The internationalization of minority rights

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Debates concerning integration and accommodation are a familiar feature of the domestic political life of many countries. But these debates increasingly have an international dimension as well. International organizations can strongly influence the way state–minority relations are framed and resolved, endorsing some models of accommodation while discouraging others. This paper attempts to explore which models of state–minority relations and, hence, which types of minority rights, have been endorsed by international organizations, for which types of groups, and in which contexts. These are not simple questions to answer. Many international organizations have struggled with this issue for the past fifteen years without any clear resolution, and their current policies and practices are full of ambiguities and inconsistencies. The goal of this paper is to bring out some of these complexities, focusing particularly on how the rights of indigenous peoples have been elaborated at the United Nations, and the way in which the rights of national minorities have been discussed within European organizations. Very different assumptions and principles underlie the two cases, and each raises its own moral and political dilemmas.

Around the world, one of the most pressing issues of constitutional design concerns the status and treatment of ethnocultural minorities. Should a constitution recognize a distinctive legal status for indigenous peoples? Should it provide official language status or self-government rights to territorially concentrated minorities? Should it guarantee political representation for dispersed ethnic minorities? In a recent study, John McGarry, Brendan O’Leary, and Richard Simeon have suggested that countries have two broad choices in this regard—either “integration” or “accommodation.” The former seeks to integrate all citizens on a nondiscriminatory basis into shared national institutions; the latter seeks to accommodate diversity through minority-specific institutions. The authors’ study provides a helpful overview of the range of

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arguments regarding these choices and the circumstances that affect how
nations choose.¹

In the past, the decision to opt for integration or accommodation (or to
attempt some hybrid) was left largely to the discretion of individual countries.
Today, however, the international community plays an increasingly impor-
tant role in shaping policy in this area, endorsing some models of integration
and accommodation while discouraging others.

Therefore, any comprehensive examination of the integration/accommo-
dation debate must look closely at the attitudes of the international commu-
nity. When does the international community favor integration, and when
does it favor accommodation? McGarry, O’Leary, and Simeon state that inte-
gration “is the dominant strategy for regulating diversity,” favored by Western
states and by the officials of intergovernmental organizations such as the
United Nations and the Bretton Woods institutions.² This is more or less cor-
rect as a generalization, but it obscures a much more interesting and compli-
cated story. Various international organizations have struggled with this issue
for the past fifteen years without any clear resolution and their current policies
and practices remain full of ambiguities and inconsistencies. This essay aims to
bring out some of these complexities and to highlight some of the challenges
they raise for those involved in debates concerning integration and
accommodation.

I will begin by examining the norms that have been formulated within the
United Nations, which divide nondominant ethnocultural groups into two
broad categories—“indigenous peoples” and “minorities.” According to the
UN, indigenous peoples have much stronger claims to self-government than
minorities. I will argue that, while it is indeed important to distinguish different
categories of ethnocultural groups, this particular categorization is inadequate
to address the actual patterns of ethnic political mobilization and conflict
around the world. I will then consider recent attempts by the Council of Europe
to develop norms relating to the category of “national minorities,” which
potentially can take us beyond the UN’s “indigenous vs. minority” dichotomy.
However, I will argue, these attempts too have proven inadequate, in ways
that raise deep questions about the capacity of international law to articulate
and protect minority rights.

¹ See John McGarry, Brendan O’Leary & Richard Simeon, Integration or Accommodation? The Endur-
ing Debate in Conflict Regulation, in Constitu tional Design for Divided Societies: Integration or Accom-
² Id.
1. The basic international framework

What is the view of the international community toward integration and accommodation? This is, of course, a hopelessly vague question, since the “international community” is not a single monolithic actor with a single set of beliefs or attitudes. Even if we restrict our attention solely to such treaty-based intergovernmental organizations as the United Nations and its agencies or the World Bank and the Council of Europe, there is no one consensus position. Each has its own distinct mandate or function that gives it a unique interest in, and perspective on, issues of ethnic diversity. There are profound differences among, as well as within, these organizations in their approaches to the governance of that diversity.

Let us look first at the United Nations. The UN is a key actor in this debate, not only because it claims to represent and speak for all the peoples of the world but also because it has addressed the question of integration and accommodation explicitly and has developed formal statements of its position. Moreover, its official position is surprisingly simple: namely, that “indigenous peoples” have a right to accommodation, whereas “minorities” have a right to integration.

This basic distinction between indigenous peoples and minorities is reiterated throughout the UN’s activities, be it in the field of environmental protection, economic development, or human rights. However, it is articulated most clearly in two key texts—the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities3 and the draft Declaration on the Rights of Indigenous Peoples, which remains a draft despite thirteen years of intensive debate.4 The former adopts an integrationist approach for minorities, focusing on nondiscrimination and civil rights; the

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4 First introduced in the Working Group on Minorities in 1993, the draft declaration was approved by the Human Rights Council in 2006. See Human Rights Council Res. 1/2, Annex. U.N. Doc. A/HRC/RES/1/2/Annex (June 29, 2006). The Council approved it by a vote of 30 in favor to 2 against (Canada and Russian Federation), with 12 abstentions, and forwarded it to the General Assembly for consideration: as of this writing, action is still pending. However, despite its lack of legal force, its core ideas have been picked up by various organs and agencies within the UN system, and similar ideas have been articulated by the International Labour Organization and in the draft declaration on indigenous rights of the Organization of American States (OAS).
latter adopts an accommodationist approach for indigenous peoples, focusing on self-government and institutional pluralism.5

This basic approach has been reaffirmed by the two UN working groups that have developed and interpreted these key texts. In 2000, Asbjorn Eide and Erica-Irene Daes, the then chairpersons, respectively, of the UN’s Working Group on Minorities and Working Group on Indigenous Populations explained their understanding of the differing rationales underlying the two documents.6 Their statements point to three basic differences between minorities and indigenous peoples: (a) minorities seek institutional integration while indigenous peoples seek to preserve a degree of institutional separateness; (b) minorities seek to exercise individual rights while indigenous peoples seek to exercise collective rights; (c) minorities seek nondiscrimination while indigenous peoples seek self-government. These statements by important UN figures confirm the fundamentally integrationist approach of the minority rights declaration, and the fundamentally accommodationist approach of the indigenous rights declaration.

Daes gives a particularly clear statement of the distinction:

Bearing the conceptual problem [of distinguishing indigenous peoples from minorities] in mind, I should like to suggest that the ideal type of an “indigenous people” is a group that is aboriginal (autochthonous) to the territory where it resides today and chooses to perpetuate a distinct cultural identity and distinct collective social and political organization within the territory. The ideal type of a “minority” is a group that has experienced exclusion or discrimination by the State or its citizens because of its ethnic, national, racial, religious or linguistic characteristics or ancestry.

… From a purposive perspective, then, the ideal type of [a] “minority” focuses on the group’s experience of discrimination because the intent of

5 I will use the accommodation/integration terminology adopted by McGarry et al., supra note 1, although it is potentially misleading. What they call integrationist models often involve some degree of accommodation of cultural diversity within common institutions. For example, a “duty to accommodate” is part of the immigrant multiculturalism policy in Canada, even though this clearly qualifies as an integrationist policy in their typology. Conversely, what they call accommodationist models can often be seen as a way of ensuring that self-governing groups are, nonetheless, connected to (and in that sense integrated into) a larger state. Provincial autonomy for Quebec accommodates an aspiration for autonomy, but it also integrates a potentially secessionist group into a larger federal political order. The terms “integration” and “accommodation” should be understood with these provisos in mind.

existing international standards has been to combat discrimination, against the group as a whole as well as its individual members, and to provide for them the opportunity to integrate themselves freely into national life to the degree they choose. Likewise, the ideal type of “indigenous peoples” focuses on aboriginality, territoriality, and the desire to remain collectively distinct, all elements which are tied logically to the exercise of the right to internal self-determination, self-government, or autonomy. 7

The parallels between Daes’s two “ideal types” and the ideal types of integration and accommodation developed by McGarry and his colleagues are both clear and direct. It is worth noting here that although Eide and Daes are primarily concerned with explaining the different entitlements of the two kinds of groups, as envisaged under the relevant UN declarations, they are not simply talking about legal distinctions. They are also making claims about the aspirations of the two groups. If international norms accord different rights to minorities than to indigenous peoples, this is because the two groups are presumed to want different kinds of rights. According to Daes, “The facts remain that indigenous peoples and minorities organize themselves separately and tend to assert different objectives, even in those countries where they appear to differ very little in ‘objective’ characteristics.” 8 Steven Wheatley makes a similar claim: “There is no objective distinction that can be made between groups recognized as minorities, national minorities, indigenous peoples and peoples. What distinguishes these groups is the nature of their political demands: simply put, minorities and national minorities demand cultural security; peoples demand recognition of their right to self-determination, or self-government.” 9

