

THE PAST, PRESENT, AND FUTURE OF HUMAN RIGHTS AND THE ENVIRONMENT

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I. INTRODUCTION

In April 2018, the *Wake Forest Law Review* held a symposium on human rights and the environment. Although rights-based approaches to environmental protection have been recognized for fifty years, in the last decade they have moved from the periphery to the center of environmental policy in many countries. Speakers addressed issues ranging from recognition of a human right to a healthy environment, to the threats facing environmental defenders around the world, to the effects of climate change and coal ash ponds on communities in North Carolina.

This issue features some of the papers presented in April as well as other articles and student notes on these critical topics. To provide context, this introduction gives an overview of our past, present, and possible future understanding of the relationship between human rights and the environment.

II. A SHORT HISTORY OF HUMAN RIGHTS AND THE ENVIRONMENT

The modern environmental movement quickly recognized that environmental harm undermines the full enjoyment of many human rights, including rights to life and health. In 1968, when the United Nations General Assembly decided to convene the first international environmental conference, it raised concerns about the effects of “the

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continuing and accelerating impairment of the quality of the human environment . . . on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights.”¹ Four years later, the conference adopted the Stockholm Declaration, which states that both the natural and the human-made environment are essential to human well-being “and to the enjoyment of basic human rights—even the right to life itself” and refers to the “right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”²

In 1971, Pennsylvania became the first government in the world to amend its constitution to include environmental rights.³ In 1976, Portugal became the first country to adopt a constitutional “right to a healthy and ecologically balanced human environment,”⁴ and in 1981, the African Charter on Human and Peoples’ Rights became the first international agreement to include an environmental right.⁵ After these early steps, recognition of the human right to a healthy environment spread widely. The right was incorporated in regional instruments in the Americas, Europe, and Asia,⁶ and many countries added an explicit environmental right of some kind to their national constitutions.⁷

1. G.A. Res. 2398 (XXIII), at 2 (Dec. 3, 1968).

2. U.N. Conference on the Human Environment, *Report of the U.N. Conference on the Human Environment*, ¶ 1, 8, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

3. Specifically, the amendment states: “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.” PA. CONST., art. I, § 27. See John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 695 (1999).

4. See DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 214–15 (2012).

5. African Charter on Human and Peoples’ Rights art. 24, June 27, 1981, 1520 U.N.T.S. 217; see BOYD, *supra* note 4, at 84.

6. ASEAN Human Rights Declaration ¶ 28(f), Nov. 18, 2012, <http://aichr.org/documents/> (including a “right to a safe, clean and sustainable environment” as an element of the right to an adequate standard of living); Arab Charter on Human Rights art. 38, May 22, 2004, *reprinted in* 12 INT’L HUM. RTS. REP. 893 (2005), <http://hrlibrary.umn.edu/instreet/loas2005.html> (including a right to a healthy environment as part of the right to an adequate standard of living); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 1, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention] (referring to “the right of every person of present and future generations to live in an environment adequate to his or her health and well-being”); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” art. 11(1), Nov. 17, 1988, 28 I.L.M. 161 (“Everyone shall have the right to live in a healthy environment . . .”).

7. See JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* 31–32 (2015); BOYD, *supra* note 4, at 214.

However, the right fell short of universal recognition. In the United States, for example, only a few states followed Pennsylvania's lead, and efforts to incorporate the right in the national constitution were unsuccessful.⁸ Globally, the situation was complicated by the fact that the seminal United Nations human rights instruments—the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights—do not include the right to a healthy environment, undoubtedly because they were drafted before the rise of the modern environmental movement.⁹

Perhaps more surprisingly, the United Nations has not recognized the right in a subsequent treaty or declaration, despite several opportunities to do so. The 1987 report of the World Commission on Environment and Development,¹⁰ which urged the international community to adopt sustainable development as a goal, presented legal principles drafted by an experts group, the first of which declared that “all human beings have the fundamental right to an environment adequate for their health and well-being.”¹¹ However, the United Nations Conference on Environment and Development, which met in Rio de Janeiro in 1992 and endorsed the Commission's call for sustainable development, did not include this language in the Rio Declaration.¹² Neither did later conferences on sustainable development in Johannesburg in 2002 and Rio de Janeiro in 2012.¹³

8. Between 1967 and 1970, members of Congress introduced four resolutions to amend the Constitution, but none was adopted. See Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment*, 1 DUKE ENV'T L. & POL'Y F. 1, 2 (1991).

9. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

10. Rep. of the World Comm'n on Env't and Dev., U.N. Doc. A/42/427, annex (Aug. 4, 1987).

11. *Id.* at annex I.

12. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*]. Two years later, 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.” Fatma Zohra Ksentini (Special Rapporteur), *Human Rights and the Environment: Final Rep.*, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994), annex I; see Neil A.F. Popović, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487, 504–09 (1996). The Commission did not adopt the draft declaration.

13. See World Summit on Sustainable Development, *Rep. of the World Summit on Sustainable Dev.*, U.N. Doc. A/CONF.199/20 (2002); U.N. Conference on Sustainable Development, *Rep. of the U.N. Conference on Sustainable Dev.*, U.N. Doc. A/CONF.216/16 (Aug. 13, 2012).

The 1992 Rio Declaration did pave the way for inclusion of certain rights in international environmental agreements. Principle 10 of the declaration states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.¹⁴

Although it does not use the term “rights,” Principle 10 supports the recognition and implementation of rights of access to information, public participation, and remedies in environmental matters. These access rights became the basis of a new agreement, the 1998 Aarhus Convention, negotiated under the auspices of the U.N. Economic Commission for Europe, which set out governments’ obligations in more detail.¹⁵ In addition, the Governing Council of the U.N. Environment Programme adopted guidelines for all states for the development of national legislation on the rights to information, participation, and remedy.¹⁶

At the national level, the widespread recognition of the right to a healthy environment in constitutions was not always followed by effective implementation, or any implementation at all. Some governments regarded the inclusion of the right in their constitutions as merely aspirational.¹⁷ In some other countries, the right joined a list of legal protections that are breached more often than they are observed. At the international level, the regional agreements recognizing the right usually did not make it justiciable, with the important exception of the African Charter.

Nevertheless, in the late 1980s and early 1990s, many national courts began to take the right seriously, applying it to specific issues and often ordering far-reaching relief.¹⁸ At the same time, the European Court of Human Rights and the Inter-American Court of Human Rights (as well as some national courts, such as those of India and Pakistan) started to “green” other human rights, including the

14. *Rio Declaration*, *supra* note 12.

15. *See, e.g.*, Aarhus Convention, *supra* note 6, arts. 3–9.

16. U.N. ENVTL. PROG., GUIDELINES FOR THE DEVELOPMENT OF NATIONAL LEGISLATION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS 3–4 (2010).

17. MAY & DALY, *supra* note 7, at 102.

18. *See* BOYD, *supra* note 4, at 214–15; MAY & DALY, *supra* note 7, at 152–69 (collecting examples of court decisions enforcing environmental rights).

rights to life, to property, and to privacy in the home. They held that environmental harm may interfere with the full enjoyment of these rights and that governments have obligations to protect against such harm.¹⁹

The United Nations human rights oversight mechanisms followed their lead. The treaty bodies appointed to oversee compliance with the two international covenants and other treaties, including the Convention on the Elimination of Racial Discrimination and the Convention on the Rights of the Child, made clear that those agreements protect against violations related to environmental harm.²⁰ In addition, the independent experts (usually called special rapporteurs) appointed by the principal intergovernmental United Nations human rights body, the Human Rights Council, issued reports describing how environmental harm caused violations of human rights within their mandates.²¹

This environmental human rights jurisprudence had become quite detailed by 2012, when the Human Rights Council decided for the first time to appoint an independent expert to study the human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, to identify best practices in the use of such obligations, and to issue a series of public reports to the Council.²² I had the honor of receiving the three-year mandate. With the help of pro bono legal research by attorneys and academics, I described the statements of international human rights bodies on environmental issues in eleven reports, each of which addressed one source or set of sources.²³

Despite the diversity of the human rights bodies analyzed, the reports' views on the relationship of human rights law and the environment were remarkably coherent: virtually every source identified human rights whose enjoyment was infringed or threatened by environmental harm, and concluded that governments had obligations under human rights law to protect against such harm. These obligations included procedural obligations (such as duties to provide information, facilitate participation, and provide access to remedies), substantive obligations (including duties to regulate

19. See generally John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Mapping Report*, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013) [hereinafter *Mapping Report*].

20. See *id.* ¶ 12. Reports prepared for the United Nations Independent Expert on human rights and the environment on each of the treaty bodies are available at <http://srenvironment.org/mapping-report-2014-2/>.

21. See *id.* ¶¶ 10–11.

22. Human Rights Council Res. 19/10, U.N. Doc. A/HR/RES/19/10, at 2–3 (Mar. 22, 2012).

23. Another three reports examine international environmental instruments. See *Mapping Report*, *supra* note 19 (summarizing the reports).

environmental harm from private actors), and specific obligations to those in particularly vulnerable situations.²⁴

III. THE PRESENT STATE OF ENVIRONMENTAL HUMAN RIGHTS LAW

Any summary of the present state of a rapidly evolving area of the law will be outdated almost immediately, like a snapshot of an airplane leaving the runway. Nevertheless, it is worth noting some of the many ways that the relationship between human rights and the environment is now an established part of the legal landscape at the national, regional, and global levels.

