I. Introduction

In the last two decades, minority rights have emerged as an important issue for both international law and political philosophy. Within international law, there has been an explosion of efforts to develop international norms on minority rights, a notion that was explicitly rejected at the end of World War II, and which lay largely dormant for the next forty years. But starting in 1989, minority rights quickly moved to the top of the agenda of several international intergovernmental organizations (IOs). Globally, the United Nations (UN) adopted a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992, and a Declaration on the Rights of Indigenous Peoples in 2007. Instruments have also been drafted at the regional level, such as the Council of Europe’s 1995 Framework Convention on the Protection of National Minorities, or the 1997 Draft Declaration on Indigenous Rights of the Organization of American States.

Political philosophy has witnessed a similar burst of interest in developing normative theories of minority rights. A number of philosophers have attempted to show how the claims of various minority groups, such as immigrants, indigenous peoples, or sub-state national groups, can be defended within broader theories of justice and democracy. This has generated a plethora of new theories of
The simultaneous emergence of multiculturalist theories and international minority rights norms was accidental, since they have different intellectual and political roots. Liberal multiculturalism emerged out of the liberal-communitarian debate that dominated Anglo-American political philosophy in the 1980s. Communitarians had criticized liberalism for being too individualistic and atomistic, and for being incapable of recognizing the importance of communal and cultural attachments. Liberals responded that communitarian claims about the ‘embeddedness’ of individuals within communities or cultures were exaggerated, and risked imprisoning people in identities and practices they no longer endorsed.

Much of this debate was pitched at an abstract level, focusing on theories of the self and the good life. But it was quickly applied to a number of policy issues, including questions about the rights of ethnic minorities. Communitarians argued that traditional liberal theories of individual rights were unable to protect such minorities from assimilationist pressures; liberals responded that communitarian demands for ‘group rights’ were a threat to individual liberty.

It was in this context that theories of liberal multiculturalism first emerged, as a way of transcending the liberal-communitarian divide. Liberal multiculturalists agree with the communitarians that there are legitimate interests in culture and community that deserve protection through various group-specific rights, such as language rights or self-government rights. However, they insist that these interests can be respected while upholding the firm protection of individual rights within groups. Liberal multiculturalism endorses certain ‘protective’ rights that groups can claim against the larger society, while rejecting ‘restrictive’ group rights that can be invoked against individual members of the group. For example, self-government
rights can help ensure that minorities are not outvoted on key issues, but these self-government regimes should be subject to the same constitutional limitations of respect for individual rights as the central government. This approach offers a distinctly liberal way of accommodating diversity: it protects vulnerable minorities against the majority, but also protects vulnerable individuals within the minority, thereby avoiding the dangers of subordinating individual rights to group rights.

The emergence of minority rights in international law had different origins. It was largely stimulated by the experiences of post-communist Eastern Europe. After the end of the Cold War, there was initially great optimism that liberal democracy would emerge around the world. Instead, what occurred in many post-communist countries was violent ethnic conflict. Overly-optimistic predictions about the replacement of communism with liberal-democracy were supplanted with pessimistic predictions about the replacement of communism with ethnic war. Subsequent events in Rwanda and Somalia suggested that this was a global problem, and that ethnic conflicts were derailing the prospects for peaceful democratization around the world. There was a strong feeling that the international community needed to ‘do something’ about the threat of ethnic conflict. This was the initial impetus for many of the Declarations and Conventions adopted by IOs in the early 1990s.

So the two movements had different origins. At another level, however, both developments can be seen as seeking alternatives to earlier models of the unitary, homogenous ‘nation-state’. Both liberal political philosophy and international relations have traditionally operated with a model of the nation-state which assumes that citizens share a common national identity, national language, and a unified legal and political system. This model of the state was diffused to the post-colonial world, and underpinned the ‘nation-building’ policies of newly-independent states in the post-communist world. But this model has increasingly been questioned, as people become more aware of the harms, injustices, and violence involved in attempts to implement it. Constructing unitary and homogenous nation-states often requires coercive measures to either assimilate or exclude minorities, such as suppressing minority languages, abolishing traditional forms of minority self-government, enacting discriminatory laws and citizenship policies, even displacing minorities from their traditional homelands. For liberal multiculturalists, the historic adoption of such measures within the West has left a stain of injustice that requires acknowledgement and remedy. For IOs, the ongoing adoption of such measures in post-communist Europe or post-colonial Africa and Asia has generated ethnic violence and instability. In both contexts, there was a growing consensus that some alternative to the traditional nation-state was required.

Both liberal multiculturalism and international minority rights norms can be understood as articulating new models of ‘citizenization’. Historically, ethnocultural and religious diversity has been characterized by a range of illiberal and undemocratic relations—relations of conqueror and conquered; colonizer and colonized; settler
and indigenous; racialized and unmarked; normalized and deviant; civilized and backward; ally and enemy; master and slave. The task for all democracies has been to turn this catalogue of uncivil relations into relationships of liberal-democratic citizenship, both in terms of the vertical relationship between the members of minorities and the state, and the horizontal relationships amongst the members of different groups. In the past, it was often assumed that the only or best way to engage in this process of citizenization was to impose a single undifferentiated model of national citizenship on all individuals. But proponents of liberal multiculturalism and international minority rights norms start from the assumption that this complex history inevitably and appropriately generates group-differentiated ethnopolitical claims. Moreover, the effort to impose a homogenous national identity often exacerbates rather than diminishes these uncivil relations. The key to citizenization, therefore, is not to suppress these differential claims, but to filter them through the language of human rights, civil liberties, and democratic accountability. This is what liberal multiculturalism and international minority rights norms both attempt to do.

