

International Law and the Death Penalty

WILLIAM A. SCHABAS

International Law has been concerned with the issue of capital punishment since the late nineteenth century, when extradition treaties began making transfer of fugitives subject to assurances that the death penalty not be imposed. The 1948 *Universal Declaration of Human Rights* recognized the "right to life", but broke with existing models in national constitutions because it did not explicitly provide for capital punishment as an exception. The *Declaration* is a "common standard of achievement" and its drafters recognized that while the death penalty, in 1948, was still widely practiced, its abolition was foreseeable and it would be counter-productive to adopt a text that might hinder such a development. The initial human rights treaties did, however, allow capital punishment as an exception to the right to life, but subject to several strict limitations. More recently, these provisions have been superseded by abolitionist protocols. Capital punishment is regularly condemned in international bodies like the United Nations Commission on Human Rights, the European Parliament. It has been abolished judicially by a growing number of constitutional courts, such as those of South Africa, Hungary and Albania. International practice confirms the tendency towards abolition. Whereas in 1948 only a handful of states had abolished the death penalty, they are now in the majority. According to figures published in 2000 by the Secretary General of the United Nations, 123 States have abolished capital punishment either *de jure* or *de facto*, while seventy-one retain it. The trend, then, is unarguable, although there is still some resistance from States with a variety of cultural traditions sprinkled around the world: China, Iran, Iraq, Nigeria, Jamaica and

the United States of America. These countries are under increasing pressure internationally to bring their domestic legislation into conformity with international law, first by respecting the numerous safeguards that are to be rigorously applied in capital punishment and, ultimately, by suspending and then abolishing capital punishment.

1. *International Law*

The cornerstone of modern human rights law is the *Universal Declaration of Human Rights*. Article 3 of the *Declaration* states: "Everyone has the right to life, liberty and security of person." Furthermore, according to article 5, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹ As the *Declaration* was being prepared, it was suggested that article 3 might be amended so as to correspond more closely to its ancestors in national legislation, such as the fifth amendment to the United States Constitution ("...be deprived of life, liberty, or property, without due process of law"), by recognizing that the right to life was subject to the important exception of the death penalty. Noting that in some countries there was a movement afoot to abolish the death penalty, Eleanor Roosevelt suggested that it might be better not to make any explicit reference to capital punishment.² Ultimately the General Assembly followed Roosevelt's approach, refusing to endorse capital punishment as a limitation on the right to life but also resisting attempts to proclaim that abolition was a necessary and logical consequence of recognition of every person's right to life.³

A wide range of international legal instruments – declarations, covenants, treaties, resolutions, bodies of principles – of variable authority and scope, now speaks directly to the issue of capital punishment. Many of these texts create binding obligations, appli-

¹ G. A. Res. 217 A (III), U. N. Doc. A/810.

² U. N. Doc. E/CN.4/AC.1/SR.2, p. 10. See also: U.N. Doc. A/C.3/SR. 103, at p. 12.

³ See: Lilly E. Landerer, *Capital Punishment as a Human Rights Issue Before the United Nations*, 4 HUM. RTS J. 511 (1971); WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (2nd ed., 1997).

cable to states that have signed, acceded to or ratified them, or in some other way indicated their recognition that they are subject to them. International tribunals and similar bodies, such as the European Court of Human Rights, the Human Rights Committee and the Inter-American Commission and Court of Human Rights, have contributed invaluable guidance as to the interpretation of some of these norms.

It is often said that "international law does not prohibit capital punishment."⁴ This is an unfortunate and imprecise statement, however, because several international treaties now outlaw the death penalty. These treaties are, to be sure, still somewhat far from universally accepted. Nevertheless, some sixty-six states are now bound, as a question of international law and a result of ratified treaties, not to impose the death penalty.⁵ As for the suggestion that customary law prohibits capital punishment, such an affirmation is premature. However, the growing trend towards abolition, and its reflection in international norms, would suggest that this is a probable development at some point in the not-too-distant future.