More than 150 countries recognize the right to a healthy environment in their national constitutions or in regional agreements.²⁵ In addition, states have implemented many rights in their domestic law and practice.²⁶ David Boyd, who succeeded to the U.N. mandate on human rights and the environment in August 2018, argues that the adoption of constitutional rights to a healthy environment has led to higher levels of environmental protection through stronger laws and judicial decisions.²⁷ Among its other advantages, he states that because the right is consistently interpreted to include the rights of access to information, public participation, and access to justice, its recognition has contributed to heightened public control over environmental policies.²⁸

At the regional level, the Aarhus Convention now has forty-seven parties, including most of Europe and much of central Asia. The Convention has a compliance committee that has heard dozens of cases, and the Organisation for Security and Co-operation in Europe maintains a network of Aarhus Centres that disseminate information and provide educational services and training projects.²⁹ In March 2018, Latin American and Caribbean countries adopted another regional agreement that, like the Aarhus Convention, requires its parties to safeguard rights to information, participation, and remedy in environmental matters.³⁰ The new agreement goes beyond Aarhus

24. See, e.g., *id.* ¶¶ 29–30, 36, 41, 44–45, 47, 58, 69–76.

25. David R. Boyd, *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 17–23 (John H. Knox & Ramin Pejman eds., 2018).

26. See generally John H. Knox, *Rep. of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Compilation of Good Practices*, U.N. Doc. A/HRC/28/61 (Feb. 3, 2015) (describing more than 100 good practices in the use of human rights obligations relating to environmental protection).

27. Boyd, *supra* note 25, at 17, 25–36.

28. *Id.*

29. Aarhus Centres, UNITED NATIONS ECON. COMM'N FOR EUR., <http://www.unece.org/env/pp/acintro.html> (last visited Oct. 18, 2018).

30. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean art. 1,

in some respects, including by requiring governments to take steps to protect environmental defenders.³¹ Known as the Escazú Agreement, the treaty was opened for signature in September 2018 and will enter into force when eleven of its signatories have ratified it.³²

Regional human rights tribunals have continued to expand their jurisprudence on human rights and the environment. For example, in May 2017, the African Court of Human Rights issued its first decision in an environmental case, holding that Kenya violated the rights of the Ogiek, an indigenous people, by attempting to evict them from their traditional home in the Mau Forest.³³ In November 2017, the Inter-American Court of Human Rights issued a sweeping advisory opinion on the interaction of human rights and international environmental law that, among other things, declared the existence of an implicit right to a healthy environment under the American Convention on Human Rights, and provided a human rights context for the duty to prevent transboundary environmental harm.³⁴

At the United Nations, too, there is greater agreement than ever before that human rights law is relevant to environmental protection. In 2015, the Human Rights Council renewed my mandate for another three years, changed the title to Special Rapporteur, and requested, among other things, that the mandate promote the realization of human rights obligations relating to the environment.³⁵ Over the next three years, I undertook country visits, received communications alleging violations, and issued reports on specific thematic issues, including climate change, biodiversity, and the effects of environmental harm on the rights of children.³⁶

Mar. 4, 2018, U.N. Doc. LC/CNP10.9/5, https://accessinitiative.org/sites/default/files/regional_agreement_on_access_to_information_-_costa_rica.pdf.

31. *Id.* art. 9.

32. *Id.* arts. 21–22.

33. African Commission on Human and Peoples' Rights v. Republic of Kenya, No. 006/2012, Decision, African Court on Human and Peoples' Rights, ¶ 216 (May 26, 2017), https://www.escri-net.org/sites/default/files/caselaw/ogiek_case_full_judgment.pdf; see Lilian Chenwi, *The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 59, 77–82 (John H. Knox & Ramin Pejan eds., 2018).

34. *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity—Interpretation and Scope of Articles 4.1 and 5.1, In Relation to Articles 1.1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017); see Maria L. Banda, *Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights*, ASIL INSIGHTS (May 10, 2018), <https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human>.