This, then, is the UN’s basic theoretical framework for addressing these issues, although the organization’s actual practices are more complicated than its formal declarations would suggest. The UN endorses integration and non-discrimination for national, ethnic, religious, and linguistic minorities, even as it endorses accommodation and autonomy for indigenous peoples. We can see echoes of this approach in other major intergovernmental organizations, such as the World Bank or International Labour Organization, which have adopted similar formal policies espousing autonomy for indigenous peoples while endorsing nondiscrimination and integration for minorities. 10

7 Id. at paras. 48–49.
8 Id. at para. 41.
9 STEVEN WHEATLEY, DEMOCRACY, MINORITIES AND INTERNATIONAL LAW 124 (Cambridge Univ. Press 2005).
2. Limitations of the international framework

The UN approach has the virtue of simplicity; however, it is arguably inadequate to the real-world challenges of ethnic diversity. With regard to indigenous peoples, its approach is widely and rightly seen as beneficial, helping to empower historically subordinated groups and to disseminate best practices for the effective participation and self-government of indigenous peoples. The UN Working Group on Indigenous Populations has served as the nerve center for a vibrant transnational network of community activists, nongovernmental organizations (NGOs), academics, philanthropic foundations, and policy makers; with considerable success, this network has diffused the ideas and standards contained in the draft declaration on indigenous rights. It has been particularly effective in encouraging and legitimizing the mobilization of indigenous peoples in Latin America.11

The UN’s approach to minorities, by contrast, has been less successful. Its Working Group on Minorities has not become the locus of a global network in defense of minority rights. And even though the UN’s declaration on minority rights has a clearer normative status than the draft declaration on indigenous rights—since it has been adopted unanimously by the General Assembly—the former has not had nearly the same public impact and is rarely invoked by minorities around the world.

There are several difficulties confronting the UN approach to minorities; the central problem, however, is the underlying assumption that “ethnic, national, racial, religious or linguistic” minorities can all be lumped together, and that they all seek integration rather than accommodation. This is, at best, a drastic overgeneralization, and at worst a serious misinterpretation of the issues. As others discuss in depth,12 there are many cases worldwide where minorities seek accommodation rather than integration. Some of the most well known and protracted struggles for autonomy around the world involve groups that are considered minorities rather than indigenous peoples by the UN—groups such as the Scots, Catalans, Chechens, Kosovar Albanians, Kurds, Kashmiris, and Tamils. Indeed, in the early 1990s, it was precisely the upsurge of ethnic conflicts involving autonomy-seeking substate nationalist minorities that led the UN to take an active interest in formulating standards regarding minorities.13 And yet, remarkably, the text that resulted—the 1992 declaration on minority rights—far from providing guidance for dealing with such minority

11 See Alison Brysk, From Tribal Village to Global Village: Indian Rights and International Relations in Latin America (Stanford Univ. Press 2000).
12 See Constitutional Design for Divided Societies, supra note 1.
13 See Kymlicka, supra note 10 at ch. 2, on the impetus given to the UN’s standard-setting activities by these ethnonationalist conflicts.
claims for autonomy, actually renders them invisible by presupposing that minorities, by definition, are only interested in integration.

The problem is not simply that a model based on a stark dichotomy between autonomy-seeking indigenous peoples and integration-seeking minorities is inadequate to deal with a number of important real-world cases. The deeper problem is that this very way of dividing up the ethnocultural landscape may obscure the actual issues involved in the choice between accommodation and integration.

In order to understand the problem, we need to step back and examine the broader patterns of ethnic politics in contemporary democracies. Relations between the state and minorities in the Western democracies are highly differentiated by group. Certain generic civil and cultural rights are guaranteed to the members of all ethnocultural groups; however, there are also a number of "targeted" rights that apply only to particular categories of groups. The precise categories vary from country to country, but they typically fall into the same basic pattern. The most common distinction is between “old” minorities, which were settled on their territory prior to its becoming part of a larger, independent country, and “new” minorities, which were admitted to a country as immigrants after it achieved legal independence. The old minorities are often called “homeland” minorities, since they have been historically settled within a particular part of a country for a long period of time and, as a result of that historic settlement, have come to see that part of the country as their historic homeland. The minority’s homeland is incorporated within a larger state or, perhaps, divided between two or more countries; nonetheless, the minority still has a strong sense of attachment to this homeland and often nurtures memories of an earlier time, prior to the origin of the modern state, when it had self-government over this territory.

There is a nearly universal tendency within the Western democracies to distinguish the rights of old homeland minorities from those of new immigrant minorities. As Perry Keller notes, this distinction is “found in the laws and policies of almost every European State.”\(^{14}\) The same is true in North America.\(^ {15}\)

Of course, these broad categories of old and new minorities are themselves quite heterogeneous. Within the category of new minorities, for example, many countries accord a different legal status to different subcategories, such

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as asylum seekers, temporary guest workers, illegal immigrants, and permanent immigrants. These may be crucially important legal distinctions but, insofar as any of these new minorities are accorded minority rights, they fall on the integration side of the ledger. In many countries, some of these new minorities are not granted any minority rights and are subject to policies of either assimilation or exclusion. But even in those countries that grant minority rights to some new minorities, often under the aegis of “multiculturalism,” these are based on ideas of integration, not accommodation, and do not entail territorial self-government, official language status, or legal pluralism.

Similarly, there are important distinctions to draw within the category of old minorities. The most important distinction is between indigenous peoples and other historically settled homeland minorities, often called national minorities. The former include the Indians and Inuit in Canada, the Aboriginal peoples of Australia, the Maori of New Zealand, the Sami of Scandinavia, the Inuit of Greenland, and Native American tribes in the United States; the latter include the Québécois in Canada, the Scots and Welsh in Britain, the Catalans and Basques in Spain, the Flemish in Belgium, the German-speaking minority in South Tyrol in Italy, the French- and Italian-speaking minorities in Switzerland, and Puerto Ricans in the United States. Here, again, this is an important distinction for many legal purposes but, in relation to issues of minority rights, both types of old minorities fall on the accommodation side of the ledger. They both seek and, increasingly, are accorded various rights to self-government over their traditional territory, as well as the right to use their language and express their culture in its public spaces.

To understand the UN’s approach, and its limitations, we need to examine this distinction between indigenous peoples and national minorities in more depth. To oversimplify, the term “indigenous peoples” arose primarily in the context of New World settler states and refers to the descendants of the original non-European inhabitants of lands colonized and settled by European powers. Most of the early work on indigenous issues at the UN, for example, focused on the so-called Indian populations in Latin America. “National minorities,” by contrast, is a term invented in Europe to refer to the European groups that lost out in the tumultuous process of European state formation over the past five centuries, and whose homelands were incorporated (in whole or in part) into larger states dominated by a neighboring European people. National minorities were active players in the process by which the early modern welter of empires, kingdoms, and principalities in Europe was turned into the modern system of nation-states. However, they either ended up without a state of their own or in states where their status was inferior to that of the majority population.

16 The Flemish form a numerical majority in Belgium, but were historically subordinated to the French-speaking elite, and so are often considered a “minority” according to definitions that emphasize nondominant status rather than numbers per se, and as a case of “minority nationalism,” in the sense of contesting the earlier French-dominated state nationalism.
own (as in the case of the Catalans) or found themselves on the wrong side of the border, cut off from their coethnics in a neighboring kin-state (as occurred with ethnic Germans in Denmark and Italy).

These are the core cases for the two categories. A preliminary and crude way of distinguishing them is to say that national minorities have been incorporated into a larger state dominated by a neighboring European people, whereas indigenous peoples have been colonized and settled by a distant colonial European power. But there are other ways of marking the distinction between the two types of groups that supervene on this basic historical difference. It is widely accepted, for example, that the subjugation and incorporation of indigenous peoples by European colonizers was a more brutal and disruptive process than the subjugation and incorporation of national minorities by neighboring societies, and that this has left indigenous peoples weaker and more vulnerable. It is also often assumed that there is a supposed “civilizational” difference between indigenous peoples and national minorities. Whereas national minorities typically share the same modern (urbanized, industrialized) economic and sociopolitical structures as their neighboring European peoples, indigenous peoples are often assumed to have retained premodern modes of economic production, engaged primarily in subsistence agriculture or a hunter-gatherer lifestyle. And, as a result of large-scale colonizing settlement, it is assumed further that indigenous peoples, unlike national minorities, have been relegated, typically, to isolated and remote areas.

