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Gun Violence and U.S. Obligations under the Inter-American System for the Protection of Human Rights

Christina M. Cerna*

INTRODUCTION

Chicago, a city of 2.7 million, generally considered the murder capital of the United States, recorded 650 murders in 2017, a drop from 2016 -- which had been the deadliest year in nearly two decades.¹ Chicago, however, did not have the highest per capita murder rate in the United States. With 24 murders per 100,000 residents, Chicago's homicide rate was ninth in a ranking of homicides in large cities in the U.S. in 2017.² The city that placed first was St. Louis, with a population of approximately 320,000, and the highest per capita murder rate in the U.S., with 66 murders per 100,000 residents (Los Cabos, Mexico, was first in the world and Caracas, Venezuela, second).³ It was interesting to discover that on a list put together by a Mexican non-governmental organization, the Citizen Council for Public Security and Criminal Justice, of the fifty most dangerous cities in the world, St. Louis came out at thirteenth in 2017. In summary, it is oddly appropriate to have this conference on gun violence and human rights in the gun violence capital of the United States.

The most recent data indicates that almost 40,000 people died of gun violence in the United States in 2017, which is equivalent to 12 per

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1. See Madison Park, *Chicago Police Count Fewer Murders in 2017, But Still 650 People Were Killed*, CNN (Jan. 1, 2018), <https://www.cnn.com/2018/01/01/us/chicago-murders-2017-statistics/index.html>; MAJOR CITIES CHIEFS ASS'N, VIOLENT CRIME SURVEY – NATIONAL TOTALS YEAR END COMPARISON JANUARY 1 TO DECEMBER 31, 2017 AND 2016, https://majorcitieschiefs.com/pdf/news/mcca_violent_crime_report_2017_and_2016_year_end_update_copy1.pdf.

2. See Francesca Mirabile & Daniel Nass, *What's the Homicide Capital of America? Murder Rates in U.S. Cities, Ranked*, THE TRACE (Apr. 26, 2018), <https://www.thetrace.org/2018/04/highest-murder-rates-us-cities-list/>.

3. See *Reported Annual Crime in St. Louis*, AREA VIBES, <https://www.areavibes.com/st.+louis-mo/crime/> (last visited June 1, 2019); *The Most Dangerous Cities in the World*, WORLD ATLAS, <https://www.worldatlas.com/articles/most-dangerous-cities-in-the-world.html> (last visited June 1, 2019).

100,000 people, a level not seen since the mid-1990s.⁴ More than half, i.e. 59%, of those deaths were suicides caused by the use of guns.⁵ The typical suicide victim is a middle-aged white male. Approximately 74% of suicide victims are white men.⁶ Most people, however, do not die from a gunshot wound and more than 85,000 people survive gun violence per year in the U.S.⁷

The Inter-American Commission on Human Rights (Inter-American Commission) is a principal organ of the Organization of American States, a regional body within the UN architecture, tasked with the promotion and protection of human rights in its 35 member states. The Inter-American Commission is the only international human rights body that has the competence to receive complaints from individuals alleging that the United States has violated their human rights.⁸ This paper aims to explain three things. Part I of this paper will discuss how revolutionary it was in international law for the State to grant individuals the right to petition an international body for the violation of one's human rights. Part II will explain the American Declaration on the Rights and Duties of Man and the Inter-American Commission. Part III will explore how to complain to the Inter-American Commission about an arbitrary violation of the right to life caused by the prevalence of guns in the United States.

4. See *Underlying Cause of Death 1999-2017*, CTR. FOR DISEASE CONTROL, <https://wonder.cdc.gov/controller/datarequest/D76.jsessionid=E25653A582206B6D868530AA599F8555> (last visited June 1, 2019).

5. *Id.*

6. See EVERYTOWN FOR GUN SAFETY, GUN VIOLENCE IN AMERICA (Feb. 1, 2019), https://everytownresearch.org/wp-content/uploads/2018/07/Gun_Violence-America-REPORT-013119B.pdf.

7. See Sean Campbell et al., *The CDC Is Publishing Unreliable Data on Gun Injuries. People Are Using It Anyway*, FIVETHIRTYEIGHT (Oct. 4, 2018), <https://fivethirtyeight.com/features/the-cdc-is-publishing-unreliable-data-on-gun-injuries-people-are-using-it-anyway/>; *Gun Violence*, AM. PUB. HEALTH ASS'N, <https://www.apha.org/topics-and-issues/gun-violence> (last visited June 5, 2019).

8. The only regional body with a human rights mechanism, of which the United States is a member, is the Organization of American States. As regards the United Nations human rights treaty bodies, the United States has ratified the UN's International Covenant on Civil and Political Rights (ICCPR), but it has not become a party to the Optional Protocol to the ICCPR, which gives individuals the right to petition the UN Human Rights Committee. See U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, *Human Rights Bodies – Complain Procedures*, <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (last visited June 2, 2019). See also U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, *Status of Ratification Interactive Dashboard*, <http://indicators.ohchr.org/> (last visited June 2, 2019).

I. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND
THE AMERICAN DECLARATION ON THE RIGHTS OF DUTIES OF
MAN

This year the international community is celebrating the 70th anniversary of the Universal Declaration of Human Rights (UDHR), which the United Nations General Assembly adopted on December 10, 1948, known ever since as “International Human Rights Day.” It is also the 70th anniversary of the American Declaration of the Rights and Duties of Man (American Declaration), which the twenty-one founding members of the Organization of American States (OAS), adopted seven months earlier than the U.N. adopted the UDHR. The OAS is a regional body within the post-War U.N. architecture that includes every independent country in the Western hemisphere, from Canada to Chile. Both the UDHR and the American Declaration are “declarations”, that is, they are not legally binding instruments, like treaties, but rather they are aspirational documents. When Eleanor Roosevelt urged the General Assembly to adopt the UDHR, she asked the General Assembly “to keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of basic principles of law or legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.”⁹

The United Nations gave legally binding force to the norms of the Universal Declaration in 1966, when it adopted the two international covenants: 1) the International Covenant on Civil and Political Rights (ICCPR), and 2) the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰ The Covenants did not enter into force until 1976, twenty-eight years after the adoption of the UDHR. The United Nations calls the UDHR and the two Covenants the “International Bill of

9. Eleanor Roosevelt, Address at the Adoption of the Declaration of Human Rights (Dec. 1948), http://www.edchange.org/multicultural/speeches/eleanor_roosevelt_adoption.html.

10. See U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, *International Human Rights Law*, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited June 1, 2019).

Rights.”

Similarly, the drafting and adoption, in 1969, of the American Convention on Human Rights gave legally binding force to the norms of the American Declaration. It also took another ten years for the American Convention to enter into force, which it did in 1978. Today, the American Convention has twenty-three States parties out of thirty-four (active) OAS member States.¹¹ The United States is the only founding member of the OAS that has never become a party to the American Convention. The States that are not parties to the Convention, as OAS member States, are under a good-faith obligation to respect the rights set forth in the American Declaration.¹²

II. THE RIGHT TO PETITION

Many advocates for a legally binding human rights instrument were disappointed when the United Nations only adopted a human rights declaration and not a human rights treaty. As mentioned, the UN did not adopt legally binding treaties giving legal force to the UDHR until 1966, eighteen years after the adoption of the UDHR.¹³ Europe, however, led the way by adopting the first legally binding human rights treaty, two years

11. *American Convention on Human Rights*, OAS, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Jan. 7, 2019). Cuba is the 35th member state which was suspended from participation in OAS activities from 1962-2009. After the lifting of the suspension in 2009, Cuba expressed no interest in returning to the OAS. *Member States*, OAS, http://www.oas.org/en/about/member_states.asp (last visited Jan. 7, 2019); Stella Krepp, *Cuba and the OAS: A Dramatic Fallout and Reconciliation*, WILSON CENTER (Dec. 18, 2017), <https://www.wilsoncenter.org/blog-post/cuba-and-the-oas-story-dramatic-fallout-and-reconciliation>.

12. This is a norm of international law derived from Article 26, “pacta sunt servanda”, of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331. Although the American Declaration is not a treaty, the Inter-American Court of Human Rights in an Advisory Opinion on the matter stated: “For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission’s Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.” Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 45 (July 14, 1989).

13. See *supra* note 10.

after the adoption of the UDHR. The Council of Europe adopted the European Convention on Human Rights, also known as the “Convention for the Protection of Human Rights and Fundamental Freedoms,” in Rome on November 4, 1950.¹⁴ The European Convention was the first legally binding human rights treaty and was revolutionary in that it created a Commission and Court to consider and decide on human rights complaints. The Preamble to the European Convention states that the Europeans were taking: “the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.”¹⁵

The U.N. Human Rights Commission began receiving complaints soon after it was created, but it had no competence to act on these complaints. Philip Alston estimates that in the late 1940s and early 1950s, the U.N. Human Rights Commission annually received about 20,000 petitions, but the Commission could not act on these complaints, which it duly ignored.¹⁶ Eleanor Roosevelt, in her reflections on the drafting of the UDHR, noted that the U.N. Human Rights Commission, that she chaired, received complaints, but “we could do nothing actually to solve the problems that the petitions presented”.¹⁷ The U.N. Human Rights Commission functioned for its first twenty years (1947-1966) in setting standards by drafting international human rights instruments, most significantly the 1966 UN Covenants.

It is only in contrast to the United Nations that we can see how truly revolutionary the European system was. The European system created a complaint mechanism as early as 1950 with the adoption of the European Convention, whereas it was almost twenty years later, in 1967, that the U.N. authorized the U.N. Human Rights Commission to begin to deal with human rights complaints. Samuel Moyn, in *The Last Utopia*, argues that international human rights law did not begin to exercise influence until the mid-1970s.¹⁸ That observation is appropriate when one considers that the complaint mechanisms only began to function at the U.N. and the inter-

14. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221.

15. *Id.*

16. Philip Alston, *The Commission on Human Rights in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 126, 146 (Philip Alston ed., 1995).