In this respect, both the multiculturalist theories and international norms that emerged in the 1990s can be seen as catching up to the actual practices of Western democracies, which have embarked on an array of experiments in minority rights since the 1960s. And the evidence from these forty years of experiments strongly suggests that minority rights can be an effective vehicle for consolidating relations of democratic citizenship in multiethnic states, at least in some times and places. A wide range of minority rights adopted since the 1960s, including land claims for indigenous peoples, language rights for national minorities, and multicultural accommodations for immigrant groups, have helped to reduce historic hierarchies, equalize opportunities, enhance democratic participation, and consolidate a culture of human rights.¹

The apparent success of these real-world practices of liberal-democratic multiculturalism has spurred efforts to formulate political theories of liberal multiculturalism, which in turn have helped to inform and justify emerging regimes of international minority rights. While the latter were initially developed primarily for short-term conflict prevention, they are increasingly linked to a broader normative vision of how liberal multiculturalism can promote justice and deepen democratic citizenship.

### III. Comparing the Two Movements

While recent international minority rights norms emerged alongside normative theories of liberal multiculturalism, and were influenced by them, the two are

¹ For the evidence, see Kymlicka, W., Multicultural Odysseys (Oxford: Oxford University Press 2007), ch. 5.
not identical. There are some aspects of the theory and practice of liberal multiculturalism that have proven impossible to codify in the form of international norms.

Both movements can be seen as responding to the inadequacy of a purely ‘generic’ approach to minority rights that seeks to apply the same set of rights to all ethnocultural minorities. An example of this generic approach can be found in article 27 of the UN’s International Covenant on Civil and Political Rights, which states that:

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

This article has been interpreted to apply to the members of all minority groups, no matter how large or small, new or old, concentrated or dispersed, even to visitors within a country. But just for that reason, it cannot address many of the key issues involved in ethnic relations, which are tied to contingencies of historic settlement or territorial concentration. Since article 27 articulates a universal and portable cultural right that applies to all individuals, even migrants and visitors, it does not articulate rights that are tied to the fact that a group is living on (what it views as) its historic homeland. Yet it is precisely claims relating to residence on a historic homeland that are at stake in most violent ethnic conflicts around the world, whether in post-communist Europe (Bosnia, Kosovo, Chechnya), or the West (Basque Country, Cyprus, Northern Ireland), or Asia, Africa, and the Middle East (for example, Pakistan, Sri Lanka, Indonesia, Turkey, Iraq, Israel, Sudan, Ethiopia). In all of these cases, minorities claim the right to govern themselves in what they view as their historic homeland, including the right to use their language in public institutions within their traditional territory, and to have their language, history, and culture celebrated in the public sphere (for example, in the naming of streets, the choice of holidays and state symbols). None of these claims can reasonably be seen as universal or portable—they only apply to particular sorts of minorities with a particular sort of history and territory.

Any plausible approach to these conflicts, whether in international law or political philosophy, needs to address the distinct types of claims raised by these different groups. And this requires supplementing a purely generic approach with a scheme of targeted or group-differentiated minority rights. Both international law and multiculturalist theories have accepted this need for a group-differentiated approach. In particular, both recognize the need to distinguish between ‘old’ minorities, such as indigenous peoples and sub-state national minorities living on their historic territory, and ‘new’ minorities formed through immigration.

However, multiculturalist theories and international law have approached this issue in divergent ways. I will examine the two main examples of targeted minority rights regimes in international law—targeted rights for ‘national minorities’ in
Europe, and targeted rights for ‘indigenous peoples’ at the UN—to see how they compare with theories of liberal multiculturalism.

IV. National Minority Rights in Europe

The most elaborate scheme of targeted rights has developed in Europe, spearheaded by the Council of Europe (CE). Confronted with spiralling ethnic conflict in the Balkans and Caucasus in the early 1990s, the CE adopted norms tailored to the specific types of groups that were involved in these conflicts, which they labelled ‘national minorities’. Whereas article 27 lumps together ‘national, ethnic, religious and linguistic minorities’, and accords them all the same generic minority rights, the CE’s norms refer exclusively to ‘national minorities’.

What are national minorities? While there is no universally agreed-upon definition, the term has a long history in European diplomacy, where it has referred to historically-settled minorities, living on or near what they view as their national homeland. It was these sorts of ‘homeland’ groups that were involved in the violent and destabilizing ethnic conflicts that generated the call for European norms, and it was appropriate therefore to focus on them when formulating targeted norms. Most European countries have explicitly stated that immigrant groups are not national minorities, and some have also excluded the Roma from the category of national minority, on the grounds that they are a non-territorial minority. These exclusions are increasingly contested, with the result that the traditional understanding of national minority co-exists alongside newer definitions of the term that are less tied to history and territory. But originally at least, European organizations were primarily targeting their efforts at historically-settled sub-state national minorities living on their traditional territory.

