

## Minority Rights: A Major Misconception?

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### ABSTRACT

This article explores the difficulties inherent in the conceptualization, legal definition, and use of the term “minorities,” framing these issues in the context of global efforts toward human rights realization. It argues that the critical concern is not majority or minority status as such, but rather the construction of dominant positions based upon collectively exclusive elements and the actual abuse of such positions. After delineating the limited role that law can and does play in the actual protection of non-dominant collectivities on the global and national planes, this article urges laying aside the term “minority” as both a label and a concept and reconceptualizing the mission in terms of collective human dignity protection, with this concept’s deep roots in the Universal Declaration of Human Rights (UDHR). This might well be linked to the urgently needed operationalization of the Responsibility to Protect (R2P).

*“Wrong does not cease to be wrong because the majority share in it.”*

*Leo Tolstoy*

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1. LEO TOLSTOY, *A CONFESSION AND OTHER RELIGIOUS WRITINGS* 65 (2010).

## I. PROLOGUE: MINORITIES AND MINARETS

On 29 November 2009 Switzerland accepted a people's initiative to amend Article 72 of its constitution (on Church and State) with a third section entitled *The construction of minarets is prohibited*. This decision resulted not only in ongoing debate within the country itself, but also an international outburst of indignation, not least in countries in which freedom of religion is categorically more problematic than in the pricey republic of the conjurers. The Islamic Republic of Iran, for example, summoned the Swiss ambassador to account for the Islam-inimical decision of his people. The dominant feeling within Europe was one of astonishment: this had happened in a country with an impressive political history of peaceful coexistence between people of different cultures and creeds; a state based upon a decentralized system of government; a constitution embodying fundamental rights, including both equality before the law and freedom of religion and conscience; and a fair record of international human rights compliance. Stunningly, all such observations had also been made in the debate in both houses of the national parliament in Bern, where the people's initiative had to be validated before it could be put to the popular vote. Meanwhile, appeals against the minarets ban have already been submitted to the European Court of Human Rights in Strasbourg.

This article is not primarily concerned about the socio-cultural background of the decision, its actual content, or its international status. Instead it discusses the change of the Swiss constitution, which is illustrative of the contemporary human rights problematique, not only from a substantive perspective, but also with regard to certain procedural aspects.

The minarets decision was taken with a turnout of 53 percent and a majority of 57.5 percent. Thus, the initiative passed even though less than one-third of the electorate had actually voted in its favor. The point is that, in the Swiss system of public-political decision-making, assurances against the popular whim are not sought in qualified majorities—such as the two-thirds majority in the second parliamentary reading of a proposal for constitutional change required in The Netherlands—but in the authority of the federal assembly to validate or invalidate an initiative that had secured the requisite number of more than 100,000 signatures.

When a people's initiative meets the formal requirements, the federal assembly has to discuss two proposals from its governing council: one on validation and one on endorsement. If the initiative is validated but not endorsed, it will be put to the popular vote with a recommendation from parliament to reject it. This is precisely what happened in the case of the minarets: both validation and the recommendation to reject the people's initiative were accepted with huge majorities.

Article 139, § 3 of the Swiss constitution sets out the grounds for invalidation:

If the initiative fails to comply with the requirements of consistency of form, and of subject matter, or if it infringes mandatory provisions of international law, the Federal Assembly shall declare it to be invalid in whole or in part.<sup>2</sup>

Because the proposed constitutional change had been formulated in clear and unequivocal wording, the discussion in the Federal Assembly naturally concentrated on its compatibility with mandatory provisions of international law (*ius cogens*). The obvious question posed by this course of events, albeit rarely discussed, is “how on earth could the *Bundesrat* (the Federal Council) recommend validation and the *Bundesversammlung* (Parliament) approve that?” This query is all the more striking if one considers the initiative’s multiple infringements of positive law, which the *Bundesrat* had already enumerated in its proposal to Parliament. Incompatibilities were noted with respect to Switzerland’s own constitution, particularly the equal treatment requirement and the nondiscrimination principle (Article 8), freedom of religion and conscience (Article 15), and the guarantee of ownership (Article 26). Furthermore, the initiative was considered to be in breach of Articles 9 (freedom of thought, conscience, and religion) and 14 (the nondiscrimination principle) of the European Convention on Human Rights. The UN Covenant on Civil and Political Rights was considered violated with respect to freedom of thought, conscience, and religion (Article 18) and the prohibition of governing with distinction to religion (Article 2).<sup>3</sup> Stuningly, the Swiss Federal Council did not regard any of these violations of international human rights norms as a contravention of *ius cogens*. What, then, is the meaning of that phrase? Remarkably, it has not been catalogued, let alone unequivocally determined. However, there is general agreement on prohibitions against aggressive war, crimes against humanity, war crimes, maritime piracy, genocide, apartheid, slavery, and torture. The way in which the Swiss government treated the matter is generally in line with states’ practice of interpreting the question of infringement of *ius cogens* according to their own authority.<sup>4</sup>

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2. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, art. 139, ¶ 3 (Switz.).
  3. See Message relatif à l’initiative populaire «contre la construction de minarets» [Message of the Federal Council on the People’s initiative “Against the Construction of Minarets”] Federal Council 08.061, 27 Aug. 2008, FF 6923 (2008), available at <http://www.admin.ch/ch/f/ff/2008/6923.pdf>. See also the deliberations on that proposal in the Federal Parliament, Gegen den Bau von Minaretten: Volksinitiative, Contre la construction de minarets: Initiative populaire [Against the Construction of Minarets: People’s Initiative], Federal Parliament 08.061, 5 June 2009, available at [http://www.parlament.ch/ab/frameset/f/s/4809/301878/f\\_s\\_4809\\_301878\\_301879.htm](http://www.parlament.ch/ab/frameset/f/s/4809/301878/f_s_4809_301878_301879.htm).
  4. Marcel Stüssi, *Banning of Minarets: Addressing the Validity of a Controversial Swiss Popular Initiative*, 3 RELIGION & HUM. RTS. 135 (2008). The author describes how “the decision to hold the proposed ban on minarets as valid is equally as legal as holding it invalid.” *Id.* at 144, based upon the conflicting *ius cogens* rights to freedom to practice one’s religion and the right to self-determination.

Perusing the parliamentary debate on the proposal, two observations struck this author. One is the reference to other states that had limited the construction of religious edifices. Indeed, it is not surprising that the issue of compliance with *ius cogens* is judged in respect of actual states' practice, which in quite a number of countries tends to be rather restrictive when it comes to Christian churches. Incidentally, as one of the delegates ironically remarked, the canton of Vaud, "reformed" until 2003,<sup>5</sup> repealed its prohibition of Catholic church towers only in 1930; strikingly, after eighty years of erecting Catholic towers, the majority of the inhabitants of its capital Lausanne are today Catholic. The other observation, which is even more remarkable from a contemporary perspective, is the delegates' overwhelming adherence to their citizens' "democratic right" to take majority decisions on their constitution by popular vote. As this freedom entails the responsibility to watch over the realization of that charter's fundamental rights, the Swiss government's action raises the question of minorities' protection in the context of majority rule, the subject of this article.

### III. DEMOCRACY AS MAJORITY RULE

Notably, democracy's way of handling conflicts of interests in a public-political community is not simply majority rule. To illustrate, let us take Abraham Lincoln's definition of democratic government as a starting point: a government of the people, by the people, (and) for the people.<sup>6</sup> Government of the people means not only self-determination but representative government; government by the people signifies participatory government; government for the people may be seen as accountable government. The three concepts are obviously interrelated, as they are all connected to principles in the formation, use, and limitation of political power. Thus, democracy implies that public-political power be representative, participatory, and accountable to both the majority and the minority if it is to be legitimate.

Even when confined to just the representative component of democratic government, majority rule entails three basic principles: (1) decisions rest on majorities, (2) dissenters acquiesce, and (3) majorities respect and protect minorities. As to the operation of the first principle, it is well known that when it comes to highly contested issues, simply counting heads without any preliminary process of consultation and persuasion is not conducive

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5. Through the new Constitution, the Reformed Church lost its established status to become a public institution on the same footing as other religious institutions.

6. President Abraham Lincoln, The Gettysburg Address (19 Nov. 1863).

to peaceful government. Indeed, in order to enhance a decision's popular acceptability, it seems essential to follow participatory procedures.

The second principle naturally presumes that the rules of the decision-making game have been followed, both in the formation and in the execution of political power. "When the majority has once spoken, it is the duty of the minority to submit," Tocqueville noted.<sup>7</sup> Minority compliance exemplifies the rule of non-violence, implying that opposition, protest, and resistance be confined to civil disobedience, though even that method of non-violent confrontation of government and the laws enacted by parliament tends to be politically destabilizing. In practice, the smooth acceptance of majority decision-making by dissenting minorities requires an adequately functioning rule of law, based on an accessible and independent judiciary within the context of limited government respecting and protecting people's fundamental interests by law.<sup>8</sup>

The third principle has been memorably explained in the European Court of Human Rights Grand Chamber judgment in the case of *Sørensen and Rasmussen v. Denmark*:

[D]emocracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and *avoids any abuse of dominant position*.<sup>9</sup>

Yet, this is perhaps the most problematic aspect of democracy in the world today as minorities still tend to be unprotected, precisely at a time when nations are becoming increasingly heterogeneous. Notably, peaceful settlements of disputes arising from conflicting interests flow from this third principle and require not only participation in decision-making by all concerned, but also a well-functioning rule of law to protect minorities' interests and to gain their acquiescence in decisions taken by the majority.<sup>10</sup>

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7. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 411 (Phillips Bradley ed., Francis Bowen trans. 1945).
  8. *Id.* at 427. It is in this respect that Tocqueville warned against a tyranny of the majority: "I do not say that there is a frequent use of tyranny in America at the present day; but I maintain that there is no sure barrier against it, and that the causes which mitigate the government there are to be found in the circumstances and the manners of the country, more than in its laws." *Id.* at 272.
  9. Case of *Sørensen v. Denmark and Rasmussen v. Denmark*, App. Nos. 52562/99 and 52620/99, 46 Eur. H.R. Rep. 29, ¶ 58 (2008) (emphasis added).
  10. The author sees this as part of the huge "human rights deficit" that still abounds after more than sixty years of the international venture for the realization of human rights. Bas de Gaay Fortman, *Human Rights*, in *THE ELGAR COMPANION TO DEVELOPMENT STUDIES* (David Clark ed., 2006); Mohamed A. Salih, *Minorities and the Political in the Human Rights Deficit*, in *RESPONDING TO THE HUMAN RIGHTS DEFICIT: ESSAYS IN HONOUR OF BAS DE GAAY FORTMAN* 105 (Karin Arts & Paschal Mihyo eds., 2003).

### III. MINORITY RIGHTS: FOR WHAT PURPOSE?

The Swiss people's initiative and the religious issue of constructing a minaret as a culturally specific type of tower connected to an already existing edifice of worship are trivial when compared to the collective discrimination that such a constitutional prohibition directed towards Muslims entails. Strikingly, this decision was made in a country with only four existing minarets where the great majority of Muslims were secular refugees from the former Yugoslavia. In conflict studies—a research area that human rights studies should more readily embrace—it is common knowledge that state policies, measures, and actions negatively directed at specific groups whose public-political position is already problematic, tend to induce political violence. Remarkably, however, criticism of the Swiss people's initiative ignored any reference to minorities' protection.<sup>11</sup>

Incidentally, reference is made to minorities in Switzerland's constitution in Article 70, § 2 in the context of languages (qualified by the adjective "indigenous") and in Articles 109 and 110 in respect to tenancy matters and employment policies (which have to take appropriate account of "the justified interests of minorities").<sup>12</sup> Notably, these clauses stipulate respecting equality before the law as the overriding principle. The fundamental prohibition of discrimination, in other words, remains the primary concern.