17. Eleanor Roosevelt, *The Promise of Human Rights*, FOREIGN AFF., April 1948.

18. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

American system in the 1970s as the victims began to empower these human rights systems.¹⁹

Prior to the adoption of the UDHR and the European Convention, public international law was the law that governed relations exclusively among sovereign nation States. The individual was a subject of the State and had no standing in international law.²⁰ Only States had standing in international law. The UDHR introduced the idea of the individual as a bearer of rights vis-a-vis the State and the European Convention introduced the first human rights complaints mechanism whereby the international community provided the individual with a forum in which to vindicate his or her rights when the State failed to protect these rights.²¹

As international human rights law evolved, it was clear that the “State” in human rights treaties was envisaged as a “competent” State, not a “failed” or a “rogue” State. As the Inter-American Court declared in its first judgment, it was the duty of the State to organize the governmental

19. By becoming a party to an international human rights treaty a State undertakes the obligation “to respect and ensure” the rights set forth in the treaty. A “victim” is a person who alleges that the State party to the treaty has violated his or her human rights and petitions the supervisory body for relief. In both the U.N. and the Inter-American system, victims began to use the complaint mechanisms of the treaty bodies in greater number, permitting these systems to begin to have an impact.

20. Cf. DAVID HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 29 (2d ed. 1995) (“In terms of international law, the [European] Convention was an important landmark in the development of the international law of human rights. For the first time, sovereign states accepted legally binding obligations to secure the classical human rights for all persons within their jurisdiction and to allow all individuals, including their nationals, to bring claims against them leading to a binding judgment by an international court finding them in breach. This was a revolutionary step in a law of nations that had been based for centuries on such deeply entrenched foundations as the idea that the treatment of nationals was within the domestic jurisdiction of states and that individuals were not the subject of rights in international law.”).

21. The European Convention was amended many times. In the original version a State party to the Convention, after ratification, had to make a separate declaration under Article 25 of the Convention, to permit the European Commission to receive petitions against the State party. The petitions could be from any person, non-governmental organization or group of individuals claiming to be a victim of a violation of the Convention “provided that the High Contracting Party against which the complaint is lodged has declared that it recognizes the competence of the Commission to receive such petitions”. See HARRIS ET AL., *supra* note 20, at 580. Today, the European Commission no longer exists, it was merged with the European Court in 1998 to form a permanent full-time Court and every State party, upon ratification, agrees to receive individual or group petitions and to recognize the competence of the European Court of Human Rights. Article 34 of the current text of the European Convention provides for the right to a complaints mechanism. See *Convention for the Protection of Human Rights and Fundamental Freedoms* art. 34, Nov. 4, 1950, *Europ.T.S. No. 5*; 213 U.N.T.S. 221.

apparatus, and all the structures through which public power is exercised, so that it was capable of judicially ensuring the free and full enjoyment of human rights.²² In order to fulfill this duty, the State must “prevent, investigate and punish any violation” of the rights recognized in the human rights instrument and to restore the right violated and provide compensation as warranted for damages resulting from the violation.²³ Consequently, acts committed by private individuals—not governmental agents—against other private individuals could fall under the State’s duty to “prevent” violations of human rights. According to the Inter-American Court, “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) 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.”²⁴ Not all crimes committed by private individuals, however, are human rights violations. The essential element is that the State failed to investigate or punish the crime committed by the private individual, thereby assuming responsibility for it. The State is obligated to ensure the full exercise of the human rights set forth in the treaty and failure to do so incurs state responsibility at the international level and the obligation to provide reparations to the victim for the violation.

A number of States, usually not democratic States, have called for human rights bodies to recognize armed groups as violators of human rights.²⁵ It is not within the scope of this paper to enter into that discussion, but States, by means of human rights treaties, have only authorized international human rights bodies to determine violations committed by States and by private individuals, when the violation is attributable to the

22. Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988).

23. *Id.*

24. *Id.* ¶ 173

25. Generally, military governments, such as the Junta in Argentina, during the so-called “Dirty War” called on the international community to declare these non-state actors human rights violators. More recently, President Juan Orlando Hernandez of Honduras called on the international community to consider organized international crime groups as violators of human rights. Michael R. Pompeo, Sec’y of State, U.S. Dep’t of State, Remarks at the Conference on Prosperity and Security in Central America (Oct. 11, 2018).

State.

III. THE INTER-AMERICAN SYSTEM AND THE AMERICAN DECLARATION

The entry-into-force of the European Convention created the European Commission, and the European Court of Human Rights. On the other hand, since the OAS did not adopt a regional human rights treaty until 1969, it created the Inter-American Commission on Human Rights (IACHR) in 1959 by a political resolution. The IACHR, like any human rights commission, began to receive complaints following its creation in 1959, but like the UN Human Rights Commission, it had no competence to deal with these complaints. In 1965, the OAS political bodies, finally, authorized the IACHR to consider complaints following the successful mediator role played by the Commission during the crisis in the Dominican Republic.²⁶

The procedure of most international human rights supervisory bodies is to send the human rights complaint to the respondent state for information as to the allegations and then the Government's response back to the complainant. Based on the facts and other information at the IACHR's disposal, the Commission first determines whether the case is admissible. If the Commission admits the case, it then seeks a friendly settlement between the parties, and if that fails it issues its decision on the merits. The most important obstacle to admissibility is the failure of the complainant to exhaust domestic remedies, and during the dictatorships in the hemisphere during the 1960s, 70s, and 80s, there were rarely any judicial remedies to exhaust, given the lack of independence of the judiciary and the lack of access to justice at the national level.²⁷

It is important to note here that the individual petition procedure, created in the European Convention in 1950, functioned in a region comprised of democratic governments with independent courts. The

26. Organization for American States (O.A.S.), Res. XXII (Nov. 30, 1965), adopted at the Second Special Inter-American Conference of the OAS, held November 17-30, 1965 in Rio de Janeiro, Brazil.

