THE SEPALA EKANAYAKE CASE -
DOMESTIC SRI LANKAN LAW
INCORPORATES INTERNATIONAL LAW

By David Averbuck*

Introduction

Sepala Ekanayake is his country's only hijacker of an international airplane. While Sri Lanka had ratified all three major international conventions on air piracy, it had failed -- as many other states have failed -- to pass enabling legislation to make Ekanayake's actions criminal in his homeland. Under his nation's Constitution of 1978, there can be no ex post facto criminal statute unless the law is based on general principles of international law recognized by the community of nations. Within three weeks after completion of the hijacking, the Sri Lankan Parliament passed the enabling legislation, and Sepala Ekanayake was tried and convicted pursuant to this ex post facto criminal statute.

This article will briefly examine the history of the Ekanayake case, and the incorporation of international law into the domestic legislation of an independent country. It is the thesis of this article that the Ekanayake case and the incorporation of international law by the courts and Parliament of Sri Lanka sets several precedents. Sri Lankan Parliament and courts, to some extent, are now bound by the general principles of law recognized by the community of nations. The courts of the nation now must interpret its domestic statutes in conformity with customary international law, part of which has been adopted in conventions to which Sri Lanka has become a party -- including those relating to human rights.

A Tale of Three Cities

The story of Sepala Ekanayake has all the makings of high tragicomedy, not only because of his actions, but also due to the unique responses taken by

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representatives of the Sri Lankan government in reacting to the crisis Sepala created. There is a wealth of material about the events which led up to the hijacking, for the Sri Lankan newspapers covered the story extensively. Ekanayake's candid statements from the dock tend to verify some of what was reported in the English and Sinhala media at the time of the hijacking, although there are a myriad of differing versions.

Ekanayake was a young man from southern Sri Lanka who was entrapped in the struggle between the worlds of Asia and Europe. Reported by the local press as an alleged drug trafficker who had been caught in Europe at least twice by authorities during his short life, Sepala's only other noteworthy accomplishment had been his marriage on July 22, 1978, to Anna, a bright Italian teacher, and the birth on December 10, 1978, of their son whom they named "Frej." It appears that the Ekanayakes had a stormy marriage which was not lessened by Sepala's erratic behaviour and volatile temper, and the couple separated.

Sepala Ekanayake was continually refused a visa to Italy by officials in Italian Embassies both in Sri Lanka and abroad, because -- according to him --- of his previous fight with the police official's relative; he thus felt himself "a victim of injustice". Whatever the motivation, Sepala hit upon a desperate plan to see his three year old son and Anna one more time, and to enrich himself in the process. On June 29, 1982, on an Alitalia passenger airliner from New Delhi, Sepala Ekanayake sent a note to the pilot threatening to blow up the aircraft unless he was reunited with his wife and son. In addition, Sepala demanded that he be given $300,000 (Three Hundred Thousand United States Dollars) in cash which he rationalized as being for his expenses and as remuneration for the trouble he had incurred in his unsuccessful attempts to secure an Italian visa.

While holding two hundred and sixty-one people hostage on the plane which landed in Bangkok, Thailand, he was finally able to succeed in having his demands met. His wife and child were in northern Italy, where she was working as a teacher. After a request by the Italian authorities, she agreed to go to Bangkok with her son. In Bangkok, Sepala thus had his wife, child and the $300,000 ransom, and safe passage back to Sri Lanka. Ekanayake was welcomed home to the applause of throngs who gathered at Katunayake Airport outside of Colombo.

The government's version of what next happened was stated by Foreign Minister Hameed:

"On Thursday morning the incident was over. The Thai Government had not taken any action. The Italian Government had not informed us of any of their intentions. He [Ekanayake] arrived here on Thursday night. On Friday night the
Italian Ambassador telephoned me and said that his Government was making a complaint with regard to extortion. Possession of money obtained by extortion is an offence in our law, whether it is done within our country or outside Sri Lanka. On Saturday morning he [the Italian Ambassador] made a complaint to the Inspector-General of Police, and then the normal steps were taken by the police. He was arrested, and the rest followed.\textsuperscript{15}

According to the loyal opposition in the Sri Lankan Parliament, the International Federation of Pilots’ Associations (hereinafter called Pilots’ Associations) said that they were going to boycott Sri Lanka unless Sepala was arrested and punished and the money was returned. Anura Bandaranaike saw the governmental policy as to Sepala’s criminal accountability change because of this external pressure:

"I do not know where their [Pilots’ Associations] headquarters are, but they made a categorical statement that they were going to boycott all planes landing in Sri Lanka. That frightened you [the Government]."\textsuperscript{16}

Outside of Sri Lanka, the reason for the Government’s new position to prosecute Sepala was seen as the result of demands made not only by the Pilots’ Association, but also by numerous international private passenger carriers, and the International Civil Aviation Organization (ICAO), created in 1945 and utilized by the parties to the air hijacking conventions to oversee their implementation. The rest of the world assumed that Sepala would be arrested because the ICAO made it known publicly that they had forced Sri Lanka to prosecute him and had demanded that criminal anti-hijacking legislation be passed immediately by Parliament. There was also expectation of prompt action, such as the passing of ex post facto criminal legislation, which was voiced privately to the Government of Sri Lanka by not only the Italian Embassy, but diplomats from other nations as well.\textsuperscript{17}

After being asked to leave the Intercontinental Hotel by the management because of the complaints of foreign guests who found it incredible that a hijacker should be in the same accommodations with them, the Ekanayake family headed south towards Sepala’s home town. He was arrested in the old seaport of Galle pursuant to the complaint filed by the Italian Ambassador, returned to Colombo, and remanded to the Magazine Prison until the trial.\textsuperscript{18} Italy requested Sepala Ekanayake’s extradition. It was denied, not only because Sri Lanka was to prosecute him for hijacking which was its option under international law, but also due to a technical defect in the application for extradition.

The trial took just over three weeks to complete, and as might be expected was unremarkable except for Sepala’s testimony. Sepala Ekanayake was convicted of possession of stolen property which resulted in a sentence of three years’ rigorous imprisonment. He was also convicted of the hijacking
charge after it was added to the indictment following the passage of the Offenses Against Aircraft Act, and sentenced to simple life imprisonment.\textsuperscript{20} The ransom, according to the Court of Appeal, (minus $300 paid to the Hotel for certain expenses), was returned to Alitalia.

\textbf{Passing Legislation: Integrating International Standards with Domestic Law}

At the time of his arrest, there was little for which Sepala could be indicted under Sri Lankan law. The hijacking had not occurred on a Sri Lankan carrier; the hijacking had taken place while the plane was over and in other countries; no threats, assaults or intimidation occurred while Sepala was in Sri Lanka; even the extortion of the $300,000 in cash had been accomplished elsewhere. Sepala was in possession of the stolen ransom money while in Sri Lanka after his arrival, and under Section 394 of the Penal Code, that is a crime in Sri Lanka even if the money was stolen elsewhere.\textsuperscript{21}

Sri Lanka had ratified the relevant anti-hijacking of aircraft conventions by July 3, 1978, long before Sepala hijacked the Alitalia airliner over India. Those conventions are:

1. The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed on the 14th of September, 1963, known as the "Tokyo Convention".


3. The Convention for the Suppression of the Unlawful Acts Against the Safety of Civil Aviation, signed on the 23rd of December, 1971, known as the "Montreal Convention".

