

2016

The Human Right to Clean Air: A Case Study of the Inter-American System

Varun K. Aery

University of California - Davis, vkaery@ucdavis.edu

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjel>



Part of the [Education Commons](#), and the [Environmental Law Commons](#)

Recommended Citation

Aery, Varun K. (2016) "The Human Right to Clean Air: A Case Study of the Inter-American System," *Seattle Journal of Environmental Law*. Vol. 6 : Iss. 1 , Article 2.

Available at: <https://digitalcommons.law.seattleu.edu/sjel/vol6/iss1/2>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal of Environmental Law by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.

The Human Right to Clean Air: A Case Study of the Inter-American System

Varun K. Aery[†]

Combatting environmental damage has become a primary goal of the international community. Unfortunately, international human rights law has not taken this aim seriously. Although the Inter-American regional human rights system, one of three regional human rights institutions, empathizes with protecting the environment, it enervates such goals by barring victims of air pollution and climate change from access to judicial remedies. Seeking to bridge the gap between human rights law and environmental protection, this article explains why clean air is a human right, develops the positive content for such a right, and evaluates the practical reasons that justify the right's importance. The article then concludes by proposing two legal strategies that will eliminate procedural barriers to victims of air pollution pursuing legal remedies within the Inter-American human rights system.

TABLE OF CONTENTS

I. Introduction	16
II. International Mobilization on Environmental Protection.....	17
III. Transforming the Status of Human Rights and the Environment.....	20
A. Clean Air is a Human Right	20
B. How Should Human Rights Law Recognize the Right to Clean Air?	22
C. Instrumental Justifications for the Right to Clean Air	25
D. Positive Framework for the Right to Clean Air.....	27
E. Limitations to the Scope of Environmental Rights	30

[†] The author would like to deeply thank Professors Albert Lin and Angela Harris for their invaluable supervision and mentorship. He would also like to thank the *Seattle Journal of Environmental Law* for their assistance throughout the publication process.

IV. Legal Mechanisms to Enforce the Right to Clean Air	32
V. Concluding Recommendations	37

I. INTRODUCTION

On the 70th anniversary of the United Nations, the intergovernmental organization became an effective sounding board for the international community to take stock of neglected policy goals.¹ For world leaders, such as President Obama and Pope Francis, multilateral responsibility toward climate change was a clear talking point.² Since the 70th anniversary, international fervor on environmental protection continued to build leading up to the Cop 21 climate negotiations, where 195 states adopted the landmark Paris Agreement.³ The agreement “commit[s] nearly every country to lowering planet-warming greenhouse gas emissions to help stave off the most drastic effects of climate change.”⁴

While these negotiations concluded with some key gains, the resulting agreement remains heavily state centric, overlooking the rights of victims to seek redress from environmental polluters. Unfortunately, international human rights law has yet to fill this gap. For example, the Universal Declaration of Human Rights (UDHR), often considered to be the foundation of international human rights, fails to acknowledge environmental rights entirely.⁵ As a consequence of this gap, those most affected by environmental hazards like air pollution—the indigent and politically disenfranchised—are left without effective legal remedies from international human rights bodies.

Utilizing the Inter-American system as a case study, this paper calls for a fully enforceable fundamental human right to clean air to safeguard vulnerable populations afflicted by air pollution. Despite the fact that this dilemma transcends borders, focusing on the Inter-American system, rather than the United Nations or the African regional system, is a con-

1. *Strong UN. Better World.*, UNITED NATIONS, <http://www.un.org/un70/en> (last visited Nov. 29, 2015).

2. President Barack Obama, Remarks by President Obama to the United Nations General Assembly (Sep. 28, 2015) (transcript available at <https://www.whitehouse.gov/the-press-office/2015/09/28/remarks-president-obama-united-nations-general-assembly>).

Pope Francis, Address to United Nations General Assembly (Sep. 25, 2015) (transcript available at <http://www.popefrancisvisit.com/schedule/address-to-united-nations-general-assembly>).

3. Coral Davenport, *Nations Approve Landmark Climate Accord in Paris* (Dec. 12, 2015), http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html?_r=1.

4 *Id.*

5. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217A(III) (Dec. 10, 1948).

scientific choice. At one end of the spectrum, Africa has codified environmental rights and provided legal mechanisms for their enforcement.⁶ At the other end, the United Nations has yet to codify a formal right to clean air or even some notion of environmental rights, more generally.⁷ In the middle of this spectrum, the Inter-American system acknowledges environmental rights but fails to explicitly proffer legal mechanisms for their enforcement.⁸ Nevertheless, by at least recognizing environmental rights in some form of hard law, the Inter-American system offers a stepping stone to enforce the right to clean air as a fundamental human right, a goal clearly satisfied within the African system and unlikely in the United Nations.

This article provides three critical contributions. Part II explores the international community's growing interest in reducing environmental degradation. Part III describes the value of human rights and explains why clean air should be regarded as a human right. Part III also explores the positive content, related state obligations, and limitations on the right to clean air. Part IV proposes legal mechanisms to enforce the right to clean air in the Inter-American system. The article will then conclude in Part V with recommendations to simplify this task.

II. INTERNATIONAL MOBILIZATION ON ENVIRONMENTAL PROTECTION

In December 2015, the United Nations Conference of Parties (COP 21) met in Paris, France “to achieve a legally binding and universal agreement on [the] climate, with the aim of keeping global warming below 2°C.”⁹ The road to Paris reflects a long, growing trend toward protecting the environment. This trend, coupled with aspirations to bolster the project of human rights, eventually converged into a demand for in-

6. African Charter articles 55–58 discuss communications that are not initiated by a state. Although the Charter does not specify that individuals may submit communications, the jurisprudence of the African Commission demonstrates that individuals may bring cases. See African Comm'n H.R., *Centre for Minority Rights Development and Minority Rights Group (on Behalf of Endorois Welfare Council) Case 276/03*, at para. 49 (Nov. 11–25, 2009), available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf.

7. There is some discussion that the Stockholm Declaration recognized a human right to the environment. Yet, as Alan Boyle explains, the “real-world impact [of Declaration Principle 1] has been noticeably modest.” See Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 *FORDHAM ENVTL. L. REV.* 471, 473 (2007) (discussing the different approaches to considering environmental rights within the existing categories of human rights generation).

8. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, reprinted in 28 *I.L.M.* 156 (1989) [hereinafter Additional Protocol].