35. Human Rights Council Res. 28/11, U.N. Doc. A/HRC/RES/28/1 (Mar. 26, 2015).

36. John H. Knox, *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and*

In my final report to the Council, I presented sixteen Framework Principles on Human Rights and the Environment, which summarize the main human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, including obligations concerning nondiscrimination in environmental law and policy; the protection of environmental defenders; freedom of expression and association in environmental matters; rights of information, public participation, and effective remedies; substantive obligations to adopt, maintain, and enforce nonretrogressive and effective environmental standards; and obligations relating to indigenous peoples and others who are particularly at risk from environmental harm.³⁷

The Human Rights Council's response to my reports was extremely positive. Over the course of the mandate, it adopted by consensus a series of increasingly strong resolutions on human rights and the environment.³⁸ For example, in March 2017, the Council called on states to "adopt and implement strong laws ensuring, among other things, the rights to participation, to access to information and to justice, including to an effective remedy, in the field of the environment," and encouraged states to address compliance with their human rights obligations relating to the environment in their reports on human rights compliance mechanisms.³⁹ The following year, the Council took note with appreciation of the report presenting the Framework Principles, and called upon states "to implement fully their obligations to respect and ensure human rights without distinction of any kind, including in the application of environmental laws and policies."⁴⁰

As human rights bodies have increasingly addressed environmental issues, environmental institutions have become more interested in rights-based approaches to environmental protection. In 2018, for example, the United Nations Environmental Programme

Sustainable Environment, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016) (climate change); John H. Knox, *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/34/49 (Jan. 19, 2017) (biodiversity); John H. Knox, *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/37/58 (Jan. 24, 2018) (children).

37. See generally John H. Knox, *Rep. of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, annex, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018).

38. See Marc Limon, *The Politics of Human Rights, the Environment, and Climate Change at the Human Rights Council: Toward a Universal Right to a Healthy Environment?*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 189 (John H. Knox & Ramin Pejan eds., 2018).

39. Human Rights Council Res. 34/20, U.N. Doc. A/HRC/RES/34/20, at 3–4 (Mar. 24, 2017).

40. Human Rights Council Res. 37/8, U.N. Doc. A/HRC/RES/37/8, at 3 (Mar. 22, 2018).

announced a new environmental rights initiative designed to support individuals and communities in exercising their environmental rights and to assist governments in safeguarding these rights.⁴¹

Two of the articles in this issue focus on how human rights are affecting the international response to two global environmental challenges: the loss of biodiversity and the effects of climate change. Elisa Morgera, a professor of law at the Strathclyde University School of Law in Glasgow, assesses the relationship between the Convention on Biological Diversity (“CBD”) and international human rights law.⁴² She emphasizes the rapid development of this relationship in the last five years, reviewing the Special Rapporteur’s 2017 report on biodiversity conservation and human rights and the recent advisory opinion of the Inter-American Court of Human Rights, both of which draw on and incorporate decisions of the parties to the CBD. She notes that with respect to indigenous and tribal peoples, in particular, “CBD decisions, even if they do not employ human rights terminology, provide helpful guidance for the interpretation and implementation of international human rights standards.”⁴³

Morgera explains how CBD instruments can provide “operational detail” to “rather abstract international human rights obligations.”⁴⁴ In particular, she describes two sets of guidelines prepared under the auspices of the CBD: the Akwé: Kon Guidelines on environmental and sociocultural assessments of developments that may affect sacred sites or the traditional territory of indigenous and local communities and the Mo’otz Kuxtal Voluntary Guidelines on consent and benefit-sharing from the use of traditional knowledge. Although these guidelines are nominally voluntary, Morgera points out that they can influence the interpretation of binding obligations and, as a practical matter, “it becomes increasingly difficult for a State to defend an approach that goes against an internationally recognized best practice, particularly when it has intensely participated in intergovernmental negotiations and eventually agreed upon it.”⁴⁵

Another expanding area of inquiry is the relationship of climate change and human rights law. The first argument that the failure to effectively address climate change violates human rights was made over a decade ago when representatives of the Inuit people filed a complaint against the United States before the Inter-American Commission for Human Rights.⁴⁶ Although the complaint did not

41. See *UN Launches Environmental Rights Initiative*, UN NEWS (Mar. 6, 2018), <https://news.un.org/en/story/2018/03/1004242>.

42. Elisa Morgera, *Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law*, 53 WAKE FOREST L. REV. 691, 691 (2018).

43. *Id.* at 700.

44. *Id.* at 701.

45. *Id.* at 710.

46. SHEILA WATT-CLOUTIER, PETITION TO THE INTER AMERICAN COMMISSION ON HUMAN RIGHTS SEEKING RELIEF FROM VIOLATIONS RESULTING FROM GLOBAL

result in a decision from the Commission, it did open the door to greater consideration of the effects of climate change on human rights, including reports from United Nations experts, resolutions by the Human Rights Council, and, eventually, inclusion of specific references to human rights in the Paris Agreement adopted in 2015.⁴⁷ Today, the international community accepts that climate change threatens a vast range of human rights and that responses to climate change must take into account human rights obligations.