The challenge facing European organizations was to formulate targeted norms for national minorities that would provide effective guidance for dealing with the immediate risks of destabilizing ethnic conflict, but would also promote a distinctively liberal-democratic conception of multicultural ‘citizenization’ in the long term.

What does liberal multiculturalism suggest regarding the treatment of such groups? If we examine the main cases of sub-state national groups in the West—the Scots and Welsh in the United Kingdom, the Catalans and Basques in Spain, the Flemish in Belgium, the Québécois in Canada, the Puerto Ricans in the United States, the Corsicans in France, the German minority in South Tyrol in Italy, the Swedes in Finland, and the French and Italian minorities in Switzerland—a clear pattern emerges. In each case, sub-state national groups have been offered territorial autonomy (TA), usually through some form of federal or quasi-federal devolution of power, as well as some form of official language status.
These reforms involved a substantial restructuring of the state and redistribution of political power, and so were initially controversial. And yet, today, the basic idea of TA for national minorities is widely accepted. It is inconceivable that Spain or Belgium, for example, could revert to a unitary and monolingual state. Indeed, no Western democracy that has adopted TA has reversed this decision. Moreover, this model is widely seen as successful. It has enabled countries to deal with a potentially explosive issue—the existence of a sub-state group that perceives itself as a distinct nation with the right to govern its historic territory—in a way that is consistent with peace and democracy, respect for individual rights, and economic prosperity. Indeed, several theorists of liberal multiculturalism have presented this model as a central test case of how minority rights and liberal democracy can co-exist, and have explored how the exercise of autonomy by sub-state national groups respects liberal values and promotes democratic citizenization.\footnote{For an overview, see Gagnon, A. and Tully, J. (eds.), \textit{Multinational Democracies} (Cambridge: Cambridge University Press, 2001).}

Not surprisingly, the initial impulse of European organizations was to promote this model in post-communist Europe. In 1993, for example, the CE’s Parliamentary Assembly recommended that any future European minority rights convention should include the following provision:

> 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.\footnote{Council of Europe Parliamentary Assembly, \textit{On an additional protocol on the rights of national minorities to the European Convention on Human Rights}, Recommendation 1201 (1993), article 11.}

As we will see, this proposal was eventually rejected. But for a time in the early 1990s, it appeared that European legal norms and liberal multiculturalist theories would converge in endorsing a right to TA for national minorities.

The proposed European norm differed in one respect from that endorsed in multiculturalist theories—namely, in the relationship between TA and the principle of self-determination. According to several theorists of liberal multiculturalism, the autonomy of national minorities should be seen, not as a delegation of power from the central state, but as a manifestation of an inherent right of self-determination of nations or peoples. According to these theorists, the interest that people have in their cultural identities and collective life is sufficiently strong to ground an inherent right to govern themselves. Moreover, extending a right of self-determination to national minorities is seen as a matter of moral consistency. International law recognizes the right of all peoples to self-determination, but has restricted this in practice to overseas colonies. For liberal multiculturalists, this restriction is morally arbitrary: internal national groups stripped of their self-government and incorporated into a larger state are just as deserving of self-determination as overseas national groups.
that have been colonized. Internal colonialism and overseas colonialism are both unjust, and both call for self-determination as a remedy. TA for national minorities, therefore, is seen as part of a more consistent approach to the self-determination of peoples generally.

The proposed European norm, by contrast, explicitly avoided the term ‘self-determination’. It affirmed a norm of self-government, but denied that this implied or entailed a principle of self-determination, largely because self-determination in international law has traditionally been interpreted as a right to form an independent state.

This is partly a semantic disagreement, since multiculturalist theorists emphasize that the principle of self-determination should not be interpreted as a right to secede. They recognize that it is impossible to give every nation or people a right to its own state, and that self-determination must be understood therefore as something that is exercised primarily through autonomy within larger multi-nation states—that is, through ‘internal’ self-determination, such as TA.

In this sense, both multicultural theorists and the CE’s proposed norm agree on the substantive issue: they both envision a world of multi-nation states that accord TA to their national minorities, as against traditional unitary nation-states or secession. However, they disagree about how to describe this outcome. International lawyers have been reluctant to describe TA as a form of (internal) self-determination because this challenges the traditional assumption in international law that each state possesses a unified sovereignty. To be sure, this unitary sovereignty must be divided, delegated, and constrained according to domestic constitutional provisions and international norms. But this is different from accepting the claim, advanced by liberal multiculturalists, that sub-state national groups have their own original sovereignty which must be recognized by international law, even if only in the form of TA within larger states. From the perspective of international law, telling sovereign states to delegate rights of self-government to national minorities is less threatening, conceptually and politically, than telling states that they do not in fact possess full and original sovereignty over those groups.