9. Sustainable Innovation Forum 2015, *COP—What's it all about?*, CLIMATE ACTION, <http://www.cop21paris.org/about/cop21> (last visited Nov. 29, 2015).

ternational environmental rights within the UN; the rest of the world quickly followed suit.¹⁰

In 1986, the African Charter became the first international legal instrument to recognize and enforce environmental rights.¹¹ In 1998, the Inter-American system adopted the Additional Protocol to the American Convention on Human Rights,¹² which explicitly enumerated a “right to live in a healthy environment.”¹³ Although judicial remedies remain unavailable for this right, the mere recognition of environmental rights reflects a growing interest in their potential. In 2002, the United Nations Committee on Economic, Social, and Cultural Rights recognized the right to water as an indispensable feature of the “right to an adequate standard of living.”¹⁴ As of 2010, on the domestic front, 142 out of 198 national constitutions include some reference to environmental rights.¹⁵

The codification of environmental human rights can be explained by the impact environmental dangers pose to our quality of life. Climate change places the world at risk of extreme droughts, mass extinctions, and extreme sea level rise.¹⁶ Moreover, increased temperatures exacerbate vehicle and factory pollution by expediting the production of ozone smog.¹⁷ This process augments air pollution placing those with respiratory conditions at risk of more serious health risks.¹⁸ In fact, the World Health Organization (WHO) notes that air pollution is “estimated to cause 1.3 million deaths worldwide per year. . . . Those living in middle-income countries disproportionately experience this burden.”¹⁹

10. Dinah Shelton, Human Rights, Environmental Rights, and the Right to Environment, 28 STAN. J. INT'L L. 103, 103–104 (1991).

11. Org. of African Unity [OAU], African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3, reprinted in 21 I.L.M. 58 (1982) [hereinafter African Charter].

12. Additional Protocol, *supra* note 8.

13. Additional Protocol, *supra* note 8, at art. 11.

14. Rep. of the Comm. on Economic, Social and Cultural Rights, 29th Sess., General Comment 15, Nov. 11–29, 2002, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003). See also International Covenant on Economic, Social and Cultural Rights [ICESCR], U.N. Doc. A/6316, at art. 11; G.A. Res. 2200A (XXI), GAOR, 21d Sess., Supp. No. 16 (Dec. 16, 1966) (defining protections of “adequate standard of living”).

15. Christopher Jeffords, *Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions*, (Human Rights Inst., Univ. of Conn., Econ. Rights Working Paper Series), <https://ideas.repec.org/p/uct/ecriwp/16.html#cites>.

16. *2 Degrees Celsius: A Critical Number for Climate Change*, CNN (Apr. 21, 2015), <http://www.cnn.com/videos/tv/2015/04/21/climate-change-2-degrees-celsius-global-warming-orig.cnn>.

17. *Air Pollution: Smog, Smoke and Pollen*, NATURAL RESOURCES DEFENSE COUNCIL, <http://www.nrdc.org/health/climate/airpollution.asp> (last visited Nov. 29, 2015).

18. *Id.*

19. *Children's Environmental Health: Air Pollution*, WORLD HEALTH ORGANIZATION, <http://www.who.int/ceh/risks/cehair/en/> (last visited Nov. 29, 2015).

Air pollution also places distant communities in danger. Rising CO₂ levels disproportionately affect small island states, such as the Maldives, who remain at risk of rising sea levels.²⁰ In addition, air pollutants threaten to destroy these states' coral reefs,²¹ fishing supply,²² and natural vegetation.²³ These states, in particular, lack the political clout necessary to encourage more developed states to halt environmentally dangerous activity. This was a central issue in the iconic *Trail Smelter* case, where pollution from a Canadian smelter damaged crops in the state of Washington.²⁴ While the case determined that there is a general duty to prevent transboundary air pollution,²⁵ its precise legal reasoning remained enigmatic. However, a closer examination of the opinion reveals that this duty emanates from human rights law and human dignity. The court held, "these conclusions are decisions in equity and [the] solution [is] inspired by [equity]."²⁶ As discussed in greater detail below, equity is essentially a proxy for human dignity.²⁷ Prohibiting transboundary air pollution, thus, serves to further egalitarianism by requiring states, and their inhabitants, to refrain from committing injurious acts abroad.

Due to greater scientific certainty about climate change and air pollution, it is becoming clearer that the environment remains in dire circumstances. As states and civil society struggle to find new mechanisms to defend this common good from threats, the pressure on international human rights bodies to address environmental concerns is building. Anticipating this pressure on regional human rights systems, the subsequent section explains the value of human rights, as well as how to incorporate environmental rights into the human rights framework within the Inter-American system.

20. Richard S.J. Tol, *The Double Trade-Off Between Adaptation and Mitigation for Sea Level Rise: An Application of FUND*, 12 *MITIGATION & ADAPTATION STRAT. FOR GLOBAL CHANGE*, no. 5, at 741–753 (2007).

21. *What is Coral Bleaching?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://oceanservice.noaa.gov/facts/coral_bleach.html (last visited Nov. 29, 2015).

22. *Climate Change Impacts on Fish*, AUSTRALIAN GOV'T GREAT BARRIER REEF MARINE PARK AUTH., <http://www.gbrmpa.gov.au/managing-the-reef/threats-to-the-reef/climate-change/what-does-this-mean-for-species/fish> (last visited Nov. 29, 2015).

23. REPUBLIC OF MALDIVES: MINISTRY OF ENVIRONMENT, ENERGY AND WATER, NATIONAL ADAPTATION PROGRAM OF ACTION 34 (2006) [hereinafter NAPA].

24. *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1905, 1905–1982 (1941).

25. *Id.*

26. *Id.*

27. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUR. J. INT'L L.* 655, 660 (2008).

III. TRANSFORMING THE STATUS OF HUMAN RIGHTS AND THE ENVIRONMENT

A. Clean Air is a Human Right

The idea of human rights has become increasingly attractive because societies that at least acknowledge human rights tend to actually respect them.²⁸ However, as Christian Erk states, “[a]ttractiveness alone cannot be a sustainable foundation for the ever-growing catalogue of alleged human rights.”²⁹ On the contrary, rights are worthy of being classified as *human* rights when rooted in some notion of human dignity. As Daniel P. Sulmasy explains, “[d]ignity is the ground of rights, not a synonym for rights.”³⁰ Therefore, in order for the international community to regard clean air as a human right, it must emanate from dignity.

While the concept of human dignity may at first seem ambiguous, philosophers have already provided some useful definitions. Christopher McCrudden notes that in the eighteenth century, political philosophers espousing republicanism extended notions of dignity to all citizens.³¹ Accordingly, dignity became intertwined with egalitarianism and communitarianism.³² As mentioned above, air pollution threatens these values by disadvantaging both the indigent and politically disenfranchised.

A helpful example of this from Brazil, a state subject to the jurisdiction of the Inter-American system,³³ involves the construction of megastadiums for events like the World Cup. According to FIFA projections, the millions of fans travelling to the World Cup would produce approximately 2.72 million metric tons of greenhouse gases.³⁴ The Nation reports that to be the “equivalent of 560,000 passenger cars driving for one year.”³⁵ Now consider how small island states suffer as a result of these games. As discussed above, escalating CO₂ levels disproportionately disadvantage states, such as the Maldives, placing them at risk of mounting sea levels.³⁶ In addition, recall that air pollutants endanger these states’

28. *Id.*

29. Christian Erk, *What Makes a Right a Human Right? A Theory of Human Rights*, in HUMAN RIGHTS & NATURAL LAW: AN INTERCULTURAL PHILOSOPHICAL PERSPECTIVE 101 (Walter Schweidler ed., 2012).