Under these conventions,\textsuperscript{22} one of the jurisdictions permitted to prosecute a hijacker is the State where the alleged offender is found, as Sri Lanka was on Sepala's return to Colombo. There is no doubt that the crime of airplane hijacking as specified in these conventions covers the facts in the Ekanayake case.\textsuperscript{23} The problem was that there was no Sri Lankan statute at the time of the hijacking, and the Conventions are not self-executing.\textsuperscript{24} Indeed, approximately half of the State signatories to the airline hijacking Conventions had also failed to pass enabling legislation as of July, 1982.\textsuperscript{25} Of those States which had enacted domestic legislation against airline hijacking, there were differences from jurisdiction to jurisdiction as to the scope of their respective statutes.\textsuperscript{26} There were also differing degrees of punishment depending upon
the State in which the hijacker was convicted, as well as different defences.\textsuperscript{27} For example, in one incident Poles were prosecuted for an airplane hijacking in which no passenger was injured; the West German court sentenced them to 4\textsuperscript{3/2} years in prison. In another case, East Germans fleeing from the Soviet Union to Turkey hijacked an airliner using violence, and were acquitted by the Turkish courts because their motive was a desire to gain freedom.\textsuperscript{28}

The theoretical difficulty in passing an \textit{ex post facto} law so as to have it apply to Sepala Ekanayake was because societies have long recognised the inherent injustice that occurs when one is punished for doing an act at the time of which there was no notice that it was illegal. This prohibition against retrospective legislation has usually been limited to situations involving retroactive criminal, as opposed to civil, legislation.\textsuperscript{29}

Under the Sri Lankan Constitution certified on August 31, 1978, Parliament does have the right to enact retroactive civil laws pursuant to Article 75, but a special protection against retrospective criminal legislation is found in Chapter III, Fundamental Rights, Article 13(6), which states:

"No person shall be held guilty of an offense on account of any act or omission which did not, at the time of such act or omission, constitute such an offense, and no penalty shall be imposed for any offense more severe than the penalty in force at the time such offense was committed."

The embodiment of this fundamental concept in international law is also well established. Indeed, the language of Sri Lanka's Article 13 (6) is almost verbatim of Article 11 of the International Bill of Human Rights\textsuperscript{30} and Article 15 of the International Covenant on Civil and Political Rights\textsuperscript{31} both of which have been ratified by Sri Lanka.

The Sri Lankan Constitution, and those of other nations,\textsuperscript{32} as well as the International Covenant on Civil and Political Rights, go on to add a major exception to the fundamental right of citizens not to be subject to \textit{ex post facto} criminal laws, and the language of those documents is identical:

"Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations."

It is this proviso in the Sri Lankan Constitution which was relied upon by Parliament in passing the retroactive sections of the Offenses Against Aircraft Act of 1982, and which enabled the courts to eventually convict Sepala Ekanayake of a crime that was not codified in Sri Lanka at the time of the hijacking.\textsuperscript{33}
General Principles of Law Enacted

The concept of "the general principles of law recognized by civilized nations" is a phrase found in Article 38, paragraph 1 (c) of the Statute of the International Court of Justice. Historically it primarily referred to general principles of domestic law, especially in the field of private law, shared by a large number of nations. Often equated with "customary law", these norms were affirmed by consistent practices of nations, tribunals and international organizations. The general principles incorporate not only well-recognized customary law, but also jus cogens, which constitutes peremptory norms which one writer has defined as denoting "fundamental or suprapositive norms which lie at the basis of the whole human society".

For the ex post facto provision of the Offenses Against Aircraft Act of 1982 to be valid in its application to the Ekanayake case, the crime of airplane hijacking must be recognized by the community of nations as a general principle of law either in the domestic law of a large number of countries or by international agreement or practice. Since many nations had not enacted air piracy legislation at the time of Sepala Ekanayake’s hijacking of the Alitalia airline, as noted in the Parliamentary debates, the only remaining basis for the passing of the retroactive provisions had to find support in previously accepted international agreements or norms.

Since the Ekanayake situation was concerned with a "general principle of international law", there was no need for the Sri Lankan Parliament to have incorporated the norms in its domestic law prior to the hijacking. Customary international law has long been accepted as incorporated into domestic law without enabling legislation, if there has been no prior contrary legislation or judicial precedent. As stated by Ian Brownlie:

"The dominant principle, normally characterized as the doctrine of incorporation, is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority."

The most famous example of retroactive international criminal law without evidence of locally enacted legislation was the "Nuremburg Laws," enforced through the 1946 London Agreement for the Establishment of an International Military Tribunal. This Tribunal decided the fate of Nazi war criminals who, inter alia, had massacred over six million Jews by systematic extermination, and violated the customs of war such as by the wanton destruction of cities, towns and villages -- regardless of any military necessity. They destroyed untold numbers of people and attempted to liquidate an entire race in their drive to dominate the world. These followers of Hitler had
several defenses, one of which is relevant here,\textsuperscript{41} and to which the Tribunal responded as follows:

"It is urged on behalf of the defendants that a fundamental principle of all law -- international and domestic -- is that there can be no punishment of crime without a pre-existing law. \textit{nullum crimen sine lege, nulla poena sine lege.} It was submitted that \textit{ex post facto} punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

"In the first place, it is to be observed that the maxim \textit{nullum crimen sine lege} is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."\textsuperscript{42}

The General Assembly of the United Nations in 1946 passed a resolution that affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."\textsuperscript{43} The Lord Chancellor was to later state in the British Parliament that the United Kingdom took the view that the Nuremberg Principles "are generally accepted among states and have the status of customary international law."\textsuperscript{44}

At least since 1951, the International Court of Justice has no longer restricted its definition of 'general principles of law' to domestic enactments or judicial decisions. In the \textit{Reservations to the Genocide Convention Case}, the World Court stated:

"...The principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."\textsuperscript{45}

War crimes and genocide are crimes of mass murder. From a moral perspective they are not equivalent to airplane hijacking. From a legal perspective of determining general principles of international law, war crimes, genocide and air piracy may indeed be similarly considered international crimes by the community of nations.

\textbf{The Supreme Court's Opinion on the Bill}

Before passage of the Offenses Against Aircraft Bill by Parliament, the Sri Lankan Supreme Court reviewed its provisions pursuant to Article 122 (1) (b) of the Sri Lankan Constitution. In not finding any of the Bill's sections
repugnant to the Constitution, and after noting the relevant hijacking conventions, the Supreme Court declared without further explanation:

"The offenses referred to in the Bill are all criminal according to the general principles of law recognized by the community of nations."46

This one sentence has profound implications in Sri Lanka's constitutional history. The Ekanayake case represents the first judicial opinion of any court that hijacking is an international crime that is part of international customary law. It is the only Sri Lankan decision that incorporates international law because the crime is in accord with the general principles of law recognized by the community of nations. The effects of this precedent cannot be underestimated. The case can be used as a precedent as to the status of hijacking in international law by over fifty other countries which have yet to enact domestic legislation in this area of the law. It has ramifications as well for all branches of the Sri Lankan Government, especially in the area of protection of fundamental human rights, for the "Ekanayake" precedent is a signal to civil rights lawyers to re-examine the impact of international customary law on Sri Lankan domestic enactments and their interpretations.

The Offenses Against Aircraft Act of 1982 incorporated the international customary criminal law of airplane hijacking into Sri Lankan domestic law by a specific act of Parliament. The Supreme Court had, prior to its passage, agreed that air piracy had developed into recognized customary international law. There are, however, other means by which international law is incorporated in domestic law.

