NATIONAL MINORITIES: A GLOBAL, EUROPEAN, AND SWISS PERSPECTIVE[1]

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> Each culture has a dignity and a value which must be respected and preserved. Every people has the right and the duty to develop its culture.
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> In this rich variety and diversity, and in the reciprocal influence they exert on one another, all cultures form part of the common heritage belonging to all mankind.[2]

In our contemporary world, there are some 3000 linguistic groups and 5000 national minorities.[3] Debates held since World War II have tended to ignore or repress this important fact. At the "fin de siècle," however, it has become a timely and important topic. The seemingly homogeneous Soviet political and ideological order has dissolved into ethnic pluralism, tension, and conflict.[4] In Western Europe and other contemporary societies, regional, cultural, and ethnic group consciousness is emerging in reaction to the anonymous, uniform, globalizing forces of a market economy and developments in technology and communica-

1. This article is based on the rather narrow concept of national minorities as a traditionally established group of citizens of the respective state. However, it is possible to postulate a more inclusive concept of minorities; see Rüdiger Wolfrum, "The Emergence of 'New Minorities' as a Result of Migration," in Brölmann, Lefeber, Zieck, *Peoples and Minorities in International Law* (Dordrecht/Boston/London: Martinus Nijhoff, 1993), 153 ff.
2. Article 1 of the UNESCO Declaration of Principles of International Cultural Cooperation, UNESCO Doc. 14 C/8/1.1/2, 1966.
3. Luzius Wildhaber, *Menschen- und Minderheitenrechte in der modernen Demokratie* (Basel: Helbling und Lichtenhahn, 1992), 19.
4. Georg Brunner, *Nationalitätenprobleme und Minderheitenkonflikte in Osteuropa* (Gütersloh: Bertelsmann Stiftung, 1993); Fernando Albanese, "Ethnic and Linguistic Minorities in Europe," *Yearbook of European Law 1991*, 313-83; Otto Kimminich, "Ansätze für ein europäisches Volksgruppenrecht," *Archiv des Völkerrechts 1990*, 1-16.

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tions. In many African and some Asian countries experiencing a second round of self-determination, political elites are confronting claims similar to those which they themselves had put forward in their fight against colonialism.[5]

Thus, in large regions of the world, seemingly stable political systems face demands for fundamental reform or are even under threat of civil war and secession. Looking at the present fragile international order, it is no wonder that in 1992 the Secretary-General of the United Nations called in *An Agenda for Peace* for adequate instruments for minority protection as a means to prevent international conflict and guarantee international security.[6] Similarly, in its final report of 1993, the Vienna Conference on Human Rights included minority protection as part of a contemporary concept of human liberty.[7]

The demands of national minorities can form part of a rich political and cultural dialogue, but they can also have a provincial, sectarian, and imprisoning character. Indeed, they might even fuel extremist movements and pave the way for brutal, genocidal wars.[8]

The aim of this article is to study the principles and elements by which minorities are protected within the present-day legal order.[9] The argument is presented on four levels. The first part deals with the global level of international law. The second part considers whether or not a more advanced regime of minority protection is emerging in Europe. Subsequently, the third part examines whether the Swiss case provides a possible model for the solution of minority questions within a national constitutional framework. Finally, at a level which forms an arch over municipal and international legal systems, we present some elements of an ideal order in which legitimate minority interests can be safeguarded in the future.

I. Universal Protection of National Minorities

Highly significant pieces of research have been accomplished in recent years concerning protection of minorities on a universal plane.[10] In the following

5. See J. Klabbers and R. Lefeber, "Africa: Lost between Self-Determination and Uti Possidetis," Brölmann, Lefeber, Zieck, 37 ff.
6. Boutros Boutros-Ghali, *An Agenda for Peace: Prevention Diplomacy, Peacemaking and Peace-Keeping*, UN Doc. A/47/277 - S/24111, 17 June 1992, paragraph 18.
7. See operative paragraph 19 of the Declaration, UN Doc. A/CONF.157/24 (Part I), 13 October 1993.
8. See Edward W. Said, "Nationalism, Human Rights and Interpretation," Barbara Johnson (ed.), *Freedom and Interpretation*, (New York: Basic Books, 1993), 175 ff.
9. For a comprehensive and detailed view see Rainer Hofmann, "Minderheitenschutz in Europa," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1992): 1-69; Florence Benoît-Rohmer, "La représentation des minorités dans les Parlements d'Europe centrale et orientale," *Revue Française de Droit Constitutionel* (1993): 499-515.
10. See, e.g., Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1991); Felix Ermacora, "The Protection of Minorities before the United Nations," *Recueil des Cours de l'Académie de droit international*, 182 (1982 IV): 247 ff; Russel Lawrence Barsh, "The United Nations and the Protection of Minorities," *Nordic Journal of International Law*, (1989): 188 ff; Yoram Dinstein, "Collective Human Rights of Peoples and Minorities," *The International and Comparative Law Quarterly*, (1976): 102 ff; Otto

pages, one element which has been unduly neglected will be considered with special care: the question of whether a *right to political autonomy* is granted, either directly or indirectly, to minorities within the general framework of international law.

The constitutional foundations of the present-day international legal system were, to a large extent, laid down after World War II. The basic principles of this world public order are incorporated into the United Nations Charter. The principle of sovereignty and equality of states is the basis of this system, and independence, political unity, and the territorial integrity of states are its cornerstones.[11] These cornerstones are, in turn, protected by the prohibition on the use of force in international relations and the prohibition on state intervention in the domestic affairs of other states.