Thus, both in their core cases and in everyday usage the two terms refer to quite different types of groups, each rooted in fundamentally different historical processes and differing in their contemporary characteristics, including degrees of vulnerability, modes of production, and habitats. Both, however, are old minorities, having a historic presence on their traditional territory that predates the formation of the current state. As such, they are both homeland minorities, living on or near a historic homeland that has been incorporated into a larger state dominated by another national group. In recognition of this fact, there has been a widespread tendency within Western democracies to adopt an accommodationist approach toward both types of groups. This typically involves some form of territorial autonomy, combined with official language rights (in the case of national minorities) and land claims and customary law (in the case of indigenous peoples). Both groups are distinguished from new minorities—those formed through immigration or refugee flows after the establishment of the state—whose cultural claims are typically addressed through a more integrationist approach, based on nondiscrimination, civil rights, and the reform of common institutions to make them more accessible to, and respectful of, the new minorities.

We now see how the UN approach to the accommodation/integration issue differs from the established practice of Western democracies. In two key contexts, UN norms and Western practices converge: both endorse a norm of
accommodation for indigenous peoples, and both endorse a norm of integration for new minorities. They diverge, however, with regard to the central case of national minorities or, more generally, on the case of homeland minorities that do not qualify as indigenous peoples, whether it is the Scots in Britain, the Kurds in Turkey, or the Tibetans in China. In the practice of Western democracies, such national minorities are typically accorded accommodation, while, under the UN norms, they would be presumed to come under the integration approach. In the practice of Western democracies, national minorities belong with indigenous peoples on the accommodation side of the ledger; according to UN norms, they would belong, with the new minorities, on the integration side.

Why have UN norms diverged from Western practices in this way? I will return to this question below; however, part of the answer lies in the special vulnerability of indigenous peoples and, hence, in their more urgent need for accommodation. As noted earlier, the subjugation of indigenous peoples by European colonizers was typically a more brutal and disruptive process than the subjugation of national minorities by neighboring European societies, and this has left indigenous peoples more vulnerable and, hence, in greater need of international protection. As a result, there was a plausible moral argument for giving priority to indigenous peoples over national minorities in the development of rights to self-government in international law.

However, what began as a difference in the relative priority and urgency of the claims of indigenous peoples and national minorities has paved the way for an almost total rupture between the two at the level of international law. If we take the stance of international organizations as our reference point—rather than the practice of Western democracies—it would appear that rights of self-government are claimed legitimately only by indigenous peoples, rather than by homeland minorities more generally. Across a wide range of international documents and declarations, indigenous peoples have been distinguished from other homeland minorities, and claims to territory and self-government have been restricted to the former. Under the current UN framework, national minorities are lumped in the same category as new minorities, ignoring their distinctive needs and aspirations in relation to historic settlements and territorial concentration. As a result, the distinction between indigenous peoples and other homeland minorities has acquired a significance and a rigidity in the international community that is entirely missing in the theory and practice of Western liberal democracy.

The attempt to draw a sharp distinction between indigenous peoples and national minorities, and to put national minorities in the same legal category as new minorities, raises a number of difficult questions. It creates (a) moral inconsistencies, (b) conceptual confusion, and (c) unstable political dynamics.

The sharp distinction in rights between the two types of groups is morally inconsistent, because whatever arguments exist for recognizing the rights of
indigenous peoples to self-government also apply to the claims for self-government by other vulnerable and historically disadvantaged homeland groups. Miriam Aukerman compared the claims of indigenous peoples with those of national minorities in postcommunist countries and noted the strong similarities in their underlying goals and justifications. As she puts it, “Indigenous peoples and Central-East European [national] minorities share the goal of preserving their distinctive cultures, and justify their claims to group-differentiated rights with similar appeals to self-determination, equality, cultural diversity, history and vulnerability.”

Indeed, this inconsistency becomes clear from the explanations and justifications offered for the proposed indigenous rights norms by the experts chairing the two UN working groups in 2000. As noted earlier, they accord targeted rights to indigenous peoples beyond those available to all other minorities because of three key differences: the former seek institutional integration, individual rights, and nondiscrimination, whereas the latter seek institutional separateness, collectively exercised rights, and self-government. These are all pertinent differences between indigenous peoples and new minorities, such as immigrants, but they do not distinguish indigenous peoples from national minorities. On all three points, national minorities typically fall on the same side of the equation as indigenous peoples.

In an earlier document prepared for the Working Group on Indigenous Populations, Daes offers a somewhat different account. She states that the crucial feature of indigenous peoples, which distinguishes them from minorities in general, is their strong attachment to a traditional territory that they view as their historic homeland:

[A]ttachment to a homeland is … definitive of the identity and integrity of the [indigenous] group, socially and culturally. This may suggest a very narrow but precise definition of “indigenous,” sufficient to be applied to any situation where the problem is one of distinguishing an indigenous people [from] the larger class of minorities.

But this criterion—“attachment to a homeland”—obviously differentiates homeland minorities (including national minorities), in general, not


19 Id. at para. 39.
indigenous peoples, in particular. Elsewhere, Daes claims that it is “possible to identify at least two factors [in the case of indigenous peoples] which have never been associated with the concept of ‘minorities’: priority in time and attachment to a particular territory.” But here again, these factors apply to old homeland minorities, generally, not just to indigenous peoples.

In short, because virtually all of the moral principles and arguments invoked at the UN to defend indigenous rights also apply to national minorities, an attempt to draw a sharp distinction in legal status between national minorities and indigenous peoples is morally problematic. It is also conceptually unstable. The problem is not merely how to justify the sharp difference in their legal rights but how to identify the two types of groups in the first place. The very distinction between indigenous peoples and other homeland minorities is difficult to draw outside the original core cases of Europe and European settler states.

In the West, there is a relatively clear distinction to be drawn between European “national minorities” and New World “indigenous peoples.” Both are homeland groups, although the former have been incorporated into a larger state dominated by a neighboring people, whereas the latter have been colonized by a remote colonial power. It is far less clear how we can draw this distinction in Africa, Asia, or the Middle East, or whether the categories even make sense there. Depending on how we define the terms, we could say that none of the homeland groups in these regions are “indigenous,” or that all of them are.

In one familiar sense, no groups in Africa, Asia, or the Middle East fit the traditional profile of indigenous peoples. All the homeland minorities in these regions were incorporated into larger states dominated by neighboring groups rather than into settler states dominated by European settlers. In that sense, they are all closer to the profile of European national minorities than to New World indigenous peoples. For this reason, several Asian and African countries insist that none of their minorities should be designated as indigenous peoples. In another sense, however, we could say that, in these regions, all homeland groups (including the dominant majority group) are indigenous. During the era of colonial rule, all homeland groups, majority and minority alike, were designated as “natives” or “indigenous” in relation to the colonial rulers. Thus, from that perspective, all homeland groups in postcolonial states (including the dominant group) are equally

20 Id. at para. 60.

21 Cf. Amal Jamal, On the Morality of Arab Collective Rights in Israel, ADALAH NEWSLETTER, Apr. 2005, at 12 (arguing that Israel should be included as a European settler state, and, hence, that the Palestinians fit the traditional definition of an indigenous people).
“indigenous.” And, indeed, the governments of several Asian and African countries declare that all their historic groups, majority and minority, should be considered indigenous.22

These two approaches yield diametrically opposed results but the upshot in both cases is to undermine the possibility of distinguishing the category of indigenous peoples from that of national minorities. Whether we say that all homeland groups are indigenous or that none are, we end up in either instance without a basis for identifying a subset of minorities as indigenous peoples, distinct from national minorities or other homeland minorities.

For this reason, some commentators have argued that the legal category of “indigenous people” should apply only to European settler states in the New World and not to Africa and Asia.23 If the UN adopted this approach, it would mean, in effect, that all minorities in Asia or Africa, both old and new, fall under the integration framework of the UN’s minorities declaration, not the accommodation framework of the indigenous declaration.

The UN, however, has not taken this approach. Instead, it has made the assumption that some homeland minorities in Africa and Asia are as deserving of—and as much in need of—autonomy and accommodation as indigenous peoples in the Americas. In order to protect such groups, therefore, the UN has attempted to reconceptualize the category of indigenous peoples so that it covers at least some homeland minorities in postcolonial states. From this perspective, we should not focus on whether homeland minorities are dominated by settlers from a distant colonial power or by neighboring peoples. What matters, simply, is the fact of their domination by others and their vulnerability.