27. See, e.g., Inter-American Comm'n on Human Rights, *Report on the Status of Human Rights in Chile*, OEA/Ser.L/V/II.34 (Oct. 25, 1974); Inter-American Comm'n on Human Rights, *Report on the Situation of Human Rights in Argentina*, OEA/Ser.L/V/II.49 (Apr. 11, 1980).

international human rights supervisory bodies with individual petition procedures functioned only as a “subsidiary procedure” triggered after the remedy at the national level had failed to function. The “principle of subsidiarity” means that the international instance is a remedy of last resort. The individual petition procedure does not function when the domestic courts are subservient to the Executive branch or there are no domestic remedies available in the respondent State’s laws. In the case of countries in crisis, where the elements of a democratic State are absent, it is preferable to conduct on-site visits, commissions of inquiry, etc. rather than to engage the individual petition procedure.

In 1978, the American Convention entered into force and as a result, the OAS established the Inter-American Court with its headquarters in San Jose, Costa Rica. The entry-into-force of the American Convention also provided the Inter-American Commission with a treaty basis that it did not have before. Prior to 1978, the only human rights instrument in the inter-American system was the American Declaration, and the Declaration was not legally binding.

The Commission, however, claimed that the American Declaration was legally binding.²⁸ It maintained that the American Declaration acquired legally binding force because it was the only catalogue of human rights in existence in the OAS in 1967, when the OAS amended its Charter and elevated the Commission to the status of a principal organ of the regional body. Distinguished jurists have suggested that the American Declaration was incorporated into the text of the 1967 Charter by means of the amendment to the Charter, since the reference to human rights in the Charter must be understood as referring to the American Declaration, the only existing catalogue of human rights norms in the inter-American system at the time.²⁹ Since the OAS member states ratified the Charter amendments, the Commission claimed that the American Declaration thereby acquired the normative status of a treaty. This position has been stated and restated in multiple merits decisions of the Commission in cases

28. For an argument that it is time to retire the American Declaration, see Christina M. Cerna, Reflections on the American Declaration of the Rights and Duties of Man at the 70th Anniversary of the *Universal Declaration of Human Rights*, in *DIREITOS HUMANOS E VULNERABILIDADE E A DECLARACAO UNIVERSAL DOS DIREITOS HUMANOS* 57 (Lillian Lyra Jubilut et al., eds., 2018).

29. Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT’L L. 828 (1975).

decided under the American Declaration over many years.

IV. IS THE RIGHT TO CARRY A GUN A HUMAN RIGHT?

Most people think of their national constitution as the set of laws that exists to protect their rights. Most Americans would recognize the First Amendment,³⁰ but not necessarily the Commerce Clause of the American Constitution.³¹ More than half of what is taught as Constitutional Law in American law schools involves two provisions of Section 1 of the Fourteenth Amendment (the due process clause and the equal protection clause), and two provisions of the First Amendment (freedom of religion and freedom of speech/ press). Professor Lou Henkin, one of the first professors to teach international human rights law in the United States, used to say that if every country had a Bill of Rights, we would not need an International Bill of Rights.

In Latin America, however, a number of countries have gone beyond Professor Henkin's needs assessment. All Latin American constitutions list protected rights but some countries have amended their constitutions to include new rights that have been set forth in the ever-increasing number of international human rights treaties to which these countries have become parties.³² These countries are merging the new international rights with the rights listed in their constitution and the State has given them all constitutional status. Pursuant to their obligations under the American Convention, these States review internally whether their laws comply with

30. U.S. CONST. amend. I.

31. U.S. CONST. art. I sec. 8.

32. See, e.g., ARTS. 36-43, CONSTITUCIÓN NACIONAL, [CONST. NAC.] (Arg.) (setting forth "New Rights and Guarantees", which includes "the right to a healthy and balanced environment fit for human development"); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 42-82 (Social, Economic and Cultural Rights and Collective Rights and the Environment); CONSTITUCION DEL ECUADOR, tit. 2, ch. 2-3 (consecrating the right to "the good life" (*buen vivir*) and protecting the right to water and food, the right to a clean environment, rights related to communication and information, culture and science, education, housing, health and work); *id.* tit. III, ch. 3 (protecting adults and the aged, youth, human mobility, pregnant women, children and adolescents, persons with disabilities, persons with catastrophic illnesses, persons deprived of liberty and users and consumers); POLITICAL CONSTITUTION OF COSTA RICA, art. 50 (providing "The State will endeavor to procure the maximum wellbeing of all the inhabitants of the country, organizing and stimulating production and the most appropriate distribution of wealth. Everyone has a right to a clean and ecologically balanced environment.").

the constitutional norms.