This perhaps reflects a difference in perspective between international lawyers and normative political theorists. For international lawyers, tying TA to self-determination is needlessly provocative, and risks undermining a core premise of international law itself—namely, the existence of sovereign states that are the main agents responsible for fulfilling international law. For normative political theorists, by contrast, the provocation contains an important moral lesson: states need reminding that they did not always possess sovereignty over all the peoples and territories they currently claim, and that addressing the original sovereignty of sub-state national groups is unfinished moral business. Tying TA to self-determination is a way of reminding states that they cannot take their (often ill-gotten) sovereignty over sub-state nations or peoples for granted.
In any event, this momentary convergence between liberal multiculturalism and European norms regarding a right of TA for national minorities did not last. The CE’s 1995 Framework Convention for the Protection of National Minorities (FCNM) rejected the Parliamentary Assembly’s advice to include a provision on TA. Nor does TA appear in any subsequent declaration of European organizations. Indeed, ideas of autonomy have essentially disappeared from the debate about European standards on national minority rights.

There are several reasons for this, but to oversimplify, the long-term goal of promoting liberal multiculturalism ran into conflict with short-term fears of destabilizing ethnic conflict. While TA was seen as a successful model in the consolidated Western democracies, and a potential long-term goal in Eastern Europe, it was seen as dangerous in the immediate circumstances of post-communist transition.

In particular, two key factors enabling the adoption of TA in the West did not exist in post-communist countries: geopolitical security and human rights protections. First, most post-communist states have one or more enemies on their borders who would like to destabilize the state. One familiar tactic for doing so is to recruit minorities within the state, and to encourage them to engage in destabilizing protest, even armed insurrection. In such a context of regional insecurity, national minorities are perceived as potential fifth-columnists for neighbouring enemies, and autonomy for such minorities is perceived as a threat to national security. This perception is particularly strong when the national minority is related by language or ethnicity to the neighbouring country, and hence is presumed to be more loyal to its ‘kin-state’ across the border than to its own government. For example, ethnic Serbs living in Bosnia are assumed to be more loyal to Serbia than to Bosnia, ethnic Hungarians living in Slovakia are presumed to be more loyal to Hungary than to Slovakia, etc.

Under conditions of regional insecurity, granting autonomy to such potentially disloyal and irrendentist minorities is seen as weakening the state in relation to its neighbouring enemies, and indeed as endangering the very existence of the state.

Western countries, by contrast, are surrounded by allies not enemies, and are integrated into broader regional security alliances. As a result, no Western state today has an incentive to use discontented national minorities as a vehicle for destabilizing its neighbours. To be sure, there are historic examples of this. In the past, Germany has incited ethnic German minorities in neighbouring countries as a way to weaken its rival states. But since World War II and the emergence of the North Atlantic Treaty Organization (NATO), the perception of homeland minorities as potential collaborators with neighbouring enemies has disappeared from the West. Relations between states and national minorities are seen as issues of domestic policy, with no repercussions for foreign policy or regional security.

This perception still exists in relation to some immigrant groups, particularly Muslim groups after 9/11. But it no longer applies to historic national minorities.
In the post-communist world, by contrast, state-minority relations are heavily ‘securitized’, perceived in the first instance as issues of national security rather than domestic policy, leaving little space for liberal multiculturalism.

A second factor distinguishing the West from post-communist Europe concerns human rights protection, or more generally the sequencing of minority rights in relation to broader processes of state consolidation and democratization. In the West, Spain excepted, the restructuring of states to accommodate national minorities occurred after democratic consolidation, with well-established traditions of the rule of law, an independent judiciary, a professional bureaucracy, and a democratic political culture. The existence of such well-rooted traditions of liberal constitutionalism was crucial to the emergence of multiculturalism in the West, since it provided a sense of security to all citizens that multiculturalism would operate within well-defined parameters of democracy and human rights.

For example, in so far as national minorities have acquired autonomous governments, these governments have typically been subject to the same constitutional requirements to respect human rights as the central government. In many cases, they are also subject to regional and international human rights monitoring. This reassures everyone that no matter how debates over autonomy are resolved, their basic human rights will be protected. This in turn generates confidence in multiculturalism’s potential to replace earlier hierarchical relations with relations of democratic citizenship.

In the post-communist world, however, claims for self-government by homeland minorities were occurring prior to democratic consolidation. As a result, there are fewer guarantees that minorities who receive autonomy will exercise their powers in a way that respects human rights, rather than creating islands of local tyranny that are intolerant of ‘outsiders’ residing on the territory. In the absence of an effective human rights framework, such outsiders may be dispossessed of their property, fired from their jobs, even expelled or killed. Indeed, this is what has happened in several cases where minorities have established their own autonomous governments: ethnic Georgians were pushed out of the Abkhazia region of Georgia when it declared autonomy, ethnic Croats were pushed out of the Serb-dominated regions of Croatia when they declared autonomy, and so on. Neither side could rely on effective legal institutions and an impartial police to ensure that human rights were respected. Under such conditions, the operation of TA can literally be a matter of life and death.