In the course of the development of international law after World War II, however, a new dimension gradually emerged within this state-centered system: principles and rules concerning the protection of human rights. Does this newly arising bipolar framework of international law contain concepts which grant autonomy to national minorities?

If we consider the constitutive texts of international law adopted after World War II, we find that minorities are not even mentioned. Despite the establishment of a quite impressive system of minority protection under the aegis of the League of Nations, a proposal to include a provision on national minorities in the Universal Declaration of Human Rights of 1948 was rejected, and the International Court of Justice has until now never been seized with disputes and demands for advisory opinions concerning national minorities.[12] Minorities were either ignored as a factor of political order or, after the experiences of World War II, were considered too divisive and dangerous to be integrated into the

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Kimminich, "Ansätze für europäisches Volksgruppenrecht," *Archiv des Völkerrechts 1991*: 1 ff; Natan Lerner, *Group Rights and Discrimination in International Law* (Dordrecht/Boston/London: Martinus Nijhoff, 1991); Wolfgang Seifert, *Selbstbestimmungsrecht und deutsche Vereinigung* (Baden-Baden: 1992); Louis B. Sohn, "The Rights of Minorities," in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), 270 ff; Henry J. Steiner, "Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities," *Notre Dame Law Review* (1991): 1539 ff; Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991); Christian Tomuschat, "Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights," *Festschrift für Hermann Mosler* (Berlin/Heidelberg/New York: Springer, 1983), 949 ff; Vernon Van Dyke, *Human Rights, Ethnicity and Discrimination* (Westport/Con./London: Greenwood Press, 1985); Ben Whitaker (ed.), *Minorities — A Question of Human Rights?* (Oxford: Pergamon Press, 1984).

11. See the considerations of a Chamber of the International Court of Justice in the *Frontier Land Case* concerning Burkina Faso and Mali: "At first sight this principle (*uti possidetis*) conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by much sacrifice. The essential requirement of stability — to develop and consolidate their independence in all fields — has induced African states, judiciously, to consent to the respect of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples." International Court of Justice Reports (1986): 554, 566-67.
12. Alfred de Zayas, "The International Judicial Protection of Peoples and Minorities," in Brölmann, Lefeber, Zieck, 253.

international legal order. Autonomy regimes for national minorities did not fit into the post-World War II philosophy of international law.

During the development of international law after World War II, however, legal platforms were created from which certain elements of autonomy regimes in favor of national minorities could be deduced.[13] Let me just mention here two articles embodied in the International Covenant on Civil and Political Rights (ICCPR) of 1966 — one on self-determination and one on the protection of minorities — and two recent documents adopted within the United Nations system.

Self-determination, as a principle of public international law,[14] is laid down in the following words of Article 1 of the ICCPR, as well as in other international instruments:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This definition embraces two types of self-determination:

- the right of peoples to determine their status vis-à-vis other people and states, which could be called the right of external self-determination; and
- the right of peoples to freely pursue their economic, social and cultural development, which could be called the right of internal self-determination.

The formula does not mention the concept of autonomy, although the word "autonomy" was often mentioned in the *travaux préparatoires* as being a possible mode of realization of the principle of self-determination.[15]

However, the argument could be made, that — seen from an evolutionary perspective — autonomy might well be considered a necessary condition or stage in the process of full realization of external self-determination. Alternatively, it could be argued that autonomy is implicit in internal self-determina-

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13. See Patrick Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments," *International and Comparative Law Quarterly* (1989): 867-87; Thomas M. Franck, "Postmodern Tribalism and the Right to Secession," in Brölmann, Lefeber, Zieck, 3 ff., with comments by Rosalyn Higgins, 29 ff.; Karl Doehring, Art. 1, in Bruno Simma (ed.), *Charta der Vereinten Nationen,* München: Ch. Beck, 1991.
14. See, *inter alia,* Brölmann, Lefeber, Zieck; Christian Tomuschat (ed.), *Modern Law of Self-Determination,* (Dordrecht, Boston, London: Martinus Nijhoff, 1993); Wolfgang Seifert, *Selbstbestimmungsrecht und deutsche Vereinigung,* (Baden-Baden: Nomos, 1992); Daniel Thürer, *Das Selbstbestimmungsrecht der Völker — Mit einem Exkurs zur Jurafrage,* (Bern: Stämpfli, 1976) (cit. Selbstbestimmungsrecht); ibid., "Self-Determination," *Encyclopedia of Public International Law,* 8 (1985): 470 ff.
15. See Thornberry, "The Democratic or Internal Aspect of Self-Determination" with some remarks of federalism, in Tomuschat (ed.), 101-15, concerning an American Draft for the "Friendly Relations Declaration" in which it is suggested to speak of "all distinct peoples" instead of "the whole people" as subjects of self-determination. See also Thürer, *Selbstbestimmungsrecht,* 106 ff.

tion, though in the "legal definition" just referred to, this political dimension is not mentioned.[16]

The second point for considering whether international law obligates states to grant autonomy to parts of their population — or if these populations have a right to be granted an autonomous status — is provided for in another provision of the ICCPR: the guarantee concerning *national minorities*. The ICCPR distinguishes self-determination from minority rights and states in Article 27:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[17]

What are the elements of this provision? Apart from the general principle of nondiscrimination, it seems, first, to imply a guarantee ensuring the continued existence of ethnic, religious or linguistic minorities, as well as a prohibition against destroying their cultural identity. Thus, state acts of forceful assimilation, expulsion, and deportation are illegal under Article 27, as well as under other rules and principles of international law; in this sense, a group right has been established.[18]