If the State violates a constitutional norm in Latin America, the appropriate legal recourse is a writ of “*amparo*,” which means “protection” in Spanish. According to the Mexican jurist Hector Fix Zamudio, the one common purpose of the *amparo* is to protect, through judicial decision, all or part of human rights, whether in individual or group form. Latin American *amparo* falls into two basic categories. First, in the majority of Latin American jurisdictions, *amparo* is used to safeguard all human rights established in the national constitutions with the exception of personal liberty, which is protected by *habeas corpus*. Second, in Guatemala, Honduras, and Nicaragua, an individual may bring an *amparo* to challenge the constitutionality of laws, but the effect of a declaration of unconstitutionality is limited to the litigants in that particular case.³³ *Amparo* was elevated to an international legal institution in Article XVIII of the American Declaration of the Rights and Duties of Man, which urges the adoption of a simple and effective remedy to protect against abusive acts of any authority.³⁴

Many rights in the Bill of Rights of the U.S. Constitution have become the subject matter of international protection in international human rights treaties. Some examples are freedom of speech, expression, and the press; the right against unreasonable searches and seizures; the right to due process; the right not to be forced to incriminate oneself; the right not to be deprived of property without just compensation; the right to a speedy and public trial; etc.³⁵ What about the right to bear arms? Is there a right to bear arms in any international human rights treaty?

In the United States, the Supreme Court, in 2008, in *District of*

33. Hector F. Zamudio, *The Writ of Amparo in Latin America*, 13 UNIV. MIAMI INTER-AM. L. REV. 361, 366 (1981).

34. American Declaration of the Rights and Duties of Man art. 18, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948) (“Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”).

35. See e.g., American Convention on Human Rights art. 13, Nov. 21, 1969, 1144 U.N.T.S. 143 (freedom of thought and expression); *id.* art. 7 (right to personal liberty); *id.* art. 8 (right to a fair trial); *id.* art. 8 (2)(g) the right not to incriminate oneself; *id.* art. 21(2) (right not to be deprived of property without just compensation); International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (right to freedom of expression); *id.* art. 9 (right to liberty and security of person); *id.* art. 14 (right to a fair trial); *id.* art. 14 (3) (g) (right not to incriminate oneself).

Columbia v. Heller, held that the Second Amendment to the Constitution protects the right to own a handgun in the home for the purpose of self-defense.³⁶ Then, in 2010, in *McDonald v. Chicago*, the Supreme Court held that the right to bear arms is a “fundamental” right and unless there are reasons to hold otherwise, a provision of the Bill of Rights that is fundamental “from an American perspective” applies equally to the Federal Government and the States.³⁷

Neither the ICCPR nor the American Declaration includes the right to bear arms as a human right among the protected rights. None of the subsequent UN human rights treaties nor any of the regional human rights treaties recognizes a right to bear arms. In fact, out of 200 world constitutions, only three - the US, Mexico and Guatemala - recognize the right to bear arms as a *constitutional* right.³⁸ Mexico experienced 15,973 homicides in the first 6 months of 2018 (11 per 100,000).³⁹ Although homicides in Guatemala have decreased, the rate is still 23.9 per 100,000 inhabitants.⁴⁰ Guatemala has a population of 17 million compared to Mexico’s population of 131 million.

V. HOW TO TAKE A CASE TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AS A VICTIM OF GUN

36. *D.C. v. Heller*, 554 U.S. 570, 635 (2008).

37. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

38. Constitution Política de los Estados Unidos Mexicanos, art. X, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.) *translation available at* https://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf (“The inhabitants of the United Mexican States are entitled to have arms of any kind in their possession for their protection and legitimate defense, except such as are expressly forbidden by law, or which the nation may reserve for the exclusive use of the army, navy, or national guard; but they may not carry arms within inhabited places without complying with police regulations.”); Guatemalan Constitution: Article 38. Possession and bearing of arms. The right to possess arms for personal use, not prohibited by the law, is recognized, in one’s home. There is no obligation to surrender the arms, except in cases so ordered by a competent judge. The right to bear arms is recognized and regulated by the law. (Free translation of: Artículo 38.- Tenencia y portación de armas. Se reconoce el derecho de tenencia de armas de uso personal, no prohibidas por la ley, en el lugar de habitación. No habrá obligación de entregarlas, salvo en los casos que fuera ordenado por el juez competente. Se reconoce el derecho de portación de armas, regulado por la ley.)

39. See Arturo Angel, *México atraviesa el año más violento del que haya registro con casi 16 mil asesinatos en 2018*, ANIMAL POLITICO (July 21, 2018, 9:13 AM) <https://www.animalpolitico.com/2018/07/mexico-violento-asesinatos-2018/>.

40. See *Cifra de muertes disminuye, pero aumentan denuncias por extorsión*, PRENSA LIBRE (Sept. 27, 2018, 00:39 AM), <https://www.prensalibre.com/guatemala/justicia/muertes-violentas-en-guatemala-cifra-de-muertos-en-2017-inacif-informe-cien-ias>.

VIOLENCE

Although the U.S. does not consider decisions of the IACHR legally binding, a victim or an advocacy organization would be well-advised to present a complaint alleging a human rights violation by the United States to the IACHR. A decision of the IACHR, although not recognized by the State as legally binding, may nonetheless have a persuasive impact on significant actors within the State.⁴¹ The IACHR is the only international human rights body that the United States recognizes as competent to receive and decide international human rights law complaints presented against it. The United States normally responds to the Commission's request for information on complaints and appears at hearings that the Commission convenes on the case. Both Commission and Court hearings are also transmitted live by internet and are subsequently accessible through an archived video library maintained by each body.