The principal international human rights instrument, the *International Covenant on Civil and Political Rights*, adopted in 1966, transformed the laconic "right to life" provision found in article 3 of the *Universal Declaration* into a complex text that recognizes capital punishment as an exception or limitation on the right to

⁴ See: "Report of the special rapporteur, Ms Asma Jahangir, submitted pursuant to Commission on Human Rights Resolution 1999/35," U.N. Doc. E/CN. 4/2000/3, para. 60.

⁵ Albania, Andorra, Australia, Austria, Azerbaijan, Belgium, Bolivia, Brazil, Bulgaria, Chile, Cyprus, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Macedonia, Malta, Mexico, Moldova, Monaco, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, San Marino, Seychelles, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, Turkmenistan, Ukraine, United Kingdom, Uruguay and Venezuela. These States are abolitionist both *de jure* and *de facto*. Bosnia and Herzegovina, Lithuania, the Russian Federation, and Sao Tome and Principe have signed one or another of the protocols but instruments of ratification have not yet been deposited.

life.⁶ Article 6 of the *Covenant* affirms the “inherent right to life”, adding that it cannot be “arbitrarily deprived”. But in a subsequent paragraph, the *Covenant* states:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.⁷

The provision goes on to state that anyone sentenced to death be entitled to seek amnesty, pardon or commutation of sentence, and to prohibit the death penalty for persons under eighteen at the time of commission of the crime⁸ and for pregnant women. A final paragraph, really more programmatic than normative, declares: “Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.” The *Covenant* is currently ratified by approximately 150 states, and its principles are therefore approaching near-universal acceptance.

There are at least two other important international treaties within the United Nations system that bear on capital punishment. The *Convention on the Rights of the Child*, adopted in 1989, states: “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.” The *Convention on the Rights of the Child* has been ratified by essentially the whole world with the exception of the United States, which signed it without reservation in 1995. The *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* may also address issues

⁶ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 6.

⁷ *Id.*, art. 6(2).

⁸ Convention on the Rights of the Child, G.A. Res. 44/25, 28 I.L.M. 1448, entered into force Sept. 2, 1990, art. 37(a), also prohibits execution for crimes committed under the age of eighteen.

relating to the death penalty, although there is nothing explicit upon the subject in its text.⁹

Setting aside the protocols, whose effect seems clear enough, international law may also prohibit capital punishment by implication, through the effect of other norms that do not explicitly call for abolition, and more specifically by the prohibition of cruel, inhuman and degrading treatment or punishment, a norm found in all major human rights treaties as well as in most domestic constitutions. The concept of what is cruel, inhuman or degrading ought to change over time to reflect contemporary thinking and values. It is now well accepted that international human rights norms must receive a dynamic and "evolutive" construction.

Does the reference to capital punishment in the treaties effectively foreclose any consideration of the death penalty as an intrinsically cruel, inhuman or degrading punishment? Or is it conceivable that present or future interpreters will consider the capital punishment exception to the right to life to be neutralized or trumped by new conceptions of what is cruel, inhuman or degrading? In constitutions where there is no allowance for capital punishment as an exception to the right to life, some courts have concluded it is prohibited by the cruel, inhuman or degrading clause. But the argument by which it is implicitly repealed, despite some more explicit recognition, was rejected by the European Court of Human Rights (with a lone dissenter),¹⁰ much as it had been dismissed nearly two decades earlier by the majority of the United States Supreme Court in an eighth amendment case.¹¹

The argument that capital punishment is contrary to the prohibition of cruel inhuman and degrading (or "cruel and unusual") punishment is a judicial time bomb, ticking away inexorably as

⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, *entered into force* June 26, 1987.

¹⁰ *Soering v. United Kingdom et al.*, July 7, 1989, Series A, Vol. 161, 11 E.H.R.R. 439, §8.