Incorporation of international law in domestic law varies, in some respects, according to the individual State's constitutional mandates and the political will of its government to fulfill international obligations.47 What is often overlooked by many legal practitioners who have little contact with international institutions and documents is that in certain subjects of the law, international norms are because of their importance incorporated in the domestic law of a country such as Sri Lanka without the need of domestic legislation.48 The scope of those subjects continue to expand, and over the last decade, the most significant increase of incorporation of international law has occurred in the field of fundamental human rights.

**Minimum Incorporation Required by International Law**

Before analyzing the Sri Lankan Constitution's permissible limits of incorporation of international law, it must be recognized that all nations are
bound by at least a limited set of internationally recognized norms, more commonly referred to as customary law. Historically, there have developed two types of State systems or models which treat the incorporation of customary law differently. The first system assumes that the domestic legal system choses when to subordinate itself to a superior international order by accepting or rejecting international law. Canada, Australia, other Commonwealth countries, the United States and the United Kingdom are such States. The second system assumes two distinct systems of law, national and international, but these countries such as Italy and Germany automatically and continually adopt customary international law as it evolves and by their constitutions are limited as to rejecting international law.

Both systems accept the fact that there are certain customary international laws by which they must abide and which are binding on their legislatures, executives and the judiciary, and cannot be avoided by constitutional fiat or legislative acts -- for example, the international law against slavery, genocide and crimes against humanity. The world learned this fundamental principle at the Nuremberg Trials. These are the non-derogable protections of human rights that form the body of law known as ‘jus cogens’.

Both systems accept the fact that, absent any conflicting local constitutional or statutory provisions or final judicial precedent, they are bound by the customary international law including jus cogens without the need for domestic enabling legislation. Since airplane hijacking was a violation of the customary international law as it had developed by June 29, 1982, it was not necessary for the Sri Lankan Parliament to ‘incorporate’ that crime into domestic legislation; it was already incorporated because there was no conflicting Sri Lankan constitutional provisions, statutes, or judicial precedent. The so-called ‘enabling’ legislation was needed to create the procedure and punishment for what had already been recognized by the community of nations through customary law as an international crime.

To illustrate incorporation of international customary law without the need of domestic legislation, consider the following hypothetical in relation to the Ekanayake case. Assume that following the hijacking, the Offenses Against Aircraft Act was for some reason not enacted. If Alitalia Airlines were to bring a civil action against Sepala Ekanayake in the Sri Lankan High Court to recover the $300,000 ransom and for other damages, it could rely on the international customary law against hijacking as a basis for a tort action (delict) even if there were no Sri Lankan judicial precedent or domestic legislation concerning hijacking. Indeed, since hijacking is an international crime in violation of the general principles of law recognized by the community of nations, it might be argued that this specific international law was applicable to Sri Lanka even if that country had not ratified the three hijacking
conventions. The fact that Sri Lanka ratified the conventions does assist the Sri Lankan courts in three ways: (1) It is evidence to support the theory that hijacking is a crime recognized by the community of nations which includes Sri Lanka, and hence customary law; (2) it is an assurance to the courts that there has been manifested a Governmental intent to support the conventions, and hence there is little likelihood of there existing conflicting constitutional provisions or legislation which would override the international customary law on hijacking; and (3) it creates the expectation by Sri Lankans and other nations that Sri Lanka will abide by the convention and arrest and prosecute hijackers.

Perhaps the most famous example of this incorporation by a State was the landmark *The Paquete Habana* case. In that case, the United States Supreme Court found and applied a customary rule of international law exempting coastal fishing vessels from capture as a prize of war, and declared:

"International law is part of our law, and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

The English system, over two hundred years ago, in *Triquet v. Bath* and *Buvoi v. Barbuit*, incorporated customary international law as part of British common law. Other Commonwealth countries have followed this accepted approach of incorporation.

Similarly, the Nuremberg Tribunal took the view that there were already international crimes in existence at the time the Nazis committed their heinous acts even without legislation. The Nuremberg Agreement and annexed Charter were needed, not to create customary law, but rather to give structure to the application of previously accepted norms that were a part of international law.

An examination of Sri Lanka's current Constitution indicates that it has taken a model of incorporation similar to the United Kingdom, other Commonwealth countries, and the United States. This permits the Sri Lankan Constitution to contravene and have supremacy over conflicting international norms that are not jus cogens. Under the other system, countries like Italy and Germany have explicit language that domestic law must not deviate from international law. Such language is lacking in the 1978 Sri Lankan Constitution. Compare the language of Article 10 of the Italian Constitution, which mandates that the domestic legal system shall conform to the generally recognized principles of international law, with Article 27 (15) of the Sri Lankan Constitution which reads:

"The State shall promote international peace, security, and co-operation, and the establishment of a just and equitable international economic and social order;"
and shall endeavour to foster respect for international law and treaty obligations
in dealings among nations.\footnote{57}

The clearest statement as to the type of system Sri Lanka has adopted is
found in the description of the office of the President; the Sri Lankan
Constitution grants him or her the power under Article 33 (f):

"to do all such acts and things, not being inconsistent with the provisions of the
Constitution or written law, as by international law, custom or usage he is
required or authorized to do."

This language is a pristine example of that used to describe the incorporation
of international law in the first type of system: customary international
law is incorporated unless it is inconsistent with statutory or constitutional
law.

There has been some misunderstanding about the need for enabling
legislation before a treaty or international convention can be applicable in Sri
Lanka.\footnote{58} Part of the problem has arisen from a misreading of the important
language in the 1965 case of Leelawathi v. Minister of Defense and
External Affairs,\footnote{59} where Sansoni, C.J. rejected the right of Leelawathi to
invoke the principles of the Universal Declaration of Human Rights as
follows:

"Even if the principles contained in the instrument (ie., Universal Declaration
of Human Rights) have any relevance, it is sufficient to say that while it is of the
highest moral authority, it has no binding force as it is not a legal instrument and
forms no part of the law of this country.\footnote{60}

One commentator has noted that Sri Lankan law is thus similar to English
law, since both countries require Parliamentary "effect if they [international
documents] are to be enforced as law by the local Courts."\footnote{61} By contrast, an
American treaty has the same status as the Constitution -- both are treated as
the supreme law of the land -- if the treaty does not conflict with the
Constitution, is signed by the executive and is ratified by the Senate.\footnote{62} While
Sansoni's language in 1965, in general, reflects the English and Sri Lankan
law of treaties, it does not apply to a situation involving customary interna-
tional law. As noted earlier "customary rules are to be considered part of the
law of the land and enforced as such."\footnote{63} In other words, customary interna-
tional law such as the crime of airplane hijacking is binding on Sri Lankan
courts -- absent contrary legislation, a conflicting Constitutional section, or a
prior judicial decision of final authority. The fact that an international cus-
tomary law is also enunciated in a treaty or adopted as an international
convention does not diminish its incorporation in domestic law. What San-
soni, C.J. was describing in his 1965 opinion was the non-binding effect of
non-customary international law absent enabling legislation. This distinction
was clearly seen in The Parliament Belge case which is cited in every
standard text on international law. In the Admiralty Division opinion of the case, Sir Robert Phillimore found that while there was a relevant treaty (granting immunity), it was of no effect since Parliament had not confirmed the treaty or passed enabling legislation. His decision was reversed by the Court of Appeal on the ground that the immunity sought, while not available by the treaty, existed at customary international law. The customary international law was therefore incorporated at common law, and was binding on the court.

In an American decision similar to Leelawathi, the California Supreme Court in 

Sei Fujii v. California

refused to apply the Charter of the United Nations as a binding document. Yet even that 1952 decision noted that the framers of the Charter intended several sections to be self-executing, the Court referring to Articles 140 and 105, and that in the case of Curran v. City of New York those self-executing articles were treated as binding.