In the European setting, a Charter for Regional or Minority Languages (ECRML) was adopted in 1992 under the auspices of the Council of Europe for "the protection of the historical *regional* and *minority languages*" in *Europe*.<sup>13</sup> As a regional security body, the Organization for Security and Cooperation in Europe seeks to identify ethnic tensions and to set standards for the rights of persons belonging to minority groups.<sup>14</sup> In 1998 a European Framework Convention for the Protection of National Minorities entered into force. Article 1 declares that "[t]he protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such

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11. An exception is Adrian Vatter of Bern University. See *Swissinfo.ch, Voters Used Minaret Ban to Halt Spread of Islam*, 26 Jan. 2010, available at [http://www.swissinfo.ch/eng/Specials/Islam\\_and\\_Switzerland/News\\_and\\_views/Voters\\_used\\_minaret\\_ban\\_to\\_halt\\_spread\\_of\\_Islam.html?cid=8167038](http://www.swissinfo.ch/eng/Specials/Islam_and_Switzerland/News_and_views/Voters_used_minaret_ban_to_halt_spread_of_Islam.html?cid=8167038).

12. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution] 18 Apr. 1999, SR 101, RO 101, arts. 70 ¶ 2, 109, 110.

13. European Charter for Regional or Minority Languages, *opened for signature* 5 Nov. 1992, Council of Europe, Europ. T.S. No. 148 (*entered into force* 1 Mar. 1998) [hereinafter ECRML].

14. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, FACT SHEET, 3 available at <http://www.osce.org/secretariat/35775>.

falls within the scope of international co-operation.”<sup>15</sup> The articles that follow also refer to “persons belonging to national minorities.”<sup>16</sup> In actual legal and political practice concerning minorities’ protection, however, this Convention plays no substantial part.<sup>17</sup>

At the global plane, a Sub-Commission of the Commission on Human Rights—known as the Human Rights Council since 2007—had been set up for the Prevention of Discrimination and the Protection of Minorities.<sup>18</sup> There has been consensus from the beginning that the Sub-Commission had “singularly failed to make any contribution towards the protection of minorities,” for more reasons than just its low place in the UN hierarchy.<sup>19</sup> In 1992 the United Nations adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. This document stipulates:

Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.<sup>20</sup>

Given this wording of the declaration, the question whether a minaret is a matter of culture or religion is irrelevant. As a declaration adopted by the UN General Assembly it is, however, not regarded as internationally binding, let alone *ius cogens*.

Since 2005 the UN has also utilized an “Independent Expert on Minority Issues” as a Charter-based institution. Her role appears to lie in regularly issuing statements of a rather general nature.<sup>21</sup>

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15. Framework Convention for the Protection of National Minorities, *opened for signature* 1 Feb. 1995, Council of Europe Parliamentary Assembly, arts. 1 & 2, 2152 U.N.T.S. 243, Europ. T.S. 157 (*entered into force* 1 Feb. 1998).

16. *Id.* arts. 3–5, 9–10, 12, 14–17.

17. See Matthew Draper, *Concluding Provisions*, in *THE RIGHTS OF MINORITIES: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES* art. 27–32 (Marc Weller ed., 2005).

18. U.N. Documentation: Research Guide, Human Rights, *available at* <http://www.un.org/depts/dhl/resguide/spechr.htm#subcom>.

19. John P. Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AM. J. INT’L L. 869 (1968). The evident toothlessness of efforts to protect minorities at the international level is not a recent development. The League system itself, involving bilateral treaties that were essentially unenforceable, and which was abused by Nazi Germany, was one reason for the lowly status given this Sub-Commission. *Id.* at 870. (Since 1999 the Sub Commission is known as Sub-Commission on the Promotion and Protection of Human Rights).

20. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *adopted* 18 Dec. 1992, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Annex, art. 2, ¶ 1, U.N. Doc. A/RES/47/135/ (1993).

21. Press Release, UNHR: Office of the High Commissioner for Human Rights, Early Attention to Minority Rights a Key Tool for Stability and Conflict Prevention, States UN Expert (20 Oct. 2010), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10472&LangID=E>.

As to treaty law, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.<sup>22</sup>

In its General Comment No. 23 the Human Rights Committee observed that this Article establishes and recognizes a right which is conferred on individuals belonging to minority groups.<sup>23</sup> Yet the Committee's jurisprudence has shown that, in practice, Article 27 can be used to address some of the problems affecting indigenous collectivities, namely those related to internal aspects of self-determination.<sup>24</sup> In this connection, the minorities' right to "enjoy their own culture" includes "a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law."<sup>25</sup> The Committee's jurisprudence on Article 27 has also confirmed that economic activities may come within its scope if they are an essential element of a minority community's way of life.<sup>26</sup> There is, however, no international enforcement in human rights treaty law. This remains dependent on the success of efforts within national jurisdictions.<sup>27</sup>

In situations of intrastate collective violence wherein the state has shown itself consistently unable to protect a minority, which constitutes a majority in a specific area within the national territory, some scholars speak of "an

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22. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 27, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976). It might be observed in passing that even where treaty-law is "binding" states have often declared reservations that make the language of the treaty essentially ineffective in that state. For instance, Turkey has insisted on a strict definition of "minority" as encompassing only "non-Muslims," a definition dating from the Treaty of Lausanne under the League system. Such reservations make legal enforcement of treaties empty. See Baskin Oran, *The Minority Concept and Rights in Turkey: The Lausanne Peace Treaty and Current Issues*, in HUMAN RIGHTS IN TURKEY 35 (Zehra F. Kabasakal Arat ed., 2007).
  23. *General Comment Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, 26 Apr. 1994, U.N. GAOR, Hum. Rts. Comm., 50th Sess., 1314th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994).
  24. See Anna Batalla, *The Right to Self-Determination—ICCPR and the Jurisprudence of the Human Rights Committee*, Symposium on "The Right to Self-Determination in International Law," 29 Sept.–1 Oct. 2006, The Hague, Netherlands, available at <http://www.unpo.org/downloads/AnnaBatalla.pdf>.
  25. *General Comment Under Article 40*, *supra* note 23, ¶ 7.
  26. Batalla, *supra* note 24.
  27. "[T]he human rights system was designed from the start not to be enforced except through political means at the behest of powerful states." See ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE, at 322 (2007).

emerging right to autonomy within international law."<sup>28</sup> Whether regarded as *lex ferenda* [future law] or not, such a "right" is still far from being *lex lata* [current law].

To draw on the terminology of the European Court of Human Rights, international minorities law appears too weak to play any effective part in the actual protection of people suffering from abuse by others in dominant positions.<sup>29</sup> The question presents itself: should efforts to protect minorities focus on properly defining and strengthening "minority rights," which seems to be the major trend in modern human rights law, or should they be directed towards a search for alternative approaches.

#### IV. THE MINORITY PROBLEMATIQUE IN A POLITICAL ECONOMY PERSPECTIVE

There is nothing normative in the notion of a minority; it is just a residual category in respect to the idea of majority rule. Nevertheless, as Tocqueville pronounced in his seminal work, "[t]he moral authority of the majority is partly based upon the notion that there is more intelligence and wisdom in a number of men united than in a single individual, and that the number of the legislators is more important than their quality."<sup>30</sup> True as this may be, majorities are fortunately not primordial categories. Hence, the starting point in this article's analysis must be majority construction as something beyond simply assembling and counting votes. Indeed, if majorities were merely incidental outcomes of political debate, majority rule would not be problematic in its consequences for dissenters, as the latter might be as "floating" in taking sides as those consenting in the issue at stake. However, this is not the case. Institutional attempts at majority construction, such as the formation of political parties, are natural and electoral systems merit particular attention here with regard to their exclusionary consequences. Strikingly, in the Westminster constituency system, the excluded (minority) parties joined together may well constitute a majority.<sup>31</sup> In the United

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28. Emma Sydenham, *The Governance Factor in Respect of Collectivities in Intra-state Collective Violence, an Emerging Right to Autonomy in International Law*, (2004) (unpublished LL.M. thesis, Utrecht School of Law) (on file with author).

29. *Case of Sørensen*, *supra* note 9.

30. DE TOCQUEVILLE, *supra* note 7, at 255 defends majority rule on the grounds that it maximizes self-determination, it is more reasonable than any other way of public decision-making, it is one way to check whether an assertion is true, and it maximizes utility. Salih, *supra* note 10, at 117 rightly observes that in respect of minority groups with no influence on the polity of the dominant "nation," the relevance of these considerations is questionable.

31. This is rather obvious as "first passed the post" requires that the winning candidate has gotten more votes than each of the others, and not of all the other candidates together.

Kingdom, for example, a majority of the popular vote seldom brings a party into power, while often the party with the most seats garners support from not much more than one third of the population.<sup>32</sup> In reality, then, it is the rules of the game that count more than “the will of the people.”<sup>33</sup>

Thus, first-past-the-post may well lead to permanent or at least long-term exclusion from power, even for groups with firm roots in society. The practice of power-sharing becomes particularly crucial in this respect. Although it is a concern usually falling beyond the scope of human rights, attaining ample participation in government for national collectivities often acts as a prerequisite for political stability and peace.<sup>34</sup> The way in which Nelson Mandela managed to secure Inkhata participation in the first South African post-apartheid government of 1994 provides a striking illustration.<sup>35</sup> On the other hand, the constituency system in certain Commonwealth countries has led not only to continuous government by the same political party<sup>36</sup> but sometimes even to one-party parliaments.<sup>37</sup> Evidently, in non-homogeneous nation-states this is likely to result in a structural minority problematique. Hence, it is not without reason that heterogeneous Switzerland uses a model of political power formation that guarantees a fair amount of power-sharing among the parties representing the citizens’ interests at all distinct levels

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32. At the 2005 UK general election, the Labour Party gained a majority of 355 seats out of a total of 645 with only 35.2 % of the popular vote. See THE ELECTORAL COMMISSION, ELECTION 2005: CONSTITUENCIES, CANDIDATES AND RESULTS, at 8 (2006), available at [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0007/47185/Election2005\\_constituencies,candidatesandresultsFINAL\\_20719-15241\\_\\_E\\_\\_N\\_\\_S\\_\\_W\\_\\_.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/47185/Election2005_constituencies,candidatesandresultsFINAL_20719-15241__E__N__S__W__.pdf).
  33. It is also worth mentioning that political consensus is the result of multiple negotiations and cost-benefit analyses, and does not necessarily, much less reliably, represent the *authentic* position(s) of the parties that form the numerical majority of votes. Not that all votes and positions are bought and sold, but they are not all represented by the “consensus of the majority” either.
  34. Political participation does have its costs, especially as it tends to require some degree of assimilation, which is precisely what non-dominant collectivities are often resisting. Reetta Toivanen, *Contextualizing Struggles Over Culture and Equality: An Anthropological Perspective*, in *RETHINKING NON-DISCRIMINATION AND MINORITY RIGHTS* 179, 197 (Martin Scheinin & Reetta Toivanen eds., 2004).
  35. See Marisa Traniello, *Power-sharing: Lessons from South-Africa and Rwanda*, 3 INT’L PUB. POL’Y REV. 28 (2008).
  36. In Botswana, for example, the Botswana Democratic Party has reigned with huge majorities since independence. That these are based on free and fair elections is not in doubt. See Electoral Institute for the Sustainability of Democracy in Africa (EISA), Botswana: Election archive, available at <http://www.eisa.org.za/WEP/botelectarchive.htm>.
  37. This has happened in St. Vincent and the Grenadines and in Lesotho, for example. See U.S. Dept. of State, Background Note: Saint Vincent and the Grenadines, 14 July 2010, available at [www.state.gov/r/pa/ei/bgn/2345.htm](http://www.state.gov/r/pa/ei/bgn/2345.htm); ELECTORAL INSTITUTE FOR THE SUSTAINABILITY OF DEMOCRACY IN AFRICA, EISA ELECTION OBSERVER MISSION REPORT: LESOTHO NATIONAL ASSEMBLY ELECTIONS 17 FEB. 2007 2 (2008), available at <http://www.eisa.org.za/PDF/lesothoomr07.pdf>.

of government.<sup>38</sup> Ignoring the concerns behind power-sharing may have disastrous consequences, particularly in a post-conflict peace-building stage.