¹¹ *Furman v. Georgia*, 408 U.S. 238, 261, 92 S.Ct. 2726, 2737, 33 L.Ed.2d 346 (1972).

international abolition gains momentum. In 2001, the Supreme Court of Canada, clearly impressed with developments in international human rights law and State practice, reassessed its position on capital punishment, denying extradition to the United States for a capital offence as a violation of the constitution when a decade earlier it had balked at such a conclusion.¹² The argument has also returned to the European Court in an application filed by convicted Kurdish terrorist Abdullah Öcalan. Condemned to death by a Turkish court in early 1999, Öcalan's request for provisional measures was granted by the European Court of Human Rights in November of the same year.¹³

There is now a considerable amount of case law on the interpretation of the human rights treaty provisions dealing with capital punishment. The Human Rights Committee, which is the organ established by the *International Covenant on Civil and Political Rights* to study periodic reports from States parties and to consider petitions from aggrieved individuals and States, has hinted that the exception allowing capital punishment in countries "which have not abolished the death penalty" means that a State that has already eliminated punishment cannot reinstate it.¹⁴

The restriction on capital punishment to "the most serious crimes" has led to criticism of countries that impose it for economic crimes and other offences with non-lethal consequences.¹⁵ Recent case law of the Committee suggests "most serious crimes" must be confined to murder, although the possibility that it might cover other crimes of violence with grave consequences, such as aggravated forms of rape, cannot be excluded. Commenting on Iran's

¹² *United States v. Burns*, 2001 SCC 7, reversing *Kindler v. Canada*, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438, 6 C.R.R. (2d) 193.

¹³ *Öcalan v. Turkey*, Provisional Measures, Nov. 30, 1999, Press Release 683.

¹⁴ *Piandong et al. v. Philippines* (no. 869/1999), U.N. Doc., CCPR/C/70/D/869/1999, para. 7.4.

¹⁵ e.g., U.N. Doc. CCPR/C/SR. 1065-1067, U.N. Doc. A/46/40, §509; U.N. Doc. CCPR/C/SR. 365, §7, 8; U.N. Doc. CCPR/C/SR. 870, 871, 874, 875, U.N. Doc. A/44/40, §259; U.N. Doc. CCPR/C/SR. 928-932, U.N. Doc. A/45/40, §93; U.N. Doc. CCPR/C/SR. 119, §14; U.N. Doc. CCPR/C/79/Add. 50 (1995), §16.

second periodic report, the Committee said imposition of the death penalty for crimes that do not result in loss of human life is contrary to the *Covenant*.¹⁶ In *Lubuto v. Zambia*, it concluded that there had been a violation of article 6(2) because the petitioner had been sentenced to death under a law imposing a mandatory sentence of death for aggravated robbery in which firearms are used. The Committee observed that "use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence".¹⁷

The prohibition on executions for juvenile offenders is a norm so fundamental that even a reservation formulated at the time of ratification is ineffective.¹⁸ Methods of execution that inflict superfluous or prolonged suffering on the condemned person – such as the gas chamber – constitute cruel, inhuman and degrading punishment, in breach of article 7 of the *Covenant*.¹⁹ The Committee holds to the view that the strictest respect of procedural due process guarantees must be ensured if the death penalty is to be imposed.²⁰ Many death penalty applications to the Human Rights Committee

¹⁶ UN Doc. CCPR/C/79/Add. 25, §8.

¹⁷ *Lubuto v. Zambia* (No. 390/1990), UN Doc. CCPR/C/55/D/390/1990/Rev. 1, §7.2.

¹⁸ When the United States ratified the *Covenant*, in 1992, it formulated a controversial reservation to article 6: "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." The reservation was condemned in objections filed by eleven European States, and been declared invalid by the Human Rights Committee: "Consideration of reports submitted by states parties under article 40 of the Covenant, Comments of the Human Rights Committee, United States – Initial Report," U.N. Doc. CCPR/C/79/Add.50 (1995), §14.

¹⁹ *Ng v. Canada* (No. 469/1991), U.N. Doc. A/49/40, Vol. II, p. 189, 15 HUMAN RTS L. J. 149.