A victim of gun violence in the United States has the option of requesting a thematic hearing before the Commission, usually with the support of a non-governmental human rights organization that is working on the issue, or of bringing an individual complaint that seeks the Commission's determination that the state has violated the American Declaration. The Commission, however, could not present the case to the Inter-American Court of Human Rights because the United States has not ratified the American Convention on Human Rights.

An injured or deceased victim of gun violence could seek a declaration by the Commission that the United States violated the victim's human rights under the American Declaration and that the victim was entitled to reparations for the damage suffered. The victim could allege that the lack of restrictive gun laws in the United States furthered a climate of violence and arbitrary killings as borne out by official statistics and compared with other countries that have more restrictive gun laws.⁴² The American

41. In a recent paper, I submitted that decisions of the IACHR involving the death penalty as applied to juvenile offenders influenced the reasoning of the U.S. Supreme Court in cases dealing with the same subject. See Christina M. Cerna, *The Abolition of the Imposition of the Death Penalty on Persons who Were Juveniles When They Committed Their Crimes*, 41 HUM. RTS. Q. 143 (2019).

42. The U.K., Australia, Japan and Germany, all developed countries, show a correlation between restrictive gun laws and a lower climate of violence. See Juliette Jowit et al., *Four Countries with Gun Control – And What America Could Learn from Them*, THE GUARDIAN (Mar. 14, 2016),

Declaration in Article I protects the right to life, liberty and the security of the person. The victim could allege that his or her right to life was violated, arbitrarily, because the state created a climate of violence due to the prevalence of guns and their easy access thereto by persons who posed a danger to society. For example, on October 27, 2018, a shooter killed eleven people with guns in a synagogue in Pittsburgh. The shooter, Robert Bowers, the New York Times reported, had twenty-one guns registered in his name and carried out the massacre with an AR-15 style assault rifle and three handguns.⁴³

The victim, however, is required to exhaust domestic remedies before coming before the IACHR, and that means the victim must first exhaust remedies before U.S. courts. If there are no remedies available, the victim must allege that the national legislation does not provide an adequate and effective remedy, or that it is futile to exhaust a remedy that is inadequate and ineffective. The State is then required to explain what adequate and effective remedies exist in the national legislation and would argue that the victim has failed to exhaust domestic remedies. These are all issues that go to the admissibility of the case, but as most lawyers know, getting your foot in the door is 90% of the battle.

The victim in our hypothetical case could argue that there are no domestic remedies to exhaust because the Supreme Court of the United States has already decided the issue. In 2008, the Supreme Court of the United States, the highest judicial instance in the country, held in *Heller* that the Second Amendment to the Constitution protects the individual's right to own a handgun in the home for the purpose of self-defense.⁴⁴ Then, in 2010, in *McDonald*, the Court held that the right to bear arms is a "fundamental" right, and unless there are reasons to hold otherwise, a provision of the Bill of Rights that is fundamental "from an American

<https://www.theguardian.com/us-news/2016/mar/15/so-america-this-is-how-you-do-gun-control>. Such a correlation, however, is not found in Latin America, a less developed region, where violence continues to flourish despite restrictive gun laws. See <https://www.as-coa.org/articles/explainer-gun-laws-latin-americas-six-largest-economies>).

43. The AR-15 was also the weapon of choice of Nikolas Cruz, perpetrator of the Parkland school shooting. The AR-15 is the counterpart of the military's automatic M-16 assault rifle, which fired several rounds with each pull of the trigger. The AR-15, its civilian counterpart, is semiautomatic; the shooter needs to pull the trigger to fire each shot. The AR-15 was designed for speedy reloading in combat situations, and it can fire dozens of rounds in seconds.

44. *Heller*, 554 U.S. at 635.

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perspective” applies equally to the Federal government and the States.⁴⁵ Consequently, our hypothetical victim should not need to exhaust domestic remedies when the highest judicial instance in the United States has declared gun ownership to be a fundamental, individual right, protected by the U.S. Constitution.

Once the Commission formally declares the petition admissible, it attempts to reach a friendly settlement of the matter between the parties. This is generally not possible in cases that involve major cultural conflict issues, such as abortion rights, the death penalty, homosexuality, etc.⁴⁶ Given this context, the victim normally comes to the Commission as a last resort and any attempt to reach a negotiated compromise usually has been attempted and failed.

If there is a dispute on the facts, or the case is a high-profile one, the Commission may convene a hearing on the matter. The Commission holds both thematic and case hearings, and although non-governmental organizations find thematic hearings give them a platform to focus the Commission’s attention on a topic that they are espousing, *case hearings*, in my view, are more compelling because the NGO presents the story of an actual victim or group of victims. Professor Leila Sadat and the Harris Institute from Washington University School of Law presented information on the gun violence crisis in the U.S. to the Commission at a thematic hearing February 2018. At a thematic hearing, the NGO may request the Commission to conduct an on-site visit in the State in question and to prepare a report on the situation being examined. In a thematic report, the Commission normally provides conclusions and recommendations for the State under examination.

45. *McDonald*, 561 U.S. at 791.

