# A Dog without a Bark: A Critical Assessment of the International Law on Language Rights

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If you dress up as a dog, be prepared to bark.
– Tamil proverb

වවුලගෙ මගුල් ගෙදර ගියානන් එල්ලිල හිතු

If you choose to attend the bat's wedding, be prepared to hang upside down.
– Sinhala[1] proverb

## ABSTRACT

This article investigates the role of international law in language policy. The post-conflict, multilingual context of Sri Lanka brings out the limitations of international law in achieving linguistic justice. The current language rights regime in international law is piecemeal and tends to cover only minimal 'tolerance' rights. Sri Lanka's official language policy seems to surpass the demands of international law, yet there are significant failures of implementation. The Sri Lankan experience suggests that international law is unable to make a helpful intervention in state language policy while it is focused on encoding a single conception of linguistic justice. International law currently faces the problems of essentialism, universalism, political neutrality and the tension between linguistic diversity and nation-building. Possible alternatives include regional instruments and a case-by-case approach to language policy. International law could provide higher tolerance standards on language rights, but the onus falls on nation-states to implement promotion-oriented rights in the pursuit of linguistic justice.

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[1] 'Sinhala' is used to refer to the language and 'Sinhalese' to refer to the people who speak it.

## Introduction

This article investigates the role of international law in influencing state language policy. The implementation of language rights in contemporary Sri Lanka is taken as a case study. While language policy was a key point of controversy in Sri Lanka, particularly since 1956, language rights now pose a possible pathway for building reconciliation after the civil war. Taking examples from the Sri Lankan context, including how language policy operates in courts, schools and public services, the expectations set by the current regime of language rights in international law are considered and the fundamental issues with the international law on language rights will be drawn out. The issues raised include the problem of essentialism, universalism, political neutrality and the tension between promoting linguistic diversity and nation-building. Finally, it will be argued that international law alone provides an inadequate framework for achieving linguistic justice, and this article will gesture at alternative approaches towards influencing state policy on language rights.

## 1. The International Law on Language Rights

There is no comprehensive, overarching framework for the protection of language rights in international law. International law does not actually recognise 'language rights' in a clear, codified form. However, limited rights to language are implied in international instruments protecting other areas of rights, including minority rights,[2] cultural rights,[3] non-discrimination rights,[4] freedom of expression,[5] children's rights,[6] the right to a fair trial,[7] and education rights.[8] Most of the rights relating to language are negative assurances of the non-interference of the state in the private uses of language. Article 27 of the International Covenant on Civil and Political Rights ('ICCPR') states in negative terms that linguistic minorities 'shall not be denied the right...to use their own language'; this is the most extensive provision on language rights in binding human rights treaty law.[9] Very few rights impose direct, positive measures for state support of minority languages. The clearest example is the right to a fair trial, which

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[2] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, art 27 (entered into force 23 March 1976) ('*ICCPR*'); *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, Annex, 47, UN GAOR, 49th supp, 210, UN Doc A/47/49 (1993) ('*Declaration on the Rights of Minorities*').

[3] *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted by the 33rd General Conference of the United Nations Educational, Scientific and Cultural Organisation ('UNESCO') on 20 October 2005, art 6 (entered into force 18 March 2007); *ICCPR,* opened for signature 16 December 1966, 999 UNTS 171, art 15 (entered into force 23 March 1976).

[4] *ICCPR*, above n 2, arts 2 and 26.

[5] *ICCPR*, above n 2, art 19.

[6] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1588 UNTS 530, arts 29(1)(c) and 30 (entered into force 2 September 1990).

[7] *ICCPR,* above n 2, art 14(3); *Convention on the Rights of the Child,* above n 6, art 40(2)(vi).

[8] *Convention against Discrimination in Education*, adopted 14 December 1960, 429 UNTS 93, art 5 (entered into force 22 May 1962).

[9] Tove Skutnabb-Kangas, Miklos Kontra and Robert Phillipson, 'Getting Linguistic Human Rights Right: A Trio Respond to Wee' (2005) 27(2) *Applied Linguistics* 318, 323 n 2.

requires the state to ensure that the accused can participate in judicial processes in a language they understand. A more ambiguous example is the recent UNESCO Convention which encourages states to 'adopt measures aimed at protecting and promoting the diversity of cultural expression' including language use.[10]

As later argued in this article, the 'phoenix'[11] of international law is a frail creature when it comes to language rights. From this brief overview of the relevant agreements, we can already see that international law does not commit to a clear vision of 'linguistic justice'.[12] The rights protected in the major international covenants are weak, minimal 'tolerance' rights. There are no clearly calibrated standards for states to aspire to. Even in the rare instances where stronger, 'promotion-oriented' rights are protected, they tend to be qualified or entail indeterminate standards such that states could easily avoid compliance. For example, the promotion of cultural expression is conditional on states 'taking into account [their] own particular circumstances and needs'.[13] As Dunbar states, language rights are not dealt with as fundamental human rights in international law. Dunbar supports this assertion by pointing to the piecemeal, patchwork nature of the language rights regime, the limits imposed upon these rights and the fact that state obligations are based on non-binding instruments which lack enforcement mechanisms.[14]

There are relatively stronger arrangements for linguistic rights protection in regional instruments, such as the European *Framework Convention*[15] and the Council of Europe's *Minority Languages Charter*,[16] and also non-binding declarations, such as the UN *Declaration on the Rights of Minorities,*[17] the *Copenhagen Document*[18] and the *Oslo Recommendations*.[19] The *Declaration on the Rights of Minorities* contains some of the stronger expressions of language

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[10] *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted by the UNESCO General Conference on 20 October 2005, art 6 (entered into force 18 March 2007).

[11] Patrick Thornberry in Lauri Mälksoo, 'Language Rights in International Law: Why the Phoenix is Still in the Ashes' (1998-2000) 12 *Florida Journal of International Law* 432, 434.

[12] This term is used broadly in this article to refer to the justice issues raised by the use of different languages, including the survival and development of minority languages within a state. For a deeper exploration of the concept, see Philippe Van Parijs, 'Linguistic Justice' (2002) 1(1) *Politics, Philosophy & Economics* 59; Jacqueline Mowbray, 'Linguistic Justice in International Law: An Evaluation of the Discursive Framework' (2010) 23 *International Journal for the Semiotics of Law*, accessed online at <http://www.springerlink.com/content/l88h571836316648>.

[13] *Convention on the Protection and Promotion of the Diversity of Cultural Expressions,* above n 10, art 6(1).

[14] Robert Dunbar, 'Minority Language Rights in International Law' (2001) 50 *International and Comparative Law Quarterly* 90, 119.

[15] *Framework Convention for the Protection of National Minorities*, opened for signature 1 February 1995, 2151 UNTS 243 (entered into force 1 February 1998).

[16] *European Charter for Regional or Minority Languages*, opened for 5 November 1992, ETS 148 (entered into force 1 June 2000).

[17] *Declaration on the Rights of Minorities*, GA Res 47/135, Annex, 47, UN GAOR, 49th supp, 210, UN Doc A/47/49 (1993).

[18] Organisation for Security and Co-operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe* (1990).

[19] Organisation for Security and Co-operation in Europe, *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities* (1998).

rights among international instruments.[20] However, it remains non-binding, 'soft law'; it has not hardened into customary international law since no uniform standards or norms on language rights have been identified.[21] On the other hand, the European region has produced exemplary multilateral agreements, setting a higher standard for positive state obligations than international agreements in this area.[22] Where Sri Lanka is concerned, there are no comparable instruments to ratify in its region.

