

# WALKING ON HOT COALS: USING THE INTER-AMERICAN HUMAN RIGHTS SYSTEM TO PROTECT BLACK COMMUNITIES' RIGHT TO A HEALTHY ENVIRONMENT

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## INTRODUCTION

*Franky. Julia Gillespie. Cyrus.* Twenty-four people with recorded names, and 152 listed simply as “Female age 8” or “Male age 50.” They range from one to sixty years old, and they represent the known enslaved persons associated with Philip Henry Pitts and his brothers, who were cotton planters in the Black Belt region of Alabama.<sup>1</sup> One of his estates, commonly known as Rurill Hill, was home to many of these enslaved African-Americans, who toiled, slept, wept, prayed, and finally died on this property just outside of Uniontown, Alabama. It was a place that, with its cotton fields, slave quarters, and lynching trees, testified loudly to our nation’s racist heritage. Ironically, 150 years later, decades after the passage of the Civil Rights Act of 1964 (CRA), it is now the site of Arrowhead Landfill, where a new type of racism echoes the same refrain. Here, Black communities continue to face unequal treatment and disproportionate harm to their health and their lives.<sup>2</sup>

The 2022 water crisis in Jackson, Mississippi, is illustrative of a pattern that is far too common in the United States.<sup>3</sup> While not the focus of this Note, recent events in Jackson, whose population is over 82% Black, would make a worthy case study.<sup>4</sup> Jackson’s lack of access to clean water draws comparisons to the Flint water crisis of 2014, which the Environmental Protection Agency (EPA) later acknowledged revealed preferential treatment of Whites and

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1. *Rurill Hill Plantation*, SANKOFAGEN (Aug. 17, 2020), <https://sankofagenus.com/2020/08/17/rurill-hill-plantation/> [<https://perma.cc/AV4X-JVW6>].

2. “[I]t doesn’t seem like much has changed,” says Esther Calhoun, a resident of Uniontown whose father and grandfather were sharecroppers, referring to the legacy of racism justifying slavery, sharecropping, and now environmental injustice. Keith Rushing, *Coal Ash Dump in Alabama’s Black Belt: Another Symbol of Racism’s Staying Power*, EARTH JUST. (Feb. 17, 2016) <https://earthjustice.org/blog/2016-february/coal-ash-dump-in-alabama-s-black-belt-another-symbol-of-racism-s-staying-power> [<https://perma.cc/LG72-DG9U>].

3. See Drew Costley & Emily Wagster Pettus, *Decades of Systemic Racism Seen as Root of Jackson’s Water Crisis*, PBS NEWSHOUR (Sept. 16, 2022), <https://www.pbs.org/newshour/nation/decades-of-systemic-racism-seen-as-root-of-jackson-mississippi-water-crisis> [<https://perma.cc/F3SX-X4E2>].

4. *Quick Facts: Jackson City, Mississippi*, U.S. CENSUS BUREAU NEWSHOUR (2022), <https://www.census.gov/quickfacts/fact/table/jacksoncitymississippi/BZA115220> [<https://perma.cc/9KR2-JDXD>].

“discriminatory treatment of African Americans.”<sup>5</sup> These events reveal an appalling trend: as a whole, Black communities experience a far more unclean and dangerous environment than their white counterparts. Unsafe drinking water, typically the result of underfunded and inadequate infrastructure, is pervasive near minority and low-income communities.<sup>6</sup> Toxic polluters are clustered near minority communities, with 80% of the nation’s incinerators located in low-income communities.<sup>7</sup> Studies show that race is the strongest predictor of a community’s proximity to a polluting facility and, thus, exposure to toxic substances.<sup>8</sup>

Finding relief for these communities is legally complex because of the nuances involved in environmental law and the difficulty of meeting the legal standard for claims of racial discrimination. For one thing, environmental law is heavily regulatory. Before proposing a major federal action, for example, a National Environmental Protection Act (NEPA) report must be written determining whether the proposal will significantly affect the quality of the human environment.<sup>9</sup> If it does, an Environmental Impact Statement (EIS) must be completed—an endeavor that is a massive and costly undertaking.<sup>10</sup> As part of their NEPA report, agencies must include an environmental justice analysis to assess whether vulnerable communities have “equal access to the decision-making process to have a healthy environment in which to live, learn, and

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5. Letter from Lilian S. Dorka, U.S. Env’t Prot. Agency, External Civil Right Compliance Office, to Heidi Grether, Director, Mich. Dep’t of Env’t Quality (Jan. 19, 2017), <https://www.epa.gov/sites/default/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf> [<https://perma.cc/2ZF3-4EQ4>].

6. See Steve Taylor & Michele Roberts, *Watered Down Justice*, NRDC 2020 REPORT (Mar. 27, 2018), <https://www.nrdc.org/resources/watered-down-justice> [<https://perma.cc/73MX-AXB9>]; Sarah Bowman, *New Reports: Contaminants from Coal Ash at Levels 40 Times Above Safe Drinking Water Standards*, INDIANAPOLIS STAR (Mar. 28, 2018), <https://www.indystar.com/story/news/2018/03/28/new-reports-contaminants-coal-ash-levels-40-times-above-safe-drinking-water-standards/454302002/> [<https://perma.cc/9FFA-NB8A>]; see IND. ADVISORY COMM. TO THE U.S. COMM’N ON CIV. RTS., ENVIRONMENTAL INJUSTICE: LEAD POISONING IN INDIANA (2020), <https://www.usccr.gov/files/2020/2020-11-12-Report-Lead-Poisoning-in-Indiana.pdf> [<https://perma.cc/7SP8-B668>]. Citing environmental racism regarding lead poisoning in Indiana, this study concluded that the Indiana State government and its agencies have not acted to address the clear racial health disparities facing Black children. Further, there was widespread governmental neglect at addressing issues related to environmental contamination.

7. Amy Laura Cahn, *TESTIMONY: Environmental Justice for All Act Protects Vulnerable Communities*, FACING S. (Feb. 17, 2022), <https://www.facingsouth.org/2022/02/testimony-environmental-justice-all-act-protects-vulnerable-communities> [<https://perma.cc/8252-NEAK>].

8. Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the disparate siting and post-siting demographic change hypotheses of environmental injustice*, 10 ENV’T RSCH. LETTERS 14–16 (2015).

9. *National Environmental Policy Act Review Process*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> [<https://perma.cc/EM9Z-UZJD>] (last visited Apr. 9, 2024); see also 40 C.F.R. § 1501.1.

10. *Id.* See also 40 C.F.R. § 1502.

work.”<sup>11</sup> The NEPA report is not determinative, however; as long as the agency takes a “hard look” at the environmental impacts, NEPA does not require the agency to act in any particular way.<sup>12</sup> In other words, a NEPA analysis can reveal that an action will have a significant impact on a particular community, and they can still proceed with the project anyway.<sup>13</sup>

When it comes to siting or permitting an industrial facility, even more regulations are heaped on. Most states regulate their own permitting programs in return for receiving federal funds from the EPA.<sup>14</sup> A facility seeking to operate in Alabama, the focal point of this Note, would need permits from the Alabama Department of Environmental Management (ADEM) for any discharge of pollutants into the water or air.<sup>15</sup> Attaining a permit can take years and is very expensive.<sup>16</sup> By the time a facility is open for business, a huge paper trail lies in its wake.

Despite this, the regulatory functions of the Environmental Protection Agency (EPA) have unfortunately done little to protect the poorest citizens, with permits often issuing for practices that expose low-income and minority communities to disproportionate levels of pollutants.<sup>17</sup> Studies have shown a “strategic choice to locate [locally unwanted land uses] in communities with the

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11. U.S. ENV'T PROT. AGENCY, EPA ANNUAL ENVIRONMENTAL JUSTICE PROGRESS REPORT FY 2020, 46 (2021), [https://19january2021snapshot.epa.gov/sites/static/files/2021-01/documents/2020\\_ej\\_report-final-web-v4.pdf](https://19january2021snapshot.epa.gov/sites/static/files/2021-01/documents/2020_ej_report-final-web-v4.pdf) [<https://perma.cc/4B8E-HB2L>]. See also Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (requiring Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”)

12. The language of taking a “hard look,” although rather vague, is the standard by which NEPA complaints are evaluated. See *Ohio Valley Env'tl Coalition v. Aracoma Coal*, 556 F.3d 177, 194 (4th Cir. 2009) (“NEPA requires federal agencies to take a ‘hard look’ at the environmental consequences of their actions, but the statute does not specify how an agency should determine the scope of its NEPA analysis”). See also *Grand Canyon Trust v. Fed. Aviation Admin.* 290 F.3d 339, 340–41 (D.C. Cir. 2002), which centered upon whether FAA can be said to have “taken a hard look” when they did not consider the total noise impact a relocated airport would have.

13. “[A]s long as the agency ‘look[s] hard at the factors relevant to the definition of purpose,’ we generally defer to the agency’s reasonable definition of objectives.” *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66 (D.C. Cir. 2011) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)).

14. For example, the Clean Water Act policy “recognize[s], preserve[s], and protect[s] the primary responsibilities of States to prevent, reduce, and eliminate pollution...” 33 U.S.C. § 1251(b). Thus, states are authorized to administer the EPA programs; if they choose not to do so, EPA will administer the program itself.

15. See, e.g., Clean Air Act, 42 U.S.C. §§ 7401–7671; Clean Water Act, 33 U.S.C. §§ 1251–1387; see also ADEM Departmental Forms, ALA. DEP’T OF ENV’T MGMT., <https://adem.alabama.gov/DeptForms/default.cnt> [<https://perma.cc/RC5V-ULQC>] (last visited Apr. 10, 2024).

16. “The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.” *Rapanos v. United States*, 547 U.S. 715, 721 (2006).

17. See Mohai & Saha, *supra* note 8.

least social and political power.”<sup>18</sup> Furthermore, while affected residents used to be able to file private complaints demanding judicial relief for the adverse impacts they faced, the Supreme Court has held that there is no private right of action for plaintiffs to accuse recipients of federal funds of racially discriminatory practices if the plaintiffs are alleging that the harm and racial discrimination are a disparate impact of those practices, as opposed to the specific intent on the part of those recipients to racially discriminate.<sup>19</sup> Thus, citizens must rely on the federal government to bring claims on their behalf.<sup>20</sup> Whereas U.S. courts require proof of discriminatory intent to establish claims of racial discrimination, the international bodies of law are broader and more favorable to the claimants.<sup>21</sup>

These problems are exacerbated by the fact that the United States does not recognize a constitutionally protected right to a healthy environment or even constitutional provisions for a healthy environment, as this Note will discuss in detail. In contrast, the Inter-American Commission on Human Rights (IACHR) has recognized a justiciable right to a healthy environment and recently issued a landmark opinion enforcing that right.<sup>22</sup> Under Article 26 of the American Convention, the Court found that Argentina had “violated the rights to cultural identity, to a healthy environment, to adequate food and to water owing to the ineffectiveness of State measures to halt activities that harmed those rights.”<sup>23</sup>

What might it look like if the United States recognized a right to a healthy environment? In lieu of such substantive rights, one must rely on procedural avenues to make environmental justice-related claims. However, those seeking to make an international claim face another obstacle in that the United States refuses to recognize the IACHR as having binding authority.<sup>24</sup> While not binding on U.S. law, the IACHR’s rulings on U.S. cases could have a persuasive effect on lawmakers and ultimately lead to meaningful changes.

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18. Claire Glenn, *Upholding Civil Rights in Environmental Law: The Case for Ex Ante Title VI Regulation and Enforcement*, 41 N.Y.U. REV. L. & SOC. CHANGE 45, 53 (2017).

19. See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

20. The process for filing a discriminatory claim will be described below.

21. This topic will be explored further throughout this note. See generally Carmen G. Gonzalez, *Environmental Justice, the Cold War, and U.S. Human Rights Exceptionalism*, in INTERNATIONAL LAW & THE COLD WAR 8–11 (Matthew Craven, Sundhya Pahuja & Gerry J. Simpson, eds., 2019) [hereinafter Gonzalez]; Jeannine Cahill-Jackson, *Mossville Environmental Action Now v. United States: Is a Solution to Environmental Injustice Unfolding?*, 3 PACE INT’L L. REV. ONLINE COMPANION 173, 191, 204 (2012); Sarah Davila, *Time to Wake Up! Pushing the Boundaries in the Americas to Protect the Most Vulnerable*, 39 UCLA J. ENV’T L. & POL’Y 123 (2021).

