Mohammad Shahabuddin

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Minorities and the Making of Postcolonial States in International Law

CAMBRIDGE

MINORITIES AND THE MAKING OF POSTCOLONIAL STATES IN INTERNATIONAL LAW

The ideological function of the postcolonial 'national', 'liberal', and 'developmental' state inflicts various forms of marginalisation on minorities, but simultaneously justifies oppression in the name of national unity, equality and non-discrimination, and economic development. International law plays a central role in the ideological making of the postcolonial state in relation to postcolonial boundaries, the liberal-individualist architecture of rights, and the neoliberal economic vision of development. In this process, international law subjugates minority interests and in turn aggravates the problem of ethno-nationalism. Analysing the geneses of ethno-nationalism in postcolonial states, Mohammad Shahabuddin substantiates these arguments with in-depth case studies on the Rohingya and the hill people of the Chittagong Hill Tracts, against the historical backdrop of the minority question in Indian nationalist and constitutional discourse. Shahabuddin also proposes alternative international law frameworks for minorities.

MOHAMMAD SHAHABUDDIN is Professor of International Law and Human Rights at Birmingham Law School, University of Birmingham. He received a Leverhulme Trust Research Fellowship (2018–20) for completing this monograph. His previous book, *Ethnicity and International Law* (Cambridge, 2016), offered the first ever comprehensive analysis of how ethnicity shaped international law.

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW: 154

Established in 1946, this series produces high quality, reflective and innovative scholarship in the field of public international law. It publishes works on international law that are of a theoretical, historical, cross-disciplinary or doctrinal nature. The series also welcomes books providing insights from private international law, comparative law and transnational studies which inform international legal thought and practice more generally.

The series seeks to publish views from diverse legal traditions and perspectives, and of any geographical origin. In this respect it invites studies offering regional perspectives on core *problématiques* of international law, and in the same vein, it appreciates contrasts and debates between diverging approaches. Accordingly, books offering new or less orthodox perspectives are very much welcome. Works of a generalist character are greatly valued and the series is also open to studies on specific areas, institutions or problems. Translations of the most outstanding works published in other languages are also considered.

After seventy years, Cambridge Studies in International and Comparative Law sets the standard for international legal scholarship and will continue to define the discipline as it evolves in the years to come.

Series Editors

Larissa van den Herik
Professor of Public International Law,
Grotius Centre for International Legal Studies, Leiden University

Jean d'Aspremont
Professor of International Law, University of Manchester and
Sciences Po Law School

A list of books in the series can be found at the end of this volume.

MINORITIES AND THE MAKING OF POSTCOLONIAL STATES IN INTERNATIONAL LAW

MOHAMMAD SHAHABUDDIN
University of Birmingham

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108483674
DOI: 10.1017/9781108678773

First published 2021

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-48367-4 Hardback

For my family

CONTENTS

Foreword *page* xi
Acknowledgements xv
Table of Cases xvii
List of Abbreviations xxi