30. Daniel P. Sulmasy, *Human Dignity and Human Worth*, in HUMAN PERSPECTIVES ON HUMAN DIGNITY: A CONVERSATION 10 (Jeff Malpas & Norelle Lickiss eds., 2007).

31. McCrudden, *supra* note 27, at 660.

32. *Id.*

33. *Member State: Brazil*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/en/member_states/member_state.asp?sCode=BRA (last visited Nov. 29, 2015).

34. *Id.*

35. *Id.*

36. Tol, *supra* note 20, at 741–753.

coral reefs,³⁷ fishing supply,³⁸ and natural vegetation.³⁹ While tourists enjoy the sporting event for a few games, the politically disenfranchised states are made to suffer long-lasting consequences.

While the local community may receive some monetary benefit from hosting the World Cup, neither states nor citizens should choose to sell or trade human rights for other benefits. Margaret Jane Radin argues that creating a market for human rights is akin to slavery, converting that which is sacred into a commodity.⁴⁰ In other words, selling clean air for attracting tourists, and their pockets, undermines our interest in protecting human rights. This concern is itself rooted in human dignity, especially given that the indigent primarily fall prey to such a market.⁴¹ Human rights law should not sanction the practice of selling clean air to privilege affluent communities.

Yoshua Arieli further explains that dignity refers to one's personal autonomy and the capacity to be "lord of his fate and the shaper of his future."⁴² In regards to the natural resource of water, Pope Francis's encyclical observed, "access to safe drinking water is a basic human right, since it is essential to human survival and, as such, is a condition for the exercise of other human rights."⁴³ In other words, human survival and personal autonomy are inextricably linked. As Melissa Thorne explains, the same principle applies to clean air: "[t]o survive, humans must have air to breathe, water to drink, food to eat, and a place in which to live and sleep. If these elements become polluted, contaminated, or are eliminated or destroyed, life will cease to exist."⁴⁴ The WHO states, "[e]xposure to air pollutants is largely beyond the control of individuals and requires action by public authorities at the national, regional and even international levels."⁴⁵ Therefore, human survival is dependent on the state ensuring a healthy and clean environment. Because the right to clean air ensures dignity by advancing equity and personal autonomy, clean air must be recognized as a fundamental human right.

37. NAT'L OCEANIC & ATMOSPHERIC ADMIN, *supra* note 21.

38. AUSTRALIAN GOV'T GREAT BARRIER REEF MARINE PARK AUTH., *supra* note 22.

39. NAPA, *supra* note 23.

40. MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

41. *Id.*

42. Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Dignity of Man and His Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 12* (David Kretzmer & Eckart Klein eds., 2002).

43. Pope Francis, *Laudato Si'*, LIBRERIA EDITRICE VATICANA, para. 30, (May 24, 2015), available at http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

44. Melissa Thorne, *Establishing Environment as a Human Right*, 19 DENV. J. INT'L L. & POL'Y 301, 301 (1990).

45. WORLD HEALTH ORGANIZATION, *supra* note 19.

B. How Should Human Rights Law Recognize the Right to Clean Air?

Typically, UN bodies or regional human rights systems prescribe, enforce, and adjudicate issues within human rights law. The Inter-American system of human rights remains one of three regional human rights systems responsible for monitoring and ensuring the implementation of human rights within thirty-five independent nations.⁴⁶ These nations are collectively known as the Organization of American States (OAS).⁴⁷ The OAS has drafted and ratified several human rights instruments. One of these is the American Convention on Human Rights, which codifies various human rights and permits victims of human rights abuses to file complaints with the Inter-American Commission.⁴⁸ Another important treaty, the Additional Protocol to the American Convention on Human Rights, enumerates a different catalogue of human rights but it does not explicitly state that victims of human rights abuses, with certain exceptions discussed later,⁴⁹ can file complaints with the Commission.⁵⁰

The weak enforcement mechanisms central to the Additional Protocol have frustrated victims seeking redress from environmental pollution. Environmental rights are codified in Article 11 of the Additional Protocol:

1. Everyone shall have a right to live in a healthy environment and to have access to basic public services.
2. The State Parties shall promote the protection, preservation, and improvement of the environment.⁵¹

In 2005, the Inuit tribe attempted to file a complaint with the Inter-American Commission to address the fact that global warming was threatening their survival, alleging a violation of Article 11 above.⁵² However, the Commission dismissed the tribe's complaint because it failed to rely on a codified right in the American Convention on Human

46. Inter-American Human Rights System, INT'L JUSTICE RES. CTR., <http://www.ijrcenter.org/regional/inter-american-system/> (last visited Nov. 29, 2015).

47. *Member States*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/en/about/member_states.asp (last visited Nov. 29, 2015).

48. Organization of American States, American Convention on Human Rights, art. 44, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

49. Additional Protocol, *supra* note 8, at art. 19, para. 6. Part IV will discuss the fact that Article 19 Section 6 guarantees the complaints procedure for two rights mentioned in the Additional Protocol.

50. DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1309 (4th ed. 2011) [hereinafter HUNTER].

51. Additional Protocol, *supra* note 8, at art. 11.

52. HUNTER, *supra* note 50, at 1351.

Rights.⁵³ This procedural obstacle precludes human rights victims from even making their case to the regional human rights body. As a result, environmental polluters are shielded from accountability efforts. By equipping certain human rights with legal remedies but not others, the Inter-American system produces an imbalance between protecting the environment and other fundamental human rights. Therefore, in order to seek redress from the Inter-American Commission, victims of air pollution clearly need to invoke an enforceable human right.

Human rights systems have struggled to enforce environmental rights globally. Their solution has been to read environmental rights into four pre-existing rights: the rights to life, family, health, and property. However, each of these rights in the Inter-American context cannot, or should not, encompass the right to clean air. As a result, the right to clean air should be recognized as a separate environmental right for litigation purposes in the regional system. For example, while the right to property⁵⁴ may make sense for some environmental rights, such as protecting a community's land from toxic waste contamination, it cannot encompass clean air. Air is not something an individual or community can own—it is a common good.⁵⁵

The right to health does not appear in the American Convention.⁵⁶ Therefore, any attempt to read environmental rights into the convention would be futile. However, the Inter-American system retains another legal instrument that does enable victims to file complaints: the American Declaration of the Rights and Duties of Man. Article 11 of the Declaration safeguards the right to health stating, “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”⁵⁷ While clean air and health are intrinsically linked, there is a key reason why environmental rights should not be read into Article 11. Food, clothing, and medical care cannot *prevent* air pollution. Rather, medical care, for example, will treat the *consequences* of exposure to pollution. On the contrary, Article 11 of the Additional Protocol, which protects environmental rights, mandates “States Parties [to] [p]romote the protection, preservation, and improve-

53. HUNTER, *supra* note 50, at 1352.

54. American Convention, *supra* note 48, at art. 21.

55. JETSKÉ BOUMA ET AL., *ECOSYSTEM SERVICES FROM CONCEPT TO PRACTICE* 11 (Jetské Bouma & Pieter Van Buekering eds., 2015).