These two factors help explain the resistance to TA in post-communist Europe. In conditions of regional insecurity, TA can be a threat to the security of the state. In the absence of democratic consolidation, TA can be a threat to the life and liberty of individual citizens who belong to the ‘wrong’ group. Under these circumstances, the intended goal of liberal multiculturalism—replacing uncivil relations of enmity and exclusion with relations of liberal-democratic citizenship—may be subverted. Institutions designed to promote citizenization in multiethnic states may be captured by actors seeking to perpetuate and exacerbate relations of enmity and exclusion.
Given these obstacles, it is not surprising that proposals to codify a right to autonomy for national minorities failed. To be sure, these proposals always included the proviso that autonomous governments must respect human rights. The basic principle that minority rights are subordinate to human rights is found in every international document on minority and indigenous rights, and is an important commonality with theories of liberal multiculturalism. However, in the context of post-communist Europe, there was a widespread fear that IOs could not enforce this ‘paper guarantee’.

Having abandoned a right to autonomy, the minority rights norms ultimately adopted by the CE are weak. Indeed, the FCNM essentially duplicates the generic minority right to enjoy one’s culture enshrined in article 27. And having retreated to generic rights, the CE immediately faced pressure to expand its coverage beyond traditional national minorities. After all, why should generic minority rights to enjoy one’s culture only be guaranteed to one particular type of minority group? Shouldn’t generic minority rights be protected generically? And indeed we see a movement within the CE to redefine the term ‘national minority’ so that it no longer refers to one type of group amongst others, but rather becomes an umbrella term that encompasses all minorities living on the territory of the state, including indigenous peoples, homeland minorities, the Roma, and immigrant groups. In short, both in its content and coverage, the FCNM has shifted from its original goal of defining targeted rights for ethno-national homeland groups to defining generic minority rights for all groups.

The decision to convert the FCNM from a targeted to a generic minority rights document is understandable—the goal of formulating principles to deal with the claims of ethno-national groups was too ambitious in light of regional insecurity and democratic transition. This is an important and sobering lesson in the difficulties of using international law to articulate the logic of liberal multiculturalism. In the end, the CE was unable to reconcile the short-term goal of conflict prevention in unstable conditions with the long-term goal of promoting robust forms of liberal multiculturalism. And this in turn provides a sobering lesson in the limits of liberal multiculturalism itself: its ability to promote citizenization depends on a number of preconditions that are far from universal.

**V. Indigenous Rights at the UN**

The second experiment in formulating targeted rights is the UN’s efforts to codify rights specifically tailored to indigenous peoples. This is a more successful story,

---

5 Kymlicka, W., *Multicultural Odysseys* (above, n. 1).
and provides an interesting contrast with the European experience with national minorities.

What are indigenous peoples, and how do they differ from national minorities? The term ‘indigenous people’ has traditionally been used 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. ‘National minorities’, by contrast, was a term invented in Europe to refer to groups that lost out in the rough and tumble process of European state formation, and whose homelands ended up being incorporated in whole or in part into larger states dominated by a neighbouring 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, but they either ended up without a state of their own (‘stateless nations’ such as the Catalans and Scots), or ended up on the wrong side of the border, cut off from their co-ethnics in a neighbouring state (‘kin-state minorities’ such as the Germans in Denmark or Hungarians in Slovakia).

A preliminary way of distinguishing the two is to say that national minorities have been incorporated into a larger state dominated by a neighbouring European people, whereas indigenous peoples have been colonized and settled by a distant colonial European power. But there are other markers that supervene on this basic historical difference. For example, the subjugation of indigenous peoples by European colonizers was a more brutal and disruptive process than the incorporation of national minorities by neighbouring societies, leaving indigenous peoples weaker and more vulnerable. There is also a perceived ‘civilizational’ difference between indigenous peoples and national minorities. Whereas national minorities typically share the same modern (urban, industrialized, consumerist) economic and sociopolitical structures as their neighbouring European peoples, some indigenous peoples retain pre-modern modes of economic production, engaged primarily in subsistence agriculture or a hunting/gathering lifestyle. And, as a result of large-scale colonizing settlement, indigenous peoples are more likely to be relegated to remote areas.

So both terms have their origins in Western historical processes. National minorities are contenders but losers in the process of state formation within continental Europe itself; indigenous peoples are the victims of the construction of European settler states in the New World. As such, it’s not clear whether either term can usefully be applied outside Europe and the New World. And indeed, as we will see, various African and Asian countries have insisted that neither category applies to them.

However we can find analogous groups in other contexts. For example, several groups in Asia or Africa share the cultural vulnerability, pre-modern economies, and geographical remoteness of some indigenous peoples in the New World, including various ‘hill tribes’, ‘forest peoples’, ‘nomadic tribes’, and ‘pastoralists’. 
Similarly, there are groups in many post-colonial states that are similar to European national minorities in being active players, but eventual losers, in the process of decolonization and post-colonial state formation. These would include groups like the Tamils in Sri Lanka, Tibetans in China, Kurds in Iraq, Acehnese in Indonesia, Oromos in Ethiopia, or the Palestinians in Israel. Like national minorities in Europe, they may have hoped to form their own state in the process of decolonization, or at least to have secured autonomy. Yet they ended up being subordinated to a more powerful neighbouring group within a larger state, or divided between two or more post-colonial states.