## 2. Distinguishing Language Policies: 'Tolerance' and 'Promotion'

There is a well-recognised distinction in the literature between two core approaches to language rights, originally articulated by Kloss.[23] Firstly, 'tolerance rights' ensure non-interference by the state in the private uses of language. They are regarded as inviolable and the minimum standard in liberal democracies. Even linguistic groups with the weakest language claims, such as immigrants, are generally granted rights such as freedom of expression and freedom from discrimination based on language (in its private usage). As shown previously, most of the rights articulated in international instruments are minimal tolerance rights.

The second category is 'promotion-oriented rights'. These are more substantial, extending to positive measures to improve language access in public institutions, such as courts, public schools and public services. Kymlicka and Patten further divide promotion rights into two categories.[24] The first type of promotion rights are accommodations granted as a special exception to the general rule that the 'normal' or dominant language will be used in the public sphere (known as the 'norm-and-accommodation' approach). The second approach is based on granting 'official' recognition to minority languages. This is the most generous concession that a state could make. It technically amounts to parity of status, although in practice the majority language may still be preferred in certain institutions.

Tolerance rights, which simply require the state to withdraw from private language conflicts, are inadequate for linguistic justice. Whether it is acknowledged or not, every state adopts language preferences. A 'hands off' or 'benign neglect' approach to language rights is impossible because states must decide their language(s) of operation. It is necessary that people working for or served by public institutions understand one another, so there is no

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[20] *Declaration on the Rights of Minorities*, above n 17. See, especially, Article 4(2): 'States shall take measures to create favourable conditions to enable persons belonging to minorities … to develop their [*inter alia*] language … except where specific practices are in violation of national law and contrary to international standards'.

[21] Catherine Wood, 'Language Rights: Rhetoric and Reality; Sri Lanka and International Law' (1999) 10(145) *Law & Society Trust Review* 1, 29.

[22] Note that the strength of the promotion rights, at least in the Framework Convention, is undermined by certain attached conditions. The *Minority Rights Charter* is stronger in its language rights obligations, however it does not have wide ratification in the region. See Dunbar, above n 14, 109-11.

[23] Heinz Kloss in Mälksoo, above n 11, 441.

[24] Will Kymlicka and Alan Patten, 'Language Rights and Political Theory' (2003) 23 *Annual Review of Applied Linguistics* 3, 8-9.

way of avoiding language policy.[25] States must consciously consider which languages should be promoted, and in which situations. The basic choice of state language policy is between assimilation towards a common language within the nation-state and encouraging linguistic diversity by protecting weaker languages.[26]

## 3. Language Policy in Sri Lanka

### *A. A Brief History*

This article evaluates the role of international law in influencing language policy specifically in the contemporary Sri Lankan context. In choosing Sri Lanka as a case study, it is recognised that language has played a role in the Sri Lankan civil war. Sri Lanka endured a bloody, decades-long ethnic conflict between the Sinhalese-dominated government and militant Tamil separatists, led by the Liberation Tamil Tigers of Eelam ('LTTE'), since 1975. The Sri Lankan army claimed a military victory over the LTTE in May 2009. Sri Lanka's current population of 20 million people is composed of approximately 74 per cent people of Sinhalese ethnicity; 12 per cent of Tamil ethnicity, originating from the North and East of the island; 5 per cent of Up-Country Tamils, originating from India; and 7 per cent Tamil-speaking people of Moorish (Muslim) origin.[27] The dominant language is Sinhala, spoken by over 80 per cent of people, whereas the Tamil language is used by around 25 per cent.[28] Language use generally follows ethnic lines as most Sinhalese and Tamil people were educated in their respective mother-tongues with no common language between them. English is spoken by few people in both communities, generally the elite, and has not been an effective link language for bridging the gaps in communication.[29]

Language policy played a crucial role in the origins of the Sri Lankan conflict. The nationalist movement that culminated in the *Official Language Act, No. 33 of 1956* ('*Sinhala Only Act*') was the single most overt assertion of Sinhalese ethnic dominance over the Tamil minority, thus precipitating the breakdown of Sinhalese-Tamil comity and marking the island for civil war.[30] Sri Lankan politics shifted from a two-language policy in the pre-independence

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[25] Ibid 9-10.

[26] Ibid 11.

[27] Department of Census and Statistics (Sri Lanka), *Statistical Pocketbook 2009* (2009). Note that these figures are estimations based on data from the most recent country-wide census in 1981; due to the LTTE control of parts of the Northern and Eastern regions, the government have not been able to conduct a comprehensive survey since then.

[28] Ibid; see also C R de Silva, *Sri Lanka: A History* (Advent Books, New York, 1987). It is estimated that, although there is a high concentration of Tamil-speaking people in the Northern and Eastern regions, around 61 per cent of Tamil speakers live outside these regions: B Skanthakumar, 'Opening the Door to Tamil/s? Linguistic Minority Policy and Rights' in B Skanthakumar (ed) *Language Rights in Sri Lanka: Enforcing Tamil as an Official Language* (2008) 59, 62.

[29] A Jeyaratnam Wilson, *The Break-Up of Sri Lanka: The Sinhalese-Tamil Conflict* (University of Hawaii Press, Honolulu, 1988) 48-9.

[30] Neil DeVotta, *Blowback: Linguistic Nationalism, Institutional Decay and Ethnic Conflict in Sri Lanka* (Stanford University Press, Stanford, 2004).

period, promoting both Sinhala and Tamil from 1926 to 1943, to the monolingual *Sinhala Only Act* in 1956.[31] In the British colonial period in between, English was used for all official business.[32] The *Sinhala Only Act* emerged from the Sinhalese-Buddhist nationalist movement that was initially generated after independence from colonial rule. The 1956 legislation meant that the Sinhala language was to be the medium used throughout the country, in the operation of courts, government departments and other public services. By this language policy, employment in the public sector required proficiency in Sinhala and translators for Tamil-speaking people appearing before the court were not guaranteed. As a result, Tamil people were disadvantaged in government employment and lacked access to justice in the judicial system.[33] It should be noted that not all Sinhala Only reforms were given effect in time.[34] A notable exception was education; Tamil-medium schools persisted across the country and students retained the right to sit public examinations in Tamil throughout the reign of the Sinhala Only policy.[35]

It took two years before the *Sinhala Only Act* was progressively reversed, firstly by the *Tamil Language (Special Provisions) Act 1958* and corresponding *Regulations 1966,* which provided for the limited use of the Tamil language in administration and education. Eventually, a Constitutional amendment granted Tamil formal parity of status in 1987. Sinhala and Tamil are now the 'official languages' and 'national languages' of Sri Lanka, and English is the 'link language'.[36] Although the Sinhala Only policy was short-lived, the delay in coming to a settlement to address the grievances of the Tamil community had already indelibly damaged Sinhalese-Tamil relations.[37] The policy bolstered Sinhalese nationalism, while deepening resentment among the minority communities. By the time that Constitutional reform had instituted linguistic rights for the benefit of Tamil people, ethnic tensions had escalated into a dispute over national and territorial rights, with the emergence of the Tamil secessionist movement to establish a separate state or 'Tamil *Eelam'* in the North and East of the island.

The progressive repeal of the Sinhala Only policy and official recognition of the Tamil language were not enough to allay minority concerns.[38] Even after the repeal of the Act, there remained a sentiment that regarded the Sinhala language as the only national language. The Sinhala Only policy was the obvious manifestation of the new republic's attempt to bulwark

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[31] See, for example, KNO Dharmadāsa, *Language, Religion and Ethnic Assertiveness: The Growth of Sinhalese Nationalism in Sri Lanka* (University of Michigan Press, Ann Arbor, 1992), 245-8.