Thirty-five years after the Sei Fujii case and twenty-two years after the Leelawathi case, the inquiry is not merely whether enabling legislation has been enacted as to those non-self-executing sections of the United Nations Charter and the Universal Declaration of Human Rights, but whether the fundamental rights in those documents have now developed into customary international law recognized by the community of nations -- just as the crime of hijacking slowly developed from an international wrong to customary international law. If the United Nations Charter and the Universal Declaration of Human Rights are now customary international law, then they are binding on the Courts of America and Sri Lanka irrespective of enabling legislation.

This is not merely an academic inquiry. The recent federal decision in the human rights case of 

Filartiga v. Pena-Irala

focuses precisely on this developmental aspect of international fundamental rights law. The plaintiffs were a Paraguayan father and his daughter who discovered that a former police chief of Asuncion, Paraguay, was in the United States. The plaintiffs brought civil proceedings for damages in the United States Federal District Court alleging that the police chief had tortured and killed their son and brother in retaliation against the father who was an outspoken critic of the Paraguayan Government. The complaint alleged, inter alia, that the cause of action arose under:

"...wrongful death statutes; the United Nations Charter; the Universal Declaration on Human Rights; the United Nations Declaration against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations."
Under a specific federal statute which granted original jurisdiction to hear the claim, it had to be shown that the tort was "in violation of the law of nations". In upholding the jurisdiction of the trial court, the Court of Appeals, per Kaufman, C.J., declared:

"...[W]e find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations...."

"...The United Nations Charter...makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern."

"...although there is no universal agreement as to the precise extent of the 'human rights and fundamental freedoms' guaranteed to all by the Charter, there is at present no dissent from the view that the guarantees include, at a bare minimum, the right to be free from torture...."

After citing numerous United Nations declarations and conventions, the Court concludes:

"Thus a Declaration creates an expectation of adherence and 'insofar as the expectation is gradually justified by State practice (how States do in fact act), a declaration may by custom become recognized as laying down rules binding upon the States.' 34 U.N. ESCOR. Indeed, several commentators have concluded that the Universal Declaration has become, in 1960, a part of binding, customary international law."^{60}

**Additional Ex Post Facto Legislation**

When international norms are incorporated in domestic law, at times some unusual correlations or analogies can occur. For example, the Government of Sri Lanka through its security forces are attempting to put down an insurrection by Tamil separatists in the north and east of the island. As in any civil conflict of a large scale, accusations of atrocities including torture, intentional wrongful imprisonment, and even murder are levelled by each side against the other as well as by international organizations. While this article is not intended to determine the guilt or innocence of either the security forces or the insurrectionists, there is evidence to allege that there have been major violations of fundamental human rights."^{71}

At this point, Sri Lankan legislators -- either now or in a future government -- might consider the following case from Argentina. The police chief of Buenos Aires and four other law enforcement officers were convicted on December 2, 1986, of "torturing and murdering" illegally seized victims in 73 cases. In one case, the police chief was convicted of having directed the torture of Jacobo Timerman, an internationally famous journalist and author who spent 29 months in prison following his illegal arrest in 1977. Sentences
ranged from four years for an officer of the security forces who witnessed the torture to twenty-five years for the chief of police who directed or ordered the torture of prisoners. There were three major defenses in the criminal prosecution of the officers: The first defense was that the defendants were following orders from former junta leaders and other superiors to eradicate leftist guerrilla activities. The judges rejected this argument, as had the Nuremberg Tribunal, noting that even military doctrine proscribes blind obedience. The second defense was that the guerrillas posed a threat to the nation and the government. The judges responded that while such may have been the case, this did not justify torture. The final defense was that there was no Argentine criminal statute in effect at the time the alleged crimes were committed which covered the specific actions of the defendants. As with hijacking in the Ekanayake case, the Argentine court ruled that torture was a violation of the general principles of law recognized by the community of nations, and hence an international crime.

Thus, the most obvious implication of the Ekanayake case is the possibility of Parliament enacting additional ex post facto criminal legislation. The subject area in which this is likely to occur is the vindication of human rights. This would not be a new concept for Sri Lanka, for Buddhism and Hinduism historically recognized such now universally accepted norms as the fair and impartial application of law, protection of minority rights, and the safeguarding of human dignity. The Kandyan and British treaty of 1815 specifically forbids torture, guarantees a fair and impartial trial based on law, and protects religious freedom — all of which are now accepted by the community of nations as fundamental human rights. An examination of the constitutional history of Sri Lanka, from the "Soulbury Constitution" to the most recent 1978 document, shows a continuity of concern for fundamental human rights.

During the years since Sri Lanka's independence from England, there has developed a complete body of international law on human rights, evidenced in part by the following:

* The adoption of general international instruments protecting universal human rights (most ratified by Sri Lanka);
* Acceptance by all member nations, including Sri Lanka of the United Nations Charter;
* Acceptance by Sri Lanka and other nations of the Universal Declaration of Human Rights.
* The adoption of specific international instruments preventing and forbidding discrimination, genocide, slavery, and other crimes against humanity (most ratified by Sri Lanka);

* The adoption of international conventions protecting women, workers, labour unions and combatants (many of which have been ratified by Sri Lanka);

* The passage of United Nations General Assembly and Security Council Declarations and Resolutions (many of which have been supported by Sri Lanka);

* The acceptance in national constitutions and domestic law of international norms of customary law and fundamental rights accepted as general principles of law, just as airplane hijacking was added to Sri Lankan law;

* Judicial interpretation and precedent as to the existence and meaning of jus cogens, both by State courts and international tribunals and boards.\(^7^6\)

Much of the international developments in the area of human rights, and in other fields such as air piracy, have created customary law that is part of Sri Lankan law unless it conflicts with the Constitution, prior legislation, or a judicial precedent. If such a conflict occurs, then Sri Lankan domestic or constitutional mandates control, unless the international law is recognized as jus cogens. Many of these international norms have already been ratified by Sri Lanka in conventions, international instruments, and by other actions of its Government in foreign affairs, such as votes in the United Nations General Assembly on specific issues.\(^7^7\)

In analyzing future legislation, let alone passing ex post facto criminal legislation, it therefore behooves the Sri Lankan members of Parliament to understand the international law that has been incorporated in domestic law. Some of the fundamental rights norms may not have reached the status of customary international law, and may need domestic legislation to give them binding effect. Some of the incorporated customary international law may need ‘enabling’ legislation, to give them structure for application by the courts, such as the Offenses Against Aircraft Act of 1982. Some of the incorporated customary international laws may be incomplete in their scope, and thus further domestic legislation is needed to expand their perimeters. Some may be incompatible with the peculiar circumstances of Sri Lanka and, if not recognized as jus cogens, may be modified or limited by specific contrary legislation.
Necessary Judicial Determinations

On June 11, 1980, the Government of Sri Lanka acceded without reservation to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In addition, Sri Lanka has endorsed the Charter of the United Nations and the Universal Declaration of Human Rights. It must be assumed that these were not hollow acts of political expediency, but rather a legal commitment to international norms. The degree of that commitment and its impact on Sri Lanka’s domestic law is what is undetermined. It is submitted that the Supreme Court is not only the constitutionally mandated organ of Government required to make this determination, but the one best suited for the difficult task. A brief review of the powers and limitations of the Court demonstrates its unique role in the administration of justice.