²⁰ For example, *Yasseen and Thomas v. Guyana* (no. 676/1996), U.N. Doc. CCPR/C/62/D/676/1996; *LaVende v. Trinidad and Tobago* (no. 554/1993), U.N. Doc. CCPR/C/61/D/554/1993.

are also granted because conditions on death row have been held to breach international standards.²¹

Imposition of the death penalty has been challenged somewhat indirectly in cases where foreign nationals are threatened with execution. Under article 36(1)(b) of the *Vienna Convention on Consular Relations*,²² foreign nationals have a right to be informed of their right to consular assistance in the event of arrest. It has become clear that many if not most foreign nationals condemned to death within the United States have not benefited from this information, which is essentially a due process guarantee akin to the "Miranda warning" given by police as a result of a constitutional requirement that suspects be informed of their right to counsel. Two cases against the United States have been taken before the International Court of Justice, by Paraguay and by Germany. Provisional measures requests to suspend at least temporarily the planned executions were issued by the Court, but these were once again defied by authorities in the United States,²³ Paraguay has since dropped its application, but Germany has insisted that the matter be fully litigated, despite the executions, and its case was heard by the International Court of Justice in November 2000.

2. *The Political Debate in International Organizations*

In parallel with the drafting of international legal norms found in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, the political bodies of the United Nations and of other international organizations have been involved in a variety of initiatives aimed at limiting and eventually abolishing the death penalty. Although the issue of the death penalty has been addressed within those specialized bodies of the

²¹ For example, *Henry v. Trinidad and Tobago* (no. 752/1997), U.N. Doc. CCPR/C/64/D/752/1997; *Pinto v. Trinidad and Tobago* (no. 512/1992), U.N. Doc. CCPR/C/57/D/512/1992; *Lewis v. Jamaica* (no. 527/1993), U.N. Doc. CCPR/C/57/D/527/1993.

²² 596 U.N.T.S. 261.

²³ *Application of the Vienna Convention on Consular Relations (Paraguay v. United States of America)*; *La Grand (Germany v. United States of America)*.

United Nations that concern criminal law,²⁴ the core of the debate has taken place in the Commission on Human Rights. The Commission is a specialized body, made up of fifty-three Member States elected by the Economic and Social Council. Its membership broadly reflects the geographic and political orientations of the entire United Nations membership. Although its interventions may be less robust than those of tribunals and similar bodies like the Human Rights Committee, it has the advantage of being able to address itself to violations of fundamental rights in all United Nations member states, even those that have not fully ratified the relevant treaties. This obviously includes the United States, which has ratified the *International Covenant on Civil and Political Rights* with reservations to the death penalty provisions, and which has not accepted the *Optional Protocol* to the *Covenant* that allows for individual complaints.

In 1997, the Commission on Human Rights began adopting a series of annual resolutions on the subject of capital punishment. The resolution affirmed the Commission's conviction "that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights". It requested states to consider suspending executions and imposing a moratorium on the death penalty. The resolution was passed by a roll-call vote, twenty-seven in favor and eleven opposed, with fourteen abstaining.²⁵ Similar resolutions, with progressively sharper language, were adopted by the Commission on Human Rights in 1998, 1999, 2000 and 2001.²⁶ The resolution adopted at the Com-

²⁴ Notably the United Nations committee and commission on crime prevention and control, which has been considering the subject of capital punishment since the 1950s. See: Roger S. Clark, *Human Rights and the U.N. Committee on Crime Prevention and Control*, 506 ANNALS AM. ASSOC. POL. & SOC. SCI. 68 (1989); Roger S. Clark, *The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990*, 1 CRIM. L. FORUM 513 (1990); ROGER S. CLARK, THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION 58-62 (1994).

²⁵ U.N. Doc. HR/CN/789 (1997)/12.