[32] Sandagomi Coperahewa, 'The Language Planning Situation in Sri Lanka' (2009) 10(1) *Current Issues in Language Planning* 69, 93.

[33] On the effects of the Sinhala Only policy, see KNO Dharmadāsa (ed), *National Language Policy in Sri Lanka 1956 to 1996: Three Studies in Implementation* (International Centre for Ethnic Studies, Kandy, Sri Lanka, 1996).

[34] The Act directed that Sinhala was to be the 'one official language', to be given effect through Regulations made by the Minister; however, the reforms could be delayed 'if immediate implementation was impracticable': *Official Language Act, No. 33 of 1956,* s 2.

[35] KM de Silva, 'Affirmative Action Policies: The Sri Lankan Experience' (1997) 15(2) *Ethnic Studies Report* 245, 269.

[36] *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978) arts 18 and 19.

[37] Dharmadāsa, above n 31, 308.

[38] See Richard W Bailey, 'Majority Language, Minority Misery: The Case of Sri Lanka' in D A Kibbee (ed) *Language Legislation and Linguistic Rights* (John Benjamins, Amsterdam, 1998) 206, 218.

an autochthonous national culture. In part, this is attributed to the inferiority complex suffered by the Sinhalese since British colonialism.[39] There was a sense of urgency to restore the superior status of the traditional culture and language, given that British rule had established a demarcation of power along language lines, such that English-educated Tamil and Sinhalese groups held a higher status in economic and social terms.[40] The Sinhalese nationalist movement also voiced concern about language survival, since Sinhala is more endangered than Tamil in a global sense; Sinhala is only found within Sri Lanka. At the time of the Parliamentary debates of the Sinhala Only motion in 1943, future President Jayewardene claimed that Sinhala was used by about 3 million people; whereas Tamil was used by more than 40 million people in India and worldwide, and has official language status in India.[41] It was argued that if Tamil was given parity of status, it would become the dominant language in Sri Lanka, eventually eliminating Sinhala.[42]

### *B. The Current Language Policy*

Sri Lanka's current language policy *prima facie* meets and perhaps even surpasses international standards on language rights. In recent times, Sri Lankan governments have been thorough in ratifying all the major human rights instruments relevant to language rights, including the *International Covenant on Civil and Political Rights*,[43] the *International Covenant on Economic, Social and Cultural Rights*[44] and the *International Convention on the Elimination of All Forms of Racial Discrimination*.[45] Sri Lanka was a sponsor, albeit with hesitation, of the *Declaration on the Rights of Minorities*.[46] The only notable exception to its record is that Sri Lanka has not taken any steps towards the ratification of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.[47] Further to joining international treaties, Sri Lanka's domestic laws have incorporated internationally-recognised language rights. Chapter III of the Sri Lankan Constitution asserts fundamental rights including the 'freedom by himself [*sic*] or in association with others to enjoy and promote his own culture and to use his own language'.[48] A statutory body, called the Official Languages Commission, was set up in 1991 to take individual complaints and monitor compliance with the Constitutional guarantees.[49] On these

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[39] A Suresh Canagarajah, 'Dilemmas in Planning English/Vernacular Relations in Post-Colonial Communities' (2005) 9(3) *Journal of Sociolinguistics* 418, 423.

[40] Dharmadāsa, above n 31, 234, 242.

[41] JR Jayewardene in DeVotta, above n 30, 49.

[42] Dharmadāsa, above n 31, 307-8. A similar argument was used to justify Estonia's monolingual policy, with respect to Russian: Mälksoo, above n 11, 452-3.

[43] *ICCPR,* above n 2, Sri Lanka ratified the Convention on 11 June 1980.

[44] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976). Sri Lanka ratified the Convention on 11 June 1980.

[45] *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). Sri Lanka ratified the Convention on 18 February 1982.

[46] *Declaration on the Rights of Minorities*, above n 17.

[47] *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, above n 10.

[48] *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978), above n 36, art 14(1)(f).

[49] Established pursuant to the *Official Languages Commission Act No. 18 of 1991* (Sri Lanka). See the Commission website: *Official Languages Commission* (2007) accessed online at <http://www.languagescom.gov.lk>.

grounds, Sri Lanka has established a creditable record in formally prohibiting linguistic discrimination in domestic legislation, in accordance with international law.[50]

Overall, Sri Lanka's current language policy includes both tolerance and promotion-oriented rights supporting the use and development of the Tamil language. The Constitutional provisions for non-discrimination, on the basis of language, may be sufficient in themselves for meeting the language standards set by the *ICCPR*.[51] Sri Lankan language policy goes beyond international standards in granting parity of status to Tamil as an official language. The official recognition of Tamil includes Constitutional and legislative provisions for state support for its use in courts, public administration and educational institutions throughout the country. Because of the concentration of Tamil speakers in the North and East, there is special provision for Tamil to be the language of administration and education in these regions. By Kymlicka and Patten's classifications of language rights, the Sri Lankan language policy conforms to the strongest form of 'promotion'. The official status accorded to Tamil elevates the policy beyond the 'norm-and-accommodation' approach, and far beyond the benchmark set by the international law on language rights. South Africa exemplifies this strategy of official recognition.[52] Although these accommodations may be regarded as 'minimum standards or best practices' for Western states, there is no provision in international law asserting the right to official language status or even recommending it as a policy.[53] Sri Lanka's language policy seems to surpass both the demands of international law and the standard practice in many developed nations.[54]

### C. *The Implementation of Language Rights*

How does language policy actually play out in contemporary Sri Lanka? This section takes closer look at evidence of the implementation of language rights in Sri Lankan government services, courts and schools.[55]

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[50] This is accepted in the otherwise critical report, produced at the request of the European Commission: Françoise Hampson, Leif Sevón and Roman Wieruszewski, *The Implementation of Certain Human Rights Conventions in Sri Lanka* (2009) 111, 121.

[51] On the right to non-discrimination, and the freedom to use one's own language, see *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978) above n 36, arts 12(2), 14(1). These articles correspond respectively with: *ICCPR,* above n 2, arts 26 and 27.

[52] See *The Constitution of the Republic of South Africa* (1966) s 6. South Africa has seven official languages. National or provincial governments may choose to use any (but at least two) of these languages for government purposes, taking practical considerations and the preferences of the population into account.

[53] Kymlicka and Patten, above n 24, 5.

[54] For example, Spanish has only received recognition as an official language in the US territory of Puerto Rico (where over 90 per cent of people speak Spanish), although more than 34 per cent of the population speak Spanish in the states of New Mexico, California and Texas. Some US state administrations provide bilingual or multilingual services, but these are not comprehensive, and arguably English is given higher priority and status. See Sandra Del Valle, *Language Rights and the Law in the United States: Finding Our Voices* (Buffalo, Clevedon, England, 2003).

[55] Due to limitations, this article does not cover the implementation of language policy in public transport, public health, police stations, and post offices.

## 1. Language Rights in Public Services

The international law on language rights does not impose any particular obligation on states to conduct their business in a minority language. Nevertheless, Sri Lanka uses both Sinhala and Tamil as the languages of administration in its public institutions. The choice of language is consistent with Sri Lanka's 'district bilingualism'.[56] That is, Sinhala is used in public transactions and records in all provinces except the North and East, where Tamil is used instead.[57] A Tamil-speaking person in a Sinhala-dominated province (or a Sinhala-speaker in the Northern or Eastern province) is entitled to communicate with officials or to obtain copies of documentation in their language or in English.[58]

People seeking employment in the public sector can elect to conduct their admission examination in any language of their choice. However, this is 'subject to the condition that he [*sic*] may be required to acquire a sufficient knowledge of Tamil or Sinhala, as the case may be … where such knowledge is reasonably necessary for the discharge of his duties'[59]. The preceding Constitutional provisions on languages of administration indicate that, depending on the province, the required knowledge would be Tamil in the North and East, or Sinhala in all other regions.