The Sri Lankan Supreme Court and lower courts have highly circumscribed powers when it comes to determining whether a proposed law is in violation of the Sri Lankan Constitution. The Supreme Court has in fact ruled that certain bills were inconsistent with the Constitution. Depending upon the degree of conflict with the supreme law of the land, the Supreme Court has sole authority to declare under Article 82 that such a bill needs a special majority of Parliament to be enacted; if the conflict infringes upon guaranteed fundamental rights or contravenes the basic constitutional structure of Sri Lanka, then under Article 83, the Supreme Court can determine that a special national referendum needs to be held for the bill to become law. But once the bill is enacted, its validity cannot be questioned, even if it appears to work an injustice in a case.

In the presentation of the Offenses Against Aircraft Act of 1982, an expedited procedure was utilized under Article 122 by certifying that the bill was "urgent in the national interest". The Supreme Court is still empowered prior to enactment to pass upon any inconsistencies between the urgency legislation and the Constitution. The difficulty, of course, regardless of the procedure used, is that the Court is unable to forecast the myriad cases to which the legislation might apply and under what circumstances the law might result in an unconstitutional decision.
The Sepala Ekanayake Case

The use of advisory opinions has long been subject to criticism, but the fact remains that this is a form of judicial review that has been utilized by other countries. Ingenuity, however, is often a judicial quality. When denied or unwilling to exercise the power to rule an Act unconstitutional in the past, the Supreme Court of Sri Lanka has at times maintained its independence by interpreting the repugnant legislation so as not to run afoul of the Constitution and fundamental due process.82

There are other methods of avoiding the unconstitutional impact of a statute after it has become law without declaring the enactment void; for example, the appellate court can rule the statute is inapplicable to the facts of the case. This principle of statutory interpretation found its constitutional footing in the historic language of Chief Justice John Marshall in the seminal American decision supporting judicial review, Marbury v. Madison.83

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. 'If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty."

The Constitution of Sri Lanka takes away from the Supreme Court Justices the choices available in the second paragraph of Marshall’s famous declaration of judicial independence, for once a bill becomes law, the courts are forbidden to rule it invalid. Yet the key word in that paragraph is "if", for the Court may determine the law and the constitution are not in conflict by interpreting the statute in such a way as to avoid inconsistencies. That is a fundamental maxim of constitutional interpretation.

Judicial review, furthermore, is a living process, based upon the need to have a fair and impartial tribunal determine conflicts in law on a case by case basis. Thus, for example, unhindered by the Sri Lankan Constitution is the ability of the Supreme Court to rule that a statute, while valid, is inapplicable to a specific set of facts because it would work an invidious discrimination. In the seminal case of Yick Wo v. Hopkins, a Chinese laundryman was denied equal application of the laws when he was denied a business permit and white people in the same circumstances were granted the license. The United States Supreme Court declared, as have other national tribunals :84

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between
persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In short, the ability to rule a statute unconstitutional after its enactment is not the true measure of a Supreme Court’s independence or power. Rather, it is the judiciary’s ability to apply the law to the facts of the case in such a way as to have just results. That is the lesson the Supreme Court of Sri Lanka taught the Ceylon legal community in the Liyanage case long before the Privy Council’s decision. It is submitted that the courts are thus best equipped to determine the scope and extent of incorporation of international law in the municipal law of Sri Lanka. In reaching an understanding of this body of law, the Supreme Court may turn to numerous international organizations such as the decisions of the International Court of Justice and the European Court of Human Rights. For example, Sri Lanka was one of the nations of this world that was operating under a governmentally declared "state of emergency". To determine whether there exists applicable customary international law or jus cogens that are binding on the Supreme Court in interpreting a statute, opinions from the European Court or the International Court of Justice might be of assistance.

In 1984, the International Law Association, after 8 years of study and revision approved by consensus the "Paris Minimum Standards of Human Rights Norms in a State of Emergency". As reported by Richard Lillich in the American Journal of International Law:

"These standards...are intended to help ensure that, even in situations where a bona fide declaration of a state of emergency has been made, the state concerned will refrain from suspending those basic human rights which are regarded as nonderogable under Article 4 of the International Covenant on Civil and Political Rights, Article 15 of the European Convention on Human Rights and Article 27 of the American Convention on Human Rights."

Some of these nonderogable rights are so firmly embedded in international law, such as the right to a fair trial or the right to be free from torture or slavery, that they have become a part of every nation’s law either by legislative enactment or by the ‘incorporation’ of jus cogens, the most basic of social norms of mankind and part of customary law. Like genocide and crimes against humanity, the violation of these norms is not legally permissible, even under the guise of protective municipal legislation. It is imperative that lawyers and judges in every country examine the "Paris Standards" and compare them to their national statutory scheme. This is especially true where there are laws enacted in the name of a ‘state of emergency’.

There are other crucial questions that are proper for the judiciary to decide, some of which follow:
1. What are the specific legal norms which comprise the body of international law incorporated by Sri Lanka without the need of enabling legislation?

2. How does the existence of treaties and conventions effect the incorporation of international law?

3. What effect does ratification of treaties and conventions by Sri Lanka have on the application of international law?

4. What effect does conflicting domestic legislation, constitutional provisions or final judicial precedent have on whether customary international law is incorporated in Sri Lankan law?

5. Which international norms, such as torture and slavery, are non-derogable?

6. What legal doctrines are available to help the judiciary avoid or minimize the impact of international law decisions where they might interfere with executive prerogatives secured by the Constitution?

7. In what ways does the law of extradition afford Sri Lanka a means to avoid certain circumstances and to accept others as to the application of international norms?

8. With the growing international economic system becoming more inter-dependent and adopting similar norms, are there other norms like hijacking which are not violations of human rights but are now, or becoming, customary law?

9. Since customary law is a developmental process, how active should the Sri Lankan Supreme Court be in setting precedents as it did in the Ekanayake case?

Conclusion

There is no conclusion to the Ekanayake case. There should be none, for it is but part of a process in the growth and incorporation of international norms intended to expand mankind's humanity to itself. International law is on the periphery of nationalistic statutes and constitutions, but for hundreds of years cases like that of Sepala Ekanayake's have steadily permitted countries to share common values and to correct those nations which forget their international obligations. Sri Lanka was, at best, encouraged to conform to accepted norms on prosecuting air piracy; at worst, it was forced to do so. That is what the international community is capable of accomplishing.
In turn, Sri Lanka enacted a statute by a process that recognized airplane hijacking as part of the customary international law. That is a landmark decision for the rest of the world. For Sri Lanka, it heralded in the incorporation of international norms in domestic law. There is no way to tell where the process will end; that will depend in part on the integrity, independence and far-sightedness of the judiciary, and the cooperation and will of the executive and legislative branches. The case is unlimited in its many facets, from the personal problems of a family to the decision of the government to enact retrospective legislation. From air piracy to judicial independence to fundamental human rights, it seems impossible to imagine the final effects of those few days in June and July of 1982.

I hope that readers do not feel that they have been taken on a "needlessly long journey to Kotte" ("Parangiya Kotte gia wagei"), which ironically is where the New Parliament Complex of Sri Lanka is located. Perhaps the entire scope of the case was summed up by Mr. Nissanka Wijeyeratne -- Minister of Justice -- when he declared on the floor of Parliament:

"We are not discussing the life of an individual, but the protection that should be offered to people and the proper course of a civilized government standing before the international comity of nations. We in our country priding ourselves as a civilized nation paying the highest regard to law and international practice, must take our side with those committed to the safety of human beings. If we do not do so we shall be condemned on the international scene."