22. See *Indigenous Communities Members of the Lhaka Honhat Association (Our Land) v. Argentina*, Official Summary Issued by the Inter-American Court, Inter-Am. Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020), [https://www.corteidh.or.cr/docs/casos/articulos/resumen\\_400\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/resumen_400_ing.pdf) [<https://perma.cc/HW4W-7MHC>] [hereinafter *Indigenous Communities Case*].

23. *Id.* at 1.

24. See *Mossville Env’t Action Now v. United States*, Admissibility, Inter-Am. Comm’n H.R., Report No. 43/10, ¶ 18 (Mar. 17, 2010), <http://www.cidh.org/annualrep/2010eng/USAD242-05EN.doc> [<https://perma.cc/R8KS-3C3X>].

This Note will discuss the history of environmental racism in the United States and the failure to find legal remedies domestically. This Note will highlight the importance of using international human rights law to adjudicate environmental justice claims and particularly, the role of the Inter-American system in defending the rights of poor and predominantly Black communities. Finally, this Note will focus on the environmental racism that has occurred in Uniontown, Alabama, as a result of coal ash disposal, and address the procedural steps that could bring relief to their citizens and others whose right to a healthy environment has been deprived. Such proceedings could ultimately lead to substantive changes in U.S. law as it relates to environmental justice.

### I. HISTORY OF ENVIRONMENTAL RACISM IN THE UNITED STATES

The 1970s brought about radical reform in environmental law and regulation. Overwhelming bipartisan majorities in Congress passed massive environmental legislation, including the Clean Water Act (CWA), Clean Air Act (CAA), Environmental Protection Agency (EPA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund), and Resource Conservation and Recovery Act (RCRA).<sup>25</sup> These reforms have been effective in improving air and water quality in the United States, which is much cleaner today than it was at the time of these legislative enactments, yet further reform is needed to protect our most vulnerable communities.<sup>26</sup>

Polluting facilities have a disproportionate impact on communities of color.<sup>27</sup> Black Americans are exposed to more pollution from all major emission sources than any other group.<sup>28</sup> Studies confirm that undesirable land uses (such as landfills and polluting facilities) are unevenly distributed, with racial minorities experiencing the greatest disproportionate impact.<sup>29</sup> The area in the American South known as the “Black Belt”—in particular, Mississippi, Alabama, Georgia, and Louisiana—has become the “sacrifice zone” for the

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25. Richard Lazarus & Sarah Zdeb, *Environmental Law & Politics*, A.B.A. (Jan. 5, 2021), [https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/environmental-law---politics/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/environmental-law---politics/) [https://perma.cc/5SRJ-Q76H].

26. Paul Voosen, *In a paradox, cleaner air is now adding to global warming*, SCI. (Jul. 20, 2022), <https://www.science.org/content/article/paradox-cleaner-air-now-adding-global-warming> [https://perma.cc/Z6TD-FGP3]; Kara Manke, *Clean Water Act dramatically cut pollution in U.S. waterways*, BERKELEY NEWS (Oct. 8, 2018), <https://news.berkeley.edu/2018/10/08/clean-water-act-dramatically-cut-pollution-in-u-s-waterways/> [https://perma.cc/8UBW-Y2TJ].

27. U.S. COMM’N ON CIV. RTS., ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY’S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 (2016), [https://www.usccr.gov/files/pubs/2016/Statutory\\_Enforcement\\_Report2016.pdf](https://www.usccr.gov/files/pubs/2016/Statutory_Enforcement_Report2016.pdf) [https://perma.cc/53G4-BG7M].

28. See Cahn, *supra* note 7.

29. Alice Kaswan, *Environmental Justice and Environmental Law*, 24 FORDHAM ENV’T L. REV. 149, 151 (2013).

nation's toxic waste; it has to go somewhere, and those in power have designated that region—predominantly poor and Black—as the dumping grounds.<sup>30</sup> The EPA's Environmental Justice screening website presents a stunning visual narrative of how disproportionately the Black Belt bears the burdens of our nation's waste.<sup>31</sup>

There is a chicken-or-egg argument regarding this topic: did people buy their homes near polluting facilities because homes were more affordable there, or did polluters move into the neighborhood because it was cheap land and they would face less resistance from the community?<sup>32</sup> A leading expert says that “sources of pollution come to environmental justice communities, rather than the other way around.”<sup>33</sup> While overtly discriminatory practices are illegal, evidence shows that institutions steer new facility sitings into minority neighborhoods.<sup>34</sup> Land is cheaper, and there is generally much less opposition—at least from politically influential groups.<sup>35</sup> Consequently, the racial composition of a community is the strongest predictor of which areas will receive hazardous Treatment, Storage and Disposal Facilities (TSDFs), many of which are regularly sited where “white move-out and minority move-in were already occurring.”<sup>36</sup>

It is common sense that waste must go somewhere—just “not in my backyard”—which begs the question: which communities *should* bear the burden of treating and storing our nation's waste? States like Louisiana offer many tax breaks to polluters and those trying to get rid of hazardous waste because waste management is a lucrative business, given the enormous amount of trash produced in the United States each year.<sup>37</sup> It would behoove our leaders to consider the cost of these policies that Black communities pay with their health.

## II. UNIONTOWN, ALABAMA AS A CASE STUDY

Uniontown, Alabama has a population of just over 1,900, 95% of whom are

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30. Robert Bullard, *Confronting Environmental Racism in the Twenty-First Century*, 4 GLOB. DIALOGUE 34, 35–36 (2002).

31. EPA's *Environmental Justice Screening and Mapping Tool*, U.S. ENV'T PROT. AGENCY, <https://ejscreen.epa.gov/mapper/> [<https://perma.cc/JZC6-QRT6>] (last visited Apr. 10, 2024).

32. See Mohai & Saha, *supra* note 8, at 3. Mohai and Saha refer to these dichotomous terms as “disparate siting” and “post-siting demographic change.” Studies have not been conclusive, largely because they have employed different methods of analysis.

33. See Cahn, *supra* note 7.

34. Mohai & Saha, *supra* note 8, at 16.

35. See Letter from Lilian S. Dorka to Heidi Grether, *supra* note 5.

36. Mohai & Saha, *supra* note 8, at 15.

37. Juhohn Lee, *The garbage industry has outperformed the market since 2015. Here's why*, CNBC (Jul. 22, 2021) <https://www.cnbc.com/2021/07/22/how-the-garbage-industry-outperformed-the-market.html> [<https://perma.cc/G6A2-XERW>].

Black or African American.<sup>38</sup> The median household income for Uniontown residents is approximately \$24,000/year,<sup>39</sup> far below the national average.<sup>40</sup> In 2007, despite objections from the community, Arrowhead Landfill opened in Uniontown.<sup>41</sup> The following year, the largest industrial spill in U.S. history, and one of the largest coal ash spills in world history, occurred approximately 300 miles away in Kingston, Tennessee, dumping over a billion tons of coal ash into the Emory River.<sup>42</sup> The Kingston site was immediately declared a Superfund site under CERCLA, and emergency cleanup began on this “hazardous” waste.<sup>43</sup> Soon after the spill, the Tennessee Valley Authority (TVA) was charged with the responsibility of finding a long-term solution for the disposal of the coal ash.<sup>44</sup> They solicited proposals, and in a competitive bidding process, selected Arrowhead Landfill for several reasons, not least of which included that it was more economical.<sup>45</sup> Money surely plays a factor. In exchange for receiving the coal ash, Perry County (notably, not Uniontown) receives \$1/ton from the landfill.<sup>46</sup> As a result, many of the county commissioners “strongly supported” the contract to bring the ash to Uniontown, despite incessant concerns voiced by the broader community that appear to have been largely ignored.<sup>47</sup> There was no opportunity provided for public comment.<sup>48</sup> Furthermore, to emphasize the hazardous properties of coal ash, Pennsylvania, one of the states bidding for the project, rejected the coal ash as too toxic.<sup>49</sup>

In 2009, Arrowhead began accepting coal ash from the Kingston spill. The

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38. *Uniontown, Alabama Population 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/us-cities/uniontown-al-population> [<https://perma.cc/HXB9-2JLC>] (last visited Apr. 26, 2024).

39. *Is Uniontown the best Alabama city for your business?*, ALA. DEMOGRAPHICS, <https://www.alabama-demographics.com/uniontown-demographics> [<https://perma.cc/6U27-EWFX>] (last visited Apr. 26, 2024).

40. See *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/SEX255221> [<https://perma.cc/B3FX-43NW>]. The median household income according to the most recent census information was just under \$65,000.

41. ELLIE BACH, *THE COAL ASH COMMUNITY: AN ANALYSIS OF ENVIRONMENTAL RACISM IN UNIONTOWN, ALABAMA*, <https://www.colorado.edu/honorsjournal/sites/default/files/attached-files/hj2021-genderethnicstudies-bachthecoal.pdf> [<https://perma.cc/NZS5-WVED>].

42. *Id.*

43. *Id.*

44. *Id.*

45. ENV’T PROT. AGENCY, *FREQUENTLY ASKED QUESTIONS REGARDING THE DISPOSAL OF COAL ASH AT THE PERRY COUNTY ARROWHEAD LANDFILL UNIONTOWN, ALABAMA*, <https://archive.epa.gov/region4/kingston/web/pdf/tvaperrycountyfaq.pdf> [<https://perma.cc/SU73-DK6>].

46. Iqra Salahand & Mary Jane Johnson, *WATCH: Close to Home: Environmental Justice in Alabama*, ENV’T HEALTH NEWS (Oct. 17, 2022), <https://www.ehn.org/uniontown-alabama-environmental-justice-2658420161.html> [<https://perma.cc/S873-TXY7>].

47. Shailla Dewan, *Clash in Alabama Over Tennessee Coal Ash*, THE N.Y. TIMES (Apr. 29, 2009), <https://www.nytimes.com/2009/08/30/us/30ash.html>.

48. Sue Sturgis, *Pa. rejected TVA’s spilled coal ash as too contaminated*, FACING S. (May 18, 2009), <https://www.facingsouth.org/2009/05/pa-rejected-tvas-spilled-coal-ash-as-too-contaminated.html> [<https://perma.cc/E7BP-JWCB>].

49. *Id.*

EPA, Alabama Department of Environmental Management (ADEM), and Perry County all approved of this transport, even though the coal ash was labeled as “hazardous” under CERCLA but was being taken to a non-hazardous waste facility.<sup>50</sup> Under complicated differences between CERCLA and the Resource Conservation and Recovery Act (RCRA), what is deemed “hazardous waste” according to one may not be considered hazardous according to the other.<sup>51</sup> In short, RCRA differentiates between hazardous and non-hazardous facilities and waste. Section C regulates hazardous waste, and in accordance with EPA’s “cradle to grave” policy, ensures that hazardous waste is regulated from its time of generation to its treatment, storage, and disposal.<sup>52</sup> Landfills require special permits to accept hazardous waste, and RCRA heavily regulates every aspect of such facilities.<sup>53</sup> Arrowhead is a non-hazardous landfill and thus could not accept the coal ash if it were labeled “hazardous.”<sup>54</sup> Because the coal industry is such an influential part of the U.S. economy, they have successfully resisted efforts to classify coal ash as “hazardous,” as this would lead to stricter regulation and higher costs.<sup>55</sup> Nonetheless, it really should be classified as such, due to its scientific properties, health risks, and international norms.<sup>56</sup>

#### A. Coal Ash Properties

Coal ash is a powdery ash that collects in smokestack filters and furnaces as

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50. Bach, *supra* note 41.

51. Marianne Engelman-Lado, Camila Bustos, Haley Leslie-Bole & Perry Leung, *Environmental Injustice in Uniontown, Alabama, Decades after the Civil Rights Act of 1964: It's Time for Action*, A.B.A. (May 21, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/vol--44--no-2--housing/environmental-injustice-in-uniontown--alabama--decades-after-the/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol--44--no-2--housing/environmental-injustice-in-uniontown--alabama--decades-after-the/) [https://perma.cc/GE99-G45C]. Furthermore, the Coal Ash Rules promulgated in 2010/2015 muddy the classification of coal ash even further.