56. American Convention, *supra* note 48.

57. Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, O.A.S. Doc. OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948), *available at* <http://cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

ment of the environment.”⁵⁸ This provision imposes a broader, proactive obligation onto the state to protect the environment, instead of simply treating pollution’s harmful effects after the fact.

In the Inter-American system, the right to life⁵⁹ also cannot encompass the right to clean air. India serves as a model for incorporating environmental protection into the right to life. In the *Ganges Pollution (Tanneries)* case, the Supreme Court of India observed that, despite concerns about unemployment or loss of revenue, the “protection and preservation of nature’s gifts” is central to the right to life codified in Article 21 of the Indian Constitution.⁶⁰ Article 21 notes, “[n]o person shall be deprived of his life or personal liberty except according to procedure established by law.”⁶¹ However, Article 21 is written much more broadly than its counterpart in the American Convention, Article 4. The Article 4 provision protects the right to life in the context of freedom from arbitrary detention and the death penalty.⁶² It would be incredibly difficult to read environmental concerns into the same provision that protects against capital punishment. As with the rights to property or to health, the right to life cannot subsume the right to clean air.

While the right to family life⁶³ might encompass a right to clean air, there are concerns with this approach as well. The European Court of Human Rights has argued that industrial air and noise pollution violates “private and family life,” codified within Article 8 of the European Convention.⁶⁴ However, much like India’s Constitution, Article 8 is written quite broadly. Article 8 states, “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”⁶⁵ However, Article 17, the comparable provision in the American Convention, is much more limited. The text of Article 17 narrowly discusses issues such

58. Additional Protocol, *supra* note 8, at art. 11.

59. American Convention, *supra* note 48, at art. 4.

60. K.B. Ojha, Human Right and Environment Pollution in India & Judiciary Contribution, 2 INT’L. J. HUMANITIES & SOC. SCI. INVENTION 42, 42–44 (2013) (discussing the Ganges Pollution (Tanneries) case).

61. INDIA CONST. art. 21.

62. American Convention, *supra* note 48, at art. 4.

63. American Convention, *supra* note 48, at art. 17.

64. The European Convention on Human Rights, art. 8, Apr. 11, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. See, e.g., *Industrial Pollution: Lopez Ostra v. Spain*, in ENVIRONMENT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS, EUROPEAN COURT OF HUMAN RIGHTS, available at http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf. See also, e.g., *Industrial Pollution: Taşkin and Others v. Turkey*, in ENVIRONMENT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS, EUROPEAN COURT OF HUMAN RIGHTS, available at http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf.

65. American Convention, *supra* note 48, at art. 17.

as divorce and respecting children born out of wedlock.⁶⁶ It is difficult to imagine how the right to clean air could fit into these specific contexts.

An interest in clean air must be recognized as some form of human right because, like all recognized human rights, clean air ensures human dignity. While environmental rights are often read into rights to property, health, life, and family life, the right to clean air must be recognized as an independent environmental right in the Inter-American system. The next section proffers several instrumental justifications for recognizing clean air as a human right within the Inter-American system, as opposed to an environmental concern or purported interest.

C. Instrumental Justifications for the Right to Clean Air

Basing one's complaint on a fundamental human right, rather than a concern, increases the complainant's opportunity to succeed in critical legal and political fora. Courts are generally much more protective of human rights rather than simply concerns.⁶⁷ For example, the United States Supreme Court has developed different levels of scrutiny for allegations concerning violations of civil rights, a form of human rights.⁶⁸ These levels ensure that state policies bend toward respecting fundamental rights, not the reverse. Moreover, David Hunter observes, "[t]he focus of human rights on the individual can inspire reform of international environmental law, which still resists full participation by individuals and NGOs."⁶⁹ Therefore, if environmental human rights are recognized and enforced, there is a greater likelihood that civil society can enter into a critical dialogue with states, and inter-governmental organizations, to promote environmental justice. Inviting these participants into such negotiations is beneficial because they can provide valuable insight into the affected community's needs, ensuring more effective public policy. Given that non-governmental organizations have been previously excluded from this dialogue, it appears clear that it is far more challenging for environmental advocates simply *concerned* about air pollution to be heard.

Beyond merely "inspiring reform" in environmental law, human rights law can effectively pressure governments to adopt certain progressive policies or refrain from taking actions contrary to human rights; failure to do so results in public shaming.⁷⁰ This establishes a vital rela-

66. *Id.*

67. See Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L. J. 779 (1987).

68. *Id.*

69. HUNTER, *supra* note 50, at 1309.

70. Kenneth Roth, *What Are Human Rights For? A Personal Reflection*, in INTERNATIONAL HUMAN RIGHTS LAW 7 (Daniel Moeckli et al. eds., 2d ed. 2014).

tionship between the public and the complainant. When the victim files a human rights based complaint against their government, they often receive community support. For example, when the United States Supreme Court recently heard oral arguments on gay marriage, thousands of supporters remained vigilant of the proceedings, either by standing outside the courthouse or watching relevant media coverage.⁷¹ Contrast this to cases where human rights issues are not central to the dispute, such as admiralty cases. Typically, the community does not become involved in admiralty cases. If framed as a human rights issue, the right to clean air can mobilize entire communities, placing significant pressure on governments to improve air quality.

Community members often mobilize around human rights claims because they wish to see the state apparatus correct situations of injustice. As Rebecca M. Bratspies explains, human rights “remed[y] the power imbalance between individuals and their governments.”⁷² The *Ogoniland* case decided by the African Commission serves as a clear example. The Ogoni people of Nigeria alleged that both the state owned Nigerian National Petroleum Company and Shell Petroleum Development Corporation caused serious environmental harm in Ogoniland, a province in southern Nigeria.⁷³ The plaintiffs relied on Article 24 of the African Charter, which secures environmental rights.⁷⁴ The African Commission observed that Article 24 imposed a series of obligations onto state-owned and private oil companies. Specifically, these actors had to conduct scientific assessments, upgrade facilities to prevent environmental harm, and issue just compensation to victims of environmental degradation.⁷⁵ The case was later brought to the United States District Court for the Southern District of New York under the Alien Tort Statute. The pressure placed on Shell eventually encouraged it to settle for \$15.5 million, one of the largest payouts for a human rights violation.⁷⁶

A fundamental human right to clean air would similarly place individuals and their governments on a more equal footing. Calculating dam-

71. David A. Fahrenthold, *Outside Supreme Court, Gay-marriage Supporters Jubilant and Expectant*, WASH. POST (Apr. 28, 2015), http://www.washingtonpost.com/politics/excited-crowds-gather-at-supreme-court-as-gay-marriage-case-is-heard/2015/04/28/b8e6e6fa-eda0-11e4-8666-a1d756d0218e_story.html.

72. Rebecca M. Bratspies, *The Intersection of International Human Rights and Domestic Environmental Regulation*, 38 GA. J. INT’L & COMP. L. 649, 652 (2010).