NOTES


2. Sri Lankan Parliamentary Debates, Official Report of Hansard, Vol. 20, No. 14, Wednesday, 21st July 1982 at page 1119. Hereinafter any reference to this date and document will be referred to as "Hansard" followed by the relevant page from this issue. The Ekanayake hijacking actually took place between June 29, 1982, and July 1, 1982; the enabling legislation passed on July 21, 1982, and the subject of the Parliamentary debates referred to in Hansard was the Offenses Against Aircraft Act, No. 24 of 1982 (Certified on July 26, 1982). While the Act has several sections dealing with aircraft safety and hijacking, this article is only concerned with those sections which have retrospective effect and were applied to Sepala Ekanayake, in particular, sections 17 (1) (a), and section 19 (1) and 19 (3) (d).

4. See note 2 supra.

5. Ekanayake was convicted in a High Court of Colombo trial without jury (H. C. Colombo 2023/83), and lost except as to a lessening of his punishment on his appeal to the Court of Appeals, Sepala Ekanayake vs. The Attorney-General, C.A. 132/84 Decided on August 7th, 1988 (hereinafter referred to as “Appellate Decision”).

6. The staff of the National Archives of Sri Lanka were most helpful in my review of the newspaper articles from the 1982-83 period. A special note of appreciation must also be given to Mrs. Shrinjani de Alwis of the American Center, Colombo, for her patience and accuracy in translating the Sinhala medium documents, and the assistance of my law students at Colombo University for interpreting sections of Hansard and being understanding of my preoccupation during the writing of this article. An interview with the Italian Ambassador Franco de Blasi and members of his staff, and the explanation of events in their historical context by Gomir Dayasiri (one of Sepala Ekanayake’s attorneys who argued against the 1982 retrospective legislation in the Supreme Court) have been invaluable.

7. The Italian Ambassador gives a conflicting account of many of the impressions left by the media and Sepala’s defense.


9. As to the drug charges, see Hansard, pp. 1106 and 1149, and Ceylon Daily News, July 2 and 3, 1982. On July 1st, 1982, the Government published newspaper Lankadipa’s Sinhala caption read: “The Sri Lankan who hijacked the plane is a world drug trafficker”.

10. Ekanayake is reported as having broken a Sri Lankan’s arm in one episode during his life, see Hansard, p. 1147, and claimed he was denied a visa because he was involved in a fight with an Italian in a bar, see Appellate Decision, p. 15. The Italian Ambassador says that he was unaware of any fight in Italy, but was aware that Ekanayake was allegedly involved in drug trafficking and had severe custody disputes with his estranged Italian wife Anna prior to the hijacking.

11. Appellate Decision, p. 14: “He has given the reasons which motivated him to act in that manner, though such reasons are in no way a justification in law for the commission of the offense. The main reason was that he was a victim of injustice and harassment by the officials of the Italian Embassy who refused to extend his visa to Italy in spite of many visits to the Italian Embassy both in Sri Lanka and elsewhere, for this purpose and his pressing desire to see his son by his wife...”


13. Ceylon Daily News, June 11, 1983, p. 13, in which it is reported that Sepala in his testimony claimed 50 visits to the Italian Embassy. The Italian Ambassador recalls only two or three such visits to the Embassy, and points out that at the time it would not have been difficult for Sepala Ekanayake to leave Sri Lanka and illegally enter Italy without a visa. If caught, he would have been expelled from the country, as opposed to running the risks of criminal prosecution for hijacking an airliner. Of course, had Sepala resorted to illegally entering Italy, he could not force his wife to join him with their son, nor would he have been able to receive a ransom of $300,000.

14. The “Dinamina” Sinhala language newspaper, July 3rd, 1982, for example under a picture has the following captions:
"The large crowd that had gathered at the airport to see the Ekanayake couple and their son."

"The security officers taking the three amidst the large crowd at the Katunayake Airport that had come to see them."

15. Hansard, p. 1150.


17. For accounts of the ICAO pressure, see, e.g., "The Guardian", July 3, 1982, at p. 4; "The Guardian", July 5, 1982, at p. 4; "The Guardian", July 22, 1982, at p. 7; and "The Guardian", December 28, 1982, at p. 4. It should be noted that the proper and full name of the Pilots' Association is the International Federation of Airline Pilots' Associations. For their active participation in control of hijackers, see I.M. Shephard, "Air Piracy: The Role of the International Federation of Airline Pilots Associations," 3 Cornell International Law Journal 79-81 (1970). The Associations' threats, and those of the ICAO are not idle, and indeed there is precedent for a boycott of a country that permits an airplane hijacker to have asylum.


20. Appellate Decision, p. 2. The Appellate Decision reduced the punishment to five years.

21. The statute reads as follows:

"Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with the imprisonment of either description for a term which may extend to three years, or with fine, or with both."

It might be argued that section 486 of the Penal Code on criminal intimidation might also have been applicable.


23. The Hague Convention in Article 7 goes far beyond Articles 15 and 16 of the Tokyo Convention. The newer Article 7 reads as follows:

"The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that State."

It is important to note that, unlike many other areas of international law, the ability of airlines, pilots, and nations to block access from and to an offending nation is a very real weapon, that can and has been used to enforce these international norms. Often, nations will control the problem on their own; see, e.g., the U.S.-Cuban Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses of February
15th, 1973, which is an agreement that has been successfully enforced by two countries that do not even have diplomatic relations. The fact that two nations, which rarely agree on anything, are able to reach an accord on hijackers should have been evidence to the Government of Sri Lanka that Sepalas could not be granted immunity without some type of international response.

24. The fact that the conventions were not self-executing was recognized by Foreign Minister Hameed; Hansard, p. 1095:

"The normal practice when a government accedes to a convention is that if enabling legislation is necessary such legislation is passed first by the national Parliament or Assembly of that country. That is the normal practice."

Samsoni, C.J., in Leelawathi v. Minister of Defense and External Affairs, (1965) 68 N.L.R. 487 at 490 states a similar concept while rejecting the right of the petitioner to invoke the principles of the Universal Declaration of Human Rights.

The fact that a treaty or a convention is not self-executing does not negate all of its impact in the domestic courts of a country that is a signatory to the document. In the United States, one state court -- while refusing to be bound by the United Nations Charter (a document very broadly written and not as binding, nor as specific, as a convention or treaty) -- has said:

"The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and equality of rights and opportunities. The charter represents a normal commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs." Sei Fuji v. California, 38 Cal. 2d 718 (1952) at 724.

While the charter was not binding on the state governments in the United States in 1952, treaties and conventions ratified by the Senate and to which the United States is a party must be recognized along with the Constitution as the supreme law of the land. U.S. Const., Article VI; see Zschernio v. Miller, 389 U.S. 429 (1968); and generally see Comment, "Individual Enforcement of Obligations Arising Under the United Nations Charter", 19 Santa Clara L. Rev. 195, and compare with the more modern incorporation theories discussed at the Conference on International Human Rights Law in State and Federal Courts, 17 U.S.F.L. Rev. 1. Cf. DE SMITH, S.A., CONSTITUTIONAL AND ADMINISTRATIVE LAW, (3rd ed. 1979) p. 125.


26. The Offenses Against Aircraft Act of 1982 is merely just another addition to the countries with anomalies. See the problems this can create in United States v. Tiede, as discussed by D. Schoner, 6 Air Law 43-47 (1981).