52. *RCRA vs. CERCLA*, ACT ENVIRO (Mar. 2, 2021), <https://www.actenviro.com/rcra-vs-cercla/> [https://perma.cc/3USG-EFWV].

53. See 40 C.F.R. § 264.1-1316.

54. Arrowhead Landfill Permit No. 53-03, Dec. 22, 2021. <https://adem.alabama.gov/news/Events/notices/mar22/pdfs/3arrowmsw.pdf>. This permit type is labeled a “Municipal Solid Waste Permit” and permits nonhazardous solid wastes.

55. Jeff Turrentine, *Coal Ash Is Hazardous. Coal Ash Is Waste. But According to the EPA, Coal Ash Is Not “Hazardous Waste.”*, NRDC (Sept. 6, 2019), <https://www.nrdc.org/stories/coal-ash-hazardous-coal-ash-waste-according-epa-coal-ash-not-hazardous-waste> [https://perma.cc/9MSJ-EZYJ]; see also Patrick Reis, *Is Coal Ash Hazardous?* SCI. AMER. (Jan. 13, 2010), <https://www.scientificamerican.com/article/coal-ash-waste-hazardous-standard-regulation/> [https://perma.cc/5C4X-U6ZS].

56. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal: Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, p. 53, Mar. 22, 1989, <https://wedocs.unep.org/bitstream/handle/20.500.11822/8385/-Basel%20Convention%20on%20the%20Control%20of%20Transboundary%20Movements%20of%20Hazardous%20Wastes%20-20113644.pdf?sequence=2&3BisAllowed=> [https://perma.cc/ZBQ6-SNDD]. The Basel Convention categorizes as “hazardous” any waste having, among other things, mercury, lead and/or arsenic as constituents. Coal ash has all three.



a byproduct of the coal-burning process.<sup>57</sup> Its danger lies in the way it concentrates dozens of carcinogens and toxins.<sup>58</sup> Duke University geochemist Avner Vengosh describes coal ash as such:

It's a cocktail of arsenic, copper, lead, selenium, thallium, antimony, and other metals at higher levels than in their natural state. People think coal ash is not going to be a problem because utilities are switching to natural gas and it's cleaner. But the legacy of coal ash production and disposal is going to be with us for ages. These contaminants don't biodegrade.<sup>59</sup>

A spill is catastrophic, but even barring such a disaster, coal ash can leach into groundwater and contaminate drinking water.<sup>60</sup> This presents an alarming problem for a nation that produces more than 100 million tons of coal ash per year.<sup>61</sup> Yet, to protect its image and stifle public fear, evidence suggests that TVA embarked on a “concerted effort . . . to downplay the dangers of coal ash.”<sup>62</sup> Investigative reports have revealed that TVA misled the workers and the general public about how dangerous the toxic waste was.<sup>63</sup>

The health impacts of coal ash are devastating.<sup>64</sup> It contains, among other things, arsenic, lead, and mercury, the three most commonly occurring toxic metals, with the highest ranking of toxicity.<sup>65</sup> Exposure can cause a range of symptoms from mild (nausea, vomiting) to kidney failure, brain swelling, and

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57. Joel K. Bourne, Jr., *Coal's other dark side: Toxic ash that can poison water and people*, NAT'L GEOGRAPHIC (Feb. 19, 2019), <https://www.nationalgeographic.com/environment/article/coal-other-dark-side-toxic-ash> [<https://perma.cc/9M7R-GZBE>].

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Jamie Satterfield, *Supporters of Kingston coal ash cleanup workers vow to keep fighting for worker safety*, KNOXVILLE NEWS SENTINEL (Dec. 21, 2020), <https://www.knoxnews.com/story/news/crime/2020/12/21/kingston-coal-ash-memorial-disaster-relief-workers-cleanup-worker-safety/3921732001/> [<https://perma.cc/4UER-HEB4>].

64. They are also widespread. The author's home state is Indiana, which leads the nation in toxic releases per square mile. 2019 TRI Factsheet: State – Indiana, U.S. Env't Prot. Agency (Oct. 2023), [https://enviro.epa.gov/triexplorer/tri\\_factsheet.factsheet\\_forstate?pYear=2019&pstate=IN&pParent=NAT](https://enviro.epa.gov/triexplorer/tri_factsheet.factsheet_forstate?pYear=2019&pstate=IN&pParent=NAT) [<https://perma.cc/YH4M-3LK3>]. For more insight into coal ash contaminants in Indiana, see Sarah Bowman, *These toxic coal ash pits are leaking into Indiana's water*, INDIANAPOLIS STAR (Sept. 24, 2017), <https://www.indystar.com/story/news/2017/09/24/ipl-duke-coal-ash-contaminants-polluting-indiana-waterways/597873001/> [<https://perma.cc/HT53-VFFH>] (Indy Star investigation into coal ash contamination in Indiana); see also Sarah Bowman, *New Reports: Contaminants from coal ash at levels 40 times above safe drinking water standards*, INDIANAPOLIS STAR (Mar. 28, 2018), <https://www.indystar.com/story/news/2018/03/28/new-reports-contaminants-coal-ash-levels-40-times-above-safe-drinking-water-standards/454302002/> [<https://perma.cc/UXL8-89UB>].

65. Patricia Helman, *Toxic Impact: the Regulation of Coal Ash and the Influence of Big Money on Small Communities*, 23 BARRY L. REV. 44, 55 (2017).

even death.<sup>66</sup> These are not just theoretical statistics, either; in the aftermath of the Kingston spill, more than 50 workers died allegedly from exposure to the hazardous waste.<sup>67</sup> In subsequent litigation related to a number of deaths and illnesses, a federal jury agreed that TVA's contractor "failed to protect them" and that "exposure to coal ash could have caused their illnesses."<sup>68</sup> Despite the fact that coal ash is extremely dangerous, according to the EPA, it is not "hazardous waste," but instead falls under the categorization of "solid waste."<sup>69</sup> This explains why over 4 million cubic yards of coal ash and coal ash contaminated material were shipped to Arrowhead Landfill, a non-hazardous waste facility, in 2009.<sup>70</sup>

Of further relevance is the stark demographic disparity between the two communities at hand in this case. Kingston, Tennessee is a suburban community that is almost 92.5% white, with an annual household income of \$67,600.<sup>71</sup> The EPA's deeming of coal ash as "hazardous" in predominantly white Kingston, followed by its subsequent removal to an almost entirely Black community, where it is deemed "non-hazardous," has led many to claim that this is an obvious case of environmental racism.

The testimony of Esther Calhoun, a Uniontown resident and former president of Black Belt Citizens Fighting for Health and Justice, captures the essence of this argument poignantly:

I've asked over and over . . . why this coal ash was considered hazardous when it left Kingston, Tennessee, and the area of the spill was declared a superfund site, but then was no longer considered hazardous when it arrived in our community, a predominantly black town? We saw pictures of people in hazmat suits loading the coal ash in Kingston, while in Uniontown, workers were provided with little protection and community members with nothing. Workers at the Arrowhead Landfill

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66. *Id.*

67. *People gather to remember victims of the Kingston coal ash spill, the worst environmental disaster in U.S. history*, WBIR NEWS (Dec. 22, 2021), <https://www.wbir.com/article/news/community/people-gather-to-remember-victims-of-the-kingston-coal-ash-spill-the-worst-environmental-disaster-in-us-history/51-24ef2540-6619-4bca-b17c-5a22df549f6e> [<https://perma.cc/47HJ-QTRY>].

68. Bourne, *supra* note 57.

69. Turrentine, *supra* note 55; see also Patrick Reis, *Is Coal Ash Hazardous?*, SCI. AMER. (Jan. 13, 2010), <https://www.scientificamerican.com/article/coal-ash-waste-hazardous-standard-regulation/> [<https://perma.cc/5C4X-U6ZS>]. The argument made is that changing coal's EPA designation to "hazardous" would be enormously impactful on the energy sector and the overall economy.

70. *Millions of pounds of garbage from other states again flooding rural Alabama*, AL.COM (Jan. 13, 2022), <https://www.al.com/news/2022/01/millions-of-pounds-of-garbage-from-other-states-again-flooding-rural-alabama.html> [<https://perma.cc/9M7V-SDYY>]. Arrowhead Landfill continues to receive trash from 33 states across the country.

71. *Kingston, Tennessee Population 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/us-cities/kingston-tn-population> [<https://perma.cc/7XZS-NPKM>] (last visited Apr. 26, 2024).

washed the train cars after unloading, but there was no system for washing the cars of the workers as they came in and out of the site, spreading coal ash across the town. I understand that the laws are different, that the spill falls under the superfund law while the coal ash becomes solid waste and falls under the Resource Conservation and Recovery Act (RCRA) when it arrives at the Landfill. But coal ash is still coal ash—it still contains exactly the same toxic chemicals whatever name you give it.<sup>72</sup>

Robert Bullard, often considered the father of the environmental justice movement, defines environmental racism as a “form of institutionalised discrimination” which consists of “actions or practices carried out by members of dominant (racial or ethnic) groups that have differential and negative impact on members of subordinate (racial or ethnic) groups.”<sup>73</sup> These institutional measures can be “policies, practices, or directives” that “intentionally or unintentionally” disadvantage communities of color.<sup>74</sup> Environmental racism is characterized by bureaucratic tangling that makes it virtually impossible to attain legal remedies; that is precisely where Uniontown residents find themselves today.

### *B. Failure to Find Domestic Relief*

The situation in Uniontown, unfortunately, has left residents helpless. They fought against the polluting facility, but EPA and ADEM granted permits, and pollutants now fill the air. In 2013 they filed a complaint with the EPA alleging that the landfill violated Title VI of the Civil Rights Act.<sup>75</sup> Title VI prohibits racial discrimination from agencies that receive federal funding.<sup>76</sup> While the language of the statute only explicitly prohibits intentional discrimination, the Supreme Court later expanded its definition to include disparate impact.<sup>77</sup> However, in 2018, the EPA rejected the complaint of Uniontown residents, issuing a 28-page letter which cites “insufficient evidence” that authorities had

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72. Engelman-Lado, Bustos, Leslie-Bole, & Leung, *supra* note 51.

73. Bullard, *supra* note 30.

74. *Id.*

75. Maxine Walters, *Good News for Uniontown, Alabama After Years of Legal Battles*, THE GEORGETOWN ENVTL LAW REVIEW, Nov. 15, 2019. <https://www.law.georgetown.edu/environmental-law-review/blog/uniontown-alabama-legal-battles/>.

76. Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

77. *Guardians Ass’n v. Civ. Serv. Comm’n*, 463 U.S. 582, 592–93 (1983) (“Title [VI] . . . has been consistently administered [to recognize the disparate impact standard] for almost two decades without interference by Congress. Under these circumstances, it must be concluded that Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination.”).

breached Title VI of the Civil Rights Act.<sup>78</sup> They also note that there was no causal connection between the coal ash and the health ailments suffered by Uniontown residents.<sup>79</sup> Because EPA denied their claim, the residents are left in the dark.

### 1. Title VI Claims of Discrimination

In 2001, residents of Camden, New Jersey, used Title VI to challenge a permitting process that “failed to consider the cumulative health and environmental impacts of siting a cement processing facility in an already-overburdened community of color.”<sup>80</sup> However, their case was precluded by *Alexander v. Sandoval*, another disparate impact case at the Supreme Court, where the Court held that there is no private right of action for plaintiffs to accuse recipients of federal funds of racially discriminatory practices unless those practices are intentional.<sup>81</sup> This means that citizens must rely on federal agencies to bring claims on their behalf, and when the agencies deny their claims, their options are exhausted. Without a private right of action, “severe and longstanding deficiencies in civil rights enforcement and oversight” have “exacerbate[d] racially disproportionate pollution burdens” and “den[ie]d equitable participation of people . . . in siting and permitting decisions.”<sup>82</sup>

If the EPA had a better reputation for responding to discriminatory claims, perhaps this would not be so problematic. However, a searing 2016 report by the U.S. Commission on Civil Rights showed several pathetic and disturbing trends. They discovered that the Office of Civil Rights has a long track record of not meeting deadlines in response to Title VI complaints.<sup>83</sup> Despite hundreds of claims, the EPA has not made a single finding of racial discrimination in over twenty-two years.<sup>84</sup> Unless compelled to do something, the “EPA does not take

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78. See Walters, *supra* note 75.