A mere prohibition of forceful assimilation, however, does not seem to adequately safeguard the cultural identity of weak minority groups. Could Article 27 possibly be interpreted in a broader and more effective sense as requiring states to take positive actions aimed at ensuring protection of minority identity and traditions? A special state obligation to protect a minority culture was, by way of interpretation of an instrument concerning Albania, recognized by the Permanent Court of International Justice. In its Advisory Opinion concerning *Minority Schools in Albania*, it stated that "there would be no true equality between a majority and a minority if the latter were deprived of its own

16. See Tomuschat, "Self-Determination in a Post-Colonial World," in Tomuschat, who argues, that if "a right to political autonomy, or, going a step further, a 'federal' right of self-determination could evolve by interpreting and adjusting self-determination to the needs of the contemporary world, qualitative progress would be achieved" (13-14). As a historical perspective see Philipp Allott, "Self-Determination — Right or Social Poetry?" in Tomuschat, 177-210; Kay Hailbronner, "Der Schutz der Minderheiten im Völkerrecht," in *Festschrift für Dietrich Schindler* (Basel: Helbing und Lichtenhahn, 1989), 75 ff.

17. See Capotorti; Tomuschat, "Protection of Minorities under Article 27 of the International Covenant of Civil and Political Rights," in *Festschrift für Hermann Mosler* (Berlin, Heidelberg, New York: Springer, 1987), 949-79. See also the General Comment on Article 27, adopted by the Human Rights Committee, UN Doc. CCPR/C/Rev.1/Add. 5, para. 3.1.

18. For the collective aspect of Article 27, see Eibe Riedel, "Gruppenrechte und kollektive Aspekte individueller Menschenrechte," *Aktuelle Probleme des Menschenrechtsschutzes, Berichte der Deutschen Gesellschaft für Völkerrecht*, 33 (Heidelberg: Springer, 1994): 62 ff.; Manfred Nowak, "UNO-Pakt über bürgerliche und politische Rechte, Artikel 27," para. 35 ff. See, further, Yoram Dinstein, "The Degree of Self-Rule of Minorities in Unitarian and Federal States," in Brölman, Lefeber, Zieck, 221-28; Natan Lerner, "The Evolution of Minority Rights in International Law" in Brölmann, Lefeber, Zieck, 77-81, with comments by Manfred Nowak, 163 ff.

institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority."[19] These considerations merit broader reflection. It may be that the concept of "true equality" or "de facto equality" should be enlarged from the cultural to include a political dimension, and as such be recognized as an integrating element of the minority protection of Article 27. Granting some sort of autonomy and self-government to minorities would indeed enable them to realize, on a local level, their own political ideals and way of life.

In summary, the ICCPR does not — in its provisions concerning self-determination and national minorities — expressly grant autonomy rights. Elements of such a concept, however, might be deduced from the Covenant if its provisions are interpreted in an evolutionary and dynamic way.[20]

Apart from the International Covenant on Civil and Political Rights, one should also note that, in 1992, during its 47th Session, the General Assembly adopted a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[21] This instrument is not, on the whole, innovative. Its purpose was to codify the rights of minorities established within the framework of Article 27. Article 2 of this Declaration enunciates the right of persons belonging to minorities to enjoy their own culture, to profess and practice their own religion, and to use their own language without discrimination. In addition, the Declaration grants persons belonging to minorities the right to "participate effectively" in cultural, religious, social, economic and public life, as well as in decisions concerning the minority. Although the Declaration is a mild one, it is an important summation of existing and evolving minority rights law.

Two other recent developments need to be mentioned here: ILO Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries,[22] and a corresponding Draft Declaration currently under preparation by a Working Group within the Commission on Human Rights. In these texts, indigenous peoples benefit from special rights so far not embodied or foreseen in minority rights texts.[23] The ILO Convention and the proposed draft declaration provide that indigenous rights include economic rights (such as the possession and control over land and natural resources) and political rights (in particular, self-government or autonomy and the recognition of existing treaties between indigenous peoples and states). It should be noted as a — perhaps

19. *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, P.C.I.J. publication, Series A-B, No. 64, p. 17.
20. See also Thornberry, 180-86.
21. See Alan Phillips and Allan Rosas, *The UN Minority Rights Declaration*, (Turku, Abo, London: Abo Akademis Tryckeri, 1993); Peter Hilpold, "Minderheitenschutz im Rahmen der Vereinten Nationen," in *Schweizerische Zeitschrift für internationales und europäisches Recht* (1994): 31 ff.; Klaus Dicke, "Die UN-Deklaration zum Minderheitenschutz," in *Europa-Archiv* (1993): 107 ff.
22. Adopted by the General Conference, 27 June 1989.
23. Gudmundur Alfredsson, "The Right of Self-Determination and Indigenous Peoples," in Tomuschat, 41-54; Catherine Brölmann and Marjoleine Zieck, "Indigenous Peoples," in Brölmann, Lefeber, Zieck, 187 ff.; Douglas Sanders, "Self-Determination and Indigenous Peoples," in Tomuschat, 55-82.

symptomatic — phenomenon of standard setting in modern international law that non-governmental organizationss representing indigenous peoples effectively contributed to the elements of these texts. Some of the work done on indigenous peoples' rights may contain valuable lessons for the minority rights debate, in particular concerning political participation, autonomy and land rights.[24]

II. Special Minority Rights Regimes in Europe?

Let us now move to the European level of our "architectural structure" and ask the following question: Have standards and principles protecting autonomy emerged within the European regional system which are superior to those embodied in the minimal world order under general international law?