73. ACHPR, *infra* note 83.

74. Article 24 states, “[a]ll people shall have the right to a general satisfactory environment favourable to their development.” African Charter, *supra* note 11, at art. 24.

75. African Charter, *supra* note 11, at art. 24.

76. See *The Case Against Shell*, CTR. FOR CONSTITUTIONAL RIGHTS, (Mar. 24, 2009), <http://ccrjustice.org/learn-more/faqs/factsheet%3A-case-against-shell-0>. See also CATHRIN ZENGERLING, *GREENING INTERNATIONAL JURISPRUDENCE* 113 (2013).

ages for air pollution is admittedly difficult, yet non-governmental organizations are constantly designing creative ways to calculate compensation, such as the value of a polluting company's operating costs.⁷⁷ However, victims are not always seeking monetary damages. Human rights bodies can be effective in requiring states to change current public policy. For example, in *South Africa vs. Grootboom*, the most cited economic rights case, a community of squatters successfully argued that South Africa violated their right to housing when the state displaced hundreds of residents without offering just alternatives.⁷⁸ As a result, various South African municipalities included a "Grootboom allocation" in their budgets to address the housing needs of their most indigent.⁷⁹ Thus, fundamental human rights can go beyond offering victims a single payout to transforming major aspects of the state apparatus to further human rights goals. Recognizing clean air as fundamental human right could similarly influence public policies to proactively limit polluting activity and enhance air quality.

Recall in the Inuit case, discussed above, the Inter-American Commission concluded that if a victim of environmental harm, such as air pollution, wishes to file a complaint with the Commission, they cannot do so.⁸⁰ Victims must have a chance to express their grievances in order to hold air polluters accountable in the Commission. Before exploring how to enforce this right, however, it is helpful to analyze the positive content of the right to clean air.

D. Positive Framework for the Right to Clean Air

Asbjørn Eide developed the "respect, protect, and fulfill" framework, employed by various United Nations bodies to parse out the legal obligations of state actors in relation to human rights.⁸¹ This framework can illuminate the legal obligations inherent to securing a right to clean air.

77. Liu Qin, *China Court to Hear 30m Yuan Air Pollution Lawsuit*, CHINA DIALOGUE (Mar. 25, 2015), <https://www.chinadialogue.net/article/show/single/en/7790-China-court-to-hear-3-m-yuan-air-pollution-lawsuit->.

78. Government of the Republic of South Africa & Others v Grootboom & Others 2000 (11) B.C.L.R. 1169, 2001 (1) S.A. 46. See also *Summary of South Africa v. Grootboom*, INT'L NETWORK FOR ECON., SOC. & CULTURAL RIGHTS, <http://www.escr-net.org/docs/i/401409> (last visited Nov. 29, 2015).

79. *Id.*

80. HUNTER, *supra* note 50, at 1351.

81. Magdalena Sepulveda, *The Nature of The Obligations Under the International Covenant on Economic, Social and Cultural Rights* 161 (Sch. of Human Rights Research Series ed., 2003).

Under the obligation to *respect* clean air, state actors must not take actions that directly adulterate clean air.⁸² For example, in the *Ogoniland* case, the African Human Rights Commission determined that the Nigerian government contravened this obligation when the state owned Nigerian National Petroleum Company *intentionally* deposited toxic waste in a southern Nigerian province.⁸³ The pollution decimated local water, soil, air, and food resources.⁸⁴ Although the African Commission acknowledged that the state “has the right to produce oil, the income from which will be used to fulfill the economic and social rights of Nigerians,” the Commission ultimately concluded that the obligation to respect prohibits state-sanctioned economic activity from compromising environmental rights.⁸⁵

To illustrate the obligation to respect clean air in Latin America, the World Cup again serves as a useful example. The sporting event is managed by the FIFA Congress, an association of sovereign states.⁸⁶ Each member state may construct multiple stadiums within its borders.⁸⁷ For the 2014 games, Brazil built twelve different stadiums.⁸⁸ As mentioned above, this state-sanctioned activity exacerbates smog production impairing air quality.⁸⁹ The obligation to respect clean air might require states, such as Brazil, not to host such an activity. Alternatively, the obligation could mandate the state develop cleaner construction or transportation alternatives, so the activity can be enjoyed with minimal adverse environmental impacts. As a human rights system, the Inter-American Commission is best suited to determine the scope of this obligation. However, because clean air is not an enforceable human right, the regional system has failed to make this determination.

Under the obligation to *protect* clean air, state actors must prevent private citizens, also known as non-state actors, from interfering with the right to clean air.⁹⁰ This obligation is rooted in the theory of due dili-

82. Cf. Frederic Megret, *Nature of Obligations*, in INTERNATIONAL HUMAN RIGHTS LAW 96, 102 (Daniel Moeckli et al. eds., 2d ed. 2014).

83. Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, AFRICAN COMM’N H.R. [ACHPR] 155/96 (Oct. 27, 2001), available at http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf.

84. *Id.*

85. *Id.* ¶ 54.

86. *FIFA Congress*, FIFA, <http://www.fifa.com/about-fifa/fifa-congress/all-you-need-to-know/index.html> (last visited Nov. 29, 2015).

87. *FIFA World Cup 2014*, THE STADIUM GUIDE, <http://www.stadiumguide.com/tournaments/ifa-world-cup-2014/> (last visited Nov. 29, 2015).

88. *Id.*

89. Autumn Spanne & The Daily Climate, *Brazil World Cup Fails to Score Environmental Goals*, SCIENTIFIC AM. (June 19, 2014), <http://www.scientificamerican.com/article/brazil-world-cup-fails-to-score-environmental-goals/>.

90. Megret, *supra* note 82.

gence, which originates from the Inter-American case *Velásquez-Rodríguez v. Honduras*.⁹¹ The case concerned the disappearance of Honduran nationals in the 1980s.⁹² Although private gangs perpetrated the kidnappings, the Inter-American Court⁹³ deemed the Honduran government liable for their actions.⁹⁴ The Court held,

An illegal act which violates human rights and which is initially not directly imputable to a State...can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁹⁵

Because the government failed to investigate the kidnappings and prosecute the perpetrators, it did not respond to the human rights abuses as required by international law.⁹⁶

Under the theory of due diligence, states would be held liable for violating the right to clean air if they failed to investigate the consequences of environmentally dangerous activities.⁹⁷ As Frederic Megret notes, “the state *is* liable [for failing to protect] individuals from other individuals [when] it has failed to [take available measures] that would have prevented the violation from happening.”⁹⁸ This suggests that states need to go beyond merely conducting research to reduce air pollution; they must take serious steps to restrict environmentally dangerous activities committed by their own citizens. The obligation to protect human rights increases as the state becomes more aware of relevant problems.⁹⁹ By holding states accountable for their citizens’ actions, the obligation to protect clean air utilizes the due diligence theory to motivate states to adopt laws or create regulatory standards that prohibit non-state actors from contaminating air quality.¹⁰⁰

91. *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 147 (July 29, 1988) [hereinafter *Velásquez*].