46. Since the U.S. Supreme Court has declared gun ownership to be a constitutional right, it is inconceivable to expect a friendly settlement in such a case. Unlike other hot-button cultural conflict issues, such as abortion, the death penalty and homosexuality, there is no tendency to look to the Church or the Pope for a condemnation of the right to bear arms although U.S. bishops appear to be in favor of the eventual elimination of guns from American society. See *What Does the Catholic Church Say on Gun Control?*, Crux (Jan. 13, 2016), <https://cruxnow.com/church-in-the-usa/2016/06/13/catholic-church-say-gun-control/>. See also U.S. Catholic Bishops, Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice, PRISON LEGAL NEWS (Nov. 15, 2000), https://www.prisonlegalnews.org/media/publications/catholic_church_responsibility_rehabilitation_and_restoration_catholic_perspective_on_criminal_justice_2000.pdf.

To return to individual cases, the victim presents his or her argument on the merits of the case, which the Commission forwards to the State for its response. The State replies with its own merits argument. Based on the information and arguments presented, the Commission reaches its decision on the merits of the case, which it forwards only to the State for its comments on a confidential basis. The Commission's merits report contains conclusions and recommendations and the Commission requests the State to respond and to indicate how it intends to comply with its recommendations. The United States generally does not comply with the recommendations, and usually replies that it does not consider the Commission's decision legally binding and that therefore, it is under no obligation to comply. The Commission then publishes its merits report online and eventually in its Annual Report to the OAS General Assembly.

The victim or the advocacy organization, however, can publicize the Commission's decision as a ruling by an international human rights body that has found the United States in violation of the American Declaration. It can then devise and pursue, through the media or by other means, what would be adequate and appropriate reparations.

This is far from instant gratification but it begins to chip away at policies that are assessed, at the international level, to be in violation of international human rights law. Little by little, with a constant repetition of cases dealing with a certain issue, such as the death penalty in the United States, civil society has managed to have an impact on public policy by invoking international human rights law and mechanisms.

The issue of the death penalty, for example, provides a prototype of such a campaign. Europe and most of Latin America reject the position that the death penalty is permissible criminal punishment. Even the default periods of incarceration are a fraction of what is common in U.S. criminal sentences for heinous crimes. The Inter-American Commission has decided approximately a dozen death penalty cases over the years against the United States. In a paper recently published, I argue that the Supreme Court of the United States in two decisions, *Thompson v. Oklahoma* (1988) and *Stanford v. Kentucky* (1989), was familiar with the Inter-American Commission's decisions in two death penalty cases that, in my opinion, clearly influenced the Supreme Court's reasoning even

though they were not cited in the judgments.⁴⁷ These two Supreme Court decisions were the precursors to the Supreme Court's decision in *Roper v. Simmons* (2005), which declared that the imposition of the death penalty on juveniles who committed crimes before the age of eighteen constituted cruel and unusual punishment.⁴⁸ Justice Kennedy's opinion in *Roper* relied extensively on international precedents.

It all had to do with the framing of the issue. The issue, the Commission held, had nothing to do with the nature of the death penalty, but rather with the age at which the State could hold a juvenile criminally responsible. The Supreme Court maintained for several years that sixteen was the appropriate age threshold distinguishing a child from an adult, but international human rights law set the threshold at the age of eighteen. Finally, in *Roper*, the Supreme Court agreed that the threshold was eighteen and no longer sixteen.

With that issue now resolved, the current issue involving juvenile offenders before the Inter-American Commission and the Supreme Court involves the compatibility with international human rights law of sentencing juvenile offenders to life imprisonment without possibility of parole. For international human rights law, these are not complex issues. International human rights law makes rehabilitation the aim of incarceration.

VI. THE EXAMPLE OF THE UNITED KINGDOM FOR THE UNITED STATES

The example of the changing role of human rights in the United Kingdom is useful for a better understanding of what an outlier the United States is, given the special relationship that unites the two countries and their historic and linguistic commonalities. Most American law students know that much of U.S. law comes from the United Kingdom. What they usually do not know is that the U.K. joined the Council of Europe as a founding member on May 5, 1949, and became one of the first States parties to the European Convention in 1951. The European Convention

47. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Stanford v. Kentucky*, 492 U.S. 361 (1989); Cerna, *supra* note 41.

48. See *Roper v. Simmons*, 543 U.S. 551 (2005).

entered into force in 1953 and as a result, in 1954 the European Commission of Human Rights was established, followed in 1959, by the European Court of Human Rights.

At the time, the right of individual petition to the European Commission was not automatic upon becoming a State party to the European Convention. A State had to take the additional, separate step of accepting the right of individuals to present complaints against it before the European Commission and in addition, the separate step of accepting the compulsory jurisdiction of the European Court. The UK did not accept the right of individual petition nor the compulsory jurisdiction of the European Court until 1966.

In 1998, Protocol 11 to the European Convention made the right of individual petition obligatory, which meant that individuals could apply directly to the Court to complain about violations of the European Convention. Protocol 11 also merged the European Commission and European Court into one body, a single full-time Court, comprised of forty-seven judges, one for each State party to the European Convention. In 1998, the U.K. also adopted the Human Rights Act, a U.K. law that entered into force on October 2, 2000, and incorporated into U.K. law the rights set forth in the European Convention. That means that any individual could seek redress against the United Kingdom in a U.K. court, for a violation of a human right set forth in the European Convention on Human Rights. "Any individual" includes, for example, Iraqi nationals in Iraq, who have been killed by British troops, *or others*, during the period in which the United Kingdom was the "occupying power" in Basra, Iraq, and responsible for the protection of human rights of the inhabitants of that region.⁴⁹

Many distinguished British jurists have been judges of the European Court of Human Rights and have contributed to the jurisprudence that has made this Court "the conscience of mankind." Although the UK is not always happy with adverse decisions of the Court, it generally complies with the Court's judgments.