Why did the UN decide to target indigenous peoples, whereas European organizations targeted national minorities? The European motivation was fear of the destabilizing impact of conflicts involving national minorities on international peace and security. The UN’s motivation was different—namely, a humanitarian desire to protect a type of group that was seen as distinctly vulnerable, even if this very weakness meant that indigenous peoples are unlikely to threaten international stability.

The task confronting the UN, then, was to develop targeted norms for indigenous peoples that alleviate their urgent vulnerability, while promoting the long-term goals of liberal multiculturalism. What does liberal multiculturalism imply for indigenous peoples? If we consider the status of indigenous peoples in the Western democracies—the Indians and Inuit/Eskimos of Canada and the United States, Maori in New Zealand, Aboriginals in Australia, Greenlanders in Denmark and Sami in Scandinavia—there has been a shift since the 1970s towards recognizing some form of indigenous self-government over (what remains of) their traditional territory. This is reflected in a wide range of land claims settlements, self-government agreements, and recognition of indigenous customary law.

This shift towards autonomy for indigenous peoples was initially controversial, but is now broadly seen as an (overdue) acknowledgement that the colonization of indigenous peoples was unjust, and that some form of decolonization is required, enabling indigenous peoples to re-establish autonomous legal and political institutions, and to regain control over some of their traditional lands. This trend has been endorsed by several theorists of liberal multiculturalism. Like the shift towards TA for national minorities, it is seen as a test case for the compatibility of group-differentiated rights with liberal constitutionalism and democratic citizenization.

Not surprisingly, therefore, the UN’s initial impulse was to endorse this model of indigenous self-government. In 1993, the Draft Declaration on the Rights of Indigenous Peoples included the right to control traditional lands and territories, the right to self-government in internal affairs, and the right to maintain distinctive

---

juridical customs. As we’ve just seen, a comparable proposal to enshrine a right to autonomy for national minorities in Europe, also drafted in 1993, was eventually rejected. In the case of indigenous peoples, however, the proposed Declaration was accepted by the UN General Assembly, after many years of negotiations, in 2007. Moreover, the UN Declaration accepts that indigenous autonomy must be understood as a manifestation of a right to (internal) self-determination, as liberal multiculturalists argue.

In this way, the UN’s efforts at formulating targeted norms for indigenous peoples have been more successful than European efforts at formulating targeted norms for national minorities, and better reflect the logic of liberal multiculturalism. As a result, many commentators identify the Declarations as a rare example of international law serving as a vehicle of ‘counter-hegemonic globalization’, promoting justice for the disadvantaged.\(^8\)

The UN’s humanitarian focus on indigenous peoples, however, leaves a serious legal vacuum with respect to the security issues raised by national minorities. Conflicts involving ethno-national groups such as the Kurds, Kashmiris, and Palestinians pose a much greater threat to regional peace and security than the struggles of pastoralists or forest dwellers. By deciding to target indigenous peoples rather than national minorities, the UN has no guidelines for addressing these pressing conflicts.

One response would be to supplement UN norms on indigenous peoples with another set of UN norms targeted at national minorities. As I noted earlier, this sort of ‘multi-targeting’ would reflect the logic of liberal multiculturalism, which involves a range of group-differentiated legal tracks, including distinctive tracks for national minorities and indigenous peoples.

Unfortunately, the prospects for developing global norms on national minorities are non-existent in the foreseeable future. The one attempt to formulate such norms at the global level—the Draft Convention on Self-Determination through Self-Administration submitted by Liechtenstein to the UN in 1994—was never seriously considered. And this shouldn’t surprise us. The same factors that inhibited the development of national minority norms for post-communist Europe—namely, fears about geopolitical security and human rights protection—apply to most countries in Africa, Asia, or the Middle East. If European organizations were unable to overcome these fears, despite their formidable economic, legal, and military capacities, it is unrealistic to expect the UN to succeed in this task. And indeed it has never tried.

So, the current UN framework which adopts targeted norms for indigenous peoples but not for national minorities is unlikely to change. Unfortunately, this asymmetry is generating instabilities. In order to understand the problem, we need to recall the broader logic of liberal multiculturalism. As I noted earlier,

---

both indigenous peoples and national minorities are treated as ‘old’ or ‘homeland’ minorities in most Western democracies. There are important differences between the two types of homeland minorities, but both are acknowledged to have legitimate interests with respect to the governance of their traditional territory, and the expression of their language and culture within the public institutions of that territory. In this respect, they are distinguished from new minorities composed of immigrants, guest-workers, and refugees.

In international law, however, the commonalities between indigenous peoples and national minorities have been obscured. There was, at first, an understandable justification for this trend. As we’ve seen, the subjugation of indigenous peoples by European colonizers was a more brutal process than the subjugation of national minorities by neighbouring European societies, leaving indigenous peoples more vulnerable, and hence in more urgent need of international protection. As a result, there was a plausible moral argument for giving priority to indigenous peoples over national minorities in the codification of self-government rights in international law.

However, what began as a difference in relative urgency between the claims of indigenous peoples and national minorities has developed into a total rupture at the level of international law. Across a wide range of international documents, indigenous peoples have been distinguished from other homeland minorities, and claims to TA have been restricted to the former. National minorities are lumped together with new minorities and accorded only generic minority rights, ignoring their distinctive needs and aspirations relating to historic settlement and territorial concentration. The distinction between indigenous peoples and other homeland minorities has thereby assumed a significance within international law that is absent in the theory and practice of liberal multiculturalism.