These legislative requirements set a commendable standard for minority access to public services and public sector employment. However, it is unclear if they have been consistently implemented. There is empirical evidence to suggest that there are inadequate services in Tamil for the Tamil-speaking public at least in the Sinhala-dominated provinces.[60] The failure to effectively employ Tamil as the language of administration may be attributed to the dearth of public officials properly trained in the Tamil language,[61] as well as inadequate resources, including the lack of trained Tamil translators, stenographers and typewriting equipment.[62] Acting on a recommendation of the Official Languages Commission, the government recently established a scheme granting incentive payments to public servants who acquire proficiency in the second official language and mandated that new recruits must have or

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[56] Applying the method of categorisation used in Alan Patten, 'What Kind of Bilingualism?' in Will Kymlicka and Alan Patten (eds) *Language Rights and Political Theory* (Oxford University Press, Oxford, 2003) 296.

[57] *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978) above n 36, art 22(1).

[58] Ibid, arts 22(2)-(3).

[59] Ibid, art 22(5).

[60] According to the census conducted in 2001, *excluding* the North and East, 4 per cent Tamil and 82 per cent Sinhalese people inhabit the remaining regions of Sri Lanka: Department of Census and Statistics (Sri Lanka), above n 27.

[61] Foundation for Co-Existence (Sri Lanka), *Language Discrimination to Language Equality: A Report of the Audit on the Implementation of the Official Language Policy* (2006).

[62] MCM Iqbal, 'Securing Language Rights: Key Elements in the Peace Process' (2002) 12(176) *Law & Society Trust Review*; A Theva Rajan, *Tamil as Official Language: Retrospect and Prospect* (2nd ed, International Centre for Ethnic Studies, Colombo, 1998).

acquire the relevant proficiency within a specified period.[63] It is yet to be seen whether the new policy will improve Tamil access to public services.

## 2. Language Rights in Courts

Language rights in the judicial system raises the issue of access to justice. International law recognises certain language rights as part of the right to a fair trial.[64] An arrestee has a right to be informed of the reasons of their arrest and charge in a language they understand. The *Breton Cases* clarified that, while parties to a proceeding have a right to participate in a language they understand, they cannot opt to speak in their mother tongue if they can understand and speak the official language used by the court.[65] The underlying principle here is that they must be able to participate in the court process. This provision is restricted to criminal matters, although there are suggestions that it could be extended to civil proceedings, with reference to the *ICCPR* right to equality before courts and tribunals.[66]

The Sri Lankan Constitution upholds the right of parties to participate in court proceedings in either Sinhala or Tamil. Legal representatives can make submissions in either of the national languages.[67] If a judge or party is not 'conversant' in the language of the court, they are entitled to translation services in order to participate in the proceedings.[68] Consistent with the aforementioned *Breton* decision, a Tamil person capable of speaking in Sinhala will not be able to seek a Tamil translation when appearing before a court in a Sinhala majority district. The business of the court is conducted in the language of administration, so Tamil is used in the Northern and Eastern provinces, where almost all of the population speak Tamil. At first glance, it appears that the court system has adequately catered for monolingual Tamil speakers. However, the realities of a long-standing ethnic conflict may have compromised the effectiveness of the scheme, for example, with the risk of biased translators.[69] A miscarriage of justice could arise where a suspect is unable to defend themselves in their mother tongue and is forced to rely on inaccurate translations.

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[63] Public Administration Circulars, Nos. 3 and 7 of 2007, in Raja Collure, 'Bilingualisation of the Public Service' in B Skanthakumar (ed) *Language Rights in Sri Lanka: Enforcing Tamil as an Official Language* (Law and Society Trust, Colombo, 2008) 37, 38.

[64] Art 14(3) provides, *inter alia*, that everyone shall be entitled to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court: *ICCPR,* above n 2, art 14(3). There is a parallel provision in the *Convention on the Rights of the Child*, above n 6, art 40(2)(vi).

[65] As decided in the first of the *Breton Cases* before the UN Human Rights Committee: *Dominique Guesdon v France,* UN GAOR, 45th sess, UN Doc A/45/40 (1990). In this case, a Breton complainant made the case that, *inter alia*, his freedom of expression under the *ICCPR* had been violated since he was denied an application to testify in the Breton language in a French court. The Committee dismissed the claim, since the Breton was bilingual but chose not to speak in French.

[66] Dunbar, above n 14, 105.

[67] *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978) above n 36, art 24(2). See G L Peiris, 'Human Rights and the System of Criminal Justice in Sri Lanka' (1990) 2 *Sri Lankan Journal of International Law* 103, 124.

[68] *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978) above n 36, art 24(3).

[69] On the general problems with court interpretation for minority language users, especially in criminal proceedings, see Llewellyn Joseph Gibbons and Charles Grabau, 'Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation' (1996) 30(227) *New England Law Review* 275.

### 3. Language Rights in Education

Education is one of the few areas of international law which offers promotion-oriented language rights. The UNESCO Convention on education entitles minorities to maintain their own educational institutions; this is a tolerance or non-interference right. There is provision for teaching in minority languages in state schools, with significant qualifications such as where 'national sovereignty' may be prejudiced or where the minority is precluded from engaging in the community.[70] This can be construed as a promotion-oriented right; however, the language of the Convention leaves open the question of what state funding or support is required. The non-binding *Declaration on the Rights of Minorities* contains a similar provision, encouraging states to take 'appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue, or have instruction in their mother tongue'.[71]

Sri Lanka's public education system has included teaching in both Sinhala and Tamil since colonial times.[72] Following the *swabasha* (vernacular) movement in education, for Sinhala or Tamil to replace English following independence, the Constitution now ensures that the medium of instruction will be one of these national languages in primary and secondary schools.[73] Government schools continue to provide education in either the Sinhala or Tamil medium (in some cases both), depending on the demography of the region. From 1998, a compulsory program was introduced for all primary school children to learn the second national language, in addition to their first language.[74]

## *D. Deficiencies in Implementation*

From the available evidence, it appears that the Sri Lankan government has instituted a robust regime of language rights for the Tamil minority. Yet, Tamil people have voiced grievances over deficiencies in implementation. This article is limited by the lack of recent, reliable data on the implementation of the languages legislation in Sri Lanka. There is extensive scholarship highlighting the absence of studies on the connection between international law and its effects on state practice 'on the ground'.[75] One empirical study alleges that states with a high rate of ratification actually tend to have a worse record in human rights violations.[76] Goodman and Jinks discredit the methodology used in this

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[70] *Convention Against Discrimination in Education*, above n 7, art 5(1)(c)(i).

[71] *Declaration on the Rights of Minorities*, above n 17, art 3.

[72] De Silva charts the emergence of two language streams in primary, secondary and subsequently university education, since the education reforms of the 1930s and 1940s: de Silva, above n 35.

[73] *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978) above n 36, art 21(1).

[74] Ministry of Education Sri Lanka, *The Development of Education: National Report* (2004).

[75] See, for example, Christof Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International, The Hague, 2002); Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14(1) *European Journal of International Law* 171.