92. *Id.*

93. The Inter-American Court is a separate institution from the Inter-American Commission. Complaints are first submitted to the Commission, which assesses admissibility. The Commission will resolve the dispute itself. If the state party has accepted the jurisdiction of the Court, then the Commission can submit the dispute to the Court for final adjudication. Jo Pasqualucci, *The Americas*, in *INTERNATIONAL HUMAN RIGHTS LAW* 398, 405 (Daniel Moeckli, et al., eds., 2d ed. 2014).

94. *Velásquez*, *supra* note 91.

95. *Id.* ¶ 172.

96. *Id.*

97. *Id.*

98. Megret, *supra* note 82.

99. Sarah Joseph & Adam Fletcher, *Scope of Applications*, in *INTERNATIONAL HUMAN RIGHTS LAW* 119, 124 (Daniel Moeckli, et al. eds., 2d ed. 2014).

100. Megret, *supra* note 82.

Under the obligation to *fulfill* the right to clean air, states must adopt a national plan with detailed steps aimed at promoting the right to clean air.¹⁰¹ In the context of the right to water, Hillel Shuval argues that “[e]ffective governance is a prerequisite” of the obligation to fulfill human rights.¹⁰² The same applies to clean air. Effective governance necessitates sufficient knowledge concerning air pollutants, and this information must be disseminated to the community. In General Comment 18, the United Nations Committee on Economic, Social, and Cultural Rights recognized that “[t]he right of individuals and groups to participate in decision-making should be an integral part of all policies, programmes and strategies intended to implement” human rights obligations.¹⁰³ This recommendation often involves reforming, or creating new, administrative agencies to monitor and ensure implementation of human rights.¹⁰⁴ Alternatively, states can pass new legislation¹⁰⁵ to limit air pollution and expand mitigating factors, such as national parks. Ultimately, states need to employ a variety of judicial, administrative, and budgetary measures to fulfill the right to clean air in a comprehensive manner.

The positive content of the right to clean air encompasses a tripartite set of obligations. The duty to respect, protect, and fulfill clean air imposes real legal obligations onto states to ensure clean air. However, as the section below reveals, this framework is not without limitations.

E. Limitations to the Scope of Environmental Rights

Despite the tripartite framework, some scholars question whether judicial bodies can define the scope of human rights, criticizing them as unmanageable.¹⁰⁶ However, human rights law has developed important mechanisms to define the scope of fundamental human rights. Human rights violations are analyzed by a minimum level, labeled the “minimum core” in human rights law. In General Comment 3, the United Na-

101. *Cf. Id.* at 103.

102. HILLEL SHUVAL ET AL., WATER RESOURCES IN THE MIDDLE EAST 288 (2007).

103. Treaty bodies are charged with monitoring and implementing their various human rights instruments. One way to accomplish this is to produce what are called “general comments.” A general comment is a form of soft law that advises member states on how to enforce the obligations to respect, protect, and fulfill human rights. In addition, they often provide the positive content of the right being described. General Comment 18 discusses article 6 of the ICESCR, the right to work. The content of general comment 18 is not limited to article 6, however. Committee on Economic, Social and Cultural Rights, General Comment No. 18, The right to work (article 6 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/18, ¶ 42 (Feb. 6, 2006), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.GC.18.En](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.GC.18.En).

104. *Id.*, ¶ 22.

105. *Id.*

106. Aryeh Neier, *Social and Economic Rights: A Critique*, 13 No. 2 HUMAN RIGHTS BRIEF 1, 1–3 (2006).

tions Committee on Economic, Social, and Cultural Rights explains that the minimum core refers to “at the very least, minimum essential levels” to realize human rights.¹⁰⁷ Peter H. Gleick applied this analysis to the human right to water, arguing for a precise minimum water supply for all individuals.¹⁰⁸ In the context of clean air, the current challenge is not the shortage of air, but rather air *quality*, which affects both human health and the environment.¹⁰⁹

In order to combat poor air quality, establishing a minimum core standard for clean air would require states to develop minimum quality standards, similar to the air quality index, for clean air.¹¹⁰ Scholars have identified six types of air pollutants that are threatening our environment.¹¹¹ The minimum core standard should impose reasonable limitations on each pollutant to a level sufficient for realizing a minimum standard of adequate human health and a healthy environment. A human rights violation becomes clear when the state exceeds these prescribed levels. States enjoy the freedom to determine which activities to regulate as long as the state falls within the prescribed levels. Defining the precise levels for the pollutants, as well as the standards regarding adequate health, would initiate a discussion between scientists and the Inter-American Commission. The concluding recommendations explain how the Commission can create an effective dialogue between scientists and human rights scholars to define these standards.

An additional limitation to the scope of environmental rights is found in the distinction between fundamental environmental rights and environmental concerns. While the right to clean air is a human right, not all environmental concerns can obtain this distinction. The beginning of Part III explained that human rights are rooted in human dignity when they advance egalitarianism and safeguard personal autonomy from injurious acts.¹¹² The right to clean air satisfied both of these conditions.¹¹³ The same could be said about the right to be free of water or noise pollution as well as freedom from aesthetic injury. In each of these cases, per-

107. Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of State's Parties' Obligations (Art. 2, Para. 1, of the Covenant) E/1991/23 ¶ 10 (Dec. 14, 1990).

108. Peter H. Gleick, *The Human Right to Water*, 1 WATER POL'Y 487, 496 (1998) (explaining that basic water requirement should be “25 lpcd [litres per capita per day] . . . with an additional 15 lpcd for bathing and 10 lpcd for cooking”).

109. HUNTER, *supra* note 50, at 504–505.

110. *Air Quality Index (AQI) Basics*, AIRNOW, <http://airnow.gov/index.cfm?action=aqibasics.aqi> (last visited Nov. 29, 2015).

111. These pollutants are nitrous oxides, sulfur dioxide, volatile organic compounds, persistent organic pollutants, carbon dioxide, and chlorofluorocarbons. *See, e.g.*, HUNTER, *supra* note 50, at 506–507.

112. *See supra* Part III (A).

113. *Id.*

sonal autonomy is threatened by enduring physical harm, such as stomach and liver illnesses from drinking contaminated water,¹¹⁴ heart conditions due to noise pollution,¹¹⁵ and even disease and depression associated with aesthetic injuries.¹¹⁶ However, environmental “rights” that do not protect people from physical harm, such as the “right to biodiversity,” cannot be considered a fundamental environmental right. In India, for example, Hindus are burning castor trees leading to the eradication of the entire species.¹¹⁷ Yet, this does not cause physical harm to local communities. While this may be addressed by environmental law generally, it does not advance human dignity. International human rights law should not designate such concerns as human rights.