We might well expect this, as a highly developed and sophisticated system of minority protection in Europe had already been created within the League of Nations and, as we all know, minorities have continued to be an important political factor on this continent. This can be clearly seen in Central and Eastern Europe with its revival of nationalism and in the western part of the continent, as a response and counterforce to modern developments of economic and political integration.

In examining whether autonomy regimes have been explicitly or implicitly integrated into the European system, three sets of rules and practices must be evaluated: treaty law, "soft law" as developed within the Conference on Security and Cooperation in Europe (CSCE), and new rules and guidelines concerning recognition of states.

As far as *treaty law* is concerned, the European Convention on Human Rights does not contain a provision comparable to that of Article 27 of the ICCPR. As was stated by the European Commission:

> the Convention does not provide for any rights of a linguistic minority as such, and the protection of individual members of such minorities is limited to the right not to be discriminated in the enjoyment of the Convention rights on the ground of their belonging to the minority (Article 14 of the Convention).[25]

In order to correct this astonishing deficit in treaty law, two project conventions are being elaborated within the Council of Europe.[26] Furthermore, a Convention concerning minority languages has been adopted by the Council of Europe.[27]

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24. See also the General Comment on Article 27, adopted by the Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 7.
25. ECHR Commission, Application No. 8142/78, X. vs. Austria, 18 Decisions and Reports 1979, 59, pp. 92-93.
26. See for further detail the projects of a Council of Europe Ad Hoc Committee for the Protection of National Minorities: "Convention-cadre pour la protection des minorités nationales" and "Protocol additionnel à la Convention européenne des droits de l'homme (CEDH) dans le domaine culturel," CAHMIN, 19, Strasbourg, 8 July 1994. See also Giorgio Malinverni, "The

A second element characterizing developments in Europe is *CSCE practice.* Interestingly enough, it was the CSCE which took the lead in developing standards for minority protection, even including elements of autonomy regimes. The CSCE process functioned as an engine for democratic change and a repository of democratic principles in Europe.[28]

Paragraphs 32 and 34 of the Concluding Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension provide for recognized minorities to use their native language in private and public and as a language of instruction. Paragraph 35 goes on to assert the right of persons belonging to minorities to "effective participation in public affairs" and the commitment of states to establish "appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities." The CSCE meeting of experts on National Minorities held in Geneva in 1991 noted the positive results for intercommunal relations within states which had been obtained by a variety of approaches, such as local and autonomous administration and autonomy on a territorial basis, including "the existence of consultative, legislative and executive bodies chosen through free and periodic elections" and "decentralized or local forms of government." Additionally, a report to the CSCE Council from a CSCE Seminar of Experts on Democratic Institutions stressed the importance of democratic culture for the adequate functioning of institutions. It should also be noted that in 1992 the office of High Commissioner on National Minorities was established, whose function it is to act as an instrument of conflict prevention with regard to tensions involving national minorities.[29]

Of course, the texts thus far mentioned as emanations of the "Human Dimension" of the CSCE process have no legal force. They have, at best, a "soft law" character,[30] but they do indicate a possible direction for legal development.

Draft Convention for the Protection of Minorities," *Human Rights Law Journal* (1991): 265 ff.

27. European Charter for Regional or Minority Languages, adopted by the Committee of Ministers on 22 June 1992 at the 478th meeting of the Minister's Deputies. This charter is not yet in force. It does not protect national minorities as such, but is an instrument to promote the use of regional or minority languages in public life.
28. See Thornberry, 134 ff.
29. The High Commissioner is appointed by the CSCE Council by consensus upon the recommendation of the Committee of Senior Officials for a period of three years. See the Helsinki Document, 10 July 1992, "The Challenges of Change." As an illustration of the activity of the acting High Commissioner, Max van der Stoel, see his recommendations and proposals concerning several Central and Eastern European countries, reprinted in *Human Rights Law Journal*, 1993m 216ff., 432 ff.
30. See Michael Bothe, "Legal and Non-Legal Norms — A Meaningful Distinction in International Law?" *Netherlands Yearbook of International Law 1980*, 65 ff.; R. Ida, "Formation des normes internationales dans un monde en mutation: critique de la notion de soft law," *Mélanges Michel Virally* (Paris: Pedone, 1991), 333 ff.; Michael Reisman, "The Concept and Functions of Soft Law in International Politics," in *Essays in Honour of Judge Taslim Olawale Elias* (Dordrecht, Boston, London: 1992), 135 ff.; Theodor Schweisfurth, "Zur Frage der Rechtsnatur, Verbindlichkeit und völkerrechtlichen Relevanz der KSZE-Schlussakte," in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1976), 679 ff.; Thürer, "'Soft law' — eine neue Form von Völkerrecht?" in *Zeitschrift für Schweizerisches Recht* (I. Halbband, 1985), 429 ff.; Prosper Weil, "Towards Relative

Some passages of CSCE resolutions have even been integrated into binding international agreements.[31]

A third aspect of recent European state practice concerns *state recognition.* According to guidelines adopted by the Council of Ministers of the European Communities on 16 December 1991 for the consideration of recently emerging states in Eastern Europe and the former Soviet Union, any new entity is to be recognized as a state only if it respects a range of international instruments and principles. These include guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE.[32] Are we, therefore, confronted in European practice with a deviation from the established doctrine of recognizing a state as soon as its government is in full and effective control of its territory?[33]