Currently, the European Court has approximately 60,000 pending cases, not petitions, but cases. Two-thirds of these cases are pending against only

49. This extraterritorial application of the European Convention affirms the practice that the State is not permitted to commit acts outside its borders that it is prohibited from carrying out within them.

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five countries: Russia, Romania, Ukraine, Turkey and Italy.⁵⁰ The number of pending cases affirms the belief common in Europe that the European Court of Human Rights will ensure the victims a certain measure of justice that they would not receive otherwise.

VII. WHY THE UNITED STATES SHOULD RATIFY THE AMERICAN CONVENTION ON HUMAN RIGHTS

The Commission's claim that the American Declaration is legally binding is a legal fiction, perpetrated due to the failure of primarily English-speaking OAS member States to become parties to the American Convention. This failure to achieve ratification or accession by all OAS member States to the American Convention undermines the system's legitimacy. Which countries damage the international human rights system more, those that denounce the system because of the failure to comply with adverse decisions against it, or those that never joined the system at all? The Commission takes the position that States that have denounced the American Convention again become subject to the default instrument - the American Declaration - like those States that never became parties to the American Convention in the first place.

The OAS member States adopted the OAS Charter contemporaneously with the American Declaration, thereby emphasizing the importance of the protection of human rights norms to the very creation and institutionalization of the inter-American system. Nonetheless, the OAS does not require, as a condition of membership and as the Council of Europe does today, that all member States become parties to this core human rights instrument.

International human rights law is not exactly congruent with the U.S. Bill of Rights. In recent times, victims of human rights abuses perpetrated by the United States, such as individuals who were tortured in "black sites" outside of the United States by CIA operatives, have sought remedies in the European Court of Human Rights. These victims were able to bring complaints against the countries that hosted these "black sites" but they were unable to bring complaints against the United States at

50. See EUROPEAN COURT OF HUMAN RIGHTS, PENDING ALLOCATIONS ALLOCATED TO A JUDICIAL FORMATION (2018), https://www.echr.coe.int/Documents/Stats_pending_2019_BIL.pdf.

the European Court since the United States is not a member state of that regional organization.

The United States is, however, a founding member State of the Organization of American States and as mentioned earlier, the only founding member, except for Cuba, that has not ratified the American Convention on Human Rights.⁵¹ The OAS suspended Cuba from participating in the OAS from 1962-2009 and when the suspension was lifted, Cuba expressed no interest in participating in the OAS.

The inability of eight countries, all English-speaking member States of the OAS, to participate fully in the Organization and to become parties to the American Convention on Human Rights is the greatest challenge to the legitimacy of this regional body. The failure of Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines and the United States to become parties to the American Convention is a failure to accept the obligations of membership in the OAS. In order to support and sustain the common values of the OAS, all member States must accept the Organization's principal human rights instrument. Unwillingness to do so should trigger a reevaluation of the principles and purposes of the Organization and the conditions of membership.

CONCLUSION

Virtually all of the independent countries in Europe and the Spanish-speaking countries of Latin America are parties, respectively, to the European Convention on Human Rights or the American Convention on Human Rights.⁵² These countries are geographically and historically closest to the United States as compared with Asia, Africa, Australia and Antarctica, and they have accepted international human rights obligations under these treaties. Even the United Kingdom, which is the source of

51. Much has been written about the U.S. failure to ratify international human rights treaties, see Joseph Diab, Note, *United States Ratification of the American Convention on Human Rights*, 2 DUKE J. COMP. & INT'L L. 323 (1992).

52. Belarus, Kazakhstan and Kosovo, for different reasons are not member States of the Council of Europe. Venezuela is the first and only Spanish-speaking country to have denounced the American Convention on Human Rights, but it still cooperates with the inter-American system as regards cases that were pending prior to its denunciation of the Convention.

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much U.S. law, has accepted the provisions of the European Convention and made them part of its domestic law. The United States, on the other hand, has not accepted the American Convention on Human Rights but as a member State of the Organization of American States, by default, is subject to the decisions on individual petitions of the Inter-American Commission on Human Rights under the American Declaration of the Rights and Duties of Man. The U.S. claims that the decisions of the Commission under the Declaration are not legally binding, and while technically correct, these decisions are a “source of international obligations” and have persuasive power.

Gun control advocates are well-advised to consider presenting individual petitions to the Inter-American Commission because there is no international human right to “bear and carry arms” in the American Declaration as there is in the U.S. Constitution. As with cases involving the imposition of the death penalty, it is clear that the Commission would find U.S. gun laws to violate the American Declaration’s provision on the right to life. The prevalence of guns in the United States has led to a situation in which the right to life is under attack as almost 40,000 lives are lost per year due to gun violence and approximately 60% of these are due to self-inflicted suicide. In addition, the Inter-American Commission is the only international human rights supervisory body that the U.S. has recognized as competent to receive and decide individual petitions presented against it. The attention given to a case before the Commission involving gun violence in the United States would, at a minimum, focus international attention on the damage done to persons with guns in this country.