A final limitation to the scope of environmental rights involves the issue of resources. The Additional Protocol recognizes that human rights will be “achiev[ed] progressively,” meaning that resource constraints can justify a delay in protecting environmental rights.¹¹⁸ However, as the UN explains, this limitation “must be read in light of the overall objective . . . to move as expeditiously and effectively as possible” to the full realization of human rights.¹¹⁹ In other words, resource constraints are not a permanent excuse for failing to fulfill human rights obligations. States must eventually take steps to decrease air pollution with the goal of fully enjoying clean air. If the Commission enforces environmental rights, as suggested in the subsequent section, it can hopefully proffer further guidance on this limitation.

IV. LEGAL MECHANISMS TO ENFORCE THE RIGHT TO CLEAN AIR

Despite policy discussions aimed at mitigating environmental concerns, this article has called for the Inter-American system to recognize clean air as fundamental human right for that purpose. This section will suggest two legal mechanisms to enforce such a right within the Inter-American system. The first mechanism entails interpreting the Additional Protocol to the American Convention as an integral part of the Ameri-

114. U.S. EPA, *The Effects: Human Health*, <http://www2.epa.gov/nutrientpollution/effects-human-health> (last visited Nov. 29, 2015).

115. Meg Selig, *What Did You Say?! How Noise Pollution is Harming You*, PSYCHOLOGY TODAY (Sep. 25, 2013), <https://www.psychologytoday.com/blog/changepower/201309/what-did-you-say-how-noise-pollution-is-harming-you>.

116. Tara L. Bennett, *Perceived Health Effects of Litter and Trash by Inner City Residents* (June 2012) (unpublished B.S. College of Nursing Honors Theses) (on file with The Ohio State University University Libraries), available at <http://hdl.handle.net/1811/51932>.

117. *Castor Burning Singes Green Tribunal*, PUNE MIRROR (Mar. 8, 2015), <http://www.punemirror.in/pune/civic/Castor-burning-singes-Green-Tribunal/articleshow/46488474.cms>.

118. Additional Protocol, *supra* note 8, at art. 1.

119. Committee on Economic, Social and Cultural Rights, *supra* note 103, ¶ 9.

can Convention and the second employs the teleological approach to enforce environmental rights.

As discussed earlier in Section B of Part III, the Inter-American system maintains two key legal instruments, the American Convention on Human Rights and the Additional Protocol to the American Convention. The American Convention permits victims to file complaints based on certain enumerated human rights.¹²⁰ In contrast, the Additional Protocol simply identifies a catalogue of human rights but leaves the topic of admissibility of complaints unclear. As discussed above, when treaties deny victims access to legal remedies, they defeat the purpose of human rights law.¹²¹

The first method to enforce the right to clean air involves treating the Additional Protocol as an integral part of the American Convention. It is entirely possible for a string of legal instruments to be considered one treaty. The Vienna Convention on the Law of Treaties, the body of international law that governs how treaties are interpreted, defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”¹²² For example, Yugoslavia and Romania produced the Final Act, a treaty relating to the establishment and operation of the Iron Gates Water Power and Navigation System on the River Danube.¹²³ According to Ulf Linderfalk, a renowned expert on treaty interpretation, the Final Act encompassed “one ‘Agreement,’ five ‘Conventions,’ four of which with ‘Annexes’ added, one ‘Charter,’ two ‘Protocols’ [and] two [letters].”¹²⁴ Breaching any of these various documents constituted a breach of the treaty.¹²⁵ If the Additional Protocol can be deemed a part of the American Convention, then violating provisions of the Additional Protocol should similarly constitute violations of the American Convention. This would effectively open the complaints procedure of the American Convention to the environmental rights embedded in the Additional Protocol.

The Additional Protocol and the American Convention could be understood as one treaty because the former was arguably adopted in connection with the latter. According to Article 31(2)(b) of the Vienna

120. American Convention, *supra* note 48, at art. 44.

121. *See* Section B of Part III.

122. Vienna Convention on the Law of Treaties, art. 2(1)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 333 [hereinafter Vienna Convention].

123. ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES 104 (Peggy Oscarsson trans., Springer 2007).

124. *Id.*

125. *Id.*

Convention, a treaty shall comprise, in addition to its text, “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”¹²⁶ There are several reasons why the Additional Protocol was likely adopted in connection with the American Convention. First, the official name of the Additional Protocol is actually the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“ESCRs”).¹²⁷ As the Additional Protocol observes, “[b]earing in mind that, although [ESCRs] have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected.”¹²⁸ At the onset, this suggests the Additional Protocol was adopted in connection with the American Convention.

Additional provisions located within the Additional Protocol also support an inseparable connection with the American Convention. The Protocol’s preamble states, “[r]ecalling that, in accordance with the Universal Declaration of Human Rights and the American Convention on Human Rights, the idea of free human beings [can]. . . only be achieved” if ESCRs are secured.¹²⁹ In addition, the Preamble also “[considers] that the [American Convention] provides that draft additional protocols . . . may be submitted . . . for the purpose of gradually incorporating other rights and freedoms into the protective system thereof . . .”¹³⁰ The Additional Protocol is submitted for that purpose.¹³¹ These textual provisions suggest that the Additional Protocol is not only related to the treaty but also sees itself as an integral supplement to the American Convention.

Beyond the official title and Preamble of the Protocol, the text of the American Convention also indicates that the Additional Protocol rights should be regarded as a part of the Convention. Article 31 of the Convention establishes that “[o]ther rights and freedoms recognized in accordance with the procedures established in [Article 77] may be included in the system of protection of this Convention.”¹³² Article 77 permits state parties to draft protocols “with a view to gradually including

126. Vienna Convention, *supra* note 122, at art. 31(2)(b).

127. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, *reprinted in* 28 I.L.M. 156 (1989).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. American Convention, *supra* note 48, at art. 31.

other rights and freedoms within its system of protection.”¹³³ Instead of merely granting state parties the right to adopt protocols independent of the American Convention, Article 77 calls for states to adopt protocols that incorporate some rights into the “system of protection,” in essence, the complaints procedure.

One possible objection to the above mechanism involves the fact that the Additional Protocol already explicitly equips two rights with the complaints procedure. Article 19(6) of the Additional Protocol notes that if state parties violate Article 8 (trade union rights) or Article 13 (the right to education), complaints may be filed in the American Commission.¹³⁴ Arguably, Article 77’s requirement for incorporation has been satisfied. However, this should not be read as precluding other rights, such as the right to clean air, from enjoying the same privilege. Article 77 of the American Convention notes that protocols must be adopted “with a view to gradually includ[ing] *other* rights and freedoms within its system of protection.”¹³⁵ In other words, complaints on these *other* rights should be admitted to the Inter-American Commission. Articles 8 and 13, however, already appear in the American Convention. Therefore, any complaint alleging violations of either Article 8 or 13 are already justiciable.¹³⁶ Consequently, the Additional Protocol has yet to include *other* rights within the “system of protection.”

While there is nothing in the Additional Protocol specifically indicating that Article 77 refers to the right to clean air, there is also nothing that states otherwise. This suggests that at the very least the door does in fact remain open for admitting complaints on some Protocol rights, such as the right to clean air. Because, as this article has demonstrated in detail, clean air is intrinsic to human dignity, the Commission should specifically utilize Article 77 to make the complaints procedure accessible to environmental rights. Article 77, thus, serves as a key window to enforcing the right to clean air.