[76] Oona Hathaway in Goodman and Jinks, above n 75.

particular study, but the point still stands that the conscientious ratification of human rights treaties does not necessarily equate to better human rights in practice.[77]

The Sri Lankan situation brings to light several context-specific factors which could affect a state's compliance with its international obligations, including the state's level of resources, financial priorities and ulterior political motivations. The most directly relevant determinant is whether there is a strong culture of dualism in terms of the relationship between international law and domestic law; that is, whether international obligations under ratified treaties require direct implementation in domestic legislation in order to take effect.[78]

This has been a controversial issue since the case of *Singarasa* in the Supreme Court of Sri Lanka.[79] The *Singarasa* case concerned, *inter alia,* an alleged breach of the *ICCPR* 'right to a fair trial'.[80] In 2004, the UN Human Rights Committee communicated a violation of the rights of Nallaratnam Singarasa, who had been convicted by a Sri Lankan court for terrorism-related offences.[81] The conviction rested solely on a confession which Singarasa alleged was extracted under duress and had been made in the absence of an independent interpreter. Singarasa spoke only Tamil and the confession was translated into Sinhala, written and verified by the same police officer. In a petition filed in the Supreme Court, the views of the Committee were cited as persuasive authority to invoke the powers of revision and to set aside the conviction.

In dismissing the petition, the Supreme Court challenged the validity of Sri Lanka's accession to the *Optional Protocol to the ICCPR*,[82] which gives individuals the right to petition the Human Rights Committee regarding alleged rights violations by state parties.[83] Also, the court found that an unconstitutional conferment of judicial power had been bestowed upon the Committee. Thus, the court denied the effects of the accession to the *Optional Protocol* in domestic law, including the benefits of rights protection and remedies for citizens of state parties. Working in the dualist paradigm, the court rejected the case law from the Human Rights Committee, given that the Committee's views are 'not as such binding in international

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[77] Ibid.

[78] See Michael Kirby, 'The Growing *Rapprochement* between International Law and National Law' in Antony Anghie and Garry Sturgess (eds) *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International, The Hague, 1998) 333. This essay includes a comparison of the dualist approaches of the Australian and Sri Lankan legal systems.

[79] *Nallaratnam Singarasa v Attorney General*, SC Spl (LA) No. 182/99 (2006). See John Cerone, 'Comment on the *Singarasa* Case Relating to the Status of the International Covenant on Civil & Political Rights in Sri Lankan Law' (2006) 17(227-228) *Law & Society Trust* 27; Noel Dias and Roger Gamble, '*Nallaratnam Singarasa v Attorney General*: The Supreme Court of Sri Lanka Confirms Limited Human Rights Protection for Sir Lankan Citizens' (2006) 18 *Sri Lanka Journal of International Law* 445.

[80] ICCPR, above n 2, art 14(3)(f).

[81] *Nallaratnam Singarasa v Sri Lanka*, Communication No 1033/2001, UN Doc CCPR/C/81/D/1033/2001 (2004).

[82] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Sri Lanka acceded on 3 October 1997.

[83] Skanthakumar, above n 28, 82.

law, even less are they binding on the internal legal system'[84]. This case raises a broader problem with Sri Lanka's engagement with external human rights bodies.[85]

Incorporation in legislation is not actually at issue in the area of language rights in Sri Lanka. As we have seen, Sri Lanka has not only ratified all the relevant international treaties for securing language rights, but it has gone beyond what international law requires by actively promoting the Tamil language in its Constitution and legislation. Nonetheless, it is likely that financial and political factors undermined the state's proper implementation of the official language policy. Another relevant factor in this case is the executive government's deference to the legislature. It cannot be taken for granted that even a Constitutional guarantee will be sufficient for the protection of human rights 'unless it is reinforced by the general will of the people … what will be decisive for national unity and integration is the presence or absence of this spirit of toleration and the abhorrence of discrimination in all its forms'[86].

## 4. Problems with the International Law of Language Rights

What does this case tell us about international law on language rights? International law is certainly not wholly answerable for Sri Lanka's deficit in its implementation of language rights. The movement for 'linguistic human rights' seems to suggest that linguistic justice requires strengthening institutional support for minority languages, focusing particularly on improving the standards on language rights in international law.[87] In this section, it is argued that the Sri Lankan situation brings to light several problems with relying on international law as a tool for influencing state language policy. Firstly, international law seems to simplify and essentialise linguistic identities, impervious to the complex social and political settings in which these identities are negotiated. Secondly, it is argued that a universal legal framework on language rights is fundamentally at odds with the particularities of linguistic contexts, especially in non-Western countries. The third contention is that international law tries to abstract itself from political conditions and hence fails to fully comprehend what is required of language policies. Finally, I consider the irreducible tension between linguistic minority rights and nation building.

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[84] Nigel Rodely, 'The *Singarasa* Case: *Quis Custodiet*...? A Test for the Bangalore Principles of Judicial Conduct' (2009) 41 *Israel Law Review* 500, 506.

[85] See Bruce Matthews, 'The Limits of International Engagement in Human Rights Situations: The Case of Sri Lanka' (2009) 82(4) *Pacific Affairs* 577.

[86] JAL Cooray, *Constitutional Government and Human Rights in a Developing Society* (Colombo Apothecaries' Co., Colombo, 1969).

[87] This movement is usually associated with certain sociolinguists and legal academics such as: Robert Phillipson, Mart Rannut and Tove Skutnabb-Kangas (eds) *Linguistic Human Rights: Overcoming Linguistic Discrimination* (2nd ed, Mouton de Gruyter, Berlin and New York, 1995); Fernand de Varennes, *Language, Minorities and Human Rights* (Kluwer Law International, The Hague, 1996).

### *A. The Problem of Essentialism*

The linguistic human rights movement has been charged with ineluctably linking language and identity, in ignorance of the socially, politically and historically constructed nature of language. In the debate on essentialism, hybridity theorists advance a 'more contingent, situational account of identity, language and culture'.[88] These ideas can be directed against the international law of language rights. In its attempt to construct a legal regime with closure and certainty, international law tends to construct simplified, reductionist categories of language. International instruments and bodies work on the assumption that language, identity and culture are static, distinctive and internally coherent concepts.[89]

The problem of essentialism is more pronounced in situations where the very definition of linguistic identity is disputed; for example, in the case of Sorbian minority languages in Germany.[90] In the Sri Lankan context, it is easier to identify the linguistic groupings, which generally align with the ethnic background of Sinhalese and Tamil people. Even so, Sri Lankan local identities have been subject to hybridisation and changing definitions throughout history.[91] For example, the Tamil ethnolinguistic identity was formerly associated with 'Sri Lankan Tamils' who have lineage tracing back to ancient Tamil kingdoms, now mostly living in the North and East, but it has since been renegotiated with the arrival of Tamil people descended from indentured labourers brought from southern India to work on Up-Country plantations by British colonisers. With the inclusion of the Moorish people, concentrated in the Eastern province, we can identify three Tamil-speaking communities in Sri Lanka. Although these groups share the same mother tongue, they demonstrate that the Tamil linguistic identity is not homogenous, but rather split between communities with distinct dialects, cultures, religious beliefs and political interests.

A major problem is the attempt to simplify and universalise language rights problems as conflicts between majority and minority languages. International law has difficulty taking account of other situational factors which shape linguistic identity affiliations, particularly class and social divisions. Brutt-Griffler's class perspective reveals that 'it is just as important to look at how language policy differentially affects disempowered members of linguistic majorities'.[92] For example, British colonial language policy made English inaccessible to the rural farming community, affecting both Sinhalese and Tamil workers. This policy served to reinforce the socioeconomic stratification in the former Ceylon, rather than a hierarchy based on ethnicity.[93] The enduring issue for contemporary Sri Lankan language policy-makers is

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[88] Stephen May, 'Language Rights: Moving the Debate Forward' (2005) 9(3) *Journal of Sociolinguistics* 319, 329.