At first glance, it might appear that a new doctrine on recognition is, in fact, emerging in European practice.[34] Indeed, there are historical precedents to the EC guidelines just mentioned. As early as 1878, the seven contracting parties to the Treaty of Berlin (Austria, France, Germany, Great Britain, Italy, Russia, and Turkey) declared that they were not prepared to recognize Romania and Bulgaria if they did not guarantee, within the framework of their constitutional system, minority rights to certain religious groups.[35] As a condition for admission to the League of Nations, five states — Albania (1921), Lithuania (1922), Latvia (1923), Estonia (1923) and Iraq (1932) — had to submit statements to the Council of the League undertaking obligations concerning the protection of minorities.[36] Similarly, on a global level, decolonization followed procedures and standards established by the United Nations. Furthermore, the international community was not prepared to recognize Southern Rhodesia, the homelands created in South Africa, and the Republic of Northern Cyprus, as long as these entities were not legitimated by the will of the people.[37]

Despite this, the principle of effectiveness seems to continue to guide recognition practice. Hopefully, however, new recognition standards will be generally established which are based on the above-specified heritage and which will, among other things, take into account respect for the rule of law, human rights, democracy, and minority protection as a precondition for the admission of new members into the international community.

Normativity in International Law," *American Journal of International Law 1982,* 413 ff.

31. There seem to be, for Central and Eastern Europe, around forty treaties in force into which CSCE clauses concerning minority protection have been integrated.
32. See *European Journal of International Law* (1993): 72 ff.
33. See Jochen A. Frowein, "Self-Determination as a Limit of Obligations under International Law" in Tomuschat, 211-15.
34. See Stefan Oeter, "Selbstbestimmungsrecht im Wandel," in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1992), 741 ff.
35. See Rein Mullerson, "Minorities in Eastern Europe and Former USSR: Problems, Tendencies and Protection," *The Modern Law Review,* Vol. 56, 759.
36. See Lerner, 77-83.
37. See James Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988).

III. The Case of Switzerland

Having considered the evolution of the principles concerning minority protection within the scope of the global and European "macro-order," it might well be worthwhile to analyze in some detail the "micro-cosmos" of a state constitutional system. After all, just like the "arch" of a bridge, the international legal order is supported by the many "stones" of state constitutional orders.[38]

In this context, the Swiss case might be of some interest. With its four languages,[39] two principal religions,[40] and a rapidly evolving economy, Switzerland may be the most pluralistic and diverse country in Europe.[41] And yet, since the establishment of the Federal State in 1848, internal peace and stability have never been seriously threatened. Can a grand theory, a model, or a formula be deduced from the traditions and the legal system of Switzerland? Does this country give at least some guidance as to how a legal order for a culturally heterogenous society can be constructed which safeguards individual rights, democracy, and group identities in a stable and balanced manner?

One of the interesting features of the Swiss legal system is the absence of specific provisions concerning the protection of minorities. Generally speaking, the terms and concepts of "minorities," "éthnies" or "Volksgruppen" do not form part of the Swiss legal or political vocabulary. In fact, linguistic and cultural groups are not safeguarded as such, but are protected on the basis of a broad regime of legal, conventional, and political principles as well as, in an indirect way, by the federal, highly decentralized structure of the Swiss constitutional and political system.

1. Basic principles of language law

Regarding language law, two basic elements can be distinguished: freedom of language on the one hand, and the territorial principle on the other.

(a) *Freedom of language* ("Sprachenfreiheit," "liberté de langue") seems to be the cornerstone of the system and has two aspects. First, it embraces the liberty of all persons to use the language of his or her choice in private, social, and other non-state relations. In the case law developed in the Federal Court, as well as in doctrine, this freedom was recognized as an individual, unwritten constitutional right. It is cast in terms of a classic human right, but it should not be taken totally for granted within the framework of a liberal constitution.[42] In the Canadian legislation, for example, provisions are made for the use of minority languages in enterprises for public utility and professional associations.[43]

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38. Thornberry, 137.
39. Among Swiss nationals, 73.4 percent speak German, 20.5 percent French, 4.1 percent Italian and 0.7 percent Romanch. See *Statistisches Jahrbuch der Schweiz, 1994*, 353.
40. Among Swiss citizens, 47.3 percent are Protestants and 43.3 percent are Roman Catholics. See *Statistisches Jahrbuch der Schweiz*, 1994, 355.
41. Wolf Linder, *Swiss Democracy — Possible Solutions to Conflict in Multicultural Societies* (New York: St. Martin's Press, 1994).
42. Charles-Albert Morand, "Liberté de la langue et principe de territorialité. Variations sur un thème encore méconnu," *Revue de droit suisse* I (1993): 11 ff.

The second conceptual element of freedom of language concerns its "official" use among state authorities as well as in relationships between the state and individuals.[44] The official languages are established and regulated within their respective spheres of competence in the federal and cantonal constitutions. For the centralized institutions of the federal government, German, French and Italian are recognized as official languages and they are each given equal status. This means, for instance, that:

- legislation is drawn up and officially published in all three official languages of the federation; and
- administrative and court decisions are, as a rule, phrased in the official language of the previous instance or according to the will of the parties.

In some respects, even Romanch, the fourth national language of Switzerland,[45] is taken into account by the Federal Parliament and Government, as well as the Federal Tribunal.