28. The West Berlin case is reported in "The Guardian", April 19, 1983 p. 8; an other decision to permit the defense of seeking freedom, a form apparently of the recognized defense of duress, is discussed in "The Guardian", December 21, 1982, p. 4. See Court of Appeal's apparent refusal to accept a defense in the Ekanayake case that conceivably could be included under "duress".
29. See Calder v. Bull, 3 Dall. 386 (1798); and Ross v. Oregon, 227 U.S. 150 (1912); in Sri Lanka, the distinction can be readily seen by a comparison of Article 13(6) with Article 75 of the Constitution. An ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal. Burgess v. Salmon, 97 U.S. 381 (1876).


32. See e.g., the Canadian Constitution: Constitution Act, 1982, Schedule B, Part I, Article 11 (g).

33. Since Sri Lanka is a signatory to the Covenant on Civil and Political Rights, the Parliament would have been in violation of Sri Lanka’s international commitments if it made Sepala Eknayake subject to prosecution by means of retrospective criminal legislation that was not, at the time of the hijacking, “criminal according to the general principles of law recognized by the community of nations”.

34. The International Court of Justice is the judicial arm of the United Nations. It is often called the World Court.


“The term ‘civilized nations’ -- and its predecessor ‘Christian nations’ -- derives from a period when the community of nations was constituted by a select group of States which pretended to represent human civilization. Since the international community, in the form of the UN, has now virtually reached universality, the notion of exclusiveness which was inherent in the term ‘civilized nations’ is out of place and consequently the term should be avoided. General recognition of human rights and fundamental freedoms cannot be achieved unless pretentions of exclusiveness and notions of inequality disappear.”

35. See generally van Boven, supra note 34 at pp. 105-107.


37. See van Boven, supra note 34 at p. 107.


40. On August 8th, 1946, France, the United States, the United Kingdom and the
Soviet Union, "acting in the interests of all the United Nations and by their repre-
sentatives duly authorized thereto", signed the Agreement in London. Annexed to the
Agreement was a Charter, and the two documents comprised the ex post facto
legislation applied to the Nazis who stood trial. See generally Goodhart, 58 Juridical
Review 1 (1946); Wright, 41 A.J.I.L. 38 (1947); Woetzl, THE NUREMBERG
TRIALS IN INTERNATIONAL LAW (1960); and Taylor, Nuremberg Trials : War
Crimes and International Law, Int. Conc. No. 450 (1949).

At the request of the U.N. General Assembly, the International Law Commission
formulated the principles which had been applied by the International Military Tribunal
in the Nuremburg trials, and those became the Nuremberg Principles. Those Principles
deal with three types of international crimes, namely, crimes against peace, war
crimes, and crimes against humanity.

Article 6(c) of the Charter of the Tribunal annexed to the London Agreement is
noteworthy in part because of the last phrase therein:

"CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement,
deportation, and any other inhumane acts committed against any civilized population,
before or during the war, or persecutions on political, racial or religious grounds in
execution of or in connexion with any crime within the jurisdiction of the Tribunal,
whether or not in violation of the domestic law of the country where perpetrated."
(Emphasis added).

See also Joyce, HUMAN RIGHTS: INTERNATIONAL DOCUMENTS, "U.N.
COMMENTARY", vol. II, Chapter XII, "Questions Originating in Events Which Cul-
inuated in the Second World War", Subsection A. 'War Crimes and Crimes Against
Humanity'; (1978) p. 249:

"The fact that internal law does not impose a penalty for an act which constitutes
a crime under international law does not relieve the person who committed the act
from responsibility under international law."

41. As to the defense of following the orders of one’s superiors, see Dinstein,
THE DEFENSE OF "OBEYDENCE TO SUPERIOR ORDERS" IN INTERNATIONAL
LAW (1965). See also the Convention of the Non-applicability of Statutory Limitations
to War Crimes and Crimes against Humanity of 1966, 8 I.L.M. 68 (1969) and Miller,

The International Tribunal for the Far East tried the Japanese leaders of World
War II in Asia using the same retrospective application of the law. See Horwitz, The
Justice Murphy’s dissenting opinion; and Hirota v. MacArthur, 338 U.S. 197, 198
(1945), for concurring opinion of Justice Douglas.


43. U.N. General Assembly Resolution 95(1), G.A.O.R., Resolutions, First Ses-
son, Part II, p. 188. See also the Convention on the Prevention and Punishment of
Supp., 6 (1951).


45. I.C.J. Reports, 1951 at p. 23.
48. Decisions of the Supreme Court on Parliamentary Bills, 1978-1983, Vol. 1, p. 137. This is a landmark decision, for it recognizes air piracy as a crime on equal footing with piracy of the high seas.

Compare the modern view of piracy as an international crime recognized by the community of nations found in OPPENHEIMER, INTERNATIONAL LAW, VOL. 1 (8th ed. 1955), para. 272, where he defines piracy as "every unauthorized act of violence against persons or goods committed on the open sea either by a pirate vessel against another vessel or by the mutinous crew or passengers against their own vessel"; with the view taken in MOORE, DIGEST OF INTERNATIONAL LAW (1906), Vol. 2 at p. 953.

For a definition of an international crime as it applies to a State, see Article 19 of the International Law Commission Draft Articles on State Responsibility, Y.B.I.L.C., 1979, II (Part II), p. 374 which reads in part:

"1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community as a whole, constitutes an international crime."


48. While this article focuses on customary international law, since air piracy is incorporated in that body of law, there are other more defined areas; see generally the citations and the analysis in Meron, "On a Hierarchy of International Human Rights", 80 A.J.I.L. 1 (1986).

49. BROWNlie, supra note 34, pp. 4-12; cf. Article 38 of the Statute of the International Court of Justice.

50. BROWNlie, ibid. at p. 49 footnote 2 and accompanying text. See also historical review of a number of different constitutions in RAY, JUDICIAL REVIEW AND FUNDAMENTAL RIGHTS, (1974) pp. 1-37. For case citations in support of the monist view in other Commonwealth countries, see FAWCETT, THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW, pp. 16-74.

51. BROWNlie, ibid. at p. 52; for detail of the Italian practice and law, see La Pergola and Del Duca, "Community Law, International Law and the Italian Constitution", 79 A.J.I.L. 598 at p. 601.

52. See BROWNlie, cited in note 34 supra and accompanying text.

53. 175 U.S. 677 (1900).


55. See note 34.

56. La Pergola and Del Duca, supra at note 125, p. 601 (footnote 7), taking the translation from BLAUSTEIN AND FLANZ (eds.), CONSTITUTIONS OF THE
COUNTRIES OF THE WORLD. See Ibid., Italy (G. Flanz & C. Figliola eds. 1973). BROWNLIE, supra at note 34 at p. 52 translates Article 10 as follows:

"Italian law shall be in conformity with the generally recognized rules of international law."

57. Article 27(15) is further weakened by Article 29 which states that it and the other sections of Chapter VI (Directive Principles of State Policy and Fundamental Duties):

"...do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal."

Compare with Article 157 which limits Parliament’s ability to enact legislation against certain types of trade agreements and treaties "essential for the development of the national economy".