[89] Jacqueline Mowbray, 'Ethnic Minorities and Language Rights: The State, Identity and Culture in International Legal Discourse' (2006) 6(1) *Studies in Ethnicity and Nationalism* 2.

[90] Reetta Toivanen, 'Linguistic Diversity and the Paradox of Rights Discourse' in Dario Castiglione and Chris Longman (eds) *The Language Question in Europe and Diverse Societies: Political, Legal and Social Perspectives* (Hart Publishing, Oxford, 2007) 103-105.

[91] See Canagarajah, above n 39, 438.

[92] J Brutt-Griffler, 'Class, Ethnicity, and Language Rights: An Analysis of British Colonial Policy in Lesotho and Sri Lanka and Some Implications for Language Policy' (2002) 1(3) *Journal of Language, Identity, and Education* 207, 225.

[93] Canagarajah, above n 39, 421-422.

breaking down the privileges associated with English education.[94] They must be concerned with not just the simple dichotomy privileging the majority Sinhala language above Tamil, but also class privileges attached to the language of English. A conception of language rights framed in terms of the 'mother tongue' would not improve the access of lower classes to English education.

### *B. The Problem of Universalism*

The linguistic human rights movement is committed to strengthening the international law on language rights by extending promotion-oriented language rights. However, international law is inherently limited due to its universalising nature. Any attempt to codify universal standards of language rights risks being too vague and abstract, and thereby difficult to enforce; or too prescriptive and thus insensitive to particular contexts. This dilemma is especially acute when language rights are expanded to include positive obligations on states. Kymlicka and Patten are critical of the linguistic human rights movement for placing too much emphasis on improving the international legal framework, since 'it is doubtful that international law will ever be able to do more than specify the most minimal standards'.[95]

There are two good reasons supporting this doubt. Firstly, promotion-oriented language rights are effectively unenforceable when their construction leaves too many unanswered questions about implementation at the discretion of states. Secondly, it is problematic to seek universal definitions of language rights, seeing that different contexts require different language policies. The Sri Lankan case is but one example of how international law's assumptions about linguistic justice are not always applicable to a country's situation. These two arguments against universalism are in tension. The challenge for international law is to set out standards that are sufficiently concrete and specific, so that states can be held accountable to them, while leaving room for reinterpretation based on social and political nuances.

### *C. The Problem of Political Neutrality*

International law's universalising, homogenising tendencies imply that language rights can be derived from an abstract, apolitical standpoint. Yet, power relations always permeate the state's language policy. This is particularly apparent in Sri Lanka's case. For example, it is arguable that the pre-independence bilingual policy was part of Sinhalese collaboration with Tamil political leaders for the purpose of mobilising against British colonial powers. This situation feeds into the argument that 'the relative power of the state and group—and not an abstract concern for minority rights—is determining the degree of language recognition'.[96]

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[94] On the historical and current role of English in language planning in Sri Lanka, see Coperahewa, above n 32, 92-4.

[95] Kymlicka and Patten, above n 24, 11.

[96] David Laitin, 'Language Policy and Civil War' in P Van Parijs (ed) *Cultural Diversity Versus Economic Solidarity* (De Boeck, Brussels, 2003) 171, 182.

This analysis suggests that a government may make language rights concessions when it is politically expedient, rather than because of the force of international law.

The gap between the current language policy and linguistic justice cannot be understood in isolation of broader political factors. Mowbray argues that it is not official recognition *per se*, but several forms of ethnocratic institutionalisation that privilege the majority identity and render other languages as 'regional' or 'backward' in comparison.[97] In this light, we can understand why Tamil-speaking communities in Sri Lanka remain concerned about their language rights, in spite of the official recognition of the Tamil language and state support for bilingual public administration and Tamil-medium schools. There could be several factors compounding the marginalisation of minority groups, including, but not limited to, deficiencies in the implementation of language policy. DeVotta suggests that 'ethnic outbidding' and 'institutional decay' could be facilitated by factors including Sri Lanka's demography, electoral system, constitutional structure, and overarching political structures.[98]

### *D. The Tension between Linguistic Diversity and Nation-Building*

Finally, there is the contention that international law promotes linguistic diversity at the expense of national unity. Noting that the rights protected in international and national law are generally interpreted subject to national interests such as security, the dominant argument in the literature on language rights is that granting minority language rights in fact contributes to peace and stability, by improving state relations with aggrieved minorities.[99] The *ICCPR* allows for states to derogate from their obligations in times of an official public emergency, provided that such measures do not discriminate 'solely' on the ground of (*inter alia*) language.[100] The Sri Lankan Constitution seems to go further, by allowing for restrictions to language rights when they are 'in the interest of national security, public order … and the general welfare of a democratic society'.[101]

Let us explore the argument that the recognition of minority languages undermines a sovereign state's ability to govern effectively, and thus imperils peace, order and stability.[102] Liberal democracies, by their very definition, require a fixed, bounded *demos*. In order to maintain sovereignty, democratic states pursue stability and unity through a process of 'nation-building'. The tendency of nation-building is towards a 'language convergence' or assimilation policy.[103] That is, a policy orientated towards instituting one language in all public

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[97] Mowbray, above n 89, 14.

[98] DeVotta, above n 30, 16.

[99] See, for example, Mälksoo, above n 11, 435 ff.

[100] *ICCPR*, above n 2, art 4.

[101] *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978) above n 36, art 15(7). See Wood, above n 21, 34.

[102] Tosco pushes this argument to the extreme: 'the nation-state is incompatible with linguistic diversity, [and] one has either to give up nation-building or language conservationism. *Tertium non datur*'. He argues that forced integration, including language convergence, is a prerequisite condition of the nation-state: Mauro Tosco, 'The Case for a Laissez-Faire Language Policy' (2004) 24 *Language & Communication* 165, 179.

[103] See Kymlicka and Patten, above n 24, 12.

institutions, and restricting use of all other languages to the private sphere. Thus, the need for maintaining a democratic state is conceptually in conflict with minority language rights.

To understand what is at stake, consider how language relates to nationality. The Sri Lankan academic Dharmadāsa argues that language claims tend to assert the uniqueness and authenticity of a singular identity. Also, language is a symbol of cohesiveness and a statement of a community's self-assertiveness.[104] Language is just one aspect of group identity; minorities seeking language rights are generally seeking recognition and inclusion of their cultural difference in the nation.[105] Language recognition can be construed as a struggle for the acceptance of a new nation within the state. Seeing language as interconnected with the concept of national identity would explain why states tend to resist the recognition of minority languages.

The Tamil language struggle can be perceived as a challenge to the dominant, Sinhalese-Buddhist definition of the Sri Lankan 'nation'. The Sri Lankan case is a stark example of how a minority's assertions of language and nationhood may be tied up with claims to territory and self-determination, which threaten the sovereignty of the state.[106] The fact that the ethnic division is territorially based makes it easier to rally nationalist and separatist sentiments. This perspective also explains Sinhalese linguistic nationalism that emerged since the post-independence democratisation of the country.[107] After independence from Britain in 1948, the government of the new Republic of Sri Lanka became quickly engaged in fostering a sense of national identity among the local populations. The rise in Sinhalese-Buddhist nationalism could initially be characterised as an effort to distance the new nation from its former colonial identity. However, the burgeoning Sinhalese nationalism was matched by dissension among the other ethnic and religious communities within Sri Lanka, also vying for a place within the image of the nation. Given the interconnected nature of language and identity, it was inevitable that conflicts around linguistic recognition would follow. The 1956 Sinhala Only language policy can be seen as an attempt by the Sinhalese-dominated government of that time to maintain its power base and guard against the perceived threat of 'other' cultural forces, both English and Tamil.