The socio-cultural basis of political party formation is a second aspect of majority construction that may be tricky in its effects on exclusion. This applies particularly to racial, ethnic, tribal, religious, or other types of party formation based on an exclusive collective identity, whether formally or informally organized. Particularly in such settings, power-sharing tends to become imperative. Indeed, the Northern Irish exclusion of Catholics from power (for whatever reasons) has been highly conducive to civil strife. Even when religious and/or ethnic majorities rotate—as in some island states of the Caribbean<sup>39</sup>—majority rule based on collective identity construction may affect entitlement positions of persons belonging to the minority temporarily out of power.

In addition to the political conditions necessary for democracy's capacity to establish legitimate government, there are also economic prerequisites of majority rule. In his exposition on *The Economic Prerequisite to Democracy*, Dan Usher's concern is with the distributive effects of democracy as a system of government. His book "is a study of how society protects democratic government by entrusting the economy with the task that the legislature can never perform—the task of assigning the major part of income and other advantages."<sup>40</sup> His worry is "conflict over assignment" in societies governed on the basis of majority rule. "For democracy to survive," Usher states, "there must be a prior agreement among citizens on a set of rules for assignment that voters and legislators will not lightly overturn." He refers to this as a system of equity, defined as "a set of rules for assigning income and other advantages independently of and prior to political decisions arrived at in the legislature."<sup>41</sup> It would be preferable to refer here to the protection of people's entitlement positions regardless of their political preferences and affiliations. A particular challenge in this connection is to prevent poverty and unemployment from affecting the same people all of the time.

Based on the three points made above—that majorities are not primordial but constructed, that they do not necessarily represent an actual majority position, and that they are subject to multiple forms of manipulation and political pressure—majority-minority relationships are not the key problema-

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38. For an explanation of the system see, for example, Swissinfo.ch, *Swiss Cabinet Model Remains Set in Stone*, 30 May 2007, available at [http://www.swissinfo.ch/eng/Specials/Elections/Background/Swiss\\_cabinet\\_model\\_remains\\_set\\_in\\_stone.html?cid=7742](http://www.swissinfo.ch/eng/Specials/Elections/Background/Swiss_cabinet_model_remains_set_in_stone.html?cid=7742).

39. Trinidad and Tobago, for example, and Guyana. See FREEDOM HOUSE, *FREEDOM IN THE WORLD: TRINIDAD AND TOBAGO* (2010); FREEDOM HOUSE, *FREEDOM IN THE WORLD: GUYANA* (2010), both available at <http://www.freedomhouse.org>.

40. DAN USHER, *THE ECONOMIC PREREQUISITE TO DEMOCRACY*, at ix (1981).

41. *Id.* at viii–ix.

tique in the formation and execution of political power. The real issue is the construction of dominant positions based on collectively exclusive elements and the actual abuse of such positions. In South Africa, for example, the apartheid regime was based on minority rule.<sup>42</sup> Political support for the Afrikaner regime by a majority of all voters would not have legitimized the creation and abuse of that white dominant position.<sup>43</sup> Another example is Guatemala, where it is still the indigenous majority that suffers from discriminatory exploitation.<sup>44</sup> Obviously, then, numerical inferiority is not an adequate criterion for establishing what constitutes a minority in a legally normative sense. As Mohamed Salih has put it:

The case of dominant minorities makes us realize that minorities are not the passive recipients of majority oppression, nor incapable of oppressing others. To that extent, minorities are social entities, a construction of a social reality and their position in the polity of the nation-state. Nevertheless, on the whole, history has so far shown that there are more oppressed than oppressive minorities in the world.<sup>45</sup>

Strikingly, there is no internationally enacted definition of the term minority. Francesco Capotorti, United Nations Special Rapporteur, in the context of Article 27 of the International Covenant on Civil and Political Rights on the Rights of Persons Belonging to Ethnic, Religious or Linguistic Minorities, proposed the following text:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>46</sup>

“A group numerically inferior to the rest of the population of a State” is not only arithmetic nonsense, but also neglects the primary background of

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42. In 1994, upon the abolition of apartheid, white South Africans comprised 13.6% of the total population. See WorldLingo, Whites in South Africa, available at [http://www.worldlingo.com/ma/enwiki/en/Whites\\_in\\_South\\_Africa](http://www.worldlingo.com/ma/enwiki/en/Whites_in_South_Africa).

43. The illegitimacy of the Afrikaner apartheid regime was based primarily upon a structural violation of the non-discrimination principle, rather than just on the lack of “one person one vote” legislation.

44. Persons descended from the Mayan Indians account for 56 percent of the nation’s total population, making Guatemala the Latin American nation with the largest indigenous population relative to total population. See Encyclopedia of the Nations, Guatemala, available at <http://www.nationsencyclopedia.com/economies/Americas/Guatemala.html>.

45. Salih, *supra* note 10, at 109.

46. *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities, Francesco Capotorti*, U.N. ESCOR, Comm’n on Hum. Rts., 96, U.N. Doc. E/CN.4/SUB.2/384/REV.1 (1979).

the minority problematique: abuse of dominant positions that are based on exclusive collective identities.

This author's experience at an intercultural conference in Brunei may help to clarify some aspects of this difficult problem:

Last year, while still struggling with the minority problematique, my own eyes were opened when at a conference in Brunei—an Islamic Sultanate with an ethnic Malay dominance—no single participant reacted in the affirmative on my question if there were “persons belonging to a minority” present. I then continued with a follow-up enquiry: “Are there Chinese among us?” Many, it appeared. “Christians?” Many, again. So the question posed itself: Why do people corresponding to Capotorti's definition decline to identify as such?

The answer was equally clear: Why identify as a minority person if there is nothing to gain from such self-identification and a lot to lose in terms of daily security?<sup>47</sup> Indeed, the Chinese in Brunei, or the Christians for that matter—to a large extent overlapping categories—wish for security above all else. This happens to be attainable by these groups only through complete identification as citizens of the land. In other words, these collectivities desired citizenship above minority rights.<sup>48</sup> Naturally, the Chinese citizens of this Malay-dominated state cherish their distinct language. Obviously, Christians desire freedom of worship in the Islamic sultanate, but while they do want to preserve “their culture, traditions, religion [and] language,”<sup>49</sup> their desire is first and foremost for human security in the sense of freedom from fear, which is best attained through indisputable integration in the nation-state.

It is true that Brunei is not a democracy, but neither is it a ruthless tyranny.<sup>50</sup> Constitutionally, as well as socio-culturally, ethnic Chinese and religious Christians are accepted and protected.<sup>51</sup> Similar results have obtained during dialogues with classes composed of students from diverse national and cultural backgrounds at Utrecht University. When the students are asked

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47. Reetta Toivanen has found similarly surprising results among minority groups in Germany. Reetta Toivanen, *Contextualizing Struggles Over Culture and Equality: An Anthropological Perspective*, in *RETHINKING NON-DISCRIMINATION AND MINORITY RIGHTS* 179 (Martin Scheinin & Reetta Toivanen eds., 2004).

48. For an examination of the advantages of citizenship rights, see PAULINA TAMBAKAKI, *HUMAN RIGHTS, OR CITIZENSHIP?* (2010).

49. *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, *supra* note 46.

50. CIA, *The World Factbook*, Brunei, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/bx.html>.

51. Article 3 (1) of the Constitution provides that “The religion of Brunei Darussalam shall be the Muslim religion of the Shafite sect of that religion. Provided that all other religions may be practiced in peace and harmony by the persons professing them in any part of Brunei Darussalam.” See *Laws Of Brunei*, Revised ed. 1984, available at <http://www.worldstatesmen.org/Brunei1984.PDF>. There are 17 languages officially listed for the state of Brunei Darussalam. *Id.*

whether any of them belongs to a minority, experience has shown that a positive answer is given only by refugees and by those whose collectivity had already organized itself as a political power (e.g. Roman Catholics in Northern Ireland).

A second flaw in Capotorti's definition lies in the phrase "whose members . . . possess ethnic, religious or linguistic characteristics differing from those of the rest of the population."<sup>52</sup> The verb "to possess" creates the impression that there is a kind of primordial distinctiveness about minorities and ignores their construction through identity-based majority formation. Incidentally, in Article 2 of the UN Convention on the Prevention and Punishment of the Crime of Genocide, a similar disregard of anthropological wisdom emerges, as it defines genocide as meaning certain specific "acts committed with intent to destroy, in whole or in part, a *national, ethnical, racial or religious group, as such*."<sup>53</sup> This way of putting things creates the impression that such entities exist regardless of their construction and definition either by themselves or by people in dominant positions.<sup>54</sup>

In the final part of Capotorti's definition, the element of self-identification does receive emphasis, as it stipulates that people manifest "a sense of solidarity, directed towards preserving their culture, traditions, religion or language."<sup>55</sup> But here, already declared human rights, such as freedom of religion and cultural rights might suffice. It is true that in practice the latter category has been treated in a step-motherly fashion, but that should be no reason to refrain from further operationalization of these already established rights.

Quite evidently, minorities are far from fixed objective categories and their identification is subject to extensive politicization, but neither is the minority issue a mere chimera in the sense of an issue that could just be ignored. It remains a reality determined by abuse of entrenched dominant positions, resulting in disqualification and discrimination of collectivities regarded as different and, in a sense, inferior. In the public-political community, deeply rooted patterns of socialization of people in terms of majoritarian superiority

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52. *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, *supra* note 46.

53. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* 9 Dec. 1948, G.A. Res. 260 (III), U.N. GAOR, 3d Sess., art. 2, U.N. Doc. A/RES/3/260 (1948), 78 U.N.T.S. 277 (*entered into force* 12 Jan. 1951) (*entered into force for U.S.* 23 Feb. 1989).

54. For an examination of minority construction in Darfur, see Michela Costa, *Towards an Open Definition of Genocide: An Inquiry into the Construction of "Ethnic" Conflict in Darfur* (2008) (thesis written for the European Master's Degree in Human Rights and Democratisation, Utrecht University) (on file with author).

55. *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, *supra* note 46.

and minoritarian inferiority are not likely to be eliminated by one stroke of the pen, nor even by enacting rights in countries lacking a strong juridical culture. Notably, in the social as well as the legal sciences, it is not wise to begin working from existing scholarly models and conceptualizations. The challenge is to study how people behave in the real world. Hence we have to start from reality on the ground and then attempt to connect the findings to human rights—upstream analysis, in other words—rather than the downstream approach starting from the legal texts, which so often prevails in academic human rights research.

## V. THE IRONY OF COLLECTIVE EQUITY

In the real world the minority problematique appears to be part of the general setting of “us-them” divides, manifesting itself in three distinct ways: collective prejudice against people associated with certain constructed categories, discrimination against members of such “groups” (not rarely culminating in the most serious of crimes), and systemic inequalities.

Evidently, legal systems do not provide an effective instrument to deal with collective prejudice. The challenge here lies in human rights education, a huge effort tuned to majority acceptance of differences, and the creation of an environment in which minorities can feel recognition as well as inclusion. As concluded from a survey in Finland, (a country in which the foremost issue is language):

The best laws are useless if the acceptance of the majority is prerequisite to the laws’ successful implementation. In this sense, human rights education would be a valuable tool for the fostering of an environment of acceptance. Human Rights Education is vital to spreading of information about minorities and their special needs, including teaching the importance of recognizing differences to change practical living conditions, even though the protection given by law seems to be perfect.<sup>56</sup>

In regard to individual rights of persons belonging to a minority, education’s utility lies primarily in the struggle for equal treatment. In a society with a strong juridical culture such as the United States, law played an obvious part in getting rid of much systemic discrimination.<sup>57</sup> However, it must be acknowledged that such laws were the result of long and contentious politi-

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56. Claudia Mahler, *Is Human Rights Education a Means of Supporting Minorities?*, in *THE UNITED NATIONS DECADE FOR HUMAN RIGHTS EDUCATION AND THE INCLUSION OF NATIONAL MINORITIES* 187, 201 (Claudia Mahler, Anja Mihr, & Reetta Toivanen eds. 2009).