79. Oliver Milman, *Environmental Racism Case: EPA Rejects Alabama Town’s Claim Over Toxic Landfill*, THE GUARDIAN (last visited Oct. 16, 2022), <https://www.theguardian.com/us-news/2018/mar/06/environmental-racism-alabama-landfill-civil-rights> [https://perma.cc/9VH2-9GSP]; see also Letter from Lilian S. Dorca, Director, External Civ. Rts. Compliance Off., Env’t Prot. Agency, to Marianne Engelman Lado, Env’t Just. Clinic (Mar. 1, 2018).

80. Cahn, *supra* note 7.

81. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

82. Cahn, *supra* note 7.

83. U.S. COMM’N ON CIV. RTS., ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY’S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER, 12898 (2016) [hereinafter EJ], [https://www.usccr.gov/files/pubs/2016/Statutory\\_Enforcement\\_Report2016.pdf](https://www.usccr.gov/files/pubs/2016/Statutory_Enforcement_Report2016.pdf) [https://perma.cc/H4RU-AX3X]; see also Kristen Lombardi, Talia Buford & Ronnie Greene, *Environmental Racism Persists, and the EPA is One Reason Why*. THE CTR FOR PUB. INTEGRITY (Aug. 3, 2015), <https://publicintegrity.org/environment/environmental-racism-persists-and-the-epa-is-one-reason-why/> [https://perma.cc/AZ5M-NY9W]. The Rogers-Eubanks Neighborhood in Chapel Hill, N.C., has been waiting for 8 years to receive a response from the EPA regarding their Title VI complaint. Other communities have been waiting up to 17 years to get a response.

84. EJ, *supra* note 84.

action when faced with environmental justice concerns.”<sup>85</sup> When they do act, they “make easy choices and outsource [their] responsibilities,” causing further troubles in overly-burdened communities.<sup>86</sup> In summary, “EPA continues to struggle to provide procedural and substantive relief to communities of color impacted by pollution.”<sup>87</sup>

Surely, part of the reason for the lack of discriminatory findings by the EPA is the standard of proof required for a constitutional claim of discrimination. In the United States, under a Title VI civil rights claim, one must prove either discriminatory intent, which is exceedingly difficult, or disparate impact, which has, since *Alexander v. Sandoval*, been rendered moot for private litigants.<sup>88</sup> In short, communities of color have no private right of action and must rely on federal agencies to investigate whether the agency’s actions have created a disparate impact on their community.<sup>89</sup> Unless the people of Uniontown can prove that EPA and ADEM *intentionally* discriminated against them, they have no Title VI claim.

## 2. NEPA Complaint

A second option for domestic relief is to file a NEPA complaint. The National Environmental Policy Act (NEPA), enacted in 1969, requires agencies, when considering major federal actions significantly affecting the quality of the human environment, to submit “a detailed statement . . . on reasonably foreseeable environmental effects of the proposed agency action.”<sup>90</sup> NEPA requires federal agencies to “take a ‘hard look’ at the environmental consequences of their actions.”<sup>91</sup> Executive Order 12898, issued by President Clinton in 1994, requires the NEPA analysis to address “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.”<sup>92</sup>

The logic of making a NEPA claim is for Uniontown to argue that the EPA and ADEM failed to take a “hard look” at the disproportionate environmental impact the siting of the landfill would have on minority or low-income

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85. *Id.* at 2.

86. *Id.*

87. *Id.*

88. *Alexander v. Sandoval*, 532 U.S. 275 (2001); see also Kirsten Williams, *The Impact of Foresight: Reframing Discriminatory Intent to Properly Remedy Environmental Racism*, 59 HOUS. L. REV. 1231 (2022). A disparate impact claim requires that one show a “causal relationship between a facially neutral policy and a disproportionate, adverse impact on a classified group.”

89. See generally Williams, *supra* note 89; Mohai & Saha, *supra* note 8; Gonzalez, *supra* note 21; Engelman-Lado, Bustos, Leslie-Bole, & Leung, *supra* note 51.

90. 42 U.S.C. §4332(C)(i).

91. *Ohio Valley Env’t Coal. v. Aracoma Coal*, 556 F.3d 177 (4th Cir. 2009).

92. Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

communities.<sup>93</sup> Under the judicial review standards of the Administrative Procedures Act, Uniontown could claim that the EPA action was “arbitrary” or “capricious” in granting Arrowhead a permit to operate its landfill with hazardous coal ash.<sup>94</sup> However, there are several problems with this kind of claim. First, because it is a procedural, not substantive, requirement, NEPA does not require the agency to select the alternative with the least environmental impact.<sup>95</sup> As long as they do in fact take a “hard look,” they are under no obligation to select the least harmful option. Second, there is some dispute whether an environmental justice claim can be asserted as a NEPA violation.<sup>96</sup> Finally, environmental justice claims are just as unlikely to prevail as Title VI claims.<sup>97</sup>

In summary, under United States domestic law, industries can follow all the rules and get all the proper permits and still end up causing vastly disproportionate environmental harms to communities where the majority population is comprised of people of color. In response, those communities can follow all the legal and administrative procedures for reporting such harms and seeking relief but to no avail. This begs the question: does United States law really protect those communities? This Note argues that the law does not protect those communities, but by adopting provisions similar to what is found in international law—and in particular, the Inter-American system—the United States can finally give these communities the environmental protection they need and deserve.

### III. ANALYSIS OF INTERNATIONAL LAW

The people of Uniontown might prevail if international human rights law could be applied to their situation. International human rights law is broader and offers more protection to individual petitioners than current U.S. law.<sup>98</sup> International claims of discrimination are not limited to intent but also consider

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93. See discussion in footnotes 12 and 13, *supra*.

94. 5 U.S.C. § 706. Scope of review grants reviewing court to decide if agency action was “arbitrary” or “capricious.”

95. *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 706 (6th Cir. 2014).

96. See *Latin Ams. for Soc. & Econ. Dev. v. Adm'r of the Fed. Highway Admin.*, 756 F.3d 447 (6th Cir. 2014), where the Court of Appeals deliberately evaded the question due to lack of precedent.

97. See *Sierra Club v. Fed. Energy Regul. Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017). Even though the FERC failed to mention in its environmental impact statement that the southern portion of a Georgia county already had 259 hazardous-waste facilities, 78 air-polluting facilities, 20 toxic-polluting facilities, and 16 water-polluting facilities, the Court held that they had “fulfilled NEPA’s goal of guiding informed decisionmaking.”

98. Gonzalez, *supra* note 21.

the effects and impact of activities or policies on a particular group of people.<sup>99</sup> Furthermore, several international bodies, including the Inter-American Court of Human Rights (IACtHR), have specifically recognized people's "right to a healthy environment."<sup>100</sup> The United Nations advocates for a rights-based approach to complement domestic regulation-based environmental law.<sup>101</sup> Where regulatory approaches focused on the duties of industries fail, a rights-based approach offers a secondary layer of legal challenges that can be brought by impacted communities.<sup>102</sup>

The Stockholm Declaration of 1972 was the first world conference centered on environmental issues and concerns.<sup>103</sup> This event marked the beginning of an important dialogue between nations around the world concerning "the link between economic growth, the pollution of the air, water, and oceans and the well-being of people around the world."<sup>104</sup> Since that ground-breaking declaration, more than three-fourths of the world's constitutions include "explicit references to environmental rights."<sup>105</sup>

#### A. *The Right to a Healthy Environment*

Additionally, in 2021 the United Nations Human Rights Council voted in favor of the universal right to a healthy and sustainable environment.<sup>106</sup> This decision was followed up by a vote from the UN General Assembly, in which 161 nations (including the United States) voted in favor of declaring "access to

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99. See International Convention on the Elimination of All Forms of Racial Discrimination art. 1, Mar. 7, 1966, 660 U.N.T.S. 195 ("In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.").

100. See *Indigenous Communities Case*, *supra* note 22.

101. U.N. ENV'T, ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT ch. 4 [https://wedocs.unep.org/bitstream/handle/20.500.11822/27381/ERL\\_ch4.pdf](https://wedocs.unep.org/bitstream/handle/20.500.11822/27381/ERL_ch4.pdf) [<https://perma.cc/WK47-S3G2>].

102. See *Marangopoulos Foundation for Human Rights v. Greece*, Case No. 30/2005, Decision on the Merits, Eur. Comm. of Soc. Rts. (Dec. 6, 2006) (holding that Article 11 of the European Social Charter of 1961 protected citizens' rights to a clean environment and found Greece's mining operations to be in violation).

103. *United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm*, U.N., <https://www.un.org/en/conferences/environment/stockholm1972> [<https://perma.cc/NJN6-8YGV>] (last visited Apr. 14, 2024).

104. *Id.*

105. *Fifty years after the Stockholm Declaration, world must step up efforts to protect the right to a healthy environment*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (June 5, 2022), <https://bangkok.ohchr.org/9943-2/> [<https://perma.cc/WVE9-N6BT>].

106. *Access to a healthy environment, declared a human right by UN rights council*, UN NEWS (Oct. 8, 2021), <https://news.un.org/en/story/2021/10/1102582> [<https://perma.cc/JV9V-THHW>].

a clean and healthy environment a universal human right.”<sup>107</sup> Following the UN’s lead, the European Parliament approved a resolution of the EU Biodiversity Strategy for 2030: Bringing Nature Back into our Lives.<sup>108</sup> This bold resolution states that the right to a healthy environment should be recognized under the EU Charter and that the EU should take the lead on the international recognition of such a right.<sup>109</sup> The European Court of Human Rights has ruled over 300 environmental related cases and stresses the importance of connecting environmental protection to human rights law.<sup>110</sup>

The adoption of the right to a healthy environment “sends a signal” to governments, lawmakers, and the public in general that this right is of equal importance to other fundamental human rights.<sup>111</sup> It affords new avenues for people to seek and enforce those rights through legislation and the courts.<sup>112</sup> It also, importantly, paves the way for international cooperation in protecting our planet and the people who inhabit it—something of increasing importance in this global world.<sup>113</sup>

#### *B. The Right of Access to Information Regarding the Environment*

While our European counterparts are making significant strides toward environmental justice, the Inter-American system (which includes North, South, and Central America) is upheld as a world leader in this regard.<sup>114</sup> Not only have they legally recognized the right to a healthy environment,<sup>115</sup> they have also applied the rights of “freedom of thought and expression” to the right to “seek, receive, and impart information and ideas of all kinds,” including specifically in

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107. *UN General Assembly declares access to clean and healthy environment a universal human right*, UN NEWS (Jul. 28, 2022), <https://news.un.org/en/story/2022/07/1123482> [<https://perma.cc/9S6A-8ZNP>].

108. *EU Biodiversity Strategy for 2030: Bringing Nature Back into our Lives*, EUR. PARLIAMENT (Jun. 9, 2021), [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0277\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0277_EN.html) [<https://perma.cc/WB3H-FK9A>].

109. *Id.*

110. *Protecting the environment using human rights law*, COUNCIL OF EUR., <https://www.coe.int/en/web/portal/human-rights-environment> [<https://perma.cc/RV2G-3ZFW>] (last visited Apr. 14, 2024).