The other method that may enforce the right to clean air entails interpreting the Protocol through a teleological approach, defined as, interpreting a treaty to effectuate its purpose.¹³⁷ The Vienna Convention, which encapsulates the teleological approach, states that treaties “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its ob-

133. American Convention, *supra* note 48, at art. 77.

134. Additional Protocol, *supra* note 8, at art. 8, art. 13.

135. American Convention, *supra* note 48, at art. 77 (*emphasis added*).

136. American Convention, *supra* note 48, at art. 16 (recognizing freedom to associate for labor purposes), art. 12 (recognizing that parents have freedom to provide education to their children).

137. Interpreting treaties based on their purpose. This approach is expressed in the Vienna Convention Law of Treaties. See Vienna Convention, *supra* note 122, at art. 31.

ject and purpose.”¹³⁸ Because the Vienna Convention is customary international law, all states are obligated to interpret treaties through the teleological approach.¹³⁹

Interpreting the Additional Protocol through this approach will make clear that the Inter-American Commission must hear complaints involving violations of the right to clean air. The object and purpose of the Additional Protocol is to safeguard, *inter alia*, the right to clean air. If states and citizens are permitted to completely subjugate this right, then the adoption of the Additional Protocol would simply be symbolic. Failing to provide legal remedies for human rights abuses defeats the principal aim of human rights law by forgoing accountability for human rights abuses.¹⁴⁰

Unlike soft law, such as declarations or resolutions, treaties impose legally binding obligations onto states.¹⁴¹ John Quigley notes that although many treaties do not specify legal remedies, that does not suggest violations should go unpunished.¹⁴² Because human rights are rooted in human dignity, denying legal remedies for human rights abuses effectively undermines human dignity. The OAS could have promulgated the Additional Protocol rights in a declaration, as they did with other human rights in the American Declaration of the Rights and Duties of Man.¹⁴³ However, the OAS chose to codify, *inter alia*, environmental rights, within a binding treaty.¹⁴⁴ Because treaties are inherently binding forms of hard law, the OAS cannot circumvent human rights obligations by denying victims access to judicial remedies.

If the international community held otherwise, the entire foundation of international human rights law, not to mention foreign policy in general, would collapse. States could no longer be pressured to comply with treaty obligations. Imagine if states summarily decided to no longer respect the Aarhus Convention, Kyoto Protocol, or the Convention on Biological Diversity. In each of these instances, states could argue that treaties are no longer deemed binding sources of law. The domino effect of

138. Vienna Convention, *supra* note 122, at art. 31.

139. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz v. Serb. & Montenegro), 2007 I.C.J. 43, ¶ 160 (Feb 26, 2007).

140. *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Dec. 15, 2005), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

141. *Id.* at art. 26.

142. John Quigley, *Must Treaty Violations Be Remedied? A Critique of Sanchez-Llamas v. Oregon*, 36 GA. J. INT'L & COMP. L. 355, 356 (2007).

143. Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, O.A.S. Doc. OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948).

144. American Convention, *supra* note 48, at art. 11.

this interpretation would strangle our efforts to regulate war, genocide, and even international trade, effectively setting the international community back to the Stone Age. As we celebrate the 70th anniversary of the establishment of the United Nations, it seems absolutely necessary to interpret the Additional Protocol as guaranteeing access to legal remedies for human rights violations. Otherwise, states can infringe fundamental human rights, including the right to clean air, across borders.

Although the Additional Protocol acknowledges environmental rights, it fails to give them legal teeth. The above section explored two possible methods to strengthen the right to clean air within the Inter-American system. The first method suggests treating the American Convention and the Additional Protocol to the Convention as one treaty. The second method interprets the Additional Protocol through a teleological approach, recognizing that denying a powerful enforcement mechanism within a human rights treaty effectively undermines human rights law. Either method retains the capacity to expand the project of environmental rights within the Inter-American system.

V. CONCLUDING RECOMMENDATIONS

For years, international environmental lawyers have been hoping to utilize international human rights law to further environmental goals.¹⁴⁵ The latter field contains many desirable attributes, such as adjudicatory bodies and long-standing and respected treaties. In addition, human rights law enjoys various soft law instruments, including general comments, resolutions, and thematic and country-specific experts, that proffer important guidance for the development of human rights law.¹⁴⁶ As this article has shown, human rights bodies have ignored complaints from victims of environmental harm. This indignity can be rectified by recognizing environmental rights as human rights. In particular, the Inter-American Commission can enforce obligations to respect, protect, and fulfill the right to clean air against relevant state actors as well as non-state actors under the theory of due diligence.¹⁴⁷ Treating the American Convention and Additional Protocol as one agreement or interpreting the Protocol to not defeat its “object and purpose” will hopefully safeguard the human right to clean air by issuing needed legal remedies to victims.

145. HUNTER, *supra* note 50, at 1309.

146. HUNTER, *supra* note 50; Jane Connors and Markus Schmidt, *United Nations in INTERNATIONAL HUMAN RIGHTS LAW* 359 - 397 (Daniel Moeckli, et al. eds., 2d ed. 2014).

147. Additional Protocol, *supra* note 8, at art. 11. Article 11 states, “(1) Everyone shall have the right to live in a healthy environment and to have access to basic public services. (2) The States shall promote the protection, preservation, and improvement of the environment.”

In order for the Commission to properly safeguard the right to clean air, there are a few options available to the Commission before adjudication ensues. Even before receiving complaints, the Inter-American Commission could fulfill its various functions under Article 41 of the American Convention. Article 41 permits the Commission to “prepare such studies or reports” and “request the governments of the member states to supply it with information” related to human rights.¹⁴⁸ Recognizing the right to clean air as a human right would enable the Commission to obtain information specific to the context of air quality. Although human rights bodies often struggle to obtain information from member states,¹⁴⁹ as Jo Pasqualucci observes, “[s]tates today generally respond to [the Inter-American] Commission requests for information.”¹⁵⁰ These reports and studies should include the participation of affected communities as well as environmentalists.

Beyond collecting information, Article 41 also enables the Commission to “submit an annual report” to the OAS General Assembly and “make recommendations to the governments of the member states.”¹⁵¹ Therefore, after conducting the aforementioned studies and compiling relevant data, the Commission can generate a uniform standard for all member states under international human rights law. This would be particularly useful given the fact that environmental problems transcend borders. Moreover, when states fail to comply with these recommendations, both the human rights body and other compliant member states can pressure recalcitrant states. These recommendations will likely further goals to protect the environment across the American region, especially offering communities cleaner air.

148. American Convention, *supra* note 48, at art. 41.

149. One can examine concluding observations prepared by various U.N. treaty bodies which openly state that countries fail to provide requested information.

150. Pasqualucci, *supra* note 93, at 403.

151. American Convention, *supra* note 48, at art. 41.