It is no accident that an indigenous people, the Inuit, first raised the alarm that climate change is a threat to human rights. Even though climate change will affect all of us eventually, its effects are not evenly distributed. Alexander Pearl, a professor at Texas Tech University School of Law and an enrolled citizen of the Chickasaw Nation of Oklahoma, reminds us forcefully that indigenous people are at the epicenter of climate change.⁴⁸ Their close, generations-long relationship with their land gives them a unique perspective on this slow-motion disaster and allows them to recognize changes that may be invisible to others who lack their time scale. In fact, Pearl writes,

They occupy critical points along the timeline of the Climate Crisis from beginning to end. The extractive hydrocarbon industry has significant production in indigenous areas in the Americas, indigenous groups from all over the world gathered in Paris in 2015 to advocate for their positions in the Conference of Parties (“COP”) agreement, and each day indigenous peoples see the effects of climate change in their communities.⁴⁹

Pearl explains why climate change is especially devastating to indigenous peoples, and he argues that legal institutions should do more to incorporate their voices. For example, their human right to free, prior, and informed consent before actions are taken that affect them should be respected in international climate negotiations such as the Paris Agreement, as well as in national law. And he stresses that they can and should vindicate their rights through litigation, including by seeking restitution for harm done to them and to their land. He concludes: “There is no alternative to our habitable Earth.

WARMING CAUSED BY ACTS AND OMISSIONS OF THE UNITED STATES (Dec. 7, 2005), https://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf.

47. See U.N. Framework Convention on Climate Change, Paris Agreement, TREATIES-XXVII.7.d (2015); Lavanya Rajamani, *Human Rights in the Climate Regime: From Rio to Paris and Beyond*, in THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 236, 242–47; John H. Knox, *The Paris Agreement as a Human Rights Treaty*, in HUMAN RIGHTS AND 21ST CENTURY CHALLENGES: POVERTY, CONFLICT, AND THE ENVIRONMENT (Dapo Akande et al. eds., forthcoming 2019).

48. M. Alexander Pearl, *Human Rights, Indigenous Peoples, and the Global Climate Crisis*, 53 WAKE FOREST L. REV. 713, 724 (2018).

49. *Id.*

Indigenous peoples across the globe see this, live this, and feel this. It is time to listen to us.”⁵⁰

In many ways, the United States lags behind other countries in recognizing the links between human rights and a healthy environment.⁵¹ Early attempts to recognize a human right to a healthy environment in U.S. law were generally supplanted by a heavily regulatory, command-and-control approach that usually ignores the potential application of civil rights law or constitutional principles.⁵² Environmental law in the United States nevertheless provides the public some important rights: for example, environmental impact procedures incorporate requirements for public information and consultation,⁵³ and many important environmental statutes provide for “citizen suits” through which individuals and groups may seek the direct enforcement of environmental laws in the courts.⁵⁴ But these provisions are not usually regarded as an outgrowth or requirement of human rights.

In the early 1980s, activists raised public awareness of the intersection of human rights and environmental harm by drawing attention to racial disparities in siting hazardous waste facilities. The birthplace of the environmental justice movement is often considered to be Warren County, North Carolina, where the decision to bury sixty thousand tons of soil contaminated by polychlorinated biphenyl (“PCB”) in a landfill located in a predominantly African-American community in 1982 led to widespread civil disobedience, hundreds of arrests, and national attention to the problem of “environmental racism.”⁵⁵ In 1994, President Clinton issued Executive Order 12898,

50. *Id.* at 738.

51. Pennsylvania continues to be an exception. See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013); *Pa. Env'tl. Def. Found. v. Commonwealth*, 108 A.3d 140, 159 (Pa. Commw. Ct. 2015), *rev'd*, 161 A.3d 911 (Pa. 2017).

52. An important recent attempt to bring a rights-based environmental case to federal court is *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), a suit brought by children and youth who claim that the failure of the U.S. government to address climate change violates the public trust doctrine and their constitutional rights to equal protection and due process. See generally Michael C. Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67 Am. U. L. Rev. 1 (2017).

53. See, e.g., 40 C.F.R. § 1503.1(a)(4) (2017).

54. See Clean Air Act of 1970 § 304(a), 42 U.S.C. § 7604(a) (2012); Federal Water Pollution Control Act Amendments of 1972 § 505(a), 33 U.S.C. § 1365(a) (2012).