111. JOHN H. KNOX, ACCESS RIGHTS AS HUMAN RIGHTS: THIRD MEETING OF THE FOCAL POINTS APPOINTED BY THE GOVERNMENTS OF THE SIGNATORY COUNTRIES OF THE DECLARATION ON THE APPLICATION OF PRINCIPLE 10 OF THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT IN LATIN AMERICA AND THE CARIBBEAN (Oct. 30, 2013), <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/AccessRightsAsHumanRights.pdf> [<https://perma.cc/J5VS-PVDR>].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Indigenous Communities Case*, *supra* note 22.



the context of environmental decision-making.<sup>116</sup>

Principle 10 of the Rio Declaration, adopted by the United Nations at the Earth Summit in 1992, states: “[E]ach 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.”<sup>117</sup> Since then, the Latin America and Caribbean region has implemented 217 instruments codifying Principle 10.<sup>118</sup> This includes the Escazu Agreement, adopted at Escazú, Costa Rica, in 2018, which seeks to protect the “rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters.”<sup>119</sup> The Escazu Agreement is the only binding agreement resulting from the UN Conference on Sustainable Development, often referred to as Rio+20.<sup>120</sup> The creation of the Escazu Agreement within the framework of the Inter-American System has created a “rich synergy” guaranteeing access to information rights as it relates to the environment.<sup>121</sup> This right of information is an essential component of environmental racism claims, as there is often a correlation between environmental injustice and lack of information. Former United Nations special rapporteur on human rights and environmental issues John H. Knox has said: “Effective environmental protection often depends on the exercise of human rights that are vital to informed, transparent and responsive policymaking.”<sup>122</sup>

Without a cause of action, claims from the people of Uniontown are likely to fall on deaf ears. A cause of action is, in short, the legal right to bring a

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116. See Knox, *supra* note 105; see also Claude-Reyes et al. v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006). The IACtHR unanimously declared that the “State violated the right to freedom of thought and expression embodied in Article 13 of the American Convention on Human Rights, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero,” when they sought to obtain information related to a deforestation project.

117. 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) [<https://perma.cc/G3YJ-92VV>].

118. *Information*, U.N. OBSERVATORY ON PRINCIPLE 10 IN LATIN AM. & THE CARIBBEAN, <https://observatoriop10.cepal.org/en/rights/information> [<https://perma.cc/5CQU-7L2J>].

119. *Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean*, U.N. OBSERVATORY ON PRINCIPLE 10 IN LATIN AM. & THE CARIBBEAN, <https://observatoriop10.cepal.org/en/treaties/regional-agreement-access-information-public-participation-and-justice-environmental> [<https://perma.cc/8GAX-V85R>].

120. *Id.*

121. Gastón Medici-Colombo, *The Escazú Agreement and the Inter-American Human Rights System: a rich synergy already in action*, THE GLOB. NETWORK FOR HUM. RTS. & THE ENV'T, <https://gnhre.org/?p=14998> [<https://perma.cc/D2TX-MZP4>].

122. Human Rights Council, Rep. of the Independent Expert on Its Twenty-Second Session, U.N. Doc. A/HRC/22/43, ¶ 10 (Dec. 24, 2012).

lawsuit.<sup>123</sup> The people of Uniontown might feel a sense of injustice, but what is their legal right or duty which has been violated? If the United States ratified or implemented current international law standards on human rights and environmental justice, there are at least three causes of action that would be available for environmental justice claims against the United States: (1) the right to a healthy environment; (2) the right to access information relating to the environment; and (3) the right to protection as Afro-descendants.

### *C. Does the U.S. Recognize These Rights?*

In contrast, the United States does not recognize a right to a healthy environment.<sup>124</sup> In fact, the U.S. does not recognize the jurisdiction of most international human rights treaties.<sup>125</sup>

Though the United States prides itself on being a champion of human rights, it has one of the worst track records in ratifying human rights and environmental treaties.<sup>126</sup> The U.S. is one of only seven countries that has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women and one of only two nations that has not ratified the Convention on the Rights of the Child.<sup>127</sup> When the U.S. does ratify a treaty, the Justice Department searches the language for any terms more stringent than domestic law and includes a reservation, declaration, or understanding (RUD) that the Senate must approve.<sup>128</sup> Furthermore, most treaties are declared to be “non self-executing,” which limits their applicability in domestic courts.<sup>129</sup> A claim can only be made if matching U.S. legislation already exists.<sup>130</sup>

International human rights law is “far superior” to domestic U.S. law in addressing environmental injustice.<sup>131</sup> The United Nations asserts that human beings have a natural right to a healthy environment, and that right is linked with other essential human rights.<sup>132</sup> As a result, many nations have recognized a constitutional right to a healthy environment.<sup>133</sup> However, U.S. acceptance of

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123. *Cause of Action*, THE LAW DICTIONARY, <https://thelawdictionary.org/cause-of-action/> [<https://perma.cc/4YXP-JJUC>].

124. *Mossville Env't Action Now v. United States*, Case 242-05, Inter-Am. Comm'n H.R., Report No. 43/10, OEA/Ser.LV/II.138, doc. 47 ¶ 18 (2010) [hereinafter *Mossville Admissibility Report*].

125. See Anya Wahal, *On International Treaties, the United States Refuses to Play Ball*, COUNCIL ON FOREIGN RELS. (Jan. 7, 2022), <https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball> [<https://perma.cc/DP9E-PMWZ>].

126. *Id.*

127. Marie Wilken, *U.S. Aversion to International Human Rights Treaties*, GLOB. JUST. CTR. (June 22, 2017), <https://globaljusticecenter.net/blog/773-u-s-aversion-to-international-human-rights-treaties> [<https://perma.cc/P9PN-VTJU>].

128. *Id.*

129. *Id.*

130. *Id.*

131. Gonzalez, *supra* note 21.

132. U.N. ENV'T, *supra* note 102.

133. *Id.*

such guidance is limited by sovereignty concerns<sup>134</sup> and by Cold War-era doctrines.<sup>135</sup> In part, and under pressure from governors and southern leaders, the U.S. did not ratify past human rights treaties because they didn't want to expose racial segregation, Japanese internment, and other human rights abuses.<sup>136</sup> The fear was that binding themselves to international jurisdictional bodies would potentially open a floodgate of civil and human rights litigation. Yet the argument is made that, by its lack of engagement, the United States has held back international environmental and human rights efforts.<sup>137</sup>

Those opposed to treaty ratification say that human rights are primarily a domestic concern and that U.S. laws offer better protection of individual rights, but that is simply not true.<sup>138</sup> Human rights are a matter of international concern and should not be subject to domestic norms.<sup>139</sup> The strongest protection of human rights would be a symbiotic relationship in which domestic and international laws worked in tandem.<sup>140</sup>

With a new administration in the White House, Congress recently passed the largest piece of climate legislation in U.S. history.<sup>141</sup> President Biden has made the environment a centerpiece of his agenda, particularly in the area of environmental justice, with the creation of the White House Environmental Justice Advisory Council and the EPA Office of Environmental Justice and

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134. Wahal, *supra* note 126. (“The United States shuns treaties that appear to subordinate its governing authority.”).

135. Gonzalez, *supra* note 21; *see also* Francisco J. Rivera Juaristi, *U.S. Exceptionalism and the Strengthening Process of the Inter-American Human Rights System*, 20 HUM. RTS. BRIEF, no. 2, 2013, at 19. Cold War-era suspicions and paranoia cast a pall over human rights advocacy in the middle and latter part of the twentieth century, particularly in relation to international treaties. Ironically, the United States was often deeply involved in the formation of such treaties but failed to sign onto them.

136. *Id.*

137. “The failure of the US to join with other nations in taking on international human rights legal obligations has undercut its international leadership on key issues, limiting its influence, its stature, and its credibility in promoting respect for human rights around the world.” *United States Ratification of International Human Rights Treaties*, HUM. RTS. WATCH (Jul. 24, 2009), <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> [<https://perma.cc/YK47-RNFR>]; *see also* *Treaty Ratification*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/human-rights/treaty-ratification> [<https://perma.cc/H662-T37V>] (discussing how the use of RUDs “dilutes the effect and enforceability of these universal human rights documents.”).

138. *See* Rivera Juaristi, *supra* note 136.

139. *Id.*

140. *Id.* Former U.S. President Jimmy Carter argues for U.S. ratification of the American Convention, saying: “Universal participation in our hemispheric human rights bodies would affirm and strengthen our democracies’ commitment to protect human rights.”

141. Fred Krupp, *The biggest thing Congress has ever done to address climate change*, ENV’T DEF. FUND (Aug. 12, 2022), <https://www.edf.org/blog/2022/08/12/biggest-thing-congress-has-ever-done-address-climate-change> [<https://perma.cc/EF59-ECBU>]. The Inflation Reduction Act earmarks \$369 billion toward climate and clean energy issues, including \$60 billion for environmental justice.

External Civil Rights.<sup>142</sup> These are good strides in the right direction. But why not go further and bind ourselves to the jurisdiction of the IACHR?

#### IV. IACHR

The Organization of American States (OAS), created in 1951, is a regional agency of the United Nations.<sup>143</sup> Participating States signed on to the American Declaration of the Rights and Duties of Man as well as the American Convention on Human Rights (ACHR).<sup>144</sup> Established in 1969, the ACHR is a treaty signed by many American States, including the United States.<sup>145</sup> The Convention created the Inter-American Human Rights system, which is comprised of two branches: the Inter-American Commission on Human Rights (IACHR), whose purpose is to promote and protect human rights,<sup>146</sup> and the Inter-American Court of Human Rights (IACtHR), whose objective is to interpret and apply the American Convention.<sup>147</sup>

People can access the Inter-American Human Rights system in two ways: (1) Petitions and (2) Requests for Precautionary Measures.<sup>148</sup> Petitions involve a lengthy process of review, whereby the formal assertions are reviewed by IACHR, submitted for feedback to the accused State, and then re-submitted to IACHR for a determination of admissibility.<sup>149</sup> In order to be declared admissible, the petitioner must show that they have exhausted all domestic legal remedies and submitted their claim within six months of the date when the case reached its limit domestically.<sup>150</sup> If a petition is declared admissible, it passes to the IACtHR, which will open a case focusing on the merits of the claim.<sup>151</sup> The case will then proceed much like any civil trial, with both parties preparing

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142. *Time is Ticking for Biden on This Urgent Environmental Work*, EARTHJUSTICE (Jan. 19, 2023), <https://earthjustice.org/blog/2023-january/time-is-ticking-for-biden-on-this-urgent-environmental-work> [<https://perma.cc/5C9H-FFBW>].

143. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 1609 (entered into force Dec. 13, 1951) [hereinafter O.A.S. Charter].

144. American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, May 2, 1948 [hereinafter American Declaration].

145. American Convention on Human Rights, Nov. 22, 1969, [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).

146. *Inter-American Commission on Human Rights*, ORG. OF AM. STATES, [https://www.oas.org/en/about/commission\\_human\\_rights.asp](https://www.oas.org/en/about/commission_human_rights.asp) [<https://perma.cc/BCK3-Q2A7>].

147. American Convention on Human Rights, Nov. 11, 1969, 1144 U.N.T.S. 123; *see also What is the I/A Court H.R.?*, INTER-AM. CT. OF HUMAN RIGHTS, [https://corteidh.or.cr/que\\_es\\_la\\_corte.cfm?lang=en](https://corteidh.or.cr/que_es_la_corte.cfm?lang=en) [<https://perma.cc/Y4US-BYZD>].

148. Lara Diaconu, *The Time Is Now For The IACHR To Address Climate Action As A Human Right: Indigenous Communities Can Lead (Again)*, 9 AM. INDIAN L.J. 213, 216 (2021), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1230&context=ailj> [<https://perma.cc/3YT3-DPSR>].

149. *Id.*

150. O.A.S. Inter-Am. Comm'n Hum. Rts., Rules of Procedure, art. 31–32 [hereinafter Rules of Procedure].

151. *Id.* at art. 37.

statements and supporting their assertions, while maintaining the option for a “friendly settlement” as the court examines the merits.<sup>152</sup> A panel of seven judges representing various member States of the OAS hears and deliberates on the case before issuing a judgment.<sup>153</sup>

A major drawback to filing a petition for admissibility is that it is such a lengthy and elaborate process, and only a fraction of all petitions are declared admissible.<sup>154</sup> There is an overwhelming backlog of cases in the Inter-American system, with over 3,000 pending cases and petitions.<sup>155</sup> This not only makes it more difficult for petitions and requests to be granted, but it also leads to long delays for cases that have been accepted. For example, *Mossville Environmental Action Now v. United States* was declared admissible 12 years ago, but the parties are still awaiting a verdict on the merits.<sup>156</sup>

In contrast, the timeline for precautionary measures is shorter, given that their purpose is to intervene in “serious, urgent situation[s]” involving an “imminent risk of irreparable harm to a person or group of persons.”<sup>157</sup> When granted, the Court asks the State to suspend all activity that could result in a violation of the human rights of the person alleging harm, until they have had a chance to evaluate the merits of the claim.<sup>158</sup> Most requests for precautionary measures involve basic human rights: the right to life and liberty, and the prohibition against torture or inhumane treatment.<sup>159</sup>

#### A. *Environmental cases in IACHR*

There are several notable environmental cases that have been funneled through the Inter-American system. This section is not intended to be a comprehensive survey but will highlight a few cases of special relevance to environmental justice claims.