It is important not to assume that minority language recognition will yield just results in every situation. Let us consider three possible justifications for the strategy of nation-building through language assimilation: mobility, peace and solidarity. Firstly, it could be argued that language convergence offers added mobility for minority groups, for example, because knowledge of the majority language is required in order to receive the same level of employment opportunities. Employment disadvantage is not an issue where there is a regional concentration of minority language-speakers, as in the Northern Jaffna region of Sri Lanka, because there are a complete range of economic opportunities. However, it is against the interests of the state to allow these 'ghettos' to persist, as it effectively splits the nation

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[104] Dharmadāsa, above n 31.
[105] Toivanen, above n 90, 101.
[106] Kymlicka and Patten, above n 24, 5.
[107] See Dharmadāsa, above n 31, 291.

into different social, economic and cultural units,[108] and portends political and territorial separation.

A second argument is that sharing a language can generate a greater sense of solidarity among people. There is a fundamental issue here about whether democracy is compatible with linguistic diversity: is a common language essential for common citizenship, for all citizens to participate in the civic sphere? If linguistic diversity means that communities become divided and cannot understand each another, democratic politics will be compromised.[109] However, this argument overlooks the possibility that public discourse could be conducted with multiple common languages. The Sri Lankan state already uses two, and sometimes three, languages in its public communications. Extending a bilingual education to all citizens would not be unreasonably burdensome on the state, or on students.[110] Encouraging Sinhalese people to learn Tamil, and vice versa for Tamil people in the North and East, would benefit cross-cultural understanding, which is essential for lasting reconciliation.

A third, related justification for language convergence is that it is a necessary condition for national unity, and thus peace. This is a highly contentious argument. The prevailing counter-argument, posited by human rights advocates, is that the recognition of minority languages assists with keeping the peace;[111] whereas, without state support for diversity, multiethnic societies would become fragmented, destabilised and prone to conflict. Laitin's thesis undermines such assumptions and suggests that the recognition of minority language rights correlates with the increased risk of conflict in some situations. Laitin makes the case that granting linguistic concessions is a move historically taken by states already in a weak, compromised position relative to a minority group growing in power.[112] Laitin's research points to surprising, counter-intuitive conclusions: democracies are in fact less likely to offer recognition to distinct language groups,[113] and language conflict can be a factor which ameliorates ethnic violence.[114] A corresponding trend is that the liberal accommodation of minority languages correlates to state weakness and even results in civil war where the linguistic minority is relatively powerful. Laitin's work highlights this correlation without

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[108] Alan Patten and Will Kymlicka, 'Language Rights and Political Theory: Context, Issues, and Approaches' in Will Kymlicka and Alan Patten (eds) *Language Rights and Political Theory* (Oxford University Press, Oxford, 2003) 1, 39.

[109] See Kymlicka and Patten, above n 24, 13.

[110] There are already some hybridised, multilingual communities in Sri Lanka. Canagarajah cites his own experience, speaking a regional dialect of Tamil with the family, a Muslim dialect of Tamil in his neighbourhood, English at school, and Sinhala when engaging with government institutions: A Suresh Canagarajah, *Reclaiming the Local in Language Policy and Practice* (2005) 16.

[111] See, for example, Stephen May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* (2001) 17; Robert Phillipson, Mart Rannut and Tove Skutnabb-Kangas, 'Introduction' in Robert Phillipson, Mart Rannut and Tove Skutnabb-Kangas (eds) *Linguistic Human Rights: Overcoming Linguistic Discrimination* (Mouton de Gruyer, Berlin and New York, 1995) 1, 6-8.

[112] Laitin, above n 96, 182.

[113] Ibid.

[114] David Laitin, 'Language Conflict and Violence: The Straw that Strengthened the Camel's Back' (2000) 1 *Archives Européennes de Sociologie XLI* 97.

making comment on how language policy could undermine state power or cause violent conflict. He implies that the patterns demonstrate that security concerns motivate language recognition, rather than justice, when it comes to weaker states, such as Sri Lanka.

The Sri Lankan context seems to fit neatly into Laitin's data set. Laitin deems the Sri Lankan linguistic concessions to be the 'result of the potential … for a minority group to mount a successful insurgency' and as 'a sign of failure to exert centralised rule'.[115] He characterises language recognition in this case as a manifestation of the power relations and ethnic tension, rather than one of the causes. Indeed, the tension had not blown out into a full-scale civil war until 1983, well after the Tamil language was formally given parity of status as an official language. It seems that the linguistic concessions were made during the build up of ethnic tension, as an attempt to relieve the stress on Tamil-Sinhala relations caused by the Sinhala Only policy. It could even be said that the linguistic concessions were a strategic move to avoid an insurgency and maintain the state's territorial integrity.

Laitin's explanation is compelling, although we must be careful not to assume that the state would have been in a better position to withstand the secessionist movement if the concessions were *not* granted. While Laitin maintains that the language conflict paradoxically worked to ameliorate violence, he admits that 'other factors outweighed the language issue to drive Sri Lanka into large-scale ethnic war'.[116] There is no single answer to the question of whether language recognition reduces or exacerbates ethnic violence. The answer is dependent on the so-called 'other factors' in a particular context. The Sri Lankan civil war must be understood in light of several political and institutional factors which provoked the Tamil separatist movement, including, but not limited to, the delay in reversing the 1956 language policy.

The fact that a single language policy can have antithetical results in different contexts suggests that international law should avoid universal prescriptions, but must somehow inform the protection of language rights on a more tailored basis. The next section raises three possible approaches to guiding state language policy that are more context-sensitive than international law.

## 5. Alternative Approaches to Language Rights

### *A. A Regional Approach?*

Should we leave aside international mechanisms in favour of detailed prescriptions at the regional level, as Mälksoo proposes?[117] Regional law is seen as more effective, because it is more sensitive to local conditions than the 'remote, invisible and anonymous' institutions of international law.[118] A regional approach may work for Europe, but Europe is unique in this

[115] Laitin, above n 96, 178-9.
[116] Ibid 114, 125.
[117] Mälksoo, above n 11, 454.
[118] Heyns and Viljoen, above n 75, 34.

respect. The Asia region is ill suited to developing uniform standards on language policy. Countries in the Asian region are less homogenous, as there are many states at different levels of development with vastly different histories and cultures. They are also less inclined to adopt the 'Western' discourse of human rights.[119]

### *B. A Case-By-Case Approach?*

The international law on language rights need not operate primarily through multilateral treaties or other instruments. Europe's approach is 'to achieve progress in the field of linguistic rights on a case-by-case basis [primarily through the European Court of Human Rights] rather than through regional norms of hard treaty law, enforced by legal mechanisms'[120]. On the international plane, there is great potential for expert and advisory human rights bodies to fill the role of discerning appropriate language policies based on the facts of a case. UN Committees have already extended the obligations on states by taking a liberal interpretation of certain provisions in international instruments. For example, in its General Comment, the CERD Committee suggests that Article 2 of the CERD on non-discrimination may require affirmative action to promote equal treatment in law and fact.[121] In considering Article 27 of the *ICCPR*, the Human Rights Committee has indicated that states may need to take 'positive measures' to protect minority rights, including the right to enjoy and develop its language.[122] However, the Committee did not go so far as to recommend particular positive steps to be undertaken by the state. For example, it remains unclear what level of funding is expected for minority language schools.[123]

Although the UN Committees have taken bold steps forward on occasion, international institutions have a long way to go in pushing states towards higher language rights standards. One major weakness is that existing human rights bodies have not proven to be capable of evaluating the implementation of language rights. The Human Rights Committee prefers to judge state compliance by evaluating only legislation, rather than the actual effects of language policies on the ground.[124] Another limitation is the prevalence of state agendas in some international organs. The United Nations Human Rights Council is typically restrained in its comments. In a special session following the Sri Lankan military victory in May 2009, the Council's final resolution '*urges* the Government of Sri Lanka to continue strengthening its activities to ensure that there is no discrimination against ethnic minorities in the

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[119] See, generally, Baogang He and Will Kymlicka, 'Introduction' in Will Kymlicka and Baogang He (eds) *Multiculturalism in Asia* (Oxford University Press, Oxford, 2005) 1.