55. Some of the seminal works drawing attention to and analyzing issues of environmental justice include ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 29–30 (3d ed. 2000); UNITED CHURCH OF CHRIST, COMM'N FOR RACIAL JUSTICE, *TOXIC WASTES AND RACE IN THE UNITED STATES* xi (1987); Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENVTL. L. 1, 2–4 (1995); Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 792, 801 (1993).

entitled “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations,” which provides that each federal agency, “[t]o the greatest extent practicable and permitted by law . . . shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”⁵⁶ However, the order does not provide for private enforcement,⁵⁷ and in practice, the Environmental Protection Agency (“EPA”) has a very poor record of responding to civil rights complaints. In fact, in 2016, 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 2016.⁵⁸

Ironically, the failure to effectively enforce these protections has occurred at the same time that evidence mounts of racial disparities that go beyond the initial concerns over siting of hazardous waste facilities. In particular, a cascade of recent studies indicates that racial and ethnic minorities are exposed to higher levels of particulate

56. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

57. Individuals do have an implied right of action to enforce compliance with §601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which provides that no one in the United States shall be denied the benefits of, or subjected to discrimination under, any program or activity receiving federal financial assistance on the ground of race, color, or national origin. 42 U.S.C. § 2000d (2012). However, the Supreme Court has held that private actions under Title VI are limited to cases of intentional discrimination. Although federal agencies may issue regulations directed at disparate impact, individuals may not sue in federal court to enforce them. *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001).

58. U.S. COMM’N ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY’S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898, at 40 (2016). Nevertheless, advocates continue to pursue environmental justice cases, with occasional success. For example, in May 2018, the North Carolina Environmental Justice Network, Rural Empowerment Association for Community Help, and Waterkeeper Alliance announced that they had reached a settlement agreement with the North Carolina Department of Environmental Quality (“DEQ”) regarding a 2014 complaint filed with EPA, which had alleged that DEQ was allowing “industrial swine facilities to operate with ‘grossly inadequate and outdated systems of controlling animal waste’ resulting in an ‘unjustified disproportionate impact on the basis of race and national origin against African Americans, Latinos and Native Americans.’” Under the agreement, DEQ committed to “new policies to ensure compliance with federal civil rights laws, including a language access program and the development of an Environmental Justice tool to examine demographic, health, and environmental characteristics of communities impacted by DEQ policies.” See *Groundbreaking Environmental Settlement Signed*, YALE L. SCH. (May 3, 2018), <https://law.yale.edu/yls-today/news/groundbreaking-environmental-settlement-signed>.

and other types of air pollution.⁵⁹ The different levels of exposure may be due not only to relative proximity to sources of pollution but also to different levels of enforcement. For example, the water crisis in Flint, Michigan, in which a majority African-American community was exposed for many months to high levels of lead in their drinking water, was primarily a failure to enforce existing water quality standards.⁶⁰ Would a predominantly white community have received the same lack of attention? Dan Kildee, the representative of Flint in Congress, called race “the single greatest determinant of what happened in Flint.”⁶¹

In his piece for this symposium issue, Wake Forest University School of Law student Logan Judy studies patterns of enforcement in environmental cases in an effort to determine whether the EPA systematically underenforces environmental laws in areas with a high racial minority population.⁶² Drawing on data from the Enforcement Compliance History Online Database from 2010 to 2015, Judy assesses the severity of enforcement actions according to whether they resulted in only informal enforcement, formal administrative enforcement by the EPA, or a judicial or legal proceeding. He then maps the enforcement actions by congressional district and characterizes each district according to several factors, including the district’s percentage of minorities. He finds that when the percentage of minorities is higher in a particular district, the level of EPA enforcement is lower, and vice versa.⁶³ This relationship is not correlated with income, since median household income level per district has neither a positive nor a negative effect on the level of enforcement. Judy’s study indicates that the higher level of exposure of minority groups to pollution is not just because they live closer to polluting sources; it may also be because the laws regulating pollution are not enforced as strictly in communities with high minority populations.

59. See Vann R. Newkirk II, *Trump’s EPA Concludes Environmental Racism is Real*, ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/> (describing a recent study by the EPA’s National Center for Environmental Assessment as well as other studies).

60. David A. Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice as Equal Protection*, 111 NW. U. L. REV. ONLINE 93, 93–94 (2017).

61. John Eligon, *A Question of Environmental Racism in Flint*, N.Y. TIMES (Jan. 21, 2016), <https://www.nytimes.com/2016/01/22/us/a-question-of-environmental-racism-in-flint.html>.

62. Logan Judy, Empirical Study, *Liberty and Environmental Justice for All? An Empirical Approach to Environmental Racism*, 53 WAKE FOREST L. REV. 739, 740 (2018).

63. *Id.* at 756–57.