##### 1. *2005 Inuit case*

In 2005, sixty-three Inuit plaintiffs petitioned the IACHR seeking relief from harms caused to the Arctic by Canada and the United States as a result of global warming.<sup>160</sup> They claimed that climate change caused by greenhouse gas

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152. *Id.* at art. 40–44.

153. Inter-Am. Ct. of Hum. Rts., *supra* note 147.

154. Diaconu, *supra* note 148, at 218.

155. *Statistics*, INTER-AM. COMM’N HUM. RTS., <https://www.oas.org/en/iachr/multimedia/statistics/statistics.html> [<https://perma.cc/5XBN-5JP5>].

156. *Mossville Admissibility Report*, *supra* note 125.

157. Rules of Procedure, *supra* note 151, art. 25; *see also* Diaconu, *supra* note 148.

158. Ines Gillich, *Limits and potentials of precautionary measures as a remedy for violations of international human rights—The case of the Inter-American Human Rights System*, 38 U. W. AUSTL. L. REV. 167.

159. *Id.*

160. Diaconu, *supra* note 148.

(GHG) emissions had fundamentally disrupted every aspect of the Inuit life and culture.<sup>161</sup> The IACHR declared their claim inadmissible, primarily because they were unable to establish a causal link between the actions of the U.S. government and the harms suffered by the Inuit people.<sup>162</sup> Much has changed in the last twenty years with respect to climate change and the scientific data linking GHG emissions to climate change.<sup>163</sup> One assumes that there would be stronger evidence for causation today. While this case does not suggest environmental racism, it does offer one of the first examples of a group of people using the IACHR as a forum to seek legal remedies for environmental claims against the United States, albeit unsuccessfully.

### 2. 2013 Athabaskan Petition

Eight years later, a similar claim was brought forth by the Athabaskan indigenous community against Canada, claiming that black carbon emissions had led directly to rapid arctic warming and melting.<sup>164</sup> They argued that harmful effects of climate change had dramatically altered the Athabaskan way of life, but like the Inuit, their claim faced challenges in proving causation.<sup>165</sup> Nine years later, as of the time of the writing, the Athabaskan petition is still awaiting a decision on its admissibility status.

### 3. Indigenous Communities Members of the Lhaka Honhat Association v. Argentina

This precedent-establishing case is the first example of the right to a healthy environment being explicitly recognized by the IACtHR.<sup>166</sup> In this case, indigenous lands had been degraded by non-indigenous people, leading to soil erosion and water contamination.<sup>167</sup> Examining Article 26 of the American Convention, the Court considered, for the first time, the rights to a healthy environment, adequate food, water, and cultural identity interdependently.<sup>168</sup> Illegal logging and other activities had interfered with the Lhaka Honhat people's traditional ways of obtaining food and had "affected [their]

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161. *Id.*

162. *Id.*

163. *See* Massachusetts v. Env't Prot. Agency, 549 U.S. 497 (U.S. 2007); Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020); West Virginia v. Env't Prot. Agency, 985 F.3d 914 (U.S. 2022).

164. Petition to the Inter American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, Apr. 23, 2013, [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2013/20130423\\_5082\\_petition.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2013/20130423_5082_petition.pdf).

165. *Id.*

166. Davila, *supra* note 21 at 158.

167. Indigenous Communities Case, *supra* note 22.

168. *Id.*

environmental rights.”<sup>169</sup> Since they were no longer able to use these lands to access clean water, hunt, and gather, the Court determined that the rights of the Lhaka Honhat people had been violated and ordered Argentina to remediate and compensate them for their harms.<sup>170</sup> This case showed that States can be held accountable by the IACHR when they violate a community’s right to a healthy environment.

#### 4. Dann v. United States

Members of a Western Shoshone indigenous group filed a petition against the United States, alleging that the U.S. had interfered with their use of ancestral land by permitting gold prospecting and threatening to remove them from their land.<sup>171</sup> The IACHR found that the U.S. had violated Article II by not affording the petitioners equal protection; they had not received the due process required by the Takings Clause of the Fifth Amendment, and therefore they had not received equal protection under the law.<sup>172</sup> Furthermore, the plaintiffs were entitled to “full and informed participation in the determination of their claims to property rights,” and a remedy should be made by the U.S. government “to ensure respect for the Danns’ right to property.”<sup>173</sup> Not surprisingly, the United States “respectfully decline[d]” to comply with the recommendations of the Court, and upon further inquiry indicated that the U.S. “does not agree with the Commission’s conclusions and that it is not bound to uphold the human rights principles outlined in the American Declaration of the Rights and Duties of Man.”<sup>174</sup>

#### 5. La Oroya Community v. Peru

This case involves a complaint by residents of La Oroya, Peru, against the Peruvian State for exposure to toxic contaminants from a metal smelting complex.<sup>175</sup> It is “one of the first cases to centrally address the indivisible relationship between a healthy environment and other fundamental rights such as life, health, and personal integrity.”<sup>176</sup>

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169. *Id.* at 4.

170. Davila, *supra* note 21, at 158.

171. Cahill-Jackson, *supra* note 21, at 189.

172. *Id.* at 190.

173. *Id.*

174. Mary and Carrie Dann v. United States, Inter-Am. Comm’n H.R., Report No. 75/02, ¶ 178 (Dec. 27, 2002).

175. Community of La Oroya v. Peru, Petition 1473-06, Inter-Am. Comm’n H.R., Report No. 76/09 (Aug. 5, 2009) [hereinafter La Oroya].

176. *With La Oroya case, the Inter-American Court may set a key precedent for protecting a healthy environment in Latin America*, AIDA (Oct. 5, 2022), <https://aida-americas.org/en/press/la-oroya-case-inter-american-court-may-set-key-precedent-protecting-healthy-environment-latin> [https://perma.cc/H5KV-CGSP].

*La Oroya Community v. Peru* was filed to address the concerns of 30,000 residents of La Oroya, where smelting activities lead to exposure of high levels of lead, arsenic, cadmium, and other toxins emitted by an American metallurgic complex.<sup>177</sup> Even though the State knew about these toxins, it did nothing about them. After being granted precautionary measures by the IACHR, the State took some action but failed to comply fully with the ordinances, and the people still suffered from high levels of contamination.<sup>178</sup> The Commission found

that the alleged deaths and/or health problems of alleged victims resulting from actions and omissions by the State in the face of environmental pollution generated by the metallurgical complex operating at La Oroya, if proven, could represent violations of the rights enshrined in Articles 4 and 5 of the American Convention, with reference to the obligations established in Articles 1.1 and 2 of that instrument.<sup>179</sup>

They also concluded that the State, aware of the environmental damage being caused, failed to regulate the environmentally degrading activities, thus compromising its human rights obligations.<sup>180</sup> The petition was admitted by the IACHR in 2009 but only in October 2022 were oral arguments heard. As reparation, the IACHR made several recommendations, including: (1) “material and moral redress for the human rights violations”; (2) “comprehensive physical and mental healthcare measures” for the victims; (3) performing a comprehensive investigation into who is responsible for the pollution; and (4) taking measures to ensure that these harms are not repeated.<sup>181</sup> This case is important because it would be the first time that the Court assessed the responsibility of a state for violations of human rights of non-indigenous peoples caused by environmental contamination.<sup>182</sup>

## 6. *Mossville Environmental Action Now v. United States*

The *Mossville* case, currently pending in the IACtHR, is of extreme importance to the people of Uniontown and their potential claim. *Mossville* is one of only two environmental justice cases against the United States to be

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177. *La Oroya*, *supra* note 176, at ¶ 2.

178. *Id.*

179. *La Oroya*, *supra* note 176, at ¶ 74.

180. *IACHR Files Case Before IA Court on Peru's Responsibility for the Effects of Contamination in La Oroya Community*, ORG. OF AM. STATES (Oct. 14, 2021), [https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media\\_center/preleases/2021/274.asp](https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/274.asp) [<https://perma.cc/H5FT-NWFP>].

181. *Id.*

182. Paula Spieler, *The La Oroya Case: The Relationship Between Environmental Degradation and Human Rights Violations*, 18 HUM. RTS. BRIEF, no. 1, 2010, at 19.



deemed admissible in IACtHR.<sup>183</sup> Residents of Mossville, Louisiana, complain that they suffer from pollution caused by fourteen industrial facilities in and around their city.<sup>184</sup> They cite health studies showing a disproportionate number of health ailments for the residents of their city, who are predominantly Black.<sup>185</sup> They allege environmental racism, which violates their right to equality before law, guaranteed under Article II of the American Convention.<sup>186</sup> Their petition also cites violations of Mossville residents' "rights to life, health and private life in relation to the inviolability of the home guaranteed by Articles I, V, IX, XI, and XXIII of the American Declaration."<sup>187</sup> Petitioners also claim that the State disproportionately grants permits to polluting facilities in predominately African-American neighborhoods, and despite the significant amount of pollution in Mossville, the State continues to grant permits to polluting industries.<sup>188</sup> The United States argues that no such right to a healthy environment exists, so there is no duty violated.<sup>189</sup> They also contend that there is no enforceable mandate to prevent clusters of polluting industries, and absent a clear showing of intentional discrimination, they cannot be held to have violated any duty.<sup>190</sup> Furthermore, they argue that the petitioners did not exhaust domestic remedies.<sup>191</sup>

While the IACHR requires an exhaustion of domestic legal remedies,<sup>192</sup> the people of Mossville want more than what can be granted domestically.<sup>193</sup> They want acknowledgement that their rights have been violated. Because the U.S. does not recognize a right to a healthy environment,<sup>194</sup> such declaration can come only through an international forum. The IACHR agreed with petitioners as to their Article II and V claims, granting them admissibility.<sup>195</sup> Though admissibility was granted in 2010, a decision has yet to be made.<sup>196</sup>

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183. The other concerns the exploitation of indigenous lands in New Mexico for uranium mining. *See Navajo Cmty. of Crownpoint & Church Rock v. United States*, Petition 654-11, Inter-Am. Comm'n H.R., Report No. 67/21 (Mar. 28, 2021).

184. Mossville Admissibility Report, *supra* note 125, at ¶ 13.

185. *Id.*

186. *Id.* at ¶ 2; *see also* American Declaration, *supra* note 145, art. II.

187. *Id.*

188. *Id.* at ¶ 12.

189. *Id.* at ¶ 18.

190. *Id.* at ¶ 19.

191. *Id.* at ¶ 17.

192. Rules of Procedure, *supra* note 149 art. 31.

193. Mossville Admissibility Report, *supra* note 125, at ¶ 15.

194. *See Tanner v. Armco Steel*, 340 F. Supp. 532, 537 (S.D. Tex. 1972) ("no legally enforceable right to a healthful environment . . . is guaranteed by the constitution.").

195. Mossville Admissibility Report, *supra* note 125, at ¶ 1.

196. Since 2010, nearly 600 members of the community of Mossville received buyout offers for their property from Sasol, a South African chemical firm. The company billed it as one of the most generous buyout offers ever, despite the fact that Sasol received almost \$3 billion in tax exemptions and \$100 million in grant funds, essentially meaning that the "buyout" was being funded by the taxpayers themselves. Furthermore, evidence shows that black homeowners

V. RECOMMENDATION: THE UNITED STATES SHOULD PASS DOMESTIC LAW  
THAT MIRRORS THE ENVIRONMENTAL RIGHTS PROVISIONS FOUND IN  
THE INTER-AMERICAN SYSTEM

Like in *Mossville*, the residents of Uniontown have experienced gross violations of their right to a healthy environment. Uniontown could follow the same path as *Mossville* and submit a claim to the IACHR, but *Mossville* residents are still waiting more than a decade later. More immediate change is needed.