Introduction 1

PART I **Ethno-nationalism and the Ideology of the Postcolonial State** **21**

1 Geneses of Ethno-nationalism in Postcolonial States 23

1.1 Introduction 23

1.2 Nation-Building and Ethnic Accommodation 25

1.3 Colonialism and Relative Ethnic Entitlements 28

1.4 Capitalism and Ethnic Polarisation 32

1.5 The Case of Anticolonial Ethno-nationalism in India 40

1.6 Conclusion 54

2 Minorities and the 'Ideology' of the Postcolonial State 56

2.1 Introduction 56

2.2 'Ideology': What Is It? What Is It For? 57

2.3 The Three Ideologies of the Postcolonial State 64

2.4 Conclusion: International Law and the Postcolonial State 82

PART II **International Law and the Postcolonial State 87**

3 The Postcolonial 'National' State: Boundaries and International Law 89

3.1 Introduction 89

3.2 International Law and Postcolonial Boundaries 90

3.3 The Case of the Rohingya in Myanmar 105

3.4 The Case of the CHT Hill People in Bangladesh 121

3.5 Conclusion 137

4 The Postcolonial 'Liberal' State: Self-determination, Minorities, and International Law 139

4.1 Introduction 139

4.2 The 'Nation' and Its 'Other' in the European Liberal Tradition 141

4.3 Minorities within the Liberal Framework of International Law 144

4.4 The Case of the Rohingya in Myanmar 175

4.5 The Case of the CHT Hill People in Bangladesh 186

4.6 Conclusion 196

5 The Postcolonial 'Developmental' State: Minority Perspectives and International Law 200

5.1 Introduction 200

5.2 Minorities in the International Law of Economic Development 202

5.3 'Development' in the International Law on Minority Rights 227

5.4 The Case of the Rohingya in Myanmar 240

5.5 The Case of the CHT Hill People in Bangladesh 261

5.6 Conclusion 275

Conclusion 277

Towards an Alternative Future for Minorities 280

Bibliography 305
Index 335

FOREWORD

The strong presence of ethno-nationalism in postcolonial states, and the associated politics, has often translated into the oppression of minorities and the denial to them of the right to self-determination. It has led to internal conflicts and gross violation of human rights, even genocide. Yet few scholars have addressed the matter in depth from an international law perspective. Mohammad Shahabuddin is an honourable exception. He has now written a timely, theoretically informed, and empirically grounded book on the subject of ethno-nationalism, postcolonial states, and international law. It continues the pathbreaking work Shahabuddin began with his previous monograph *Ethnicity and International Law* (2016). His work deserves to be read by anyone interested in the fate of minorities and subaltern groups in postcolonial states.

His theoretical framework is rich, albeit eclectic. He draws insights from liberalism, Marxism, and feminism. He weaves an analysis that relates the problem of ethno-nationalism to continuance of colonial boundaries, particular trajectories of development, the role of ethnic bourgeoisies, the nature and character of the postcolonial state, and the place of minority rights in the constitutional scheme of things. His deconstruction of the 'ideology' of ethno-nationalism and the postcolonial state draws from among others the 'critical hermeneutics' of John Thompson. In so far as the world of international law is concerned he relies on different strands of critical scholarship that include third world approaches to international law (TWAIL), feminist approaches to international law (FtAIL), and new approaches to international law (NAIL). His essential argument, made by all these three approaches in one form or another, is that international law is part of the problem.

The embrace of critical theory allows him to depart from existing work on minorities which essentially adopt a human rights perspective and identify in its matrix the shortcomings in the normative and institutional framework on minority rights. This strand of scholarship usually calls for more effective implementation, and at times a binding treaty to replace

the 1992 UN Declaration on Minority Rights. Shahabuddin takes a different track. He argues that international law contributes to the problem of minority oppression by helping construct and promote 'national', 'liberal', and 'developmental' postcolonial states that cannot actualise the accompanying programmatic agenda without coming to clash with minority rights. It results in an over reliance on 'the individualist notion of equality and non-discrimination', as against 'group identity', and stresses a trajectory of capitalist development that excludes marginalised groups from its benefits. The problem of minority rights is in this sense embedded by international law in the very being of the postcolonial state.

Shahabuddin undertakes three case studies to sustain his argument. While these are of countries in South and Southeast Asia, the insights he generates can be productively deployed to analyse the problem of ethno-nationalism across regions. The first case study he undertakes is that of the Indian national movement which serves as backdrop to the two detailed cases of Rohingya Muslims of Myanmar and the hill people of the Chittagong Hill Tracts (CHT) of Bangladesh. The historical literature on the Indian freedom struggle and the partition of British India is substantial and growing. There are multiple readings of its cultural, social, and political dimensions. In other words, there are divergent takes on the history of the period written in and across different nations in the region of South Asia. This is equally the case when it comes to the postcolonial era. In short, the history of the region is multifarious, complex, and contested. Shahabuddin offers from the standpoint of the theme of ethno-nationalism a version of that history that may not always find acceptance but deserves to be engaged with.

In his case study of Rohingya Muslims Shahabuddin shows how individualist notions of citizenship were unable to prevent them being deprived of their citizenship and becoming subjects of genocide. The efforts to secure 'a separate constitutional safeguard' were unsuccessful. Shahabuddin rightly suggests in this regard that taking citizenship seriously should be treated as 'the point of departure and not as the end'. In the case of Bangladesh, the denial of autonomy to the CHT hill people also coexisted with liberal guarantees of equality and non-discrimination and some safeguarding of local cultures. A degree of autonomy was eventually granted through an accord and following it the Hill District Councils Acts and the CHT Regional Council Act of 1998 but only for it to be struck down by the Supreme Court of Bangladesh. It would be imagined that after sufferings in the hands of Pakistan, the makers and

interpreters of the constitution of Bangladesh would readily recognise the concerns of the CHT. But it was not to be the case.