²⁶ "Questions of the death penalty," C.H.R. Res. 1997/12; "Question of the death penalty," C.H.R. Res. 1998/8; "Question of the death penalty," C.H.R. Res. 1999/61; "The question of the death penalty," U.N. Doc. E/CN.4/RES/2000/65.

mission's 2001 session called upon States that still retain the death penalty progressively to restrict the number of offences for which it may be imposed, to establish a moratorium on executions, with a view to completely abolishing the death penalty, and to make available to the public information with regard to capital punishment. All States were required to reserve the right to refuse extradition in the absence of assurances that the death penalty not be imposed.²⁷

The Sub-Commission on the Promotion and Protection of Human Rights, an expert body subordinate to the Commission on Human Rights, debated death penalty issues at its 1999 session. In August 1999 it adopted a resolution condemning the imposition of the death penalty for crimes committed by persons under the age of eighteen. A preamble to the resolution referred to six countries that had applied capital punishment in such circumstances over the past decade, namely Iran, Nigeria, Pakistan, Saudi Arabia, the United States of America, and Yemen. The resolution also called upon States not to apply the death penalty for refusal to serve in or desertion from the military, and called on States to commute all death sentences to at least life imprisonment on December 31, 1999 to mark the millennium.²⁸

3. *International Criminal Law*

The first truly international trials were held in the aftermath of the Second World War, and led, in many cases, to executions.²⁹ The *Charter of the International Military Tribunal* authorized the Nuremberg court to impose upon a convicted war criminal "death or such other punishment as shall be determined by it to be just."³⁰ Many of the Nazi defendants were condemned to death,

²⁷ "The question of the death penalty," U.N. Doc. E/CN.4/RES/2001/68.

²⁸ U.N. Doc. E/CN.4/Sub.2/1999/L.16. See also: "The death penalty in relation to juvenile offenders," U.N. Doc. E/CN.4/Sub.2/RES/2000/17.

²⁹ See: William A. Schabas, *War Crimes, Crimes against Humanity and the Death Penalty*, 60 ALBANY L.J. 736 (1997).

³⁰ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.), adopted Aug. 8, 1945, 82 U.N.T.S. 279, art. 27. Also: Special Pro-

although a few received lengthy prison terms and some were acquitted. At the Tokyo Trial, seven were sentenced to death and fifteen to life imprisonment.³¹ The president of the Tokyo Tribunal penned a separate opinion which seemed to favor sentences other than death: "It may well be that the punishment of imprisonment for life under sustained conditions of hardship in an isolated place or places outside Japan – the usual conditions in such cases – would be a greater deterrent to men like the accused than the speedy termination of existence on the scaffold or before a firing squad."³²

In 1989, the General Assembly initiated work in the International Law Commission aimed at establishment of an international court. When the issue of sentencing came before the International Law Commission in 1991, special rapporteur Doudou Thiam declared that capital punishment should be excluded from the *Code of Crimes Against the Peace and Security of Mankind*, and that a maximum sentence of life imprisonment was provided.³³ Although a few members of the Commission argued that the supreme penalty should not be abandoned,³⁴ the vast majority felt it would be unthinkable, given the international trend in favor of abolition of the death penalty.

While the debate had been underway in the International Law Commission and the Preparatory Committee, the Security Council had also addressed the issue of sentencing when it set up

clamation by the Supreme Commander for the Allied Powers at Tokyo, 4 Bevans 20, as amended, 4 Bevans 27, art. 16.

³¹ *United States et al. v. Araki et al.*, in R. JOHN PRITCHARD, SONIA MAGBANUA ZAIDE, *THE TOKYO WAR CRIMES TRIAL*, VOL. 20 49, 854-49, 858 (1981).

³² *Id.* See also: B.V.A. RÖLLING, ANTONIO CASSESE, *THE TOKYO TRIAL AND BEYOND* (1993).

³³ U.N. Doc. A/CN.4/435 and Add. 1, §29. For the discussion of this proposal by the International Law Commission, see U.N. Doc. A/CN.4/SR.2207-2214; U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (Part 2), A/46/10, §§70-105.