The plight of Uniontown is stark. After the EPA declared the Kingston coal ash spill a hazardous Superfund site, the coal ash was sent to an uncapped landfill in Uniontown, where residents complained of “coal dust storms in windy conditions,” ash “seep[ing] down the sides of the ‘mountain’ in the rain,” and increased illness and death to animals and residents.<sup>197</sup> Coal ash disposal ought to be regulated under Subtitle C, as it meets EPA’s standards for hazardous waste; by excluding coal ash from Subtitle C, the EPA endangers communities like Uniontown from potentially “devastating effects.”<sup>198</sup>

The people of Uniontown have exhausted their domestic legal remedies and come up short. What they face is, to use Bullard’s term, “institutionalised discrimination,” in which a dominant group has exerted its power over a subordinate group.<sup>199</sup> What they need is acknowledgement of their human rights, and specifically, the right to a healthy environment.<sup>200</sup> Following the example provided by *Mossville* and the indigenous cases above, Uniontown can use the Inter-American system to vindicate its cause.

Uniontown residents have several claims against the United States. First, the United States has violated their right to a healthy environment, which is foundational to the enjoyment of other human rights.<sup>201</sup> Second, the United States has limited their access to decision-making and impinged their right to prior consultation and approval of plans.<sup>202</sup> Third, the United States has failed

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received, on average, 40% less than their white counterparts. See *They Didn’t Pay Us For Our Memories: Environmental Racism, Forced Displacement, and the Industrial Buyout of Mossville, Louisiana*, UNIV. NETWORK FOR HUM. RTS. (2019), <https://www.humanrightsnetwork.org/mossville> [<https://perma.cc/Q6KD-3YMB>]; see also Sara Sneath, *A chemical firm bought out these Black and white U.S. homeowners—with a significant disparity*, THE GUARDIAN (Nov. 17, 2021), <https://www.theguardian.com/us-news/2021/nov/17/this-communitys-black-families-lost-their-ancestral-homes-their-white-neighbors-got-richer> [<https://perma.cc/QDY7-NUDR>].

197. Helman, *supra* note 65.

198. *Id.* at 57.

199. Bullard, *supra* note 30.

200. Engelman-Lado, Bustos, Leslie-Bole, & Leung, *supra* note 51.

201. Davila, *supra* note 21, at 151.

202. See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, CLIMATE EMERGENCY: SCOPE OF INTER-AMERICAN HUMAN RIGHTS OBLIGATIONS, RESOLUTION 3/2021, at ¶ 16 [https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion\\_3-21\\_ENG.pdf](https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf) [<https://perma.cc/H3TB-NQ>]

to safeguard particular groups who experience a disparate impact, specifically “Afro-descendants.”<sup>203</sup>

The Inter-American human right to a healthy environment is explicitly recognized in Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), which states that (1) “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services,” and (2) “[t]he States Parties shall promote the protection, preservation, and improvement of the environment.”<sup>204</sup>

Responding to a request from Colombia, the Court issued a lengthy advisory opinion addressing how to interpret the Court’s position on the environment and human rights—specifically the recognized right to a healthy environment.<sup>205</sup> The Court identified an “undeniable” and “close” relationship between the protection of the environment and other human rights—economic, civil, and political—forming an “indivisible whole.”<sup>206</sup> These rights are both substantive (such as the right to life, water, food, health, and property, to name a few) and procedural (such as the right to access information and participate in decision-making).<sup>207</sup> Those most frequently pled through the Inter-American system when considering environmental harm are:

- (a) the right to a healthy environment;
- (b) the right to life;
- (c) the right to physical, mental, and moral integrity (humane treatment);
- (d) the right to property;
- (e) the right to health;
- (f) the rights of the child; and
- (g) the right to equality before the law.<sup>208</sup>

The Court has notably gone out of its way to recognize those who are

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MP]. “Climate change affects all people, but it generates differentiated impacts with respect to the effective enjoyment of their rights. States have a reinforced obligation to guarantee and protect the rights of individuals or groups who are in situations of vulnerability or who are particularly vulnerable to the damage and adverse impacts of climate change because they have historically and systematically borne the greatest burden of structural inequality.”

203. *Id.* ¶¶ 23–25. The rights of Afro-descendants are specifically recognized and protected by the IACHR.

204. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156, 165 [hereinafter Protocol of San Salvador].

205. The Environment And Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017).

206. *Id.* ¶ 47.

207. *Id.* ¶¶ 64–66.

208. Off. of the U.N. High Comm’r for Hum. Rts., *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 18 (June 2014).

“particularly vulnerable to environmental harm and climate change due to their reliance on the natural environment and their historic marginalization.”<sup>209</sup> People living in extreme poverty and minorities<sup>210</sup> are “especially vulnerable to environmental damage.”<sup>211</sup>

Under United States law, plaintiffs raising an equal protection claim under Title VI bear the burden of proving that the “decision maker was motivated by a discriminatory purpose.”<sup>212</sup> In environmental racism cases, the agency or developer can almost always offer a race-neutral justification for their actions.<sup>213</sup> Within the IACHR, however, a much broader right to a healthy environment and the right to access information provide avenues by which relief may be obtained.

The right to a healthy environment “is applicable to instances of environmental pollution by private actors.”<sup>214</sup> Courts have established a low threshold (“reasonably foreseeable risk of harm”) for triggering State responsibility to protect this right.<sup>215</sup> Despite adherence to permitting protocols, this right to a healthy environment still applies in the context of industrial pollution.<sup>216</sup> States bear responsibility for ensuring the right to clean air is not violated by private actors, including industries.<sup>217</sup> This obligation is particularly relevant in regions such as the Black Belt and Cancer Alley, which are widely regarded as “sacrifice zones” for toxic waste in the United States.<sup>218</sup> In an amicus brief to the IACHR in the matter of *La Oroya Community v. Peru*, a senior attorney with Earthjustice notes that “La Oroya is a tragic example of a ‘sacrifice zone,’ one of many communities in the hemisphere that live in the shadow of concentrated heavy industry that subjects them daily to a toxic

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209. Davila, *supra* note 21.

210. In accordance with international law, the Court interprets minorities as a group who share certain traits and “are in non-dominant positions of power.” *Id.* at 22 n. 213.

211. The Environment And Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R., ¶ 67 (Nov. 15, 2017).

212. Melissa Kiniyalocts, *Environmental Justice: Avoiding the Difficulty of Proving Discriminatory Intent in Hazardous Waste Siting Decisions* 11 (Land Tenure Ctr., Working Paper No. 36, Apr. 2000).

213. *Id.*

214. JUAN MENDEZ ET AL., INTER-AMERICAN COURT OF HUMAN RIGHTS, AMICUS CURIAE, CASE OF LA OROYA COMMUNITY V. PERU: BRIEF OF INTERNATIONAL LEGAL SCHOLARS DETAILING THE SCOPE AND CONTENT OF THE RIGHT TO A HEALTHY ENVIRONMENT IN CASES OF ENVIRONMENTAL POLLUTION ¶ 9 (2022)

215. *Id.* at ¶ 10.

216. Special Rapporteur of the Hum. Rts. Council, *Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 17, U.N. Doc. A/HRC/40/55 (Jan. 8, 2019).

217. *Id.* at ¶ 60.

218. Engelman-Lado, Bustos, Leslie-Bole, & Leung, *supra* note 51; *see also* Lisa Song & Lylla Younes, *EPA Calls Out Environmental Racism in Louisiana’s Cancer Alley*, PROPUBLICA (Oct. 19, 2022), <https://www.propublica.org/article/cancer-alley-louisiana-epa-environmental-racism> [https://perma.cc/SH7R-LL4M].

cocktail of chemicals.”<sup>219</sup>

The application of domestic law is more favorable to industries. Adherence to the CWA or CAA requirements creates a “permit shield” protecting industries from litigation as long as they comply with the conditions of the permit.<sup>220</sup> When viewed through the lens of human rights, however, the issues in Uniontown can clearly be seen as violations of basic rights demanding a remedy. Those violations reflect a failure of the United States to fulfill its procedural and substantive obligations.

*A. Violation 1: The United States Has Violated Uniontown’s Right to a Healthy Environment*

As stated previously, coal ash contains a toxic brew of arsenic, boron, cadmium, mercury, chromium, lead, radium, and more.<sup>221</sup> These toxins are known to cause cancer and neurological damage.<sup>222</sup> Additionally, the medical community warns that they can also cause “heart damage, lung disease, respiratory distress, kidney disease, reproductive problems, gastrointestinal illness, birth defects, and impaired bone growth in children.”<sup>223</sup> There are over 100 documented cases of coal ash disposal “in which danger to human health or the environment *has been proved*.”<sup>224</sup>

Knowing these facts, the EPA nonetheless failed (and continues to fail) to regulate coal ash as hazardous waste. The coal industry spent millions of dollars in lobbying and campaign contributions to ensure that EPA’s rules on coal combustion residuals would classify the substance as solid, not hazardous, waste.<sup>225</sup>

Under U.S. law, while the permitting process can be lengthy and heavily regulated, there are flaws. For one, by its very language, any permit allows a certain level of pollutants to be emitted. Those who set industry standards may

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219. *Mining and Industrial Pollution in Peru*, UNIV. NETWORK FOR HUM. RTS., <https://www.humanrightsnetwork.org/mining-industrial-pollution-in-peru> [https://perma.cc/2E7N-WA4A].

220. 40 C.F.R. § 70.6(f) (1992).

221. *Mapping the Coal Ash Contamination*, EARTHJUSTICE (Nov. 3, 2022), <https://earthjustice.org/features/coal-ash-contaminated-sites-map> [https://perma.cc/46FY-TK5R].

222. *Id.*

223. PHYSICIANS FOR SOCIAL RESPONSIBILITY, *COAL ASH: HAZARDOUS TO HUMAN HEALTH*, <https://psr.org/wp-content/uploads/2018/05/coal-ash-hazardous-to-human-health.pdf> [https://perma.cc/NHH7-F8VF].

224. *Id.* (emphasis added). This is not to mention the hundreds more under investigation. This total includes 70 cases identified by the EPA itself and more than 30 by various independent agencies such as Earthjustice and the Environmental Integrity Project. *See also* ENV’T PROT. AGENCY, OFF. OF SOLID WASTE, *COAL COMBUSTION WASTE DAMAGE CASE ASSESSMENTS* (2007), [http://graphics8.nytimes.com/packages/pdf/national/07sludge\\_EPA.pdf](http://graphics8.nytimes.com/packages/pdf/national/07sludge_EPA.pdf) [https://perma.cc/7M27-VFVS].

225. Manuel Quinones, *Coal Industry Deploys Donations, Lobbying as Its Issues Gain Prominence*, THE N.Y. TIMES (Oct. 13, 2011), <https://archive.nytimes.com/www.nytimes.com/gwire/2011/10/13/13greenwire-coal-industry-deploys-donations-lobbying-as-it-45582.html> [https://perma.cc/KX2F-7R8S].

not have the best interests of the community in mind.<sup>226</sup> Second, as long as a permit is attained, the law is satisfied and the industry is protected. In a nutshell, the system requires industries to jump through a bunch of hurdles, but once they do, they're virtually free of liability.

International law, on the other hand, considers the rights of the people or community being violated—it takes a look at the impact on children, the elderly, and low-income minorities.<sup>227</sup> In the Inter-American system, States are required to meet a minimum standard of due diligence under the duty to prevent, which must be “appropriate and proportional to the degree of risk of environmental damage.”<sup>228</sup> This duty of prevention includes safeguarding human rights to ensure that violations of those rights are dealt with as wrongful acts.<sup>229</sup>

When the IACHR considered the cases of *Lhaka Honhat*, *La Oroya*, and *Mossville*, they held the community's interests as equal to the interests of the polluting industries. They would likely do the same if Uniontown filed a petition. The linchpin would be evidence that shows that Uniontown residents' health issues are a direct result of the coal ash at Arrowhead Landfill. They would need to show more than anecdotal reports of higher rates of cancer, respiratory conditions, or nerve damage.<sup>230</sup> When the coal ash was first accepted at Arrowhead, there was no cap on it, and residents complained of the fugitive ash floating through the air.<sup>231</sup> It stripped paint from their cars, and people got sick after exposure to it.<sup>232</sup> Their tap water began to smell and taste strange; they had asthmatic reactions; discharges from the landfill invaded adjacent property and killed animals.<sup>233</sup>

When Uniontown residents filed their formal Title VI complaint with the EPA in 2013, they listed numerous ailments and also submitted an environmental report linking their alleged harms with air emissions from the landfill.<sup>234</sup> EPA's final response in closing that investigation in 2018 was that their experts determined “a number of deficiencies in how the modeling was conducted,” and so they could not rely upon the data of that report.<sup>235</sup>

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226. See generally Kiniyalocts, *supra* note 214.