57. The U.S. Equal Opportunity Commission is charged with enforcement of a considerable part of these federal laws. See U.S. Equal Employment Opportunity Commission, *Laws & Guidance*, available at <http://eeoc.gov/laws/index.cfm>.

cal struggles that are not over, even in a country that at least domestically and for its own citizens, has a long history of struggling to realize the rule of law. On the other hand, when the laws are not observed, national legal systems can deal with disputes only if cases come from recognized legal personalities, or, in practice, individuals. In regard to such individual cases of discrimination, domestic law may provide certain remedies, though these remedies are inherently unsatisfactory because they tend to be only partial and reactive in response to discrimination that is systemic and pervasive. This is to say nothing of countries where the juridical culture is deficient.

In the international setting direct remedies are lacking. Thus, with all due respect to the Committee on the Elimination of Racial Discrimination (CERD), which receives occasional individual complaints and scrutinizes state reports while making useful comments and policy recommendations,<sup>58</sup> the lack of effective mechanisms for direct enforcement tends to reduce its role to merely reporting on the effectiveness of national institutions.<sup>59</sup> Nevertheless, where national instruments are completely lacking because specific forms of discrimination have not been established as human rights violations—such as castes and discrimination against certain unrecognized minorities—international human rights may still play its part in bringing issues to the fore and in mobilizing shame.

It should be clear from the prior discussion that what law has to offer regarding efforts to rectify systemic inequities is inherently limited. This complicated problematique is a matter of policies in the first place, as this author has discussed in an earlier work.<sup>60</sup> With that in mind, this article will now focus on the minority issue in its contextual connection with intrastate collective violence, starting with an attempt to draw lessons from a frightful episode in European history: collective oppression, persecution, and resistance in France in the epoch between the rise of Protestantism and the French Revolution.<sup>61</sup>

This period of religious strife began with the Reformation, which questioned the public-political monopoly of the Roman Catholic Church in Western Europe.<sup>62</sup> In France, as in other countries, that church had been

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58. See, for example, *Comments by the Government of Turkey, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Reports Submitted by States Parties Under Article 9 of the Convention*, U.N. CERD, 30 Mar. 2009, U.N. Doc. CERD/C/TUR/CO/3/Add.1.

59. See NORMAND & ZAIDI, *supra* note 27.

60. See Bas de Gaay Fortman, *Racism and Poverty in a Human Rights Perspective*, in EUROPE'S NEW RACISM: CAUSES, MANIFESTATIONS, AND SOLUTIONS 71 (Evens Foundation ed., 2002).

61. For a detailed history of the Huguenots in France see the magnum opus of PIERRE LOUIS VAN ENK, *FRANCE AND THE HUGUENOTS* (2002).

62. The Protestant reformation began in Germany when, on 31 October 1517, Martin Luther tacked his ninety-five theses at the Church door in Wittenberg, Saxony. See Lorri Brown, *Martin Luther and the Reformation*, 29 Mar. 2007, available at <http://www.suite101.com/content/martin-luther-and-the-reformation-a17603>.

established as the sole institutionalization of Christianity.<sup>63</sup> The suppression of those who adhered to the reformed faith, the so-called Huguenots, amounted to what would now be called crimes against humanity as well as acts of genocide.<sup>64</sup> As the protestant resistance had organized militarily, the almost three hundred years of intrastate collective violence included religious wars and war crimes on both sides.<sup>65</sup>

While always a minority in the entire kingdom of France, the Huguenots were geographically concentrated in an area south of the Loire and especially in the crescent stretching from La Rochelle through the southern provinces of Guyenne, Languedoc, and Dauphiné to Geneva.<sup>66</sup> In the cities under their control, it was the Roman Catholics who had to suffer from collective discrimination and humiliation. The Edict of Nantes (1598) brought a short period of relative peace based upon a certain degree of power-sharing that allowed the French Protestants to garrison some 200 towns.<sup>67</sup> Huguenots acquired access to royal offices, legal redress before special royal courts (known as *chambres de l'édit*), and the right to establish their own academies.<sup>68</sup> Royal letters (*breve*s) accompanying the Edict granted subsidies for their troops, pastors, and schools.<sup>69</sup> In most of France, however, Protestants were granted only limited rights of worship.<sup>70</sup> Thus, rather than extracting religion from state power, the Edict launched a kind of religious cleansing of the kind still found today in a city like Belfast.<sup>71</sup>

63. *The Monopoly of the Holy Roman Catholic Church*, ARTICLESBASE, 31 Aug. 2010, available at <http://www.articlesbase.com/history-articles/the-monopoly-of-the-holy-roman-catholic-church-3172395.html>.

64. In Article II the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 defines "genocide" as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

See William A. Schabas, *Convention for the Prevention and Punishment of the Crime of Genocide*, U.N. AUDIOVISUAL LIBR. OF INT'L L. (2008).

65. See VAN ENK, *supra* note 61.

66. PHILIP BENEDICT, *THE HUGUENOT POPULATION OF FRANCE, 1600–1685: THE DEMOGRAPHIC FATE AND CUSTOMS OF A RELIGIOUS MINORITY* (TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY) (1991).

67. See *The History Guide: Lectures on Early Modern European History, The Edict of Nantes (1598)*, available at <http://www.historyguide.org/earlymod/nantes.html>.

68. See DIANE C. MARGOLF, *RELIGION AND ROYAL JUSTICE IN EARLY MODERN FRANCE: THE PARIS CHAMBRE DE L'ÉDIT, 1598–1665* (SIXTEENTH CENTURY ESSAYS & STUDIES) (2003).

69. A *brevet royal* was a royal letter granting a certain privilege.

70. For further details see VAN ENK, *supra* note 61.

71. For a map depicting religious segregation in Belfast see *City of Belfast and Maps, Religious Segregation*, available at <http://www.wesleyjohnston.com/users/ireland/geography/belfast.html>.

Collective minority recognition is the inevitable consequence of majority entrenchment through public-political establishment. Yet a major lesson from French history, which has yet to be learned, is that its side-product may well be a worsening of the divide. Political organization and international recognition of minorities may well stand at the roots of new processes towards construction of dominant positions that might be abused. For instance, after the war of 1998 the Albanians in Kosovo lost no time in transforming themselves from an abused minority into an abusive majority.<sup>72</sup> It is acknowledged that collective human 'cleansing,' that repulsive phenomenon of the twentieth century, is definitely not the answer to the 'minority' problematique. Nevertheless, in this connection an "irony of collective equity"<sup>73</sup> can be empirically detected: with each supposedly equitable solution to one minority problematique, new majority-minority divides manifest themselves resulting in new iniquities. The former Yugoslavia provides a striking illustration of this tendency. As to the insoluble puzzles to which intolerance in a heterogeneous nation-state may lead, Belgium represents an off-putting illustration.

Notably, in the negotiations leading to the pacification of the Nantes Edict, the Huguenots had formulated three major demands:

1. Guaranteed freedom of worship for the Protestant (Reformed) religion in the whole Kingdom of France without any restriction as to time and place;
2. Guaranteed equal access to office, whatsoever; and
3. Guaranteed security for all citizens of the reformed faith.<sup>74</sup>

The failure to grant these guarantees had forced the Huguenots to further organize as a strong minority, dependent on auto-protection. This resulted in collective political and military organization.<sup>75</sup> Where they were in control, they adopted policies of discrimination against the Catholics in their turn.<sup>76</sup> Under Louis XIV, the Huguenots were crushed.<sup>77</sup> The Edict of Nantes, although registered by the legislatures in 1598 as fundamental and irrevocable law, was revoked in 1685.<sup>78</sup> Protestantism was declared illegal. As a result the following century until the French Revolution was a time of unrestrained

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72. See HUMAN RIGHTS WATCH, *WORLD REPORT 2011: SERBIA*, available at <http://www.hrw.org/en/world-report-2011/serbia>.

73. In the context of public administration, the term "irony of equity" was introduced by Bernard Schaffer and Geoff Lamb in BERNARD SCHAFER & GEOFF LAMB, *CAN EQUITY BE ORGANIZED? EQUITY, DEVELOPMENT ANALYSIS AND PLANNING* (1981).

74. VAN ENK, *supra* note 61, at 334.

75. *Id.* at 341.

76. *Id.* at 359.

77. *Id.* at chps. 11–12.

78. See The History Guide: Lectures on Early Modern European History, The Revocation of the Edict of Nantes, October 22, 1685, available at [http://www.historyguide.org/earlymod/revo\\_nantes.html](http://www.historyguide.org/earlymod/revo_nantes.html).

anti-Protestant tyranny, persecution, and oppression. Hundreds of thousands of Huguenots fled hearth and home.<sup>79</sup>

It is instructive here to pay heed to the second Huguenot request, which amounts to equal economic opportunities. The lack of perspective resulting from politico-economic exclusion has proven to be a major factor contributing to intrastate violence—both then and in the present. The following observation from Adam Smith's *Wealth of Nations*, published in 1776, might still be taken as a starting point here:

[C]ommerce and manufactures gradually introduced order and good government, and with them the liberty and security of individuals, among the inhabitants of the country, who had before lived almost in a continual state of war with their neighbours, and of servile dependency upon their superiors.<sup>80</sup>

As a structural basis for peace and political stability, this presumes nondiscrimination in trade and employment as well. Equally, the third Huguenot demand obtains protection of everyone against violence. This may still be seen as the most important function of the state: law and order, aiming at the equal protection of all who find themselves on the territory in respect to:

their *person*, implying not only protection *against* the state<sup>81</sup> in the sense of security of person as stipulated in Article 3 of the UDHR, but also protection *by* the state against criminality;

their *goods*, implying solidity of entitlement positions, which is both more and less than the right to own property as such<sup>82</sup>; and

their *deals*, implying the execution of contracts (*pacta sunt servanda*) through an "exact administration of justice."<sup>83</sup>

Obviously, all this requires a strong state based on an inclusive social contract and commitment to the rule of law. The guarantees the Huguenots sought are the basic assurances that any citizen should expect from the state. Beyond these prerequisites, is there any specific role for minority rights?

79. See BENJAMIN J. KAPLAN, *DIVIDED BY FAITH: RELIGIOUS CONFLICT AND THE PRACTICE OF TOLERATION IN EARLY MODERN EUROPE* 159 (2007).

80. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 313 (1776).

81. The acid test of democracy, as Geoffrey Robertson once put it, "is a justice system where there is at least a chance, a possibility of beating the State at its own game." Radio National Transcripts: The Law Report, *Adventuring Advocates of the Adversarial System* (31 Mar. 1998), available at <http://www.abc.net.au/rn/talks/8.30/lawrpt/lstories/lr980331.htm>. On the intricacies of this element of the rule of law, see Bas de Gaay Fortman, *Beating the State at Its Own Game: An Inquiry into the Intricacies of Sovereignty and the Separation of Powers*, in *CHANGING PERCEPTIONS OF SOVEREIGNTY AND HUMAN RIGHTS: ESSAYS IN HONOUR OF CEES FLINTERMAN*, 41, 41–56 (Ineke Boerefijn & Jenny E. Goldschmidt eds., 2008).

82. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess, art. 17, U.N. Doc. A/RES/3/217A (1948) [hereinafter UDHR].