From the perspective of liberal multiculturalism, this attempt to create a firewall between the rights of indigenous peoples and national minorities is problematic. The sharp distinction in rights seems morally inconsistent, because whatever arguments exist for recognizing rights of self-government for indigenous peoples also apply to other homeland groups. This is clear from the UN’s own explanations for the targeted indigenous track. In a document, Asbjorn Eide, Chair of the UN’s Working Group on Minorities, and Erica-Irene Daes, Chair of the UN Working Group on Indigenous Populations, were asked to explain their understanding of the distinction between ‘indigenous peoples’ on the one hand, and ‘national, ethnic, religious and linguistic minorities’ on the other. In explaining why indigenous peoples are entitled to targeted rights beyond those available to all minorities under the generic article 27, the two Chairs identified three key differences: (a) whereas

minorities seek institutional integration, indigenous peoples seek to preserve a
degree of institutional separateness; (b) whereas minorities seek individual rights,
indigenous peoples seek collectively-exercised rights; (c) whereas minorities seek
non-discrimination, indigenous peoples seek self-government. These are indeed
relevant differences that liberal multiculturalism attends to. But none of them
distinguishes indigenous peoples from national minorities. On all three points
national minorities fall on the same side of the ledger as indigenous peoples.

In an earlier document, Daes offered a somewhat different account. She stated
that the distinguishing feature of indigenous peoples, compared to minorities in
general, is that they have a strong attachment to a traditional territory. As she
puts it;

attachment to a homeland is nonetheless 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.10

But this criterion—‘attachment to a homeland”—picks out homeland minorities
in general, not indigenous peoples in particular.

Since the principles advanced within the UN for targeted indigenous rights also
apply to national minorities, the sharp gulf in legal status between the two groups
lacks any clear moral justification. It may be politically impossible to extend norms
of self-government to national minorities, for reasons explored earlier, but we
shouldn’t ignore the moral inconsistencies this generates.

The sharp distinction between national minorities and indigenous peoples is
unstable in another way, as the very distinction is difficult to draw outside the core
cases of Europe and European settler states. In the West, as we’ve seen, there is a
relatively clear distinction to be drawn between European national minorities and
New World indigenous peoples. Both are homeland groups, but the former have
been incorporated into a larger state dominated by a neighbouring people, whereas
the latter have been colonized and settled by a distant colonial power. It is less clear
how we can draw this distinction in Africa, Asia, or the Middle East.

In one sense, no groups in Africa, Asia, or the Middle East fit the traditional
profile of indigenous peoples. All homeland minorities in these regions have been
incorporated into larger states dominated by neighbouring groups, rather than
being incorporated into settler states. In that sense, they are all closer to the profile
of European national minorities than to New World indigenous peoples. And for
this reason, several Asian and African countries insist that none of their minorities
should be designated as indigenous peoples. However, if we restrict the category
of ‘indigenous people’ to New World States, this would leave homeland minorities
in much of the world without any meaningful form of international protection. If

targeted indigenous norms do not apply in Asia or Africa, then minorities are left with only the weak generic minority rights under article 27, and these provide no protection for homeland-related interests.

In order to extend the protections of international law, therefore, the UN has attempted to reconceptualize the category of indigenous peoples to cover at least some homeland minorities in post-colonial states. On this view, we shouldn’t focus on whether homeland minorities are dominated by settlers from a distant colonial power or by neighbouring peoples. What matters is simply the facts of domination and vulnerability, and finding appropriate means to remedy them. And so various IOs have encouraged groups in Africa and Asia to identify themselves as indigenous peoples in order to gain greater international protection.

This push to extend the category of indigenous peoples beyond its original New World setting is a logical result of the humanitarian motivation that led to the targeting of indigenous peoples in the first place. In so far as the motivation for targeted rights was the distinctive vulnerability of indigenous peoples in New World settler states, it was natural to expand the category to include groups elsewhere in the world that share similar vulnerabilities, even if they were not subject to settler colonialism.

The difficult question however is how to identify which homeland groups in Africa, Asia, or the Middle East should be designated as indigenous peoples under international law. Once we start down the road of applying 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 IOs about how widely to apply the category of indigenous peoples in post-colonial states.11 Some would limit it to isolated peoples, such as hill tribes or forest peoples in South East Asia, or pastoralists in Africa. Others, however, would extend the category much more widely to encompass all historically-subordinated homeland minorities that suffer from some combination of political exclusion or cultural vulnerability.

Under these circumstances, attempts to draw a sharp distinction between national minorities and indigenous peoples will seem arbitrary. Moreover, any such line will be politically unsustainable. The problem here is not simply that the category of indigenous peoples has grey areas and fuzzy boundaries. The problem, rather, is that too much depends on which side of the line groups fall on, and as a result, there is intense political pressure to change where the line is drawn, in ways that are politically unsustainable.