(b) Freedom of language as a basic element of Swiss language law is not conceived as an absolute individual right in the Swiss Constitution. It might well be limited by the so-called *territorial principle* ("Sprachgebietsprinzip," "principe de territorialité").[46] According to the Federal Court, as well as legal writers, this concept is implied in a constitutional clause recognizing four languages — German, French, Italian and Romanch — as national languages (Article 116 section 1 of the Federal Constitution).[47] This enables the cantons to take measures to safeguard the homogeneity of traditional language areas. According to this principle, the Federal Court considered the following as being in conformity with the Federal Constitution:

- cantonal provisions prohibiting advertisements in a non-local language;[48] and
- rules of procedure declaring the majority language as the only court language in a cantonal district with a linguistic minority of not less than 24 percent and not more than 40 percent of the population.[49]

The territorial principle is an embodiment of the philosophy that language is more than just a mere instrument of communication. It constitutes and

43. Ibid., 21 ff.
44. See Andreas Auer, "D'une liberté non écrite qui n'aurait pas dû l'être: la 'liberté de la langue,' *Pratique Juridique Actuelle* (1992): 955-58.
45. Romanch was recognized on a constitutional vote in 1938, at the high point of European nationalism, as a fourth national language of Switzerland by an overwhelming 98 percent vote.
46. See Thürer, "Zur Bedeutung des sprachenrechtlichen Territorialitätsprinzips für die Sprachenlage im Kanton Graubünden," *Schweizerisches Zentralblatt für Staats- und Verwaltunsrecht* (1984), 241 ff., 246 ff.; de constitutione ferenda "Le Quadrilisme Suisse — présent et future," *Rapport Saladin* (Bern 1989), 249 ff.
47. Giorgio Malinverni, *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft, Artikel 116.*
48. See Decision of the Swiss Federal Court, 31 October 1990 (BGE 116 la 345 ff.).
49. See Decision of the Swiss Federal Court, 25 April 1980 (BGE 106 la 302 ff.). This relationship is in no way prejudicial for the use of language in the public school system.

expresses, so to speak, the "living environment" ("Lebenswelt," "Daseinsform") and "collective self" of a language community as such. Individual freedom of language may, therefore, be legitimately limited by law if such measures are adequate and necessary in order to protect the identity and regional extension of a national language in its traditional territory and, as a consequence, the identity and freedom of the individuals belonging to and rooted in that traditionally dominant language community.[50]

2. Federalism as an institutional device to support linguistic freedom

Federalism has been conceptualized by K.C. Wheare in his classic treatise on "Federal Government" as existing "when the powers of government for a community are divided substantially according to the principle that there is a single independent authority for the whole area in respect of some matters and that there are independent regional authorities for other matters, each set of authorities being co-ordinate with and not subordinate to the others within its own prescribed sphere."[51] This definition is neither comprehensive nor adequate. On the contrary, in light of the reality of the modern state it is appropriate to start from the premise that every modern federal system is constituted by the existence and interplay of three elements: the (constitutional) division of powers between the central and regional levels of government (including their constitution-making authority); the implementation by regional authorities of laws and programs enacted by the central government and policies shaped by it; and institutions and practices enabling political authorities and the people of regional areas to represent their values and interests and to influence, shape, and contribute to decisions made on the central plane.

Applied to Swiss language regions, federalism indirectly supports linguistic freedom in three ways:

1. It is up to the cantons within their constitutional sphere of autonomy to decide in which form and to what degree they desire to adopt the territorial principle or whether, to the contrary, they wish to tolerate or favor bilingual or multilingual regimes. Only in cases of isolated and endangered minorities, such as the Romanch-speaking people in the canton of Graubünden, might it be argued that a Federal constitutional mandate exists for the host canton to protect the linguistic community by referring to the principle of territoriality.
2. Federal law is applied by cantonal political and administrative authorities, as well as cantonal tribunals in the local official language. The same is true for actions taken by decentralized federal institutions, such as railway or postal services.

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50. Thürer, "Schutz der sprachlichen Minderheiten im Staatsrecht," in Kurt Müller (ed), *Minderheiten im Konflikt* (Zürich: Neue Züricher Zeitung, 1994), 116-19.
51. K. C. Wheare, *Federal Government* (New York: Oxford University Press, 1964), 35. See, in context, Thürer, *Bund und Gemeinden — Eine rechtsvergleichende Untersuchung zu den unmittelbaren Beziehungen zwischen Bund und Gemeinden in der Bundesrepublik Deutschland, den Vereinigten Staaten von Amerika und der Schweiz* (Berlin, Heidelberg, New York: Springer, 1986.)

3. In the field of "representative federalism," minorities can take advantage of the electoral system according to which political parties and other relevant political groups within a canton are represented in the National Council (First Chamber of the Federal Parliament) on the basis of the proportionality principle, and every canton is represented in the Chamber of Cantons (Second Chamber of the Federal Parliament) with an equal number of seats. More importantly, linguistic minorities are represented in the Federal Council (Government) and in other federal institutions and arrangements to a degree exceeding their numerical strength.[52] Power is to be shared by all relevant groups in a cooperative manner, rather than exercised at will by a mere 51 percent majority. By use of such a concept, federal institutions and procedures are responsive to the voices from varying groups allowing them to participate in the process of government in an authentic and meaningful way.

Pluralism, especially with its multilingual character, forms a "raison d'être" of the Swiss state and constitutional system. Can the rules and principles of its language law be taken as a model by other states or international organizations?