³⁴ U.N. Doc. A/CN.4/SR.2211, §15; U.N. Doc. A/CN.4/SR.2212, §19; U.N. Doc. A/CN.4/SR.2212, §28; U.N. Doc. A/CN.4/SR.2213, §55. Special rapporteur Thiam promised that the Commission's report would state that "two or three of its members" had expressed reservations about exclusion of the death penalty: U.N. Doc. A/CN.4/SR.2213, §59.

the *ad hoc* tribunals for the former Yugoslavia and Rwanda. The *Statutes* of the two *ad hoc* tribunals contain brief provisions dealing with sentencing, proposing essentially that sentences be limited to imprisonment (thereby tacitly excluding the death penalty, as well as corporal punishment, imprisonment with hard labor, and fines) and that they be established taking into account the "general practice" of the criminal courts in the former Yugoslavia or Rwanda, as the case may be.³⁵

The death penalty is formally excluded from the *Rome Statute of the International Criminal Court*. The *Statute* was adopted on July 17, 1998, and as of December 31, 2000, some 139 states had signed it, including many where the death penalty is still in effect. As of June 1, 2001, thirty-two states had ratified the instrument, which requires sixty ratifications for its entry into force. The exclusion of the death penalty from the *Rome Statute* can be nothing but an important benchmark in an unquestionable trend towards universal abolition of capital punishment.³⁶

4. *Extradition*

Extradition has become an important indirect way in which international law promotes abolition of the death penalty. Since the late nineteenth century, many extradition treaties have contained clauses by which States parties may refuse extradition for capital offences in the requesting State unless a satisfactory assurance will be given that the death penalty not be imposed. Such provisions can be found as early as 1889, in the *South American Convention*, in the 1892 extradition treaty between the United Kingdom and Portugal, in the 1908 extradition treaty between the United States and Portugal, and in the 1912 treaty prepared by the International Commission of Jurists.³⁷ These clauses have now

³⁵ "Statute of the International Criminal Tribunal for the Former Yugoslavia," S/RES/827 (1993), annex, art. 24§1; "Statute of the International Criminal Tribunal for Rwanda," S/RES/955 (1994) annex, art. 23§1.

³⁶ "Question of the Death Penalty," C.H.R. Res. 1999/61, preamble.

³⁷ P. Leboucq, *Influence en matière d'extradition de la peine applicable dans le pays requérant*, (1911) JOURNAL DE DROIT INTERNATIONAL 437; J.S. Reeves, *Extradition Treaties and the Death Penalty*, 18 AM. J. INT'L L. 290 (1924);

become a form of international law "boilerplate" and are contained in model extradition treaties adopted within international organizations including the United Nations.³⁸ Several important cases have been heard by courts in Europe, Africa and Canada concerning extradition to the United States. Extradition to the United States from Europe is now contingent on such assurances, the result of the case law of the European Court of Human Rights and the new *Charter of Fundamental Rights* of the European Union. The European Union's *Charter of Fundamental Rights*, adopted at Nice in December 2000, affirms that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty..."³⁹.

On February 15, 2001, in a unanimous decision, the Supreme Court of Canada declared that extradition without assurances in capital cases was contrary to the *Canadian Charter of Rights and Freedoms*, except in "exceptional cases". Relying largely on the international debate, the Supreme Court noted that the abolition of the death penalty was a major Canadian initiative at the international law, and reflected a "concern increasingly shared by most of the world's democracies." In support, the Court referred to the various treaties and resolutions, as well as the prohibition of capital punishment for war crimes, crimes against humanity and genocide by the international criminal tribunals. According to the Supreme Court:

American Institute of International Law, Project No. 17, 20 AM. J. INT'L L. Supplement 331 (1926); *Harvard Law School Draft Extradition Treaty*, 29 AM. J. INT'L L. 228 (1935); GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 99-100 (1991); Sharon A. Williams, *Extradition to a State that Imposes the Death Penalty*, 28 CAN. YB INT'L L. 117 (1990); Sharon A. Williams, *Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extraditions*, 62 INT'L REV. PENAL L. 259 (1991); Sharon A. Williams, *Human Rights Safeguards and International Co-operation in Extradition: Striking the Balance*, 3 CRIM. LAW FORUM 191 (1992).