IV. POSSIBLE FUTURES FOR HUMAN RIGHTS AND THE ENVIRONMENT

The growing clarity of the human rights norms relating to environmental protection highlights just how wide the gap is between principle and practice. Perhaps the most striking sign is our failure to protect children from environmental harm. The Convention on the Rights of the Child has the most explicit reference to the importance of environmental protection of any United Nations human rights treaty.⁶⁴ Adopted in 1989, after the relationship between human rights and the environment had started to become much clearer, it requires its parties to pursue full implementation of children's right to health, including by taking 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."⁶⁵ And yet the World Health Organization estimates that more than one quarter of the deaths of children under the age of five, as well as of the total disease burden on them, result from avoidable environmental harm.⁶⁶ Air pollution causes approximately 600,000 deaths and water pollution another 350,000 deaths of these small children every year.⁶⁷

Another way that governments are falling far short of their obligations is their failure to protect environmental human rights defenders—those who work to safeguard the environmental rights of others as well as their own. Environmental defenders have the right to freedom of expression, peaceful assembly, and association in relation to environmental issues as well as the right to seek information, participate in decision-making, and pursue legal remedies for environmental harm. Nevertheless, governments often violate these rights or fail to protect against abuses by corporations and other powerful actors.⁶⁸ Thanks to the work of Global Witness, a human rights organization based in London, we now know that on

64. Convention on the Rights of the Child pmb., Nov. 20, 1989, 1577 U.N.T.S. 3.

65. *Id.* art. 24, ¶ 2.

66. See WORLD HEALTH ORG., DON'T POLLUTE MY FUTURE! THE IMPACT OF THE ENVIRONMENT ON CHILDREN'S HEALTH 1–2 (2017), <http://apps.who.int/iris/bitstream/handle/10665/254678/WHO-FWC-IHE-17.01-eng.pdf;jsessionid=ED09DC9E4B40AEC1AEEB1C4C98505800?sequence=1>.

67. *Id.* at 3, 13, 15. Of the 600,000 deaths due to air pollution, about 500,000 are from household air pollution and 100,000 from ambient air pollution. UNICEF, CLEAR THE AIR FOR CHILDREN: THE IMPACT OF AIR POLLUTION ON CHILDREN 24 (2016), https://www.unicef.org/publications/files/UNICEF_Clear_the_Air_for_Children_30_Oct_2016.pdf; see also John H. Knox, *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶¶ 16, 19, U.N. Doc. A/37/58 (Jan. 24, 2018).

68. See CTR. FOR INT'L ENVTL. LAW, A DEADLY SHADE OF GREEN: THREATS TO ENVIRONMENTAL HUMAN RIGHTS DEFENDERS IN LATIN AMERICA 27 (2016), https://www.ciel.org/wp-content/uploads/2016/08/Deadly_shade_of_green_English_Aug2016.pdf.

average about four environmental defenders around the world are killed every week.⁶⁹ Many more are threatened, harassed, unlawfully detained or imprisoned, or subjected to violence.⁷⁰

At the April 2018 symposium, Kenyan environmental advocate Phyllis Omido spoke powerfully about her experience after learning that her infant son had become sick by exposure to lead as a result of her work at a battery smelter in Mombasa. As she tried to find out more and to tell others in her community about the hazards they faced, she was subjected to threats and physical assault. Fortunately, she also received increasing international attention, including from Human Rights Watch and the Goldman Environmental Foundation, which named her the African recipient of its prestigious annual Goldman Prize in 2015.⁷¹ Using the award money, Phyllis set up a nonprofit organization to fight for the human rights of those affected by environmental pollution.⁷² Her organization, the Centre for Justice, Governance, and Environmental Action, forced the closure of the plant and is pursuing a class action lawsuit seeking compensation for the victims and a cleanup of the hazardous waste.⁷³

The need for more urgent attention to this global crisis is obvious. In addition to the moral and legal imperative of standing up for the rights of these courageous people, it is clear that if we do not protect those who are on the front line of environmental defense, we cannot protect the environment. At the symposium, Carole Excell, the director of The Access Initiative at the World Resources Institute, described the inclusion in the Escazú Agreement of a specific provision requiring governments to take steps to protect environmental defenders—a first in any international environmental

69. See GLOBAL WITNESS, *AT WHAT COST? IRRESPONSIBLE BUSINESS AND THE MURDER OF LAND AND ENVIRONMENTAL DEFENDERS IN 2017*, at 45 (2018), <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/>; see also GLOBAL WITNESS, *DEADLY ENVIRONMENT 4* (2014), <https://www.globalwitness.org/en/campaigns/environmental-activists/deadly-environment/>.

70. See JOHN H. KNOX, *ENVIRONMENTAL HUMAN RIGHTS DEFENDERS: A GLOBAL CRISIS* 13 (2017), <https://www.universal-rights.org/wp-content/uploads/2017/03/EHRDs-spread.pdf>; see also Michel Forst (Special Rapporteur on the situation of human rights defenders), *Situation of Human Rights Defenders*, ¶ 30, U.N. Doc. A/71/281 (Aug. 3, 2016).

71. *The 2015 Goldman Environmental Prize Recipient Award Profile*, GOLDMAN ENVTL. PRIZE, <https://www.goldmanprize.org/recipient/phyllis-omido/> (last visited Oct. 18, 2018).