In the abstract, they may certainly serve as a source of inspiration. It should be kept in mind, however, that the arrangements just described are unique in two ways. First, they are rooted in a long history of cohabitation, existing long before the age of nationalism. In modern institutional settings and political habits, traditions have survived which were shaped at the time when the concepts of "state" or "nation-state" had not yet emerged. Second, habits and rules concerning group protection are based on and embedded in a subtle and complex web of religious, linguistic and other group identifications, group loyalties, and relations which do not coincide with political borders: a "systemless" system which produces ever shifting majorities and thereby prevents certain citizens from being constantly locked into a minority position.

Above all, it should be noted that for existential questions such as those discussed in this article, the effectiveness of legal rules is highly questionable. Languages live, flourish, and decay in a process of facts and forces which can be conditioned and shaped to a certain degree, but which — within the framework of liberalism — can never be dictated by constitutional law or other legal regimes.

IV. Model Elements of Minority Protection through the Rule of Law

We now turn to the more speculative stage of our investigation and ask the following question: How should a legal order be constructed to protect the existence, identity, rights, and legitimate interests of minorities and other

52. At present, the French-speaking minority of 20.5 percent of the Swiss national population is represented in the federal government with 28.6 percent and the Italian-speaking minority of 4.1 percent of national population with 14.3 percent.

groups, as well as individuals belonging to these communities? At the same time, how can one limit the negative, destructive, illiberal effects inherent in the nationalist ideologies which may be encouraged by such a regime? The large majority of states are not based on homogeneous populations; they tend to have an ethnically and culturally diverse character. International law, however, only marginally takes notice of the pluralist character of society, and state constitutional orders often fail to adequately recognize the legitimate aspirations of their heterogeneous populations. Thus, our question is: On what principles and models should an all-embracing legal system be based in order to guarantee stability on the one hand, and human dignity for all irrespective of the group to which they belong, on the other?

Let me mention some elements of such a system:

1. It is crucial to begin from the basic premise that, according to general international law and within an optimal world order, the territorial integrity of states is to be preserved and protected. Secessionist movements rarely improve real world situations and are to be prohibited in all but the most extreme of circumstances.[53]

Intervention and outside action by third states, especially by so-called "mother countries" (i.e. dominant states within the same "national community"), which tend to impair the integrity of states, are not compatible with basic principles of international law and sound principles of good-neighborliness.[54] As a general rule, solutions to minority problems have to be found within the framework of existing states. Legitimate claims by individuals and groups should normally be accommodated within the state constitutional system by creating adequate political arrangements, structures, and procedures.[55]

Thus, the starting point of the existing and of a model world order is that there is no generally recognized right of secession,[56] that state borders are not to be altered except with the consent of the parties concerned, and that weight should not be put on *external* self-determination. Instead, the focus must be on the creation and pragmatic development of flexible forms of *internal* self-determination[57] which give all social groups — majorities and minorities, ethnic and other groups — a fair chance for political autonomy and other forms of self-realization.[58]

Ethnonationalism in its expansionist form as well as outside intervention or

53. Tomuschat, 1-16.
54. Asbjorn Eide, "Ethno-Nationalism and Minority Protection: For Institutional Reforms," in *The Reform of International Institutions for the Protection of Human Rights* (Brussels: Bruylant, 1993), 130.
55. Tomuschat, 1-17; Ruth Lapidoth, "Some Reflections on Autonomy," in *Mélanges offerts à Paul Reuter*, (Paris: Pedone, 1981), 379, 389.
56. See Dietrich Murswiek, "The Issue of a Right of Secession — Reconsidered," in Tomuschat, 28 ff.
57. Rosas, "Internal Self-Determination," in Tomuschat, 225-52; Jean Salmon, "Internal Aspect of the Right to Self-Determination: towards a Democratic Legitimacy Principle?," in Tomuschat, 253-82.
58. Eide, "In Search of Constructive Alternatives to Secession," in Tomuschat, 139-76.

agitation by co-national countries (or from the territories of such countries) is not compatible with the principal aim of the international community: stability in international relations.

2. Within a sound constitutional regime, ethnic differences should be subordinated to common political values. State constitutions should be conceived as expressions of the political will and basic consensus of all citizens. They must not be allowed to degenerate into instruments designed merely to realize the political aims of dominant groups.

Ethnonationalism in its inclusive sense (forced assimilation), as well as its exclusive sense (arbitrary restrictions on citizenship, deportation, etc.), is incompatible with the basic ideals of citizenship and constitutionalism.

On the other hand, ideals of "civil society" — "Verfassungspatriotismus," in the sense of Jürgen Habermas, principles of "political justice," as elaborated by John Rawls,[59] "citizen-nationalism" as opposed to "ethnonationalism," in the sense of Asbjorn Eide,[60] or the concept of the "political nation," as it is incorporated into the Swiss constitutional system — are able to turn cultural and ethnic diversity into a rich political and cultural dialogue, and "weak" and open constitutions into a source of coherence and strength.[61]

3. State constitutions are to be based, above all, on human rights. These fundamental freedoms are at the center of "civil society" and delimit, on the one hand, a private, impermeable personal sphere; on the other hand, they also enable individuals to create, individually and jointly, a "public space" and to define and realize common values.

Constitutional protection of human rights can be supported by international guarantees and monitoring systems. Human rights are the most effective guarantee against inclusive and exclusive tendencies of fundamentalist ethnonationalism. They are best safeguarded, on the national as well as the international plane, by adequate, effective, and impartial judicial and quasi-judicial proceedings.