22 E.g., Zambia’s report to the UN, which states, “Zambia does not have the classifications of indigenous populations and minority communities as defined by the United Nations Organization. Zambia has ethnic groups that are all indigenous” (UN Doc. CRC/C/11/Add.25, Nov. 19, 2002), para 470. Lennox describes this as “representative of the commonly held view” among African states. See Corinne Lennox, The Changing International Protection Regimes for Minorities and Indigenous Peoples: Experiences from Latin America and Africa (paper presented to Annual Conference of International Studies Association, San Diego, Mar. 2006) (on file with author and with I•CON). As Mamdani notes, however, there is often an important exception to this claim that all ethnic groups are considered indigenous; in many African countries, groups brought to the country during the period of colonial rule often are still considered immigrants or foreigners, such as the indentured laborers from India whom the British moved throughout the British Empire. See MAHMOOD MAMDANI, CITIZEN AND SUBJECT (Princeton Univ. Press 1996) for a discussion of the ways these colonial-era migrant groups are (mis)treated by many postcolonial citizenship regimes in Africa. It remains true, however, that all precolonial groups are often called indigenous, including the dominant group.

and, thus, the need to find appropriate means to remedy these conditions. If homeland groups are dominated and vulnerable, we should use the international norms of indigenous rights to protect them, even if their oppressors are their historic neighbors and not colonizing settlers from afar. Hence, the UN approach has encouraged groups in Africa and Asia to identify themselves as indigenous peoples in order to gain greater international visibility and protection.

The difficult question this raises, however, is how to identify which homeland groups in Africa or Asia should be designated as indigenous peoples for the purposes of international law and practice, and on what basis? Once we start down the road of extending the category of indigenous peoples beyond the core case of New World settler states, there is no obvious stopping point. Indeed, there are significant disagreements within various international agencies about how widely to apply the category to homeland minorities in postcolonial states. Some would limit it to those peoples who were especially isolated geographically, such as the hill tribes or forest peoples in southeast Asia or pastoralists in Africa. Others would limit it to groups that fall outside the market economy—that is, to groups living as hunter-gatherers or subsistence cultivators but not involved in trade or the labor market. (This seems to be one of the World Bank’s criteria, invoked to deny indigenous status to the Berbers in Algeria.)

These narrow definitions of indigenous people are clearly inconsistent with the way the term is used in the New World. In Latin America, for example, the term applies not only to isolated forest peoples in the Amazon, such as the Yanomami, but also to peasants in the highlands who have been in intensive contact and trade with the larger settler society for five hundred years, such as the Maya, Aymaras, or Quechas. Similarly many indigenous peoples in North America, such as the Mohawks, have been involved in either settled agriculture and/or the labor market for generations. To limit the category to groups that are geographically isolated or not involved in trade or the labor market

24 According to Daes, attempts to distinguish long-distance colonizing settlement from incorporation into states dominated by neighboring societies rest on an “unjustified distinction.” Daes, Working Paper 1996, supra note 18, at para. 63. Similarly, the Working Group on Indigenous Populations/Communities in Africa, established by the African Commission on Human and People’s Rights (created by the Organization of African Unity [OAU]), has stated that “[d]omination and colonisation has [sic] not exclusively been practised by white settlers and colonialists. In Africa, dominent groups have also after independence suppressed marginalized groups, and it is this sort of present-day internal suppression within African states that the contemporary African indigenous movement seeks to address...” (African Commission 2005: 92).


26 Id., Box 3.1.
would be to exclude some of the largest and most politically influential indigenous groups in the New World.

Accordingly, other commentators would extend the category of indigenous peoples in postcolonial states much more widely in order to encompass all historically subordinated homeland minorities that suffer from some combination of political exclusion, poverty, or cultural vulnerability. (This seems to be the recent approach of the International Labour Organization [ILO], at least in southeast Asia). On this view, the label “indigenous peoples” would become virtually synonymous with “homeland minority”; it would cease to be a subcategory of homeland minority. The difference between the narrower and broader conceptions of indigenous peoples is potentially enormous—estimates of the number of people who would qualify as “indigenous peoples” in Indonesia range from 2 percent to 60 percent of the population, depending on whether a narrower or broader definition is used. There is an enormous literature on this question of how to apply the category of “indigenous peoples” in Africa and Asia, and on the relative merits of broader and narrow definitions. This is a matter of ongoing debate within various intergovernmental organizations, each of which has adopted different definitions, to the consternation of commentators who wish that a single definition would be adopted across the international community.

From my perspective, however, the fact that different definitions are being used by different intergovernmental organizations is not the only, or even the primary, problem. The more serious problem is that all of these proposed approaches, whether narrow or broad, invoke criteria that are clearly a matter of degree. Homeland minorities in postcolonial states form a continuum in terms of their cultural vulnerability, geographical isolation, level of integration into the market, and political exclusion. We can, if we like, set a threshold somewhere along this continuum in order to determine which of these groups are called “indigenous peoples” and which are “national minorities”; however, any such threshold is likely to appear arbitrary and incapable of bearing the weight that international law currently places upon it. International law treats the distinction between indigenous peoples and national minorities as a categorical one, with enormous implications for the legal rights each type of group

28 Pieter Evers, Preliminary Policy and Legal Questions about Recognizing Traditional Land in Indonesia, 3 EKONESIA 1–24 (1995).
30 For an overview of these variations, and the calls for greater consistency, see WORLD BANK, LEGAL NOTE ON INDIGENOUS PEOPLES (Apr. 8, 2005); and WORLD BANK: IMPLEMENTATION OF OPERATIONAL DIRECTIVE, supra note 25.
may claim. In the postcolonial world, however, any attempt to distinguish indigenous peoples from national minorities on the basis of their relative levels of vulnerability or exclusion can only track differences of degree, not the difference in kind implied by international law.  

The attempt to preserve such a sharp distinction is not only morally dubious and conceptually unstable, it is also, I suspect, politically unsustainable. The problem here is not simply that the category of indigenous peoples has gray areas and vague boundaries, with the potential for being over- or under-inclusive. That is true of all targeted categories, and there are well-established techniques of democratic deliberation and legal interpretation for dealing with such boundary disputes. The problem, rather, is that too much depends on which side of the line the various groups fall, and, as a result, there is intense political pressure to change where the line is drawn. This pressure is pushing the UN in unsustainable directions.

As should be clear by now, the current UN framework provides no incentive for any homeland minority to identify itself as a national minority, since this category provides no rights that are not available to any other ethnocultural group, including new minorities. Instead, all homeland minorities have an overwhelming incentive to define, or redefine, themselves as indigenous peoples. If they present themselves to the international community as a national minority, they get nothing other than generic minority rights premised on the integration model; if they come, instead, as an indigenous people, they have the promise of rights to land, control over natural resources, political self-government, language rights, and legal pluralism.

The increasing tendency for homeland groups in Africa, Asia, and the Middle East to adopt the label of indigenous peoples is thus not surprising. An interesting case is the Arab-speaking minority in the Ahwaz region of Iran, whose homeland has been subjected repeatedly to state policies of Persianization, including the suppression of Arab language rights, the renaming of towns and villages to erase evidence of their Arab history, and settlement policies that attempt to swamp the Ahwaz with Persian settlers. In the past, Ahwaz leaders have complained to the UN Working Group on Minorities that their rights as a national minority were not respected. But since the UN does not recognize

11 See this frank admission of the chairman of the UN Working Group on Minorities: “The usefulness of a clear-cut distinction between minorities and indigenous peoples is debatable. The Sub-Commission, including the two authors of this paper, have played a major role in separating the two tracks. The time may have come for the Sub-Commission to review the issue again… The distinction is probably much less useful for standard setting concerning group accommodation in Asia and Africa.” Eide, in Eide & Dues, Working Paper, supra note 6, at para. 25.

national minorities as having distinctive rights, the Ahwaz have run into a dead end. Thus, they have relabeled themselves as an indigenous people and begun participating in the work of the Working Group on Indigenous Populations. Similarly, various homeland minorities in Africa, which once sent representatives to the Working Group on Minorities, have now started rebranding themselves as indigenous peoples and participating in that working group, primarily in order to gain protection for their land rights.\footnote{For list of African organizations attending meetings of the Working Group on Minorities, see http://www.ohchr.org/english/issues/minorities/main.htm; for the (overlapping) list of African organizations attending the Working Group on Indigenous Populations, see U.N. Doc. A/HRC/Sub.1/58/22*. For a discussion of how groups move from one to the other, see Lennox, supra note 22.}

This is just the tip of the iceberg. Any number of minorities are now debating whether to adopt the label of indigenous peoples, including the Crimean Tatars, the Roma, or Afro-Latin Americans. Even the Kurds—the textbook example of a stateless national minority—are debating whether to redefine themselves as an indigenous people, so as to gain international protection. So, too, with the Palestinians in Israel, the Abkhaz in Georgia or Chechens in Russia, and the Tibetans in China.\footnote{For examples and discussion, see Ursula Dorowszewska, Rethinking the State, Minorities and National Security, in CAN LIBERAL PLURALISM BE EXPORTED? 126–134 (Will Kymlicka & Magda Opalski eds., Oxford Univ. Press 2001) (on the Crimean Tatars); Edo Banach, The Roma and the Native Americans: Encapsulated Communities within Larger Constitutional Regime, 14 FLORIDA J. INT’L L. 353 (2002); and Ilona Klimova-Alexander, Transnational Romani and Indigenous Non-Territorial Self-Determination Claims, 6 ETHNPOLITICS 395 (2007) (on the Roma); Jamal, supra note 21; and Hassan Jabareen, Collective Rights and Recognition in the Constitutional Process, 12 ADAHAH NEWSLETTER (Apr. 2005) (on the Palestinians); Lennox, supra note 22. (on Afro-Latinos); and Aukerman, supra note 17 (on various Eastern European cases).}

In all of these cases, minorities are responding to the fact that generic minority rights are “regarded as fatally weak”\footnote{Russel Lawrence Barsh, Indigenous Peoples in the 1990s: From Object to Subject of International Law?, 7 HARV. HUM. RTS. J. 33, 81 (1994).} and as “completely inadequate … to their needs,”\footnote{Aukerman, supra note 17, at 1030.} since generic rights are premised on integration and do not protect any claims based on historic settlement or territorial attachments. Given international norms as currently conceived, recognition as an indigenous people is the only avenue for pursuing protection for these interests. Perhaps, in time, the Scots and Basques will also claim this status. After all, what homeland minority would not want the same rights—as currently formulated—that are accorded indigenous peoples?