[120] Mälksoo, above n 11, 461.

[121] United Nations Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, UN Doc CERD/C/GC/32 (2009).

[122] Dunbar, above n 14, 107.

[123] United Nations Human Rights Committee, *General Comment 23*, in Mowbray, above n 89, 5.

[124] Wood, above n 21, 36.

enjoyment of the full range of human rights'.[125] The government was not challenged on its compliance with human rights standards.

### C. A Reasoning-by-Analogy Approach?

Even the case-by-case approach relies to some degree on assumptions about state language policies in analogous cases. Thus, it is important to distinguish between classes of linguistic conflict, and consider how to respond to these differences in context. We can identify three distinct categories of linguistic conflict based on the *minority group* making the language recognition claims.[126] Costa suggests that the strategy of nation-building is not viable if there is a competing nationalist movement within the state by a disenfranchised minority; he proposes that, in this situation, 'the best way to promote a common identity, and to encourage a more deliberative form of democracy, may be to adopt policies that recognise and institutionalise a degree of national and linguistic difference'.[127] Firstly, there are minority regional languages where speakers are usually concentrated in a particular territory and have shared historical roots, such as French in Canadian Quebec. Secondly, there are 'endangered languages', usually indigenous languages. Thirdly, ethnically diverse societies especially in the West have a multiplicity of languages used by immigrant groups. There will be different implications flowing from language recognition of relatively strong competing linguistic groups. The Sri Lankan situation falls within the first category. To add to these points of differentiation, there is only one significant linguistic minority making language claims in Sri Lanka. It may be easier for the state to make language concessions in multilingual societies such as India, where the competition on all sides makes it more difficult for a single group to gain dominance.[128] The Sri Lankan experience, on the other hand, suggests that the perceived threat of the 'other' linguistic group is heightened within the majority/minority language dichotomy.

To take a different approach, we can distinguish contexts based on the position of the *state*. Laitin separates language policies in 'strong' (Pattern I), 'weak' (Pattern II) and 'weakening' states (Pattern III), in order to understand the correlation of language recognition and civil war. He suggests that a 'strong' Western state contending with, for example, a minority regional language (such as French in Canadian Quebec), are generally able to make linguistic rights concessions, including major promotion-oriented commitments, which do not threaten its power and legitimacy (Pattern I). He contrasts situations where weak states, mostly developing Eastern states, grant language recognition at the expense of their sovereignty, typically escalating in civil war (Pattern II). The Sri Lanka case fits squarely within Pattern II. Finally, Laitin considers contexts, mainly in Europe, where weaker

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[125] United Nations Human Rights Council, *Report of the Human Rights Council on its 11th Special Session,* UN Doc A/HRC/S-11/2E (2009).

[126] See, for example, Kymlicka and Patten, above n 24. In addition to these categories, this article makes special mention of the linguistic contexts in Eastern Europe and the European Union.

[127] See Joseph Costa, in Kymlicka and Patten above n 24, 13.

[128] Ibid 199.

industrialised states face relatively strong language recognition claims, which threaten state unity but do not lead to insurgency (Pattern III).[129]

The strength of Laitin's work is in identifying the different implications of recognition for 'established rich states' compared to 'newly independent and economically backward states'.[130] It sends a pertinent message that international law must be sensitive to differences, not just in terms of minority demands, but also in terms of state power and the state's position relative to ethnolinguistic minorities. However, rather than adopt Laitin's broad categories, we should enter a deeper investigation of the competition between different conceptions of national identity within states. These questions must be raised for each context of linguistic conflict: How does a state characterise and defend its national identity? Does it allow for competing conceptions, without substantially compromising its sovereignty? How strong is the position of the state vis-à-vis the linguistic group vying for the recognition of a different notion of national identity?

## 6. Whither International Law on Language Rights?

The place of international law in promoting language rights cannot be taken for granted. The literature covered in this essay suggests that we are still searching for the 'phoenix': it remains a matter of dispute among scholars whether international law is the appropriate tool to use in language conflicts. The mission of the linguistic human rights movement is a valiant one: to use the platform of international law to level the playing field and protect endangered languages so that they are in an equal position to freely develop in language communities. However, as Mälksoo articulates, 'the current approach seems to be that international law can only set minimum standards, and the situations of linguistic injustice must be fought with the tools of domestic and international politics'.[131] Even if we take language rights as best promoted through regional or national laws, international law has an important role to play in setting these minimum standards.

A logical next step would be to institute a comprehensive international legal instrument on language rights. There have been academic attempts to draft such an agreement. For example, Gromacki's draft Universal Declaration on Linguistic Rights aims to provide both positive language rights as well as a negative guarantee against language-based discrimination.[132] Gromacki suggests that the proposed Declaration allows for 'ample flexibility' in the implementation of language programs, given the different circumstances of language conflicts in states.[133] It is questionable whether this 'flexibility' leaves too much room for states to avoid inconvenient language concessions. At the same time, Gromacki has excluded detail on the special rights of linguistic minorities, acknowledging that universal

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[129] Laitin, above n 96.
[130] Ibid 183.
[131] Mälksoo, above n 11, 465.
[132] Joseph Gromacki, 'The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights' (1992) 32 *Virginia Journal of International Law* 515, 576-9.
[133] Ibid 575.

rules would fail to distinguish between minority language contexts. The draft Declaration is most effective at setting out tolerance rights, whereas it struggles to define positive obligations on states for the promotion of minority languages.

The fundamental dilemma, manifested by the three problems discussed earlier, is that the international law on language rights seeks to encode a single conception of linguistic justice. Yet, as demonstrated, international law has great difficulty defining in substance what linguistic justice would look like in different states. The very act of reducing language rights to a single, international legal code will inevitably involve some measure of essentialism, universalism, apolitical abstraction, and tension with national sovereignty and peace. International lawyers can strive to minimise these problems, beginning with a greater appreciation of their existence and implications in particular situations. However, we must accept that international law is essentially constrained in its ability to intervene helpfully in every situation.

Are we asking too much of international law? International law cannot be expected to deliver a comprehensive and universal regulatory framework, which attends to the differing needs of linguistic groups. However, it has an important role in terms of establishing symbolic, universally-recognised 'bottom-line' standards on language rights. International human rights bodies can offer individuals limited recourse to complain of violations against these general principles. Through their decisions and commentaries, these bodies could pressure states in analogous situations to rethink their language policies.

## Conclusion

The role of international law is limited when it comes to language rights. The Sri Lankan case draws out several limitations with relying on international law as a tool to achieve linguistic justice. The inherent problem with international law is its need to reduce guidelines on language policy to a single, universal set of standards. Yet there are so many points of difference between linguistic groups, state power, and other relevant circumstances, such that international law is unable to give all states meaningful, relevant guidance on what is required for linguistic justice. Regional instruments are also inadequate (at least outside of Europe) for similar reasons. Critical case-by-case commentary may be offered by international human rights bodies, although they are currently too weak to make a significant impact. Ultimately, the onus falls on nation-states to proactively implement language rights. Since the nation-state is inclined towards language convergence, there will necessarily be a struggle to maintain linguistic diversity.