4. Rights of peoples and groups are effectively supported by a democratic system of government.[62] Democracy means, according to a widespread view, largely representative institutions based on fair and regular elections and a free choice between different political parties. For heterogenous and pluralistic societies, however, (proportional) representation and majority rule are not enough. In these cases alternatives are needed, as is convincingly argued by Lani Guinier, to "winner-takes-all majoritarianism"[63] or — as this system might be called — "Westminster-Type Democracies."

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59. John Rawls, *Political Liberalism,* (New York: Columbia University Press, 1993).
60. Eide, 101 ff.
61. Steiner.
62. Thomas M. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law 1992,* 46-89.
63. Lani Guinier, *The Tyranny of the Majority* (New York: Free Press, 1994), 5.

Mature modern democracies must take into account social pluralism and therefore seek a participatory,[64] consensual, and communal character. In such a system, majority rule is mitigated by the minority groups' right of access to public decision making, a coalition structure of government, over-representation of minorities within state institutions, veto powers to protect vital minority and other group interests, and a spirit of compromise. Absolute democracy may oppress minority groups in pluralistic societies. A non-monolithic conception of the people is a precondition for the enjoyment of fair opportunities by minority groups in this conception of government.

5. A "federal right" of minorities or a right to political autonomy is not to be found and would be hard to realize in international law or in state constitutional systems.[65] But federalism and decentralization of decision-making power to autonomous units certainly facilitate the possibility for people belonging to minorities to identify with state institutions, to adequately express their will, and to shape their way of life.[66] Autonomy regimes which may have a territorial or individual basis allow the people themselves to influence those matters which concern them most directly.

Of course, small governmental units may also have an oppressive character.[67] A federal system or a system of decentralized power works to the benefit of all groups when, in the overall system, different minority groups overlap. An illustration might be of a particular individual who belongs to a minority religious community, but also to a majority linguistic community. Or, an individual might belong to a local minority which forms the majority at the national level.

6. Even within an overall system of government described above, special protection, promotion, and assistance may be needed to help weak and threatened minority groups survive and assert their collective identity, thereby protecting the basic human dignity of persons belonging to these groups.

7. Finally, within an architectural structure such as that now being created in Europe,[68] tendencies of economic liberalization should avoid harming the legitimate interests of cultural and political communities. For instance, media regulations, personnel policies, provisions on subsidies, and rules concerning the labelling of products do not only have an economic character. They should also — when relevant — consider cultural perspectives.[69] A balance has to be found

64. See Thornberry, 117.
65. See Otto Kimminich, "A 'Federal' Right of Self-Determination," in Tomuschat, 83.
66. Eide, "Ethno-Nationalism and Minority Protection," 130.
67. See Peter Saladin, "Kleinstaaten mit Zukunft?" in *Kleinstaat und Menschenrechte, Festgabe für Gerard Batliner* (Basel: Helbing und Lichtenhahn, 1993), 133-56.
68. See Pierre Pescatore, "Eine neue europäische Architektur — ist darin ein Platz für die Schweiz?," in *Schweizerische Zeitschrift für internationales und europäisches Recht 1992*, 265 ff.; Daniel Thürer, "Elemente einer europäischen Architektur," in Kay Hailbronner (ed.), *Europa der Zukunft -Zentrale und dezentrale Lösungsansätze* (Trier: Bundesanzeiger, 1993), 65 ff.
69. See B. de Witte, "The European Community and its Minorities," in Brölmann, Lefeber, Zieck, 167 ff.

between the imperatives of a free, non-discriminatory, and competitive market on the one hand, and respect for cultural and linguistic group interests on the other.

* * *

In the preceding remarks, one may have observed three central points:

First, the emphasis is on those general principles, institutions, and procedures of liberal and democratic constitutionalism which indirectly provide, in the greatest number of cases, the most effective guarantee for minority protection. In cases of political, cultural, geographical, or economic isolation or majority domination, however, financial, institutional, or other measures might be necessary to protect minority groups and safeguard their rightful place in political and cultural life.

Second, one might have observed that the general constitutional and political system I have described exists not just in utopia, but has been fairly well realized in, for instance, Switzerland. By chance of history, this country was not shaped by nationalistic forces. In the Swiss constitutional and political system, a type of government has been realized which political scientists call a consociational form of government ("Konkordanzprinzip").[70] This type of peaceful cohabitation of linguistic and religious groups emerged in Switzerland over a long period of time, as a consequence of specific — maybe unique — political and historical forces. It therefore seems doubtful that the Swiss case can be put forward as a model capable of being exported to other countries.

Third, there is a strong link between the domestic legal order and the international legal order which, together, seem both to be part of a "one world" legal system. International law contains basic principles to limit the use of force and secure stability and a fair balance of interests in the world order. It should be noted that, whereas most of the existing nations have emerged from bloody wars, processes of modern nation-building, as a consequence of the collapse of the colonial and Soviet Empires have, to a large extent, been peacefully guided by principles of international law. Rule of law as it has developed on the international plane also serves to a growing extent as a basis and yardstick for legitimation of domestic law systems in terms of human rights, democracy, and "good governance." This international order objectively limits the concept of state sovereignty and interrelates the global and national aspects of legal order. The very fact that the discussion of minority rights is situated in an area where the municipal and international system intersect both complicates and enriches this dialogue.

70. See Linder, 31 ff.

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