While the tendency for national minorities to adopt the label of indigenous peoples is not surprising, it is also not sustainable. The net effect of such shifts in self-identification would be the total collapse of the international system of indigenous rights. Many states supported the UN draft declaration on indigenous
rights only because it was seen as exceptional, relevant to a very specific and relatively small and peripheral set of groups, and not as a precedent that could be invoked by other, larger homeland groups, such as national minorities. As we will see below, various intergovernmental organizations have repeatedly and explicitly rejected attempts to codify rights of self-government for powerful substate national groups, in part, because of geopolitical security implications. They are not going to allow such groups to gain rights of self-government through the back door simply by redefining themselves as indigenous peoples. Yet there is very little within the current UN indigenous rights machinery that prevents such a shift from taking place.

If more and more homeland groups adopt the indigenous label, the likely result is that the international community will retreat from its current commitment to robust accommodation rights for indigenous peoples. Indeed, the first signs of such a retreat are already visible. There are a number of ways this retreat could take place. The most obvious is that member states may bring negotiations on the UN and Organization of American States (OAS) draft declarations to a halt. Or they may gut these declarations of their substantive content—for example, by excising rights to land or self-government, and by moving toward a more integrationist approach. Or they may attempt to limit sharply the scope of application of these declarations—perhaps by limiting them to “remote” groups that do not participate in the wage economy, such as forest dwellers. Whatever the technique, the result of such a retreat would be to undermine the major progress that has occurred to date on behalf of indigenous people.

This suggests that the long-term future of the targeted track for the indigenous at the UN and other intergovernmental organizations is not yet clear. This track is often cited as the clearest success in the development of international minority rights, but this judgment may be premature. Indeed, it has been a success, but it is in danger of becoming a victim of its own success. Achievements in the New World, particularly in empowering indigenous peoples in Latin America, are encouraging intergovernmental organizations to redefine and extend the category in ways that are morally inconsistent, conceptually unstable, and politically unsustainable.

3. Rethinking the approach

The UN is not unaware of these difficulties with its current approach to minority rights. Many key actors within the UN realize that the simple distinction

37 The Draft Declaration finally came up for adoption by the General Assembly in November 2006, and was widely expected to pass, but instead it was deferred, largely due to concerns by African countries about the definition of indigenous peoples. For the African Group’s objections, see its Draft Aide Memoire (Nov 9, 2006), available at http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/AfricanGroupAideMemoireOnDeclaration.pdf.
between autonomy-seeking indigenous peoples and integration-seeking minorities does not capture the reality of ethnic relations around the world, and that many different types of homeland minorities—not just indigenous peoples—seek autonomy. Indeed, the UN has direct hands-on experience with these claims for autonomy, since such claims are at the root of some of the most difficult and violent ethnic conflicts around the world, which it is often called upon to help resolve. In many cases, the UN has intervened actively to support the autonomy aspirations of national minorities, as in Cyprus (for the Turkish minority), Sudan (for the Southern peoples), Iraq (for the Kurds), Indonesia (for Aceh and Papua), Sri Lanka (for the Tamils), and Burma (for the Karens and others). Indeed, in Cyprus, the UN essentially drafted a new constitution (the “Annan Plan”) proposing federalization and consociational power sharing as a means to overcome the long-standing conflict between the Greek majority and Turkish national minority.

Analogous situations have arisen in postcommunist Europe, although in this context it has been European organizations (such as the European Union, the Organization for Security and Cooperation in Europe [OSCE], and NATO) that usually have taken the lead role in conflict resolution. In several cases of conflict between states and homeland minorities in postcommunist Europe, intergovernmental organizations have pushed for the adoption of some form of federal or quasi-federal territorial autonomy—for example in Serbia (for Albanians), Bosnia (for Serbs), Macedonia (for Albanians), Ukraine (for Russians in Crimea), Moldova (for Slavs in Trans-Dniestria), Georgia (for Abkhaz), and Azerbaijan (for Armenians).

Thus, in a wide range of cases, the UN and other intergovernmental organizations have endorsed an accommodationist rather than integrationist approach toward national minorities. Moreover, they have justified this preference for a more accommodationist approach by citing “best practices” from the Western democracies. The Annan Plan for Cyprus, for example, explicitly drew on strategies used in Switzerland and Belgium to accommodate their substate national groups. Similarly, the EU’s proposals for the former Yugoslavia were based on the model of autonomy for the German national minority in Italy. These Western examples are presented as successful models of how a liberal-democratic state should deal with its national minorities; they were not understood as regrettable deviations from an ideal of integration. In these and other ways, the UN has been actively involved in diffusing the theory and practice of autonomy regimes for national minorities to policy makers, journalists, community leaders, and academics around the world.\(^{38}\)

In short, the UN exhibits a degree of inconsistency regarding the appropriate treatment of national minorities. In terms of norms, the UN presupposes

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\(^{38}\) See Kymlicka, supra note 10, for more on the role of international organizations in diffusing discourses and models of minority rights.
that national minorities seek only integration (and are entitled only to integration) and belong in the same legal category as new minorities. In the actual practice of case-specific conflict resolution, however, the UN has set aside this presupposition, acknowledged the necessity of considering accommodationist alternatives to integration, and helped to diffuse models and best practices of accommodation.

In my view, this willingness to consider accommodationist alternatives is essential if the UN is to play a constructive role in resolving conflicts between states and national minorities. There was (and is) no plausible alternative to autonomy in such countries as Sudan, Iraq, Indonesia, and Sri Lanka. However, the fact that the UN’s recommendations for accommodation in specific cases deviate from the norms and expectations of its own minorities declaration does create some obvious problems. For one thing, its recommendations appear ad hoc: Why is the UN supporting autonomy for national minorities in Indonesia and not, say, in Pakistan? Why is the UN supporting autonomy for the Kurds in Iraq but not for the Kurds in Iran? Why are intergovernmental organizations supporting autonomy for Albanians in Macedonia but not for Hungarians in Slovakia? At best, these recommendations seem arbitrary, and, at worst, they appear to be rewarding belligerence. An obvious explanation for why the UN is supporting autonomy for some national minorities and not others is simply that the former took up arms and engaged in violent struggles. In virtually all of the cases where the UN has endorsed autonomy for national minorities, it is after the minorities resorted to violence. By contrast, where national minorities have peacefully and democratically mobilized for autonomy, they typically receive no support from the international community and, instead, are told that international norms on the rights of minorities do not recognize a right to autonomy. 39

The perverse effect is to increase the incentive for autonomy-seeking national minorities to take up arms, as this is the only way they can obtain any international support. At the same time, this state of affairs may delegitimize the very idea of autonomy, since it easily could be perceived as a payoff to belligerent minorities, rather than as a principled approach to the management of ethnocultural diversity.

Obviously, it would be preferable if the UN or other intergovernmental organizations could find a more principled basis on which to evaluate national minority claims to autonomy. To pretend that national minorities do not seek

39 The ethnic Hungarians in Slovakia and Romania have repeatedly complained that their peaceful mobilization for autonomy has received no support from international organizations and indeed has often been discouraged. See Margit Bessenyey-Williams, European Integration and Minority Rights: The Case of Hungary and its Neighbours, in Norms and Nannies: The Impact of International Organizations on the Central and East European States, 227–258 (Ron Linden ed., Rowman & Littlefield 2002).
autonomy, as the UN declaration does, is to bury one’s head in the sand. To support autonomy only in cases of violent conflict, as the UN practice of case-specific intervention does, may unintentionally encourage aggression. Developing a more consistent and principled approach to national minorities would not only enable more effective international intervention but also would help to stabilize the current framework for indigenous rights since, as we have seen, the absence of any recognition of national minority rights puts unsustainable pressure on the policy track regarding indigenous peoples.