227. Maria Antonia Tigre, *Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment*, 24 AM. SOC'Y INT'L L., no. 14, 2020.

228. *Id.*

229. *Id.*

230. Tamara Kamis, “We Deserve to Not Live Around Poison”: Alabama Resident Activists Speak Up Against Environmental Injustice, THE CORNELL DAILY SUN (Oct. 28, 2019), <https://cornellsun.com/2019/10/28/we-deserve-to-not-live-around-poison-alabama-resident-activists-speak-up-against-environmental-injustice/> [<https://perma.cc/8VXW-GXKD>].

231. *Ashes: A Community's Toxic Inheritance*, EARTHJUSTICE (Sept. 1, 2024), <https://earthjustice.org/features/campaigns/photos-a-toxic-inheritance> [<https://perma.cc/V79J-5767>].

232. *Id.*

233. *Id.*

234. Letter from Lilian S. Dorka to Marianne Engelman Lado, *supra* note 73.

235. *Id.* at 8.

*B. Violation 2: The United States Has Deprived the Minority Community of Uniontown from Having Meaningful Access to Information*

When the Kingston site spill occurred, the EPA deemed it a Superfund site and triggered CERCLA. As part of that process, a public notice-and-comment period ensued, whereby the EPA and Tennessee Valley Authority (a federal agency) addressed many of the public's concerns.<sup>236</sup> The notice-and-comment period serves an important role in administrative decision-making to ensure that the agency is adequately addressing the needs and concerns of the community and/or stakeholders, and that step was honored for the Kingston community.<sup>237</sup> However, that feature was notably absent when it came to the import of coal ash into Arrowhead Landfill. In response to direct questions about the lack of proper notice-and-comment, and the specific worries about environmental justice in Uniontown, the EPA largely ignored the concerns raised, stating that they met with six local elected officials and "a number of community members in June 2009 to hear public concerns and answer questions."<sup>238</sup> They also pledged that, "[t]hough it was necessary for the disposal of the coal ash to begin quickly and properly, the public is invited to comment while the work is ongoing."<sup>239</sup> Such perfunctory actions do not satisfy the public's right to meaningful access to information. They are token gestures devoid of any real meaning or power.

The EPA's failure to include the community of Uniontown in its decision-making effectively removed them from the process. The denial of a private right of action in *Alexander v. Sandoval* allows permitting practices that "exacerbate racially disproportionate pollution burdens" and den[ies] equitable participation . . . in siting and permitting decisions."<sup>240</sup> This is certainly true for the people of Uniontown. The only response they received to a lengthy litany of environmental justice concerns—most of which have been addressed in this Note—was *one sentence* from the EPA: "EPA and TVA considered environmental justice issues in making a decision under the Options Analysis and consulted with the Office of Environmental Justice regarding these issues."<sup>241</sup>

Furthermore, in 2016, four Uniontown residents who spoke out against the

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236. ENV'T PROT. AGENCY, SUMMATION OF COMMENTS RECEIVED AND RESPONSE TO COMMENTS TVA KINGSTON FOSSIL FUEL PLANT RELEASE SITE ADMINISTRATIVE ORDER AND AGREEMENT ON CONSENT, DOCKET NO. CERCLA-04-2009-3766 (2009), <https://archive.epa.gov/region4/kingston/web/pdf/tvaacommentga82009.pdf> [<https://perma.cc/QB6X-KUWW>].

237. *Id.*

238. *Id.*

239. *Id.*

240. Cahn, *supra* note 7.

241. ENV'T PROT. AGENCY, *supra* note 238.

landfill were hit with a \$30 million defamation SLAPP suit<sup>242</sup> by Green Group Holdings, which owns Arrowhead Landfill. That suit was settled one year later but was followed by more resistance in 2018 when EPA issued its Letter of Closure in response to Uniontown's environmental racism complaint.<sup>243</sup> The EPA admitted to "concerns" about how ADEM handled Uniontown's complaints when they first raised them at the state level, referring to a "lack of transparency regarding the process it utilized to address this retaliatory complaint."<sup>244</sup> Notwithstanding this admission, they saw "insufficient evidence" for all of Uniontown's claims and closed the investigation.<sup>245</sup>

*C. Violation #3: The United States Has Failed to Protect the Rights of African-Americans*

This Note cannot comprehensively describe the ways in which African descendants have been oppressed, stigmatized, brutalized, and marginalized in the United States. On the heels of slavery, Jim Crow, and segregation have come new forms of racism through police brutality and environmental injustice.<sup>246</sup> As the Commission recognizes:

[There is a] pattern of racial discrimination and historical and systematic exclusion that affects the Afro-descendants in the Americas. Therefore, it is possible to see that the phenomenon of slavery and the subsequent lack of positive actions adopted in order to neutralize and change their effect, resulted in the perpetuation of mechanisms of direct and indirect discrimination towards Afro- descendants.<sup>247</sup>

The "subsequent lack of positive actions" most certainly applies to southern Black communities. As discussed in the introduction of this Note, the problem of environmental racism is pervasive in this country, and the struggles of Uniontown are a poignant and troubling example of what can happen when a nation fails to protect its people. More often than not, those unprotected people are Black communities, who "systematically inhabit the poorest areas with the

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242. "Strategic Lawsuit Against Public Participation." 28 states (not including Alabama) have bans against SLAPP suits because they essentially seek to silence opposition and perpetuate "systemic racial and environmental injustice." Sabrina Shankman, *Alabama Town That Fought Coal Ash Landfill Wins Settlement*, INSIDE CLIMATE NEWS (Feb. 8, 2017), <https://insideclimate.news.org/news/08022017/coal-ash-environmental-justice-uniontown-alabama-green-group-holdings-aclu/> [<https://perma.cc/U22W-YCCR>].

243. Letter from Lilian S. Dorka to Marianne Engelman Lado, *supra* note 79.

244. *Id.* at 21.

245. *Id.* at 18, 25.

246. In reference to slavery, the IACHR recognizes that "Africans and people of African descent . . . were victims of these acts and *continue to be victims of their consequences*..." The Situation of People of African Descent in the Americas, Inter-Am. Comm'n H.R., Report No. OEA/Ser.L/V/II., doc. 62, p. 31 (Dec. 5, 2011).

247. *Id.* at 34.



most precarious infrastructure . . . and encounter serious obstacles regarding access to health and education services.”<sup>248</sup> By its own admission, the IACHR aims to be a staunch advocate specifically for the African diaspora, “strengthening” and “empowering” them toward “full dignity” in the eyes of the law.<sup>249</sup> Furthermore, the right to equality is the “central, basic axis of the inter-American human rights system”<sup>250</sup> with tremendous legal protection. Uniontown’s claims, therefore, need not be predicated solely on the right to a healthy environment or a lack of access to meaningful information; they have an avenue in the IACHR by which to seek relief and protection as Afro-descendants.

#### *D. Precautionary Measures*

These claims are urgent; they involve significant human exposure to toxic elements, and therefore should be viewed as critical in nature. Delays of five to fifteen years are unreasonable and would afford scant relief to communities worried about their children or the elderly. As such, Uniontown may have a claim through Article 25 of IACHR’s Rules of Procedure, which defines three main criteria for Precautionary Measures— “serious situation, urgent situation and irreparable harm to human rights.”<sup>251</sup> Most IACHR Precautionary Measures upheld against the United States involve incarcerated individuals awaiting the death penalty, where failure to abide by their guidance would result in “serious and irreparable harm.”<sup>252</sup> Clearly, the circumstances are different regarding toxic exposure, but that is why there are three “levels” of consideration— serious, urgent, and irreparable harm. It certainly could be said that the situation in Uniontown is urgent, and given that admissibility cases take many years to be adjudicated, it makes sense to implement a “stay” on the alleged harm pending a decision on the merits.

#### *E. Okay, So There’s a Problem—What’s the Solution?*

While a solid case can be built to advocate for the rights of Uniontown’s residents, there is an elephant in the room. At the end of the day, the United States has refused to acknowledge any binding authority from the Inter-American Human Rights system. Consequently, even if there was a victory on

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248. *Id.* at vii.

249. *Id.* at 3. “The Commission seeks to make a contribution to the ownership of human rights by persons of African descent in the Americas, to their strengthening, and to give persons of African descent a tool for empowerment.”

250. *Id.* at 31.

251. Gillich, *supra* note 159.

252. *Id.* at 178.

the merits from the IACtHR, it would not automatically lead to change.<sup>253</sup> Prior cases before the IACtHR resulting in recommendations to the United States have been met with a shrug of the shoulders; for example, see the following excerpts from *Jessica Gonzales v. United States*:

[W]ith due respect to the Commission, it is not a formal judicial body that is fully equipped with a strong set of fact-finding authorities and tools. The Commission's petition and hearing process does not involve a discovery procedure, nor does it have formal rules of evidence or provisions for witness examination and cross-examination.<sup>254</sup>

Further, the United States noted that

[I]t is essential to bear in mind that the judging of governmental action such as in this case has been and will remain a matter of domestic law in the fulfillment of a state's general responsibilities incident to ordered government, rather than a matter of international human rights law to be second-guessed by international bodies.<sup>255</sup>

Despite these overtures which downplay the significance of the IACHR, the United States would be well-advised to honor its recommendations. First, though it is not binding authority, it is persuasive. There is a certain level of accountability which the IACHR holds against the United States. Second, victories in the IACHR will only increase the pressure on Congress to pass legislation that protects communities like Uniontown. When the Commission grants a hearing or, even better, makes recommendations on the merits, this can be used as a tool for political pressure and can significantly sway public opinion.<sup>256</sup>

Still, the IACHR has a significant administrative backlog which limits the number of cases it admits and causes lengthy delays.<sup>257</sup> Even if the United States bound itself to the authority of the IACHR, this would do very little to help the citizens whose claims are not admitted or who are waiting years for a response.

A far better solution would be for the United States to adopt domestic law

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253. 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, U.N. Doc. A/HRC/25/53 (Jan. 8, 2019). "States that are parties to the OAS Charter but not to the American Convention are therefore subject to the jurisdiction of the Commission only with respect to its pre-Convention powers, and they are not subject to the jurisdiction of the Inter-American Court." High Comm'r for Hum. Rts., *supra* note 197, ¶ 14.

254. Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. Comm'n H.R., Rep. No. 80/11 ¶ 50 (2011).

255. *Id.* at ¶ 57.

256. Christine Pakkala, *The U.S. and the Inter-American Human Rights System Symposium*, COLUM. L. SCH., <https://www.law.columbia.edu/news/archive/us-and-inter-american-human-rights-system-symposium> [<https://perma.cc/URM9-RHUX>].

257. Inter-Am. Comm'n H.R., *supra* note 147.

that mirrors what is found in the Inter-American system. The political winds are blowing toward a greater commitment to environmental justice. President Biden's agenda has put environmental justice squarely on the map and prioritized addressing systemic problems. The creation of a new position of Director of Environmental Justice further underscores this goal.<sup>258</sup> A recent piece of legislation, the Environmental Justice for All Act, contains many provisions that would address the problems in this Note. One can only imagine what that would do for people like the residents of Uniontown. While it is tempting to dismiss these actions as political overtures to appease public opinion, they are nonetheless steps in the right direction. Perhaps a victory in the IACHR would lead to greater urgency and compel our policy makers to action.

#### V. CONCLUSION

In conclusion, claims of environmental injustice posed by the people of Uniontown—and others similarly situated—can and should be petitioned before the Inter-American Commission of Human Rights, where a higher regard for the human rights is upheld. These claims may involve the right to a healthy environment, the right of access to meaningful information in decision-making, and the protected rights of Afro-descendants. With each case admitted and heard on its merits, the pressure on the United States government and policy makers will increase, creating a greater incentive for the United States to recognize these rights within its own statutory or constitutional law. While the United States may never—for a variety of reasons—fully ratify or recognize the provisions of the IACHR or other international human rights law, it must take steps to adopt these rights and principles within its own policies or statutory regime. In so doing, “liberty and justice for all” may become a real possibility within these borders.

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258. Earthjustice, *supra* note 143.