58. For example, see a paper presented to the Conference and Workshop on Arbitration, International and Domestic, held in Colombo between January 22-25, 1987, by Senaka K. Weeraratna, "The Enforcement of Arbitral Awards in Sri Lanka," pp. 12-13. See also paper by Kisham Fernando, entitled "Human Rights" delivered at the Ministry of Justice, Sri Lanka, August 15, 1984, pp. 15-14 which assumes that there cannot be incorporation in Sri Lanka of international fundamental rights that are delineated in the International Covenant on Civil and Political Rights because Article 27 (which refers to some of these rights) makes them non-justiciable in Article 29. Such an argument is unsupportable for several reasons: (1) The language of 33(1) is inconsistent with such an interpretation, for it is nonsensical that the President of Sri Lanka would be bound by incorporated international law that is not inconsistent with the Constitution but the other branches of Government are not so bound; (2) while it is true that some of the rights in Article 27 may be found in the International Covenant on Civil and Political Rights, that document is not the only source of fundamental rights, nor does it exclude the incorporation of other customary international laws; (3) Articles 10 through 14 also corresponds to many human rights recognized in the International Covenants on Civil and Political Rights and in other international documents, yet Article 29 is not applicable to them; and (4) Article 17, unlike Article 29, does confer and impose legal rights and obligations, and specifically guarantees that every person shall have the right to seek judicial review of any threatened or actual infringement of fundamental rights. Thus, Fernando’s conclusion that "International Law has no domestic effect, unless the Legislature expressly transforms or incorporates it into Domestic Law" totally ignores a quarter of a millennium of common law, the Nuremberg Principles, and the modern authorities and cases.

59. (1965) 68 N.L.R. 487.

60. Ibid at p. 490.

61. See Weeraratna, supra note 58 at pp. 11-12.

62. U.S. Constitution, Article VI; see also U.S. Const. Article II, Sec. 2 which empowers the President "by and with the advice and consent of the Senate, to make treaties provided two-thirds of the senators present concur". Cf. Article 157 of the Sri Lankan Constitution.

63. See BROWNLIE at note 34 supra.

64. The Parliament Belge, (1878-79) 4 P.D. 129, Probate, Divorce and Admiralty Division.

66. 38 Cal. 2d 718 (1952), discussed in BROWNIE, supra note 34 at p. 53.


69. United States Judiciary Act 1789 (28 U.S.C. Section 1360) ; for the difficulty that the United States federal courts are having applying the statute (primarily due to doctrines of immunity and political questions) following the Filartiga decision, see the discussion of Tel-Oren v. Libyan Arab Republic, 726 Fed. 2d 774 (District of Columbia Circuit Court of Appeals 1984) in a series of articles in 79 A.J.L., No. 1, pp. 92 et seq. (January 1985).


72. Facts as reported in the International Herald Tribune, Thursday, December 4, 1986, p. 3.

73. There are sound reasons to oppose ex post facto legislation, as discussed in greater detail in my firma Institute publication. Yet one of the benefits of being able to enact such legislation is that it acts as a deterrent to wrongful activities. Thus, when a person knows that his or her actions are wrongful, although not in violation of specific criminal statute, the possibility of facing prosecution for his or her actions may have a chilling effect or even stop them from happening.


76. On the domestic level, the Supreme Court opinion on the Offences Against Aircraft Act of 1982 is now part of that body of judicial precedent for other nations to draw upon; on the international level, decisions of the International Court of Justice and the European Court on Human Rights are the two most common examples. See, e.g., Ireland v. United Kingdom, Eur. Court H.R., Series A, Judgment of January 18, 1978 (involving claims against the U.K. for violations of human rights during count-

77. Thus, the acceptance of fundamental human rights should come as welcome news to Sri Lanka, since it is one of the few Asian nations to ratify the major conventions.

78. See generally, COORAY, supra note 74, which compares the different roles of the Supreme Court during different constitutions.

79. For an example of a bill requiring a special Parliamentary majority pursuant to Article 82, see Supreme Court Application No. 3 of 1978 (Licensing of Produce Brokers Bill) reported in Decisions of the Supreme Court on Parliamentary Bills, Vol. 1, 1978-1983 at pp. 29 et seq.

80. For an example of the need for a referendum pursuant to Article 83, see Supreme Court Application No. 58 of 1979 (Essential Public Services Bill) ibid. at pp. 63 et seq.

81. The inadequate aspects of this expedited procedure occurred in the Ekanayake situation; counsel opposing the Offenses Against Aircraft Act of 1982 had little more than an hour to make their presentation, and the Supreme Court, with so little time, delivered a two page opinion to Parliament without any detailed discussion of international law. For another attack on the procedure, see "The Island" of Wednesday, January 21, 1987, wherein three Members of Parliament claim that the manner in which the Article 121 process is handled denies the people their fundamental constitutional rights.

82. DOUGLAS, MARSHALL TO MUKHERJEA, STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW at p. 16:

"This power of declaring an Act of Congress unconstitutional is sparingly used. If a construction of the Act is possible that will save it from being constitutionally infirm, the Court will adopt that construction. This practice of saving an Act by construing it to avoid the constitutional issue has sometimes been carried a long way. Extreme instances of tailoring an Act to make it constitutional can be seen in United States v. Rumely, 345 U.S. 41, and in United States v. Harriss, 347 U.S. 612."

For an example of judicial agility exercised by the Sri Lankan (then Ceylon) Supreme Court, see The Queen v. Lyanage (1965) 67 N.L.R. 198, at pp. 198, 205-206, 262, and 423-424, all discussed in COORAY, supra note 74 at pp. 165-167.

83. 1 Cranch 137, at p. 16 (1803); the case is further noteworthy because (while it is cited for the proposition that the United States Supreme Court has the power to invalidate a law of Congress if it violates the Constitution) Chief Justice Marshall, while ruling the act unconstitutional, was able to succeed in giving the Congress the result it desired in the case, by clever statutory interpretation; thus the language of the Court declaring its supremacy in interpreting the Constitution and laws is dictum, and in fact has been sparingly used. See generally, FRIEDMAN, AMERICAN LAW, AN INTRODUCTION, (1984) PP. 180-181.

84. 118 U.S. 356, at pp. 373-374 (1886); cf. Bombay v. Appa, 39 A.J.R. 84. Compare Sri Lankan Constitution Article 12 (1) with the 14th Amendment (applies to the states) of the United States Constitution, the latter being incorporated by the Fifth Amendment and thus is applicable to the federal government. See generally for a discussion of equal protection of the laws, DOUGLAS, supra note at pp. 69-70, 207, 368-331.

The ability to discover and use as precedent human rights cases from international tribunals does not guarantee that this will be properly done, and may lead to an injustice.

On the other hand, they may be helpful to the Court in solving statutory interpretation problems. Compare the Supreme Court's interpretation of the one month statute of limitations for filing a fundamental right application and its rejection of claims in Vadivel Maahanthiran v. Attorney-General et al., S.C. 68/80, K.S.S.E. Ranatunga v. A.R.M. Jayawardena et al., S.C. 27/79, and B.M. Jayawardena v. Attorney-General et al., S.C. 4/81 with the Golder Case, Eur. Court H.R., Series A, Vol. 10, Judgment of February 21, 1975, wherein a prisoner was denied access to counsel and thus deprived of his human rights.


86. See e.g., Nicaragua v. United States, I.C.J. Reports, 1986; for an example of application of general principles of international law, see also United States v. Iran, I.C.J. Reports 1980, at p. 3.

87. See 75 A.J.I.L. 1073-81 (1985). The special subcommittee was chaired by Mr. Subrata Roy Chowdhury of India; participants in the full Committee on the Enforcement of Human Rights represented the countries of Nepal, Ghana, Hungary, Bulgaria, the United States, Bangladesh, Canada, Finland, the Federal Republic of Germany, Guyana, Japan, India, the Republic of Korea, the Netherlands, Nigeria, the Philippines, Sweden, Switzerland, the United Kingdom, Yugoslavia and Australia.

88. Ibid., at p. 1072.


90. Hansard, at p. 1142.