83. SMITH, *supra* note 80, at 540.

## VI. A MISCONCEPTION?

Minority rights do not find much of a basis in the UDHR. The UDHR is a foundational document that has assumed the character of the first chapter of a virtual global constitution. Consequently, in efforts to conceptualize minority rights, there was little ground to start from. Actually, two international missions have been confused here: collective rights and the rights of collective entities—usually referred to as group rights or minority rights.<sup>84</sup> Collective rights are rights that by their nature can be enjoyed collectively.<sup>85</sup> Self-determination is the most familiar example. Currently the right to a healthy environment is a typical specimen. In the UNESCO setting of announcing every new right, a declared “right to cultural diversity” may be mentioned.<sup>86</sup> In practice, such rights may play the part of principles (*regulae iuris*)—both in the realm of politics and in litigation.<sup>87</sup>

Group rights are a different matter; here the legal subject is a collective entity no matter the character of the rights involved. Although it is often argued that only individuals can be human beings and therefore enjoy human rights,<sup>88</sup> there is no compelling reason why the subject of such legal protection could not be a collective entity. Since rights protect interests by law, they merely represent abstract acknowledgements of claims based on those interests. The practical prerequisite of creating rights for collectivities, then, would merely be that the groups be granted legal personality.<sup>89</sup> As human beings live in community with others, there are definitely collective aspects to the need for protection of human dignity, as has been clearly recognized in the UN human rights venture.<sup>90</sup> In the case of ethnic and religious groups—the categories

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84. See JAN BERTING ET AL., *HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES* (1990), for example, this confusion pervades the argumentation.

85. Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 1 INT'L & COMP. L. Q. 102 (1976).

86. YVONNE DONDEERS, *TOWARDS A RIGHT TO CULTURAL IDENTITY?* (2002).

87. Bas de Gaay Fortman, *Adventurous Judgments: A Comparative Exploration into Human Rights as a Moral-Political Force in Judicial Law-Development*, 2 UTRICHT L. REV. 22 (2006), available at <http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/24/24>.

88. See, e.g., Jack Donnelly, *Human Rights, Individual Rights and Collective Rights*, in *HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES*, *supra* note 84, at 39.

89. It is true that class action suits or public interest litigation may well result in measures conducive to the protection of excluded collectivities, but the national jurisdictions in which these legal instruments pertain are generally not the most problematic in respect of minorities.

90. See, for example, Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 53; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956). Indeed, collective notions pervade International Humanitarian Law in particular.

usually referred to in international human rights documents concerned with minorities—this has generally not been the case. However, the real issue is not whether collectivities might be recognized as legal personalities, but whether doing so is an effective strategy in protecting the human dignity of the individuals in these groups.

While international human rights law could universally declare all individual human beings to possess legal personality, with regard to groups this would be unwise. To the degree that this notion is pursued, it is distracting, confusing, and even counterproductive. This holds true for two central reasons. First, there is the unavoidable problem of definition, discussed above, as to whether the group is a minority, a majority, a people, or an indigenous group. There exists no consistently reliable legal methodology for defining and with that limiting the membership composition of groups in a public law context.<sup>91</sup> The human rights bodies and the human rights instruments do not share a single definition of “minority.” Hence, to imagine that a useful and reliable legal definition of “minority” will emerge seems a naïve dream. Instead, the result of granting special or extra rights—such as rights of self-government or secession, or even mere special protection of already existing rights, to vaguely defined and ultimately illimitable “groups”—is that groups, however defined, will multiply and compete in the political arena in an attempt to take advantage of such rights. This has generally led towards, rather than away from, greater political strife. This is, however, only the first problem.

The second issue—and this impediment applies more generally to the narrow conception of human rights as mere rights in the sense of abstract legal acknowledgement of interests—is that even if legal personality were granted to collectivities, the lack of a single, unitary international court of human rights seriously hampers the realization of judicial remedies related to those rights they may invoke. Thus, the question remains whether an international legal discourse is to be seen as an effective way to achieve the aim of equal protection for all, as far as the collective aspects of human dignity are concerned.<sup>92</sup> Indeed, the same doubt persists about whether modern state law could provide the right machinery for such protection.

Yet there are states that have incorporated constitutional clauses for the protection of specific minorities.<sup>93</sup> A striking example is Macedonia where

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91. The most consistent method and the one most in line with the principle of self-determination is self-identification, but this method is relatively unhelpful in the *legal* determination of a group's status.

92. Strikingly, a new international journal to be published through Intersentia in Antwerp presents itself as *Human Rights & International Legal Discourse*, as if it is here that the main vacuum in human rights studies must be located.

93. The whole Swiss constitution, for example, is based on coexistence of collectivities, each of which is a minority.

in 2001, after a period of serious civil strife between the ruling Macedonians and the structurally excluded Albanians, a new constitution was enacted as part of a peace accord.<sup>94</sup> This involved deletion of references in the constitution's preamble suggesting that persons belonging to minorities are second-class citizens, as well as enshrining fifteen amendments designed to give greater rights to the country's ethnic Albanians. There is no general reference to minority rights, but specific clauses are enacted to protect the position of a designated category of citizens, identifiable by their common language.<sup>95</sup> Notably, in response to the peace accord, the leader of the political party of Albanians welcomed the constitutional changes with the following words: "[w]e repaired the constitution and now we have to repair the mentality that created ethnic conflicts."<sup>96</sup>

Yet, Macedonia is a shining exception. In constitutional documents one tends to find more references to arrangements for the protection of the majority than to minority rights. Does the term minority rights create mere illusions? Does it not represent a major misconception?

### A. Majority entrenchment

Constitutions embody rules on the authority of states to maintain public order through law; they tie the exercise of power to moral norms. This is reflected in the notion of a social contract: behind state law, as a way of stipulating legal obligations, lies the citizens' agreement to form one public-political community. The term social contract is not conceived in this article as a philosophical idea, but used in line with conflict theory. From theoretical and empirical analysis, into the kind of context in which intrastate collective violence finds a breeding ground, two major factors emerge: structural socio-economic inequalities and the lack of an adequately functioning social contract.<sup>97</sup> The latter implies that there is not a failing but a functioning state and that citizens in general look upon the state as theirs. Naturally, this requires legitimate government in the sense of an administration ruling on the basis of the principles, institutions, and processes that are regarded as right, as well as commonly acceptable outcomes.<sup>98</sup>

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94. *Macedonia Adopts a New Constitution*, BBC NEWS, 16 Nov. 2001, available at <http://news.bbc.co.uk/2/hi/europe/1659132.stm>.

95. *Id.*

96. *Id.*

97. See, e.g., Bas de Gaay Fortman, *Violence Among Peoples in the Light of Human Frustration and Aggression*, 526 EUR. J. PHARM. 2 (2005).

98. Fatos Tarifa & Bas de Gaay Fortman, *Vulnerable Democracies: The Challenge of Legitimacy in Post-Communist Systems*, 2 J. Soc. Sci. 211 (1998).

Even where majority construction, as a way of privileging a defined segment of the public community to the exclusion of other groups, has an emancipatory background, it remains a problematic practice. A characteristic example is Malaysia, where Article 153 of its constitution grants the Head of State responsibility for safeguarding the special position of the Malay and other indigenous peoples, collectively referred to as *Bumiputra*, meaning the sons of the land.<sup>99</sup> The *Bumiputra* actually form a majority within Malaysia, but have historically been at the bottom end of the economic ladder.<sup>100</sup> The discriminatory arrangement that Malaysia's constitution entails can be seen as a carry-over of laws made by the British colonial power to protect the Malay from being overpowered by the immigration of Chinese and Indian workers into Malaysia. Indeed, behind the construction of the Bumiputra as a majority at independence, is a period in which income inequalities corresponded to a socio-economic dissimilarity between Chinese and Indians on the one hand, and ethnic Malays on the other. In practice, Article 153 has created a distinction between Malaysians of different ethnic backgrounds, resulting in the implementation of affirmative action policies which only benefit the majority Bumiputra.<sup>101</sup> This entrenchment of a division between the Bumiputra and other groups is one cause of ongoing political tensions.<sup>102</sup>

No matter their intelligibility and their historical origin, such entrenched dominant positions<sup>103</sup> are not only susceptible to abuse; they also institutionalize sensitive us-them divides, thus affecting the susceptibility to conflict of the nation-state as such. Their legal starting point lies in public-political

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99. For a brief account, see Christopher Noon, *The Use of Racial Preferences in Public Procurement for Social Stability*, 38 PUB. CONT. L.J. 611 (2009). Laws of Malaysia, Federal Constitution, available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_125966.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125966.pdf).

100. Groups subject to this phenomenon have confusingly been called "minoritized majorities," which is reason enough for removing this distinction between "majority" and "minority" from the vocabulary. See Will Kymlicka, *The Internationalization of Minority Rights*, 6 INT'L J. CONST. L. 1, 26 (2008).

101. Article 153 § 1 provides that the government should act "in accordance with the provisions of this Article." Constitution, Art. 153, § 1 (1963) (Malaysia). The government has done this by implementing certain policies, particularly the New Economic Policy (NEP), that was later changed into the New Economic Model (NEM). Meanwhile the Prime Minister has launched the One Malaysia Policy as an attempt to move towards a more inclusive society. Notably, the only major clash that Malaysia has witnessed is the 13 May 1969 bloodshed that followed election results, which the Malay majority regarded as unacceptable, leading to the stronger affirmative action policies of the NEP. Later 'us-them' clashes have involved crackdowns on Muslim extremism.

102. See Noon, *supra* note 99.

103. Other notable examples of majority entrenchment arising out of an obvious historical context are Israel, which was established as a Jewish State, and Sri Lanka, where the provision of its Constitution on Buddhism declares: "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights granted by Articles 10 and 14(1)(e)." Constitution, ch. II, art. 9 (Sri Lanka).

establishment of one specific religion, origin, language, or any other grouping in a way that may well marginalize or exclude people who do not share the established characteristics. Such establishment of a dominant position for one particular collective entity may be either formally embodied in the constitution or informally entrenched in daily decision-making. As this may well have been seen as the crux of the whole minorities problematique, this article will now examine the international venture for the realization of human rights.

## VII. THE INTERNATIONAL HUMAN RIGHTS VENTURE

In the global political idea of human rights that emerged after World War II, two genealogies converged: the fight for recognition and fundamental protection of the dignity of *all* human beings, and the struggle for fundamental rights as a way to protect citizens against abuse of power—in particular by their own sovereign (the state). The distinct convictions behind these two historical lines are reflected in the preamble of the United Nations Charter in which “[w]e the peoples” express our determination “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small.”<sup>104</sup>

The preamble of the UDHR repeats that expression of global faith in the inherent worth and dignity of the human being and in fundamental rights as a confessional foundation: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .”<sup>105</sup> The two genealogies then meet in Article 1 of the Universal Declaration of Human Rights of 1948, which states “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>106</sup>

This global political confession (in legal terminology *ius divinum*) reflects two grand principles, one of a substantive and the other of a procedural nature: universal human dignity and fundamental rights (including their inalienability). While the emergence of the basic rights idea as legal protection against abuse of power may indeed be called a “Western” history,<sup>107</sup> the

104. U.N. Charter, pmbl., signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force 24 Oct. 1945).

105. UDHR, *supra* note 82, pmbl. (emphasis added).

106. Today one reads “sister and brotherhood” or *fellowship*. Obviously, the underlying principle is *solidarity*. In the global venture for human rights, this constitutes the basis for so-called solidarity rights such as the right to a healthy environment. Besides solidarity, one can also read here an urge not to engage in aggressive behavior—endangering peace and stability—as the human rights instruments were adopted immediately after World War II. *Id.* art. 1.