³⁸ "Model Treaty on Extradition," U.N. Doc. A/CONF.14/28/Rev. 1, p. 68 (1990), art. 4; Inter-American Convention on Extradition, 20 I.L.M. 723 (1981), art. 9; European Convention on Extradition, (1960) 359 U.N.T.S. 273, E.T.S. 24, art. 11. The Italian Constitutional Court has ruled that article 11 of the *European Convention on Extradition* does not codify a customary rule of international law: *Re Cuillier, Ciamborrani and Vallon*, (1988) 78 I.L.R. 93 (Constitutional Court, Italy).

³⁹ "Charter of Fundamental Rights of the European Union," art. 19(2).

The existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend to abolition in the democracies, particularly the Western democracies, minors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada.⁴⁰

The Court also attached significance to the evolving debate within the United States itself, citing recent studies raising the dangers of conviction and execution of the innocent, as well as showing that racial bias and poverty continue to play too great a role in determining who is sentenced to death.

On May 28, 2001, the South African Constitutional Court made a similar ruling.⁴¹

Conclusion

The classic weakness of international human rights law is in its means of implementation. Increasingly, however, international human rights law is being applied by domestic courts, and this contributes immensely to its effectiveness. In some countries, it is given primacy over incompatible domestic legislation. In others, it has been used by courts to assist in interpreting the scope of constitutional norms which have usually been inspired by the international instruments. Death penalty jurisprudence provides one of the most dramatic examples of this synergy between international and domestic human rights law.

⁴⁰ *United States v. Burns*, *supra* note 13, para. 92.

⁴¹ *Mohamed et al. v. President of Republic of South Africa et al.*, CCT 17\01, May 28, 2001.

Courts of several States, including South Africa,⁴² Zimbabwe,⁴³ Canada,⁴⁴ Hungary,⁴⁵ Tanzania,⁴⁶ Bosnia and Herzegovina⁴⁷ and the United Kingdom⁴⁸ have found international law to be particularly helpful in the interpretation of such notions as the right to life and cruel, inhuman and degrading punishment. In the 1995 judgment of the South African Constitutional Court, which ruled that capital punishment was incompatible with the right to life and the protection against cruel, inhuman and degrading punishment, President Arthur Chaskalson wrote: "The international and foreign authorities are of value because they analyze arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention."⁴⁹ He provided a detailed analysis of the international instruments as well as the case law of such bodies as the Human Rights Committee and the European Court of Human Rights.

Can the international context influence the course of abolition within Taiwan and China? Certainly, there is a very direct impact when countries refuse to extradite without assurances that capital punishment will not be imposed. More generally, movement towards abolition can be expected to the extent there is a desire to join the mainstream of international human rights norms and organizations. □

⁴² *S. v. Makwanyane*, 1995 (3) S.A.L.R. 391.

⁴³ *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, Zimbabwe, et al.*, [1993] 4 S.A. 239 (Z.S.C.), [1993] 1 Z.L.R. 242 (S), 14 *H.R.L.J.* 323.

⁴⁴ *United States v. Burns*, *supra* note 13.

⁴⁵ Ruling 23/1990 (X, 31) AB, Constitutional Court of Hungary, Judgment of October 24, 1990, *Magyar Közlöny* (Official Gazette), Oct. 31, 1991.

⁴⁶ *Republic v. Mbushuu et al.*, [1994] 2 L.R.C. 335 (High Court of Tanzania).

⁴⁷ *Damjanovic v. Federation of Bosnia and Herzegovina*, CH/96/30, DECISIONS AND REPORTS 1996-1997, 147.

⁴⁸ *Pratt et al. v. Attorney General for Jamaica et al.*, [1993] 4 All.E.R. 769, [1993] 2 L.R.C. 349, [1994] 2 A.C. 1, [1993] 3 W.L.R. 995, 43 W.I.R. 340, 14 *H.R.L.J.* 338, 33 I.L.M. 364 (J.C.P.C.).

⁴⁹ *S. v. Makwanyane*, *supra* note 40, para. 34.