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 national minorities can claim only generic minority rights. Instead, all homeland minorities

have an incentive to (re)-define themselves as ‘indigenous peoples’. If they come to the UN under the heading of ‘national minority’, they get nothing other than generic article 27 rights; if they come as ‘indigenous peoples’, they have the promise of land rights, control over natural resources, political autonomy, language rights, and legal pluralism.

Not surprisingly, an increasing number of homeland groups in Africa, Asia, and the Middle East are adopting the indigenous label. Consider the Arab-speaking minority in the Ahwaz region of Iran, whose homeland has been subject to state policies of Persianization, including the suppression of Arab language rights, renaming of towns and villages to erase evidence of their Arab history, and settlement policies that swamp the Ahwaz with Persian settlers. In the past, Ahwaz leaders have gone to the UN Working Group on Minorities to complain that their rights as a national minority in relation to their traditional territory are not respected. But since the UN does not recognize national minorities as having any distinctive rights in relation to their areas of historic settlement, the Ahwaz have relabelled themselves as an indigenous people, and have attended the UN Working Group on Indigenous Populations instead. Similarly, various homeland minorities in Africa that once attended the Working Group on Minorities have rebranded themselves as indigenous peoples, primarily to gain protection for their land rights. Leaders amongst the Crimean Tatars, Roma, Afro-Latinos, Palestinians, Chechens, and Tibetans are now debating whether to self-identify as indigenous. Even the Kurds—the textbook example of a stateless national minority—are debating this option.

In all of these cases, national minorities are responding to the fact that the UN’s generic minority rights are ‘regarded as fatally weak’, since they do not protect any claims based on historic settlement or territorial attachments. Given international law as it stands, recognition as an indigenous people is the only route to secure protection for these interests.

The availability of this back-door route for national minorities to gain targeted self-government rights may seem like a good thing. After all, from the perspective of liberal multiculturalism, the underlying moral logic should be to acknowledge the legitimate interests relating to historic settlement and territory shared by all homeland minorities, and expanding the category of indigenous people to cover all homeland minorities is one possible way to do this.

Unfortunately, this is not a sustainable approach. The tendency of national minorities to adopt the label of indigenous peoples is likely to lead to the collapse of the international system of indigenous rights. As we’ve seen, the UN and other IOs have repeatedly rejected attempts to codify rights of self-government for powerful

---

sub-state national groups, in part because of their geopolitical security implications. They are not going to allow such groups to gain rights of self-government through the back-door by redefining themselves as indigenous peoples. If more and more homeland groups adopt the indigenous label, the likely result is that IOs will retreat from the targeted indigenous rights track.

This suggests that the long-term future of the UN’s indigenous track is unclear. It is often cited as the clearest success story in developing international minority rights, but its success rests on shaky foundations. The UN has attempted to create a legal firewall between the rights of indigenous peoples and national minorities. This firewall was needed to get the indigenous track off the ground, but it is at odds with the logic of liberal multiculturalism, and politically unsustainable. A durable international framework will require a more coherent account of the relationship between indigenous peoples and national minorities, and a more consistent approach to self-government rights.

VI. Conclusion

New standards of minority rights have emerged within international law at the same time as new theories of liberal multiculturalism have emerged within political philosophy. The two developments are mutually supporting in many ways: the ideals of liberal multiculturalism have helped to shape international law, and international law has helped to promote liberal multiculturalism.

However, there are limits to the extent that international law can serve as a vehicle for promoting liberal multiculturalism. If we compare existing international minority rights standards with the conclusions of liberal multiculturalist theories, there are several gaps. The two converge most closely in the area of indigenous rights, where UN standards closely parallel liberal theories of indigenous rights, particularly in their commitment to self-government, treaty rights, and land claims. There is greater divergence in the area of national minorities. In this context, liberal multiculturalism has generally endorsed some norm of territorial autonomy and official language status, but attempts to formulate such ideas in international law have been decisively rejected. And the divergence is perhaps greatest in the case of immigrants, where there has been no attempt to formulate international standards based on the theories of liberal multiculturalism.

These gaps partly reflect the relationships of power that underpin international law. After all, international organizations are clubs of states, and hence are not neutral arbiters in addressing conflicts between states and minorities. It would be surprising indeed if clubs of states endorsed strong minority rights, particularly where those minorities are seen as posing a powerful challenge to state sovereignty.
But *raison d’état* isn’t the whole story. IOs have in fact shown considerable sympathy for ideals of liberal multiculturalism. If current international standards of minority rights provide only a pale reflection of those ideals, this is partly due to genuine difficulties in translating liberal multiculturalism into international law. The preconditions that enabled liberal multiculturalism to take root (unevenly) in the Western democracies do not exist in many countries, and promoting liberal multiculturalism without attention to these underlying conditions can exacerbate rather than mitigate ethnic conflict. Moreover, the basic categories that are used in theories of liberal multiculturalism—such as the categories of ‘indigenous peoples’ and ‘national minorities’—are rooted in the experience of particular regions, and may not work well at a global scale.

These difficulties should not surprise us. The exercise of formulating international standards of minority rights is a relatively recent one, as is the attempt to formulate normative theories of liberal multiculturalism. We are still at the earliest stages of thinking through how the two can and should inform each other.