107. For this narrative see, for example, LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007).

narrative of universal recognition and protection of human dignity could just as well be termed “anti-Western” history in the sense that equal dignity had to be vindicated in contravention of Western ideas and powers. For example, the idea of legal principles was already part of Roman law (*generalia iuris principia*). One of these referred to freedom as something of inestimable value (*libertas inaestimabilis res est*);<sup>108</sup> yet this excluded subjugated peoples in general and slaves in particular. In fact, the whole story of universal human dignity remains an ongoing struggle.<sup>109</sup> In his inaugural address as first holder of the Treaty of Utrecht Chair, titled *Race and the Right to be Human*, Paul Gilroy perceptively showed how the struggles against colonization and conquest, and the historical efforts to fight racial and ethnic hierarchy have shaped the idea of truly universal human rights.<sup>110</sup> Note, for example the following insight gained by Angelina Grimké, daughter of a slaveholder who became an active abolitionist:

The investigation of the rights of the slave has led me to better understanding of our own. I have found the Anti-slavery cause to be the high school of morals in our land—the school in which human rights are more fully investigated and better understood and taught, than in any other. Here a great fundamental principle is uplifted and illuminated, and from this central light rays innumerable stream all around. Human beings have *rights*, because they are moral beings: the rights of all men grown out of their moral nature; they have essentially the same rights.<sup>111</sup>

This perception is clearly reflected in Article 1 of the UDHR: “born free and equal in dignity and rights, and endowed with reason and a *conscience*.”<sup>112</sup>

Grimké’s deeply felt apprehension was that a country, which at the time of Independence had already declared as “self-evident” truths that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, and that among these are Life, Liberty and the Pursuit of Happiness,”<sup>113</sup> yet tolerated slavery:

[M]an is never vested with . . . dominion over *his fellow man*; he was never told that any of the human species were put *under his feet*; it was only *all things*, and man, who was created in the image of his Maker, *never* can properly be termed a *thing*, though the laws of Slave States do call him “a chattel personal”;

108. Paulus libro secundo ad edictum, *Corpus Iuris Civilis*, DE DIVERSIS REGULIS IURIS ANTIQUI, D. 50, 17, 106. See also 122: Gaius libro quinto ad edictum provinciale: “Libertas omnibus rebus favorabilior est.” (Freedom is more precious than all things).

109. A typical “anti-Western” source for the declaration of freedom is Ho Chi Minh: “Rien n’est plus précieux que la Liberté et l’Indépendance.” For the context of that famous quote see PIERRE FARDEAU, RIEN N’EST PLUS PRÉCIEUX QUE LA LIBERTÉ ET L’INDÉPENDANCE. (2009).

110. PAUL GILROY, RACE AND THE RIGHT TO BE HUMAN (2009).

111. *Id.* at 10.

112. UDHR, *supra* note 82, art. 1 (emphasis added).

113. The Declaration of Independence ¶ 2 (US 1776).

*Man* then, I assert was *never* put *under the feet of man*, by that first charter of human rights which was given by God, to the Fathers of the Antediluvian and Postdiluvian worlds, therefore this doctrine of equality is based on the Bible.<sup>114</sup>

Human dignity, then, refers to the inherent worth of each and every human being, simply as an innate consequence of human existence whether or not an individual person is herself convinced of that.<sup>115</sup> Inherent is the adjective used in the preambles of both the UN Charter and the UDHR, meaning that human dignity is a matter of being rather than having, and hence implying that it cannot be taken away. Yet, it is worth emphasizing here that some people have been denied the enjoyment of these rights merely because of their group identity, whether that is imposed from without or within. It is violation, then, more than preconceived group rights that governs the problematique. Thus what have been conceptualized as minority rights (rights protecting minorities) must be reconceptualized as based not on minority status, but upon universal human dignity as already internationally established— as rights protecting universal human dignity in its collective aspects too.

Notably, the way in which this mission has been conceptualized in legal instruments and mechanisms has placed great emphasis on the second foundational principle of human rights: the quest for fundamental rights.<sup>116</sup> The major flaws that affect minorities' protection can be traced to this overreliance on legal, judicially enforceable rights. International mechanisms for the realization of human rights were set up as if the emancipatory struggles preceding adoption of the legal model had already been definitively concluded with the victory of the allied forces in World War II.<sup>117</sup> That model is based on three stages: standard-setting, supervision through monitoring of compliance, and enforcement. Its capacity to enforce international human rights law, however, is terribly weak, so the responsibility for implementing all those internationally declared rights still rests at the national and local level. In respect of minorities, however, the nation-state is precisely the level at which the struggle for equal protection faces the greatest challenges.

Monitoring state compliance with the protection of minorities is clearly flawed, as a summary survey of the recently created Universal Periodic

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114. GILROY, *supra* note 110, at 9–10 (emphasis added).

115. Matthijs de Blois, *Self-Determination or Human Dignity: The Core Principle of Human Rights*, in TO BAEHR IN OUR MINDS: ESSAYS ON HUMAN RIGHTS FROM THE HEART OF THE NETHERLANDS 523, at 531 (Mielle Bulterman, Aart Hendriks, & Jacqueline Smith eds., 1998). For a full discussion of human dignity as a core principle in human rights, see BERMA KLEIN GOLDEWIJK & BAS DE GAAY FORTMAN, *WHERE NEEDS MEET RIGHTS: ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN A NEW PERSPECTIVE* (1999).

116. The quest for specific fundamental rights manifests itself particularly in Human Rights Treaty Law.

117. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* (2000).

Reviews (UPRs) in the Human Rights Council (HRC) reveals. The organization of these UPRs is through a peer review with a troika of three countries preparing a first list of questions. For the plenary session there are three hours for discussion, whether China or San Marino faces review. (Currently, the list of speakers and the allocation of the speaker's time is treated as a hot issue). Strikingly, in respect to a country such as Burundi, wherein it has consistently been the Tutsi minority that has abused its dominant position, no substantive questions on minorities and minority rights were asked.<sup>118</sup> The same applies to the sessions concerning the Czech Republic, India, Indonesia, Philippines, Pakistan, Uzbekistan, and the Democratic Republic of the Congo,<sup>119</sup> to mention just a few other examples of states facing evident challenges in the protection of distinct collective entities.

The substance of the recommendations received by reviewed countries is equally revealing. The whole process, as it is conducted, fully deserves the title that "UN Watch" gave its first evaluation of the process: "Mutual Praise Society."<sup>120</sup> Three examples from the review sessions confirming the negative assessment in respect to minorities are illustrative. First, the United Kingdom suggested that Poland "consider forming twinning relationships or partnerships with countries that have been through a process of legal reforms on minority issues to work closely with them on the legal, technical and institutional challenges involved in introducing change."<sup>121</sup> Is there

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118. *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review: Burundi*, U.N. GAOR, Hum. Rts. Council, 10th Sess., Agenda Item 6, U.N. Doc. A/HRC/10/71 (2009).
119. *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, Czech Republic*, U.N. GAOR, Hum. Rts. Council, 8th Sess., Agenda Item 6, U.N. Doc. A/HRC/8/33 (2008); *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, India*, U.N. GAOR, Hum. Rts. Council, 8th Sess., Agenda Item 6, U.N. Doc. A/HRC/8/26 (2008); *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, Indonesia*, U.N. GAOR, Hum. Rts. Council, 8th Sess., Agenda Item 6, U.N. Doc. A/HRC/8/23 (2008); *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, Philippines*, U.N. GAOR, Hum. Rts. Council, 8th Sess., Agenda Item 6, U.N. Doc. A/HRC/8/28 (2008); *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, Pakistan*, U.N. GAOR, Hum. Rts. Council, 8th Sess., Agenda Item 6, U.N. Doc. A/HRC/8/42 (2008); *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, Uzbekistan*, U.N. GAOR, Hum. Rts. Council, 10th Sess., Agenda Item 6, U.N. Doc. A/HRC/10/83 (2008); *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, Democratic Republic of the Congo*, U.N. GAOR, Hum. Rts. Council, 13th Sess., Agenda Item 6, U.N. Doc. A/HRC/13/8 (2010).
120. UNITED NATIONS WATCH, MUTUAL PRAISE SOCIETY: COUNTRY SCORECARD AND EVALUATION OF THE UNIVERSAL PERIODIC REVIEW SYSTEM OF THE U.N. HUMAN RIGHTS COUNCIL (2009), available at <http://www.unwatch.org/atf/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/Mutual%20Praise%20Society.pdf>.
121. *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, Poland*, U.N. GAOR, Hum. Rts. Council, 8th Sess., Agenda Item 6, ¶ 22, U.N. Doc. A/HRC/8/30 (2008).

anyone in Geneva who believes that such advice was really conducive to minorities' protection in the country under review? And what can anyone say about Myanmar recommending that Malaysia

continue to share and extend its experience and best practices in the efforts in developing comprehensive policies and strategies for the advancement of indigenous groups which focus on uplifting the status and quality of life of the community via socio-economic programs.<sup>122</sup>

In the words of the Malaysian poet Cecil Rajendra: "Can the blind see for the dumb? Can the dumb talk?"<sup>123</sup>

Finally, the following proposal that Mexico made to Sri Lanka is quite astonishing:

[c]ontinue to strengthen its activities to ensure there is no discrimination against ethnic minorities in the enjoyment of the full range of human rights, in line with the comments of the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Right of the Child and the Committee on the Elimination of Discrimination Against Women.<sup>124</sup>

To conclude, as treaty-based human rights law hardly offers effective protection of minorities against abuse by those in dominant positions, the UN charter-based mechanism appears to provide no solution either.

## B. A critique

It is in this context that strongly worded criticism of the international human rights endeavor comes to the fore. Strikingly, the 1 March 2010 cover of Newsweek magazine screams, "The Death of Human Rights." The article by Joshua Kurlantzick, which confines its title to the mission's downfall, shows a primary concern with the declining role of human rights and the agendas of major state actors, international civil society, and the public at large.<sup>125</sup> Notably, the Geneva-based and New York-based mechanisms for human

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122. *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, Malaysia*, U.N. GAOR, Hum. Rts. Council, 11th Sess., Agenda Item 6, ¶ 30, U.N. Doc. A/HRC/11/30 (2009).

123. Cecil Rajendra, *Voice of the Dispossessed*, in *DOVE ON FIRE: POEMS ON PEACE, JUSTICE AND ECOLOGY* 30–31 (1987).

124. *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review, Sri Lanka*, U.N. GAOR, Hum. Rts. Council, 8th Sess., Agenda Item 6, ¶ 38, U.N. Doc. A/HRC/8/46 (2008).

125. He attributes these failings in part to the economic crisis, its effects on the middle class in Western democracies, and its concurrent influence on the attitude of "political realism" adopted by their leaders. Joshua Kurlantzick, *The Downfall of Human Rights*, *NEWSWEEK*, 19 Feb. 2010, available at <http://www.newsweek.com/2010/02/18/the-downfall-of-human-rights.print.html>.

rights standard-setting and supervision are totally ignored—implicitly assessing these mechanisms as irrelevant. Indeed, it may be time to reconsider this part of the UN mission in light of the following considerations:

- (1) The UN project as envisaged in the Charter was never meant to be *legally* enforceable by *international* means.<sup>126</sup> While rights already imply protection—namely by law—the terminology consistently refers to “protection and promotion of human rights,” which is a clear testimony to its soft law character.<sup>127</sup> In this light it is not surprising that there is remarkably little attention to follow-up both country-assessments and individual cases in which evident violations of human rights were established through resolutions and/or concluding observations.<sup>128</sup> It is precisely in respect of collectivities’ protection that provisions for *international* enforcement cannot be missed.
- (2) The juridical nature of the international human rights venture went together with an emphasis on *case-by-case* approaches. Yet, non-implementation is often of a structural nature, requiring primarily international *political* action. Insofar as such action has been forthcoming, it has suffered from the almost inherent double standards in a world of states. This certainly applies to collectivities within powerful states with a veto-right in the Security Council whose consent to effective action would have to be sought.
- (3) Effective protection of collectivities requires close ties between the United Nations political set-up, which deals with international peace and security, and its juridical branch, which is supposed to be tuned to the implementation of human rights. Likewise, the realization of economic, social, and cultural rights needs the full commitment of relevant development-oriented agencies, including the international financial institutions. Yet, mainstreaming human rights as envisaged in the whole United Nations system of governance has, above all, resulted in documents that reflect policy briefs, reports, and policy guidelines, rather than an effective operationalization of human rights at all levels and layers.

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126. See NORMAND & ZAIDI, *supra* note 27.