Unfortunately, the prospects for the development of new international norms regarding the rights of national minorities are not good. There has only been one attempt at the UN to develop such norms, and that was stillborn. In 1994, Liechtenstein circulated in the General Assembly’s Social, Cultural and Humanitarian Affairs Committee a draft Convention on Self-Determination through Self-Administration, which recognized a right of internal autonomy for all “peoples,” where peoples were explicitly defined to include not only indigenous peoples but also homeland national minorities.40 However, this draft was never debated seriously and quickly disappeared from view.

A more sustained effort to develop new norms for national minorities has occurred at the regional level within Europe. I will describe these European initiatives in some depth, because I believe they shed light on the prospects for reform at the global level. Recent European efforts to codify new minority rights norms have run into difficulties that would also surface, perhaps even in stronger form, at a global level.

When the Berlin Wall fell and communism collapsed in 1989–1990, a number of violent ethnic conflicts involving national minorities emerged in the postcommunist countries, undermining the transition to liberal democracy. As a result, several European organizations attempted to formulate norms and standards for the treatment of national minorities that could guide these countries in dealing with such issues. This initiated a period of intense debate within Europe about the appropriate treatment of national minorities, and about whether autonomy, as a right or norm, should figure in that treatment.

This debate was particularly intense between 1990 and 1993. After the collapse of communism, the very first statement by a European organization on minority rights—the 1990 Copenhagen declaration of the Conference on Security and Co-operation in Europe (CSCE)41—explicitly endorsed territorial autonomy as a best practice. Article 35 of the declaration states:


41 The precursor to the OSCE.
The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.42

An even stronger endorsement of territorial autonomy came in 1993, in Recommendation 1201 of the Council of Europe Parliamentary Assembly. It provides that

[...] in the regions where they are a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching this specific historical and territorial situation and in accordance with the domestic legislation of the state.43

Unlike the 1990 CSCE declaration, this recommendation recognizes territorial autonomy as a right, not merely as a best practice. It was widely hoped and assumed that this text’s provisions would play a central role in the Council of Europe’s Framework Convention for the Protection of National Minorities, which was being drafted at the same time.

In short, there was much talk of an emerging right to autonomy in Europe in the early 1990s. A concrete expression of this idea was the decision of the European Commission in 1991 to require Yugoslav republics seeking independence to establish a “special status” for regions where national minorities form a local majority, modeled, in part, on the example of South Tyrol.44

However, as it turns out, the Parliamentary Assembly’s Recommendation 1201 reflects the high-water mark of support for territorial autonomy within European organizations. Since then, there has been a marked movement away from it. The framework convention, adopted just two years after Recommendation 1201, decisively rejected the Parliamentary Assembly’s advice and avoided any reference to territorial autonomy. Not only is territorial autonomy not recognized as a “right,” it is not even mentioned as a recommended practice. Nor does territorial autonomy appear in any subsequent

declaration or recommendation by European organizations, such as the series of Hague, Oslo, and Lund recommendations adopted by the OSCE from 1996 to 1999,45 or the draft constitution of the European Union.46 Moreover, the Venice Commission47 has ruled that national minorities do not have rights of self-determination, even in the form of internal self-determination.48 For all intents and purposes, ideas of autonomy have disappeared from the debate about “European standards” on minority rights.

There are a number of reasons for this. For example, there was strong opposition to the idea of entrenching a right to territorial autonomy for national minorities in the West and to the notion that there might be international monitoring of how Western states treated their minorities. France, Greece, and Turkey have traditionally opposed the very idea of self-government rights for national minorities, and, indeed, they deny the very existence of national minorities. Even those Western countries that accord autonomy to their substate national groups do not necessarily want their own laws and policies regarding national minorities subject to international monitoring. The treatment of national minorities in various Western countries remains a politically sensitive topic, and many countries do not want their existing majority–minority settlements, often the result of long and painful negotiation processes, reopened by international monitoring agencies. In short, while they were willing, at first, to insist that postcommunist states be monitored for their


46 The European Free Alliance, a coalition of minority nationalist parties from various regions of Western Europe (e.g., Catalonia, Scotland, Flanders, South Tyrol), proposed that the EU constitutional treaty contain a clause that recognized “the right of self-government of all those territorial entities in the Union whose citizens have a strong and shared sense of national, linguistic or regional identity.” The proposal was never seriously debated. Eur. Conv., Secretariat, Democracy at Many Levels, para. 3, CONV 298/02 (Sept. 24, 2002) (prepared by Neil MacCormick). See Neil MacCormick, The European Constitutional Convention and the Stateless Nations, 18 INT’L AFF. 331 (2004), for the failed efforts to strengthen the recognition of “stateless nations” in the European constitution.

47 The European Commission for Democracy through Law, the Council of Europe’s advisory body on constitutional matters.

treatment of minorities, Western democracies had no wish to have their own treatment of national minorities examined.

This resistance from within the West might have been sufficient to scuttle any attempt to formulate a right to self-government for national minorities. But the more immediate difficulty was the growing recognition by European organizations that it was unrealistic to apply or expect to impose such a norm of self-government in the postcommunist region. Any idea of minority self-government was bitterly opposed by postcommunist countries as a threat to their very existence.

Why was there such resistance to autonomy for national minorities in postcommunist countries? To answer this question, we need to step back and consider why Western democracies, over time, have become more comfortable with the idea of autonomy for their own national minorities. I would argue that there have been two key preconditions in the West that have lowered the risk to states and the dominant national groups in accepting national minority claims: (a) the existence of reliable human rights protections, and (b) the “desecuritization” of ethnic relations, such that the treatment of minorities is seen as an issue of domestic politics rather than regional geopolitics. Neither was present in postcommunist Europe in the early 1990s.

For majorities in the West, the consolidation of robust legal mechanisms for protecting human rights and the development of a human rights culture, generally, have provided guarantees that the accommodation of minority claims to self-government would not result in islands of tyranny in which the basic security or rights of citizens would be in jeopardy. These guarantees dramatically lowered the stakes involved in debates about minority rights. In postcommunist Europe in the early 1990s, however, these guarantees were absent. Dominant groups lacked the confidence that they would be treated fairly within self-governing minority regions. Indeed, in those cases where minorities seized territory and established their own autonomous governments, the results were often various forms of discrimination and harassment—even ethnic cleansing—against anyone who did not belong to the minority. Ethnic Georgians were pushed out of the Abkhazia region of Georgia when it declared autonomy and/or sovereignty; ethnic Croats were expelled from the Serbian-dominated regions of Croatia when they declared autonomy; ethnic Serbs were forced from Albanian-dominated Kosovo when it achieved autonomy—and so on. Neither side could rely on effective legal institutions and an impartial police to ensure that human rights were respected.

These fears for individual security were compounded by geopolitical fears regarding the security of the state. A crucial precondition for the adoption of self-government for national minorities in the West has been the desecuritization of state–minority relations. With respect to both national minorities and indigenous peoples in the West, there is no longer any anxiety that they will collaborate with enemies of the state, and this allows claims for self-government to be treated as part of normal democratic politics. In postcommunist Europe,
however, the perception of homeland minorities as potential fifth columns likely to collaborate with neighboring enemies remains pervasive, and so ethnic relations remain highly securitized.

In order to understand this perception, we need to recall the history of the region. The current configuration of states in Central and Eastern Europe is the result of the breakdown of three empires after World War I—the Russian Romanov empire, the Austro-Hungarian Habsburg empire, and the Turkish Ottoman empire—and the more recent collapse of the Soviet empire in 1989. Each of these empires encompassed the homelands of several national groups, many of which became independent states emerging from the ashes of the former empires (for example, Poles, Romanians, Czechs and Slovaks, Bulgarians, Serbs, Latvians, and so forth).

This process of state formation in the aftermath of imperial breakdown created several distinctive security problems relating to homeland minorities. First, the boundaries of these newly independent states typically (and inevitably) left some members of the national group on the wrong side of a new international border. When the border between Germany and Poland was drawn, there were many ethnic Germans on the Polish side of the border. Similarly, there were large numbers of ethnic Hungarians on the Romanian side of the border with Hungary; ethnic Russians on the Latvian side of the border with Russia; ethnic Turks on the Bulgarian side of the border with Turkey; and ethnic Albanians on the Macedonian side of the border. Often, these kin-state minorities are thought to have a higher loyalty to their kin-state than to the states in which they live. As a result, there is anxiety that such minorities are irredentist—that is, that they wish to redraw international boundaries so as to unite (or reunite) the territory where they live with their adjacent kin-state. Indeed, it is often assumed that they would collaborate willingly with their kin-state if it militarily invaded the country in order to claim this territory, as, indeed, some have done at various times in the twentieth century. No state is likely to accord self-governing powers voluntarily to a minority under these circumstances.

