare>.