127. Rights signify abstract acknowledgement of interests implying protection by law. Human rights refer to interests directly connected to human dignity, namely fundamental freedoms and basic entitlements. To “protect human rights,” means protecting the protection of these interests by law. Obviously, such discourse weakens the mission.

128. Except for the jurisprudence of regional human rights bodies such as the European Court of Human Rights in Strasbourg, there exists no database on the follow-up of human rights cases. It is particularly in respect of the whole UN system that this need is urgently felt.

- (4) There has not been much interest in global human rights as a common mission of the United Nations, as envisaged in the UDHR.<sup>129</sup> Instead, many member states appear to believe in setting up their own human rights enforcement mechanisms, not as complementary to the international framework, but as an alternative.<sup>130</sup> Consequently, there is an almost worldwide lack of commitment to truly supranational supervision and enforcement: a particularly crucial deficiency with respect to the protection of collectivities.
- (5) International human rights are not yet sufficiently focused on the economic, political, social, and cultural aspects of the distinct environments in which these rights have to be realized. As the whole international venture for the protection of human dignity against abuse of power is based on satisfactorily functioning legal systems that connect national law to international law, efforts to realize these rights primarily require the creation of good government based on the rule of law. Since malfunctioning economies also commonly form the background for failing states and tyrannies, creating the environments conducive to the realization of human rights would entail a shift of resources from juridical or quasi-juridical action towards policies supporting political-economic transformation. This applies especially to collectivities that lack financial and legal resources almost completely.
- (6) Devoid of global governance, economic globalization has increased socio-economic inequality while also creating an adverse environment for the realization of economic, social, and cultural rights.<sup>131</sup> Simultaneously, non-state agencies have become more relevant in the whole international endeavor for structural protection of human dignity.<sup>132</sup> Yet, effective checks on the actions of multinational corporations that affect human rights are seen primarily as the duty of states under whose aegis these companies operate.<sup>133</sup> Thus, collectivities affected by corporate actions lack legal recourse as, for example, the Ogoni in Nigeria have experienced.<sup>134</sup>

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129. See NORMAND & ZAIDI, *supra* note 27.

130. *Id.*

131. See GOLDEWIJK & FORTMAN, *supra* note 115, at chps. 2, 7.

132. See BAS DE GAAY FORTMAN, POLITICAL ECONOMY OF HUMAN RIGHTS: RIGHTS, REALITIES AND REALISATION 70, 71 (forthcoming 2011).

133. There are, indeed, various sets of international guidelines (such as the OECD Guidelines for Multinational Corporations), but hardly any international supervision, let alone enforcement.

134. See TINEKE ELISABETH LAMBOOY, CORPORATE SOCIAL RESPONSIBILITY: LEGAL AND SEMI-LEGAL FRAMEWORKS SUPPORTING CSR (2010).

Yet, despite its flaws from the judicial/juridical perspective, the international human rights mission did create a strong notion of global legitimacy. Indeed, no use of power can be considered legitimate if it violates international standards on the protection of human dignity. It is here that one finds a genuine prospective vision for substantial improvement in the relevance of human rights. Taking this as its starting point, the next section returns to the subject of minorities and their need for protection.

### VIII. EPILOGUE: MINORITY PROTECTION IN AN INTEGRATED HUMAN DIGNITY PERSPECTIVE

That Muslims in Switzerland can no longer connect minarets to their mosques is, of course, a *minor* issue compared to the major violations of human dignity that other minorities have to suffer. Yet, the formal incorporation of the prohibition into the Swiss constitution despite all national, regional, and international law to the contrary is indicative of a world in which offensive action based on us-them divides tends to prevail over legal protection of collectivities. The validation of the people's initiative by the Swiss national parliament also constitutes a striking illustration of the systematically weak incorporation of human rights into positive law.

A case in point is the civil war that has raged in the Democratic Republic of the Congo since the Rwandan genocide of 1994.<sup>135</sup> This conflict, in which the fighting factions are mainly based on ethnically identified collectivities, has already cost the lives of almost six million people.<sup>136</sup> Since the formal peace agreement of 2003, it is particularly the eastern region that remains prey to gross and systematic violations of human rights.<sup>137</sup> In such a context, crimes against women tend to abound, too.<sup>138</sup> A United Nations peace force is apparently unable to provide military protection to civilians, let alone force an end to the atrocities. A limited legal response comes from the costly International Criminal Court in The Hague,<sup>139</sup> which since its start

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135. See GlobalSecurity.org, Congo Civil War, *available at* <http://www.globalsecurity.org/military/world/war/congo.htm>.

136. "An estimated six million people have died as a result of conflict, hunger and disease since 1998 when a civil war broke out between the existing government and rebel forces." MerlinUSA, Democratic Republic of Congo, *available at* <http://www.merlinusa.org/where-we-work/congo>.

137. *Id.*

138. Chiseche Mibenge, Show me a woman! Narratives of Gender and Violence in Human Rights Law and Processes of Transitional Justice (unpublished Doctoral Dissertation, Utrecht University 2010) (on file with author).

139. The Court works on an annual budget of well over € 100 million. In 2010 the number of people working in the ICC office, including interns, approached 1,000. International Criminal Court, Facts and Figures from Registry as at 30 April 2009, *available at* [http://www.icc-cpi.int/NR/rdonlyres/302CA5E0-E2B5-4663-96DE-93E55B1FD26C/280383/Facts\\_and\\_figures\\_30\\_April\\_2009\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/302CA5E0-E2B5-4663-96DE-93E55B1FD26C/280383/Facts_and_figures_30_April_2009_ENG.pdf).

in 2002 has indicted a few military commanders responsible for major human rights violations in Eastern Congo. So far none of these cases has led to a conclusive judgment.<sup>140</sup> In the meantime, the political economy of that war appears to be based on illegal mining and selling of coltan, gold, and other minerals.<sup>141</sup> While legal deterrence does not offer much in terms of staunching the flow of blood, political-economic intervention holds much more promise as a way to end the carnage. That reality is well known, but not acted upon despite some forceful advocacy by civil society organizations, including the Netherlands Institute for Southern Africa (NIZA).<sup>142</sup>

Overall the picture is grim. Yet, before coming to final conclusions on human rights and collectivities' protection, there are two more recent developments that warrant attention: the progression of indigenous rights and the responsibility to protect.

### A. Indigenous rights

In 2007, after an astonishing twenty-two years of preparation, the United Nations General Assembly adopted a strongly worded Declaration on the Rights of Indigenous Peoples which contains clear statements on vital issues, such as self-determination, and access to lands, territories, and resources.<sup>143</sup> These include not only cultural rights,<sup>144</sup> but also strong provisions on land rights. Thus, Article 26 declares:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with

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140. International Criminal Court, News and Highlights, available at <http://www.icc-cpi.int/Menu/ICC?lan=en-GB>.

141. See, for example, Koen Vlassenroot's, *War and Social Research: The Limits of Empirical Methodologies in War-Torn Environments*, 54 REV. INT'L D'ANTHROPOLOGIE ET DE SCI. HUMAN. 191, 191–198 (2006), available at <http://civilisations.revues.org/index442.html>.

142. See NIZA, Homepage, available at <http://www.niza.nl/>.

143. Declaration on the Rights of Indigenous Peoples, adopted 13 Sept. 2007, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (2007) [hereinafter UNDRIP].

144. *Id.* art. 11.

due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.<sup>145</sup>

Four states, all with historically oppressed indigenous populations far outnumbered by later settlers—Canada, the United States, Australia and New Zealand—voted against this declaration.<sup>146</sup> Two of these, Australia and New Zealand, soon thereafter endorsed it,<sup>147</sup> the latter with the following qualification:

In moving to support the Declaration, New Zealand both affirms those rights and reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system. Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances, define the bounds of New Zealand's engagement with the aspirational elements of the Declaration.<sup>148</sup>

This reservation is in line with the expressed views of many countries that had already voted in favor of the declaration.<sup>149</sup> At the time of its adoption, concerns were also expressed about the lack of a clear definition of the term indigenous.<sup>150</sup> The consensus was that this would have to be decided at the national level.<sup>151</sup> Indeed, an international rule on who is considered indigenous and who is not would conflict with the general trend towards self-identification as the only reasonable way to determine allegiance with collective entities, such as race and ethnic groups. But when socio-cultural groups within a nation-state self-identify as indigenous peoples, the whole declaration loses its meaning. In fact, this practice appears to be happening

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145. *Id.* art. 26.

146. Press Release, U.N. General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President (13 Sept. 2007), available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

147. In 2010 Canada and the US also reversed their positions. See UNPFII, UN Declaration on the Rights of Indigenous Peoples: Adopted by the General Assembly 13 Sept. 2007, available at <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.

148. New Zealand Permanent Mission to the United Nations, Opening Ceremony: New Zealand Statement (19–30 Apr. 2010), available at [http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASHe2c9/a6688410.dir/PF10pita007.PDF#search="Pita SHARPLES](http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASHe2c9/a6688410.dir/PF10pita007.PDF#search=).

149. Given the "soft law" character of such a General Assembly declaration and the common law prerequisite of national incorporation, even for treaty law obligations, it is questionable whether that reservation had to be made explicitly. It may well have been meant to restrain the country's judiciary from using the declaration for interpretative purposes prior to the enactment of new legislation. For presumably internal reasons, New Zealand apparently wished to make clear that it *aspires* to protect its indigenous peoples in accordance with the Declaration.

150. See, for example, Indian & Northern Affairs Canada, Update Paper: UN Declaration on the Rights of Indigenous Peoples (10 Jan. 2008), available at <http://www.ainc-inac.gc.ca/ap/ia/pubs/updir/updir-eng.asp>.

151. UN Press Release, *supra* note 146.

in Bolivia<sup>152</sup> as well as in Iran.<sup>153</sup> Political mobilization amongst ethno-cultural groups in Africa, based on (a contested meaning of) “indigenouness,” similarly illustrates the inherent difficulties in relying upon a normative, all-encompassing legal definition of this concept.<sup>154</sup> The same problematique, in regard to the construction of minorities, is threatening to be overshadowed by the desire to identify as indigenous rather than as “a person belonging to a minority.” While some scholars may “hope to develop a more adequate legal framework” as the path forward, such an approach is not available because of the inherent problems attached to such a legalistic definition, whether the object of the definition is “minority” or “indigenous.”<sup>155</sup>

Meanwhile, the actual problematique of indigenous peoples conspicuously follows from operations of multinational companies endorsed by government policies that make them victims of development. Thus, while language and culture remain important elements in the protection of human dignity in its collective aspects, a primary need is the protection against so-called development and its consequences in terms of sustaining daily livelihoods, particularly insofar as these are based on access to land. Oddly, the human rights mission is not of much use here as it has uncritically opted for an understanding of development as inherently positive, culminating in the UN declared “Right to Development.”<sup>156</sup> Given this observation it is imperative to move beyond such blinkered analysis in order to achieve a universal understanding of the meaning of human rights as opposed to a policy analyst’s meaning.<sup>157</sup> Legalistic questions about the definitions of “minority” and “indigenous” must be put to the side. Instead of focusing on enforcing rights based on legal status—which evidently engenders legal battles over status while the rights go unrealized for decades<sup>158</sup>—human rights must be envisaged and implemented in a wider human dignity perspective, including sustainable human development and human security.

## B. The responsibility to protect

In 2001, an International Commission on Intervention and State Sovereignty published a report titled *The Responsibility to Protect*. Of the five distinct

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152. M.L. Pallares-Burke, *Raza, Mestizaje e Identidad*, CLXXXII ARBOR 831 (2006).

153. Kymlicka, *supra* note 100, at 16–17.

154. FELIX MUKWIZA NDAHINDA, *INDIGENOUSNESS IN AFRICA: A CONTESTED FRAMEWORK FOR EMPOWERMENT OF “MARGINALIZED” ETHNO-CULTURAL COMMUNITIES* (2009).