An important contribution of the book is to extend the framework dealing with minority rights to 'gender,' arguing that women suffer the same kind of marginalisation as minorities. In Shahabuddin's view feminist approaches to state shed much light on the situation of minorities. His theoretical lens could also be extended to others subaltern groups such as the working class, Dalits, and LGBT communities. To put it differently, the problem of marginalisation in postcolonial states is not simply that of minorities but of all disempowered and dispossessed groups. This does not distract from the fact that postcolonial states oppress ethnic, linguistic, religious, and other minorities in ways that other groups are not.

Unlike much critical work Shahabuddin does not rest with advancing a critique of extant state of affairs. He also offers thoughtful suggestions on how the problem of minority rights can be addressed. Ideally, in his view, a way should be found around the rule of *uti possidetis*. But he recognises that this is not a realistic possibility. He also notes the consensus in the international community against remedial secession. However, he cites the examples of Bangladesh and South Sudan to show that it remains a possible pathway. His support for 'the option of remedial secession of north Rakhine by the Rohingya' may find resonance with even those who are otherwise opposed to the idea. But there is for good reasons a healthy degree of scepticism among scholars and states with regard to the option of remedial secession. The problem of minorities is often recreated by the very act of secession. The condition of other subaltern groups is also unlikely to improve in the new situation. In other words, the fact that the postcolonial state is often actively inconsiderate towards all marginalised groups shows that the option of remedial secession is perhaps not the answer to the problem of ethno-nationalism. It is only inclusive cultural and social development, or of 'development as freedom', that can address the problems that these groups encounter. To be sure, in the instance of minorities it should be accompanied by the grant of cultural and political autonomy. The suggestions that Shahabuddin makes on this count are worthy of serious consideration. The recommendations include ethnic federalism, regional autonomy, and consociational democracy.

At the end of the day these too may not vastly improve the condition of minorities. The argument that international law facilitates the marginalisation of minorities and other subaltern groups in the postcolonial state

is a statement about its internal relationship with imperialism. As long as imperialism continues to shape international laws through its cultural and economic policies, the problem of marginalisation and oppression of minorities and other subaltern groups is not going to go away. In fact, imperialism exploits conflicts that arise to further its own agenda. The doctrines of humanitarian intervention or the responsibility to protect are deployed by imperialism to its own ends. Only in a post-imperial world can we expect serious justice for all subaltern groups, including minorities. Meanwhile, as Shahabuddin suggests in this important work, there are a whole range of measures that can help ameliorate the condition of minorities.

B. S. Chimni

ACKNOWLEDGEMENTS

Writing of this book was made possible by a research leave secured under the Leverhulme Trust Research Fellowship. I express my sincerest thanks and gratitude to the Trust for supporting the project. I am also thankful to Birmingham Law School and the College of Arts and Law, University of Birmingham, for necessary research support.

The book also benefitted from generous appreciation and constructive feedback from a number of individuals: Professor Antony Anghie (NUS/Utah), Professor B. S. Chimni (JGLS), Professor Matthew Craven (SOAS), Professor Jean d'Aspremont (Manchester/Sciences Po), Professor Fiona de Londras (Birmingham), Dr. Adil Khan (Melbourne), Professor Ratna Kapur (Queen Mary), Professor Patrick Thornberry (Keele), Professor Michael Whitby (Birmingham), and Professor Karen Yeung (Birmingham). I express my sincerest gratitude to each of them. Needless to say, all errors are solely mine.

Special thanks to Professor B. S. Chimni for writing an insightful foreword to the book. I am also grateful to the General Editors of the Cambridge Studies in International and Comparative Law series – Professor d'Aspremont and Professor Larissa van den Herik (Leiden) – for their confidence in the project. I also thank Cambridge University Press's Commissioning Editor Mr. Tom Randall for his cooperation throughout the process.

During my field visits to Bangladesh, a number of individuals extended their help and support in the most generous way despite challenging circumstances under which they perform their everyday duties. It is not possible to name everyone here, but I must mention Mr. Steven Corliss, UNHCR Country Representative in Bangladesh, and some of his colleagues at the UNHCR Cox's Bazar office: Ms. Tayba Sharif, Mr. Ikteruddin Bayzid, Mr. Istiaque Ahmed, and Mr. Kamrul Hasan Arif. I am also grateful to Bangladesh government's Office of the Refugee Relief and Repatriation Commissioner (RRRC) in Cox's Bazar for facilitating my fieldwork at Rohingya refugee camps. Special thanks to Mr. Md.