Where homeland minorities take the form of irredentist kin-state minorities, there is a much greater likelihood that ethnic relations will be perceived as a threat. But this is not inevitable. There are factors that can either alleviate or exacerbate the problem. If, for example, the neighboring states are close allies, integrated into larger regional economic and security organizations, such that the kin-state has no interest in destabilizing its neighbor, this will alleviate the problem. This, of course, is precisely what has defused the problem of kin-state minorities in Western Europe. In the past, Belgium, Denmark, and Italy resisted according strong rights to their ethnic German minorities.

49 By contrast, many of the paradigmatic examples of national minorities in the West do not have a kin-state (e.g., Catalans and Basques; Scots and Welsh; Québécois; Puerto Ricans).
because they were perceived as kin-state minorities with a primary loyalty to Germany. But once Germany became a close ally rather than a potential enemy, as a result of the EU and NATO, the transborder affiliations of ethnic German minorities became unimportant (and came to be viewed, for that matter, as a potential asset in ongoing processes of regional integration). In the postcommunist countries in the 1990s, however, there was no equivalent of the EU and NATO to turn potential enemies into allies. In the absence of regional security arrangements, postcommunist countries were in an almost Hobbesian state of nature, distrustful of all their neighbors. And in this context, the presumed disloyalty of kin-state minorities was quickly perceived as a security threat.

Another key factor in these considerations is the balance of power between a state, its minorities, and the neighboring kin-state. The perceived threat to state security obviously is reduced if the state feels itself to be a strong state confronting weak enemies, whether these are internal irredentist minorities or their kin-states across the border. Unfortunately, in the postcommunist world, the balance of power has tended to exacerbate rather than alleviate the problem. In many cases, the national groups that acquired independence after imperial collapse view themselves as historically weak, confronted with minorities and kin-states that have been historically dominant. The result is the phenomenon known as “minoritized majorities”—majorities that continue to think and act as if they are weak and victimized minorities and, therefore, continue to live in existential fear for their survival.

This phenomenon is pervasive in the postcommunist world, as well as in much of the developing world, but is virtually unknown in the West (at least in a geopolitical sense), and so needs some explaining. If one simply looks at the numbers and ignores the historical background, it may appear that kin-state minorities in most postcommunist countries are fairly small and weak. Ethnic Hungarians in Slovakia, for example, represent about 15 percent of the population and, hence, are relatively powerless in relation to the overwhelming ethnic Slovak majority in the country. Historically, however, the Hungarians were members of the privileged and dominant group within the larger Habsburg empire and were active collaborators in Habsburg policies to create Hungarian hegemony in the region. The ethnic Slovaks, by contrast, were subordinated, subject to coercive Magyarization campaigns. Since independence, this hierarchy has, of course, been reversed: Slovaks are now the dominant group, and Hungarians are the threatened minority subject to Slovak nation-building policies. But the

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50 The same applies to other potential kin-state minorities in the West that are linked by ethnicity to a neighboring state. The French in Switzerland or Belgium are not seen as a fifth column for France; neither are the Flemish for the Netherlands nor the Swedes in Finland. This is a testament to the success of the EU and NATO in desecuritizing national minority politics in Western Europe.
memory remains. Slovaks view ethnic Hungarians not merely as a potentially irredentist group loyal to their kin-state but as a historically powerful and privileged group that had collaborated with a hegemonic imperial power to oppress the Slovak language and culture. In the absence of effective regional security arrangements, the fear persists that this could happen again—that is to say, that the Hungarian minority could collaborate with the Hungarian kin-state to subordinate Slovaks once again and crush their national independence.

We see the same phenomenon in Poland regarding the German minority or in Romania and Serbia vis-à-vis the Hungarian minority. The same state of affairs may be found in the Baltics, Ukraine, and Moldova regarding the Russian minority; in Croatia and Bosnia with reference to the Serbs; and in Bulgaria regarding the Turkish minority, to name but a few. In all these cases, minorities are seen (rightly or wrongly) as allies or collaborators with external powers that have historically oppressed the majority group, and the majority group, in turn, reacts as a “minoritized” majority.

In short, several factors were at work exacerbating the securitization of ethnic relations in postcommunist Europe. The phenomenon of homeland minorities seeking self-government can raise difficulties at the best of times, since it challenges the state’s claim to represent a single people and to derive its legitimacy from an undivided popular sovereignty. However, this challenge becomes that much greater in a state where (a) the homeland minorities are potentially irredentist minorities with loyalty to a neighboring kin-state; (b) the national groups forming the majority in the state were historically subordinated by the neighboring kin-state in its former capacity as an imperial power; and (c) there are no regional security arrangements to guarantee nonaggression. Where these factors are present, as they were and are in much of postcommunist Europe, the likely result is a pervasive securitization of ethnic relations.

This securitization is reflected in three assumptions that dominate public debate on minorities in the region. The first is that minorities are disloyal, not just in the sense that they lack loyalty to the state (that is equally true of secessionists in Quebec or Scotland) but in the stronger sense that they have collaborated with former oppressors and will continue to collaborate with current enemies or potential enemies. The second assumption follows from the first: that a strong and stable state requires weak and disempowered minorities. Put another way, ethnic relations are seen as a zero-sum game; anything that benefits the minority is seen as a threat to the majority. Therefore—the third assumption—the treatment of minorities is above all a question of national security.

Thus, the two main factors that enabled dominant groups in the West to accept accommodation policies—namely, human rights guarantees and desecuritization—were absent, or only weakly present, in postcommunist Europe in the early 1990s. Given this fact, it is hardly surprising that attempts to
promote autonomy were strongly resisted in postcommunist Europe. The homeland minorities seeking self-government were often perceived as geopolitical threats to the security of the state, as well as threats to the individual human rights of people living in the potentially self-governing territory. Under these circumstances, it would have been surprising indeed if there had been much genuine interest in Western models of accommodating national minorities. Instead, most postcommunist states clung firmly to an integrationist agenda, maintaining the goal of turning themselves into centralized, unitary, and monolingual nation-states, premised on a singular and undifferentiated conception of popular sovereignty.

The distinctive history of imperialism and minority collaboration in the region also creates another important obstacle to the adoption or tolerance of autonomy—namely, perceptions of historic injustice. In many postcommunist countries, there is a strong sense that historical wrongs have not yet been acknowledged or remedied. Some say that this focus on historical rights and wrongs is unique to Eastern Europe, and that Western democracies have managed to get beyond this backward-looking obsession with history and to focus, instead, on forward-looking coexistence. It is certainly true that feelings about historic injustice run deep in many postcommunist countries. But the same is true in many Western countries, as well. Appeals to historical injustice are increasingly common in the West. Consider the recent explosion of writing on the issue of reparations to African-Americans for the historic wrongs of slavery and segregation. Claims for the rectification of historic injustice are also a vital part of contemporary mobilization by indigenous peoples in New Zealand, Australia and Canada, and even of some immigrant groups—such as, for example, Japanese-Americans seeking compensation for their detention in World War II.

As we have just seen, however, there is an important difference in the nature of the historic hierarchies in the West and in postcommunist Europe. In the West, it is almost always a minority that is seeking apology and compensation from the state that has historically mistreated it. Hence the argument from historic injustice operates to strengthen minority rights claims, and to buttress the argument for greater equality between majority and minority. It is invoked to pressure the majority to say, in effect, that never again will we try to expel, subordinate, or oppress you.

51 These are not the only reasons for opposition to territorial autonomy in postcommunist Europe. For a discussion of a range of other such issues, see Kymlicka, supra note 10, at ch. 6.