72. Fred Pearce, *'East African Erin Brockovich' Wins Prize for Closing Polluting Lead Smelter*, GUARDIAN (Apr. 19, 2015), <https://www.theguardian.com/environment/2015/apr/20/east-african-erin-brockovich-wins-prize-for-closing-polluting-lead-smelter>.

73. Jonathan Watts, *Kenya's 'Erin Brockovich' Defies Harassment to Bring Anti-pollution Case to Courts*, GUARDIAN (Feb. 14, 2018), <https://www.theguardian.com/world/2018/feb/14/kenyas-erin-brockovich-defies-harassment-to-bring-anti-pollution-case-to-courts>.

instrument.⁷⁴ Since Latin America is the region with the highest number of environmental defender killings,⁷⁵ this is an important step in the right direction. However, it remains to be seen how well it will be implemented in practice.

In addition to closing gaps in implementation, the future will see efforts to close gaps in coverage. Now that the great majority of United Nations member states have recognized the human right to a healthy environment in their national laws or regional agreements, or both, it seems increasingly anomalous that the United Nations itself has not recognized the right in a global instrument. In 2017, the Government of France proposed a new Global Pact on the Environment for consideration by the United Nations, the first article of which states that “every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment.”⁷⁶ In 2018, the outgoing and incoming Special Rapporteurs on human rights and the environment urged the General Assembly to recognize the right,⁷⁷ either through a new treaty such as the Global Pact,⁷⁸ a protocol to an existing treaty, or a resolution such as the 2010 General Assembly resolution on the right to water.⁷⁹

Finally, some advocates, governments, and courts are exploring the boundaries of environmental rights by extending them to future generations and the rights of nature. In her paper for the symposium, Erin Daly describes innovative ways that national courts have applied constitutional environmental rights to protect nature and natural resources. She points out that with respect to environmental protection, a weakness of human rights law is its focus on *human* rights, which may exclude components of the natural world that do not directly or evidently benefit human beings.⁸⁰

Daly reviews the key role played by courts in giving life to constitutional environmental rights in many countries, from

74. Carole Excell, Dir., World Res. Inst. Access Initiative, Remarks at Wake Forest Law Review Symposium: Rights and Resources (Apr. 6, 2018).

75. GLOBAL WITNESS, AT WHAT COST?, *supra* note 69, at 8.

76. LE CLUB DES JURISTES, TOWARD A GLOBAL PACT FOR THE ENVIRONMENT, DRAFT GLOBAL PACT FOR THE ENVIRONMENT 44, 46 (2017), https://www.leclubdesjuristes.com/wp-content/uploads/2017/05/CDJ_Pacte-mondial-pour-lenvironnement_Livre-blanc_UK_web.pdf.

77. John H. Knox, *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/73/188 (July 19, 2018).

78. In May 2018, the General established an ad hoc open-ended working group to discuss possible options to address gaps in international environmental law and environment-related instruments. The working group could provide an opportunity for consideration of such a new instrument. G.A. Res. 72/277, Towards a Global Pact for the Environment (May 14, 2018).

79. G.A. Res. 64/292, Human Right to Water (Aug. 3, 2010).

80. Erin Daly, *Environmental Constitutionalism in Defense of Nature*, 53 WAKE FOREST L. REV. 667, 671 (2018).

Argentina to the Philippines, by expanding the definition of standing to enable environmental suits to be brought more easily.⁸¹ Fewer countries have explicitly recognized rights to nature. Ecuador was one of the first, when it amended its constitution in 2008 to state that “Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.”⁸²

Some courts in other countries are not waiting for explicit recognition of such rights; instead, they are interpreting existing constitutional rights to provide a basis for rights of nature. In March 2017, for example, the High Court in Uttarakhand, a state in northern India on the border of China and Nepal, held that the Ganges and Yamuna rivers, as well as other rivers, forests, lakes, and glaciers, have the status and rights of legal persons.⁸³ The court appointed certain individuals to act as their human face to protect, conserve, and preserve them. Daly suggests that such decisions may represent a fast-moving trend toward greater constitutional recognition of rights of nature. She concludes her contribution with a general observation, which could easily apply to the entire field of human rights and the environment:

By recognizing the importance of the environment to people and the special obligations that people have to the environment—particularly in times of climate and environmental crisis—courts around the world have developed new rules, new doctrines, and new ways of thinking about their own obligations to protect what is most cherished—and most imperiled—to human beings and to the planet.⁸⁴

81. *Id.* at 680–81.

82. Constitución de la República del Ecuador, art. 71.

83. Daly, *supra* note 80, at 687–88.

84. *Id.* at 690.