155. Kymlicka, *supra* note 100, at 31.

156. Declaration on the Right to Development, *adopted* 4 Dec. 1986, G.A. Res. 41/128, U.N. GAOR, 97th plen. mtg., U.N. Doc. A/RES/41/128 (1986).

157. See MICHAEL IGNATIEFF, *WHOSE UNIVERSAL VALUES?: THE CRISIS IN HUMAN RIGHTS* (1999).

158. See FORTMAN, *POLITICAL ECONOMY OF HUMAN RIGHTS*, *supra* note 132.

kinds of protection tasks it identified as post-intervention necessities, the first stood out as the protection of “minorities.”<sup>159</sup> The UN World Summit of September 2005 embraced this responsibility to protect:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.<sup>160</sup>

In the next paragraph the international community, through the United Nations, also recognized its responsibility “to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>161</sup> Security Council Resolution 1674 reaffirmed these provisions and committed itself to taking action to protect civilians in armed conflict.<sup>162</sup>

In February 2008, Secretary General Ban Ki-Moon appointed a Special Adviser for the Responsibility to Protect (R2P) at the Assistant Secretary-General level.<sup>163</sup> The responsibility to protect constitutes an important shift in the international law doctrine of sovereignty. This principle no longer means “the right to control” people and borders at all costs, but now implies the duty to protect civilians, especially from genocide, war crimes, ethnic cleansing, and crimes against humanity. When a state fails to protect its civilians that responsibility falls on the international community in three phases: to prevent, react, and rebuild in countries affected by mass suffering and atrocities.

As to prevention, R2P admirably recognizes and addresses the root causes of civil conflict to prevent atrocities and frames prevention as the foremost duty.<sup>164</sup> R2P is also the broadest responsibility insofar as activities

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159. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT*, ¶ 7.42 (2001).

160. *Resolution on the 2005 World Summit Outcome*, G.A. Res. 60/1, U.N. GAOR, 60th Sess., ¶ 138, U.N. Doc. A/RES/60/1 (2005).

161. *Id.* ¶ 139.

162. Security Council Resolution 1674, *adopted* 28 Apr. 2006.

163. See UN News Centre, Secretary-General Appoints Special Advisor to Focus on Responsibility to Protect (21 Feb. 2008), *available at* <http://www.un.org/apps/news/story.asp?NewsID=25702&Cr=ki-moon&Cr1>.

164. See, for example, Arthur Bellamy, *Conflict Prevention and the Responsibility to Protect*, 14 *GLOBAL GOV'T: A REV. OF MULTILATERALISM & INT'L ORG.* 135, 135–156 (2008).

that positively contribute to the stability and well-being of a country and its people can help prevent future civil conflict and mass human suffering.<sup>165</sup>

However, prevention efforts may fail. This calls for intervention through a range of reaction options—the large majority of which are non-violent, including targeted sanctions and political pressure from neighboring countries. If military intervention becomes necessary, it must satisfy the “force majeure” threshold, which implies that large scale loss of life must be imminent or actually happening, before any action can be authorized. It must also meet the “threshold criteria,” which include such things as “right intention” and “reasonable prospects of averting suffering.”<sup>166</sup> Yet, to prevent abuse by powerful states, humanitarian intervention in the sense of military action, for peace with justice against a sovereign state, beyond chapter seven of the UN Charter and hence without authorization by the Security Council, has not been regulated in international law.<sup>167</sup> It may nevertheless be accepted in practice by the international community through acquiescence, meaning tacit ex-post approval by the Security Council in the first place. The intervention of NATO allies in Serbia/Kosovo (1999) is a case in point.<sup>168</sup>

Finally, R2P recognizes that without effective rebuilding measures, which establish the rule of law, good government, and reconstruction, regions recovering from violent conflict are likely to remain confronted with civil strife.<sup>169</sup> This means that development and poverty reduction programs like education, health, water, and food security projects, as well as injustice response programs like peace building, human security, and refugee assistance projects are encompassed in this new international doctrine.<sup>170</sup>

Since the relevant record of the Security Council is not particularly impressive, it is too early to arrive at a final assessment.<sup>171</sup> Meanwhile, the acknowledgement of international responsibility for national security and peace that R2P represents may well imply a shift away from useless references to minority rights in Geneva-based or New York-based, powerless fora to the day-to-day security agenda of the Security Council. Thus, it might contribute to the quest for protection among collective entities under state jurisdiction. However, it should not be seen as simply an extension of the

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165. *Id.*

166. See THE RESPONSIBILITY TO PROTECT, REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION & STATE SOVEREIGNTY (ICISS) (Dec. 2001) at 4.18–4.27, available at <http://www.iciss.ca/report2-en.asp#criteria>.

167. See A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J.L. & PUB. POL'Y 725, 725–736 (2004).

168. See CLARA PORTELA, BERLIN INFORMATION-CENTER FOR TRANSATLANTIC SECURITY (BITS), HUMANITARIAN INTERVENTION, NATO AND INTERNATIONAL LAW: CAN THE INSTITUTION OF HUMANITARIAN ACTION JUSTIFY UNAUTHORISED ACTION?, Research Report 00.4 (Dec. 2000), available at <http://www.bits.de/public/pdf/rr00-4.pdf>.

169. See THE RESPONSIBILITY TO PROTECT, *supra* note 166, at chp. 5.

170. *Id.*

171. See, for example, JOHN PRENDERGAST & DAVID SULLIVAN, ENOUGH STRATEGY PAPER 33, IRRESOLUTION: THE UN SECURITY COUNCIL ON DARFUR (July 2008), available at <http://www.americanprogress.org/issues/2008/07/pdf/enough33.pdf>.

human rights mission as conceived in legal discourse. R2P plainly confronts the international community with the need to strategically conceptualize human rights in close connection with the two major ventures that form the other points of the golden triangle of human dignity: human security, as based on Franklin D. Roosevelt's freedom from fear, and human development, as tuned towards FDR's freedom from want.<sup>172</sup> That interconnectivity might be represented as follows:

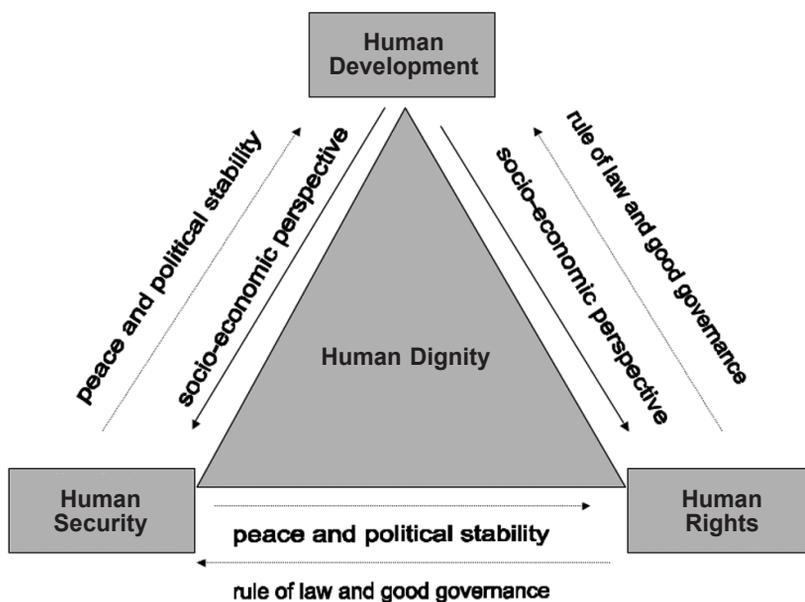


Figure 1

172. *"In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.*

*The first is freedom of speech and expression—everywhere in the world.*

*The second is freedom of every person to worship God in his own way—everywhere in the world.*

*The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.*

*The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world."*

Nat'l Endowment for the Hum., FDR's "Four Freedoms" Speech: Freedom by the Fireside, available at <http://edsitement.neh.gov/lesson-plan/fdrs-four-freedoms-speech-freedom-fireside>.

This figure represents the human dignity mission in a wider perspective than just human rights. Essential linkages are laid out that are highly relevant from the perspective of collectivities: to achieve human security, a socio-economic perspective (and hence a functioning economy) is required, as well as good governance and the rule of law (and hence a functioning state); for the realization of human rights it is also important that people enjoy a socio-economic perspective in their lives, while living in peace and security in a politically stable environment. The latter is crucial for human development, as well as for good governance based on the rule of law. This golden triangle of human dignity—considered as an indivisible whole—represents the core challenges in respect of protecting so-called minorities.<sup>173</sup>

### C. Conclusion

In the days of the dictator Marcos a student in a class taught by the author at the International Institute of Social Studies remarked: “We in the Philippines learned human rights not from books, but through oppression and the need for resistance.” Evidently, her statement refers to the first genealogical line in human rights: inclusive human dignity to be asserted by victims of violation. Here lies the clue to a new conceptualization of what was meant by minority rights. The key issue is in how to identify the collective subject in need of protection.

As a normative category entitled to international protection, a minority should not be seen as just a group of people in a non-dominant position with access to particular rights, but rather as a collective entity in need of public-political protection against abuse of dominant positions; identification through violation, in other words, rather than legally recognized, seemingly primordial characteristics. To determine abuse of dominant positions, the standards of international human rights law may well serve as a useful starting point, meaning primarily the norms of *ius cogens* such as prohibitions of aggressive war, crimes against humanity, war crimes, maritime piracy, genocide, apartheid, slavery, and torture, and generally the Universal Declaration of Human Rights that was proclaimed by the UN General Assembly in 1948:

as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive . . . to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.<sup>174</sup>

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173. Bas de Gaay Fortman, *The Golden Triangle of Human Dignity: Human Security, Human Development and Human Rights*, in *FROM WARFARE TO WELFARE: HUMAN SECURITY IN A SOUTHERN AFRICAN CONTEXT* 5–15 (Marie Muller & Bas de Gaay Fortman eds., 2004).

174. UDHR, *supra* note 82, pmb1.

While this approach to the minorities' problematique provides sufficient clarity for integrated policy responses, it cannot form a basis for judicial protection as the legal subject is, and will remain, indefinite. Indeed, the collectivities in need of public-political protection are not primordial categories, but collective entities arising out of (deficient) political practice. As such these collectivities will benefit from a shift of resources from quasi-judicial action towards policies supporting political-economic transformation. After a meaningless beginning in the UN hierarchy with the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities, it is high time now to take the security of national collectivities seriously. A new mission might well need a new name. Conceivably, a Sub-Council for Protection of National Collectivities might be established directly under the Security Council, the only UN body with real teeth, to operate according to the principles of R2P.<sup>175</sup> The normative background for such a new institutional setting lies in the genealogy of universal human dignity rather than that of fundamental rights, and in established global legitimacy rather than declared universal legality. Indeed, to effectively protect collective victims of abuse of dominant positions, this whole mission will not merely be rooted in human rights, but in the full triangle of human dignity, including human security and human development.

Naturally, there is nothing wrong with rights, including group rights in the sense of "rights of collectivities." Yet, there are conceptual and contextual difficulties in pursuing efforts to realize such rights. The term "minority," both as a label and as a concept, does not assist in any way toward overcoming those obstacles. It is here that one encounters a major misconception. What is required now is to first reconceptualize the mission in terms of collective human dignity protection, and, secondly, to move that mission from the UN mechanisms for the "promotion and protection of human rights" to an international environment truly conducive to their realization.

In this respect UN Security Council resolution 1973 (2011) on the creation of a "no-fly zone" over Libya may well be seen as a breakthrough. In that text, the Council authorises member states "to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack" (emphasis added), excluding only "a foreign occupying force". Unlike earlier resolutions such as 688 (1991) on a no-fly zone in North Iraq, the language is fully based on the responsibility to protect. Thus, R2P may now be seen as a fully legitimate foundation for validating international military action of an intra-state protective nature.

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175. Typically, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities that used to fall under the Commission on Human Rights has not been a success. For the history of that set-up, see Humphrey, *supra* note 19.