52 This is a familiar trope of the extensive literature that distinguishes a “forward-looking” civic nationalism in the West from a “backward looking” ethnic nationalism in the East. See, e.g., Michael Ignatieff, Blood and Belonging (Farrar Straus & Giroux 1993), and the discussion in Will Kymlicka, Politics in the Vernacular (Oxford Univ. Press 2001) (ch. 12).
In postcommunist countries, however, it is typically the majority that feels it has been the victim of oppression, often at the hands of minorities acting in collaboration with foreign enemies. Hence the majority wants the minority to express guilt, and to offer an apology, as a way of saying that never again will the minority be disloyal to the state. We see this in the Czech Republic regarding the German minority; in Slovakia with reference to the Hungarian minority; and in the Baltics, vis-à-vis the Russian minority. In short, the sort of historic injustice that is central to postcommunist debates, unlike that in the West, is the historical oppression of the majority group by its minorities in collaboration with a kin-state or foreign power. This truly distinguishes Eastern Europe from the Western experience, although there are, to be sure, comparable examples from Africa and Asia. 53

In this context, arguments about historic injustice work against minority rights claims. In the West, homeland minorities typically would have been stronger had it not been for historic injustices perpetrated by the larger state—for example, there would have been more people speaking the minority’s language and practicing its culture, over a wider area. Minority rights can be seen, in part, as a way of acknowledging and remedying that harm. In postcommunist countries, however, historic injustice is often understood as having expanded the scope and prestige of the minority’s language and culture at the expense of the majority. Indeed, taken to their logical conclusion, arguments of historic injustice may suggest that minorities have no right at all to exist on the territory of the state, if their very presence is related to such an historic injustice. Were it not for unjust Russian and Soviet imperialism, there would be few Russians in the Baltics. But for unjust Ottoman imperialism, there would not be all that many Turks in Bulgaria. If the goal is to remedy the wrongs created by these historic injustices, why not try to undo the Russification of the Baltics, either by expelling the Russians or by insisting that they assimilate to Estonian and Latvian culture? Why not try to reverse the Turkification of Bulgaria under the Ottomans, whether by expelling the Turks or by insisting they assimilate to Bulgarian culture? 54

53 For example, members of the Sinhalese majority in Sri Lanka often expresses this sense of historic injustice. It is widely believed that the minority Tamils collaborated with, and were unfairly privileged by, the British colonizers, and remain willing to collaborate with neighbouring India against the Sri Lankan state in order to defend those privileges. See SANKARAN KRISHNA, POSTCOLONIAL INSECURITIES: INDIA, SRI LANKA AND THE QUESTION OF NATIONHOOD (Univ. Minn. Press 1999).

54 This is precisely what Bulgaria, for example, tried to do in the 1980s, by forcing all the Turks to adopt ethnic Bulgarian names. The communist Bulgarian government argued that the coerced assimilation of the Turks was simply reversing the unjust pressure that the Ottomans had put on Slavs to convert to Islam and to assimilate to Turkish culture.
These profound differences between East and West in human rights protection, geopolitical security, and in the nature of historic injustices create, therefore, obvious grounds for opposition within postcommunist countries to the adoption of autonomy for national minorities. Given these obstacles, it is not surprising that efforts to codify a right to autonomy for national minorities have failed. While the international community has shown some willingness to consider this idea in the case of indigenous peoples, internal self-determination has proven too controversial in the case of European national minorities. As then OSCE High Commissioner on National Minorities Max van der Stoel observed in 1995, claims to territorial autonomy meet “maximal resistance” in the states of the postcommunist region, and so it was more “pragmatic” to focus on modest forms of minority rights. As a result, European organizations have not only backed away from formulating territorial autonomy, as a legal norm, they have also, in many cases, stopped recommending it as a best practice. The OSCE high commissioner, in particular, has said that territorial autonomy should be viewed not as a best practice but as a last resort and has discouraged various minorities from putting forth autonomy demands on the grounds that such demands are destabilizing under existing conditions of geopolitical insecurity. Far from imposing provisions for minority self-government on postcommunist Europe, some European organizations are now actively discouraging it.

Predictably, then, when the European standards for national minority rights were finally codified, all references to self-government or autonomy were dropped, and a much weaker set of norms were proposed. Indeed, the Council of Europe’s framework convention and the OSCE’s recommendations are essentially updated versions of the UN’s minorities declaration, founded on a clear integrationist approach. However—as with the UN—this integrationist legal framework coexists alongside a political practice of case-specific interventions more supportive of autonomy. We have already seen how European organizations have intervened in several cases to support the autonomy aspirations of national minorities, in Serbia, Bosnia, Macedonia, Ukraine, Moldova, Georgia, and Azerbaijan. Unfortunately, as was also the case with the UN, these case-specific

55 In all of these cases, it is important to distinguish objective facts about security threats and historic wrongs from the way these facts are perceived and discussed. Political actors make choices about whether or when to highlight (or exaggerate) these factors in public debate. The perception of kin-state minorities as a security threat and as collaborators in historic injustices against the majority is something that is deliberately inculcated and reproduced by certain political elites for reasons of self-interest.

56 Max van der Stoel, Peace and Stability through Human and Minority Rights: Speeches by the OSCE High Commissioner on National Minorities 111 (Nomos Verlagsgesellschaft 1999).

57 Id.
interventions appear arbitrary, at best, and, at worst, as rewarding belligerence. In short, the European experiment in national minority rights reproduces many of the limitations of the UN approach.

4. Conclusion

If the analysis in this paper is correct, the international community’s approach to minority rights is at an impasse. Intergovernmental organizations are operating with a legal framework that draws a sharp dichotomy between an accommodationist approach to indigenous peoples and an integrationist approach to minorities. This legal framework is wholly inadequate to deal with the actual patterns of ethnic relations around the world and, in particular, is unable to deal with the aspirations to autonomy by homeland national minorities. Yet these aspirations lie at the root of many of the most pressing ethnic conflicts in the world today. In order to manage these real-world conflicts, intergovernmental organizations supplement their legal norms with case-specific interventions that are more accommodationist. However, these case-specific interventions in support of autonomy are often arbitrary and ad hoc.

This combination of unrealistic legal norms and arbitrary case-specific interventions has a number of perverse results, including encouraging and rewarding the resort to violence. Yet it is difficult to see what would be a feasible alternative. Ideally, we might hope to develop a more adequate legal framework, one that moves beyond the simplistic indigenous–minorities distinction, in order to address the distinctive needs and claims of various groups, such as homeland national minorities, which do not fit into the current dichotomy. Such a new framework would recognize that, just as indigenous peoples have legitimate claims relating to history and territory that are not addressed by generic integrationist minority rights provisions, so, too, do other homeland minorities. Indeed, we might imagine this as the first step toward a new multitargeted system of international minority rights, with separate legal provisions not only for indigenous peoples and national minorities but also for other distinctive types of minorities, such as the Roma in Eastern Europe or Afro-Latin Americans. These groups also have needs and interests that are not sufficiently protected by the current framework based on the indigenous–minority dichotomy. Various proposals for such a multitargeted system of minority rights have been made.58

Unfortunately, the prospects for reform of the framework of international norms are poor. There is no support at the UN for revisiting the issue of the

58 For example, several NGOs have proposed a “Charter of Romani Rights,” to develop targeted rights for the Roma in Europe; and the Parliamentary Assembly of the Council of Europe called for a specific legal instrument regarding the rights of immigrant citizens (Recommendation 1492). For these and other proposals for new targeted rights, see KYMLICKA, supra note 10, at ch. 6 and 8.
rights of minorities. Furthermore, the one serious attempt that has been made at a regional level to address the distinctive issues raised by national minorities—namely, the European norms developed by the OSCE and Council of Europe—has retreated to a more cautious defense of generic integrationist minority rights. Some commentators have expressed the hope that other regional intergovernmental organizations—such as the African Union, ASEAN, or the League of Arab States—might take up the task of formulating their own regional standards of minority rights. It is unlikely this will happen, but, if it did, it is almost certain that they, too, would shy away from endorsing any right to autonomy for national minorities. They might be willing to endorse a norm of autonomy for small and isolated indigenous peoples but not for powerful substate national minorities.

Nor is this simply a matter of a lack of good faith or political will. The reality is that the conditions that have enabled a consensus to emerge within various Western democracies in support of autonomy for national minorities simply do not exist in many parts of the world. Indeed, all of the obstacles that have prevented European organizations from codifying a right to autonomy for national minorities apply just as powerfully in other regions of the world. The problems we have seen in postcommunist Europe—such as the securitization of state-minority relations; the fear of human rights violations; and the nature of historic hierarchies—are pervasive in Africa, Asia and the Middle East, as well. If anything, the willingness to consider autonomy for national minorities is even weaker in these postcolonial states than in the postcommunist countries of Eastern Europe.

Under these circumstances, the prospects for gaining an international consensus on a new and more accommodationist framework for addressing the claims of national minorities is virtually nil. For the foreseeable future, we are left with the status quo. As McGarry, O’Leary, and Simeon correctly explain, the status quo is predominantly integrationist. However, as I hope I have shown, the commitment of the international community to an integrationist approach is neither uniform nor stable; there are multiple, if unpredictable, avenues open by which accommodationist approaches may find international support. As international organizations become increasingly influential in shaping domestic choices concerning the rights of minorities, there are deep and unresolved questions about how this influence should be exercised.

For example, longstanding calls to turn the 1992 UN Declaration on minority rights into a binding convention have essentially disappeared from the debate. Even Minority Rights Group, the main international advocacy group in the field, has stopped pushing this idea. See MRG, Possible New United Nations Mechanisms for the Protection and Promotion of the Rights of Minorities, Working Paper submitted to UN Working Group on Minorities, 9th Session, E/CN.4/sub.2/AC.5/2002/WP.3. Other proposals to strengthen the codification and monitoring of international norms have also fallen by the wayside. See Kymlicka, supra note 10, at ch. 6.