Shamsud Douza, Additional Refugee Relief and Repatriation Commissioner, and Ms. Shamima Akter Jahan, Assistant Camp-in-Charge, Kutupalong Rohingya Refugee Camp (Unit 2).

It would have not been possible for me to complete the fieldwork without the efficient assistance of Mr. Shafayat Salam, an Assistant Judge in Bangladesh Judicial Service and a brilliant former student of mine. I am thankful to him for everything he has done with utmost sincerity and care. I also thank three of my students at Birmingham Law School for their excellent research assistance at various stages of the project: Ms. Lilya Belfer, Ms. Kamila Lauer Czerwinski, and Ms. Josephine Gillingwater.

Earlier versions of parts of the book have been published as tweets, blogs, journal articles, or book chapters, and have attracted useful comments from readers. Ideas incorporated in the book have also been enriched through my engagement with colleagues at Birmingham Law School, in Third World Approaches to International Law (TWAIL) network, and in Harvard Law School's Institute for Global Law and Policy (IGLP). I have also benefitted from constructive feedback from participants in a series of invited talks, most notably at Lauterpacht Centre for International Law (Cambridge), Refugee Studies Centre (Oxford), Bangladesh Institute of Law and International Affairs, and law schools at Glasgow, LSE, Melbourne, Queen Mary, Colorado, and Bangladesh University of Professionals (BUP). I am grateful to each of them.

It would be less than fair if I did not thank the production and design teams at Cambridge University Press. Thanks also to Integra Software Services Pvt. Ltd. for managing the production process. I am also thankful to Ms. Allison Turner for her help with editing.

Words are not enough to express my gratitude to my wife Aznin and our three boys (Ehan, Eshan, and Auhon), who have always been there for me with their unfailing support, kindness, and understanding. This book would not have seen the light of day without their sacrifice. My extended family in Bangladesh has also been a source of inspiration for completing this project. Especially, my mother, elder brother, and his family have tried their best to make my frequent visits to Bangladesh pleasant, comfortable, and memorable. I cannot thank them enough.

Memories of my father are my greatest inspirations and the driving force behind all my major works, including this book.

TABLE OF CASES

Aaland Islands case. Commission of Rapporteurs. Report of the Commission of Rapporteurs (1921). League of Nations Council Doc B7 [C] 21/68/106. *Page* 98–99
Aaland Islands case. International Commission of Jurists. Report of the International Commission of Jurists. *League of Nations Official Journal*, Special Supplement No. 3 (1920). 98, 104
Acquisition of Polish Nationality case. Permanent Court of International Justice. PCIJ Reports (1923) Ser. B, No 7. 173
Ángela Poma Poma v. *Peru.* Human Rights Committee. Communication No. 1457/2006 (26 March 2009). UN Doc CCPR/C/95/D/1457/2006. 232–233
Arbitration Commission Opinion No. 1 (1991) Conference on Yugoslavia. *European Journal of International Law* 3 (1992), 182. 102
Arbitration Commission Opinion No. 2 (1991) Conference on Yugoslavia. *European Journal of International Law* 3 (1992), 184. 104
Arbitration Commission Opinion No. 3 (1991) Conference on Yugoslavia. *European Journal of International Law* 3 (1992), 185. 102–103
Arbitration Commission Opinion No. 8 (1992) Conference on Yugoslavia. *European Journal of International Law* 4 (1993), 87–88. 102
Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo* v. *Belgium*) case. International Court of Justice. ICJ Reports (2002). 94
Beagle Channel case (*Case Concerning a Dispute between Argentina and Chile Concerning the Beagle Channel*). International Arbitration. *Reports of International Arbitral Awards* XXI (1977). 101
Bernard Ominayak, Chief of the Lubicon Lake Band v. *Canada*. Human Rights Committee. Communication No. 167/1984 (26 March 1990). UN Doc Supp No. 40 (A/45/40). 165
Bishna Lal v. *The Union of Burma*. Supreme Court of Myanmar. BLR 3 (1959) HC. 179
Centre on Housing Rights and Evictions (COHRE) v. *Sudan*. African Commission on Human and Peoples' Rights. Communication No. 296/2005 (2009). 237
Chagos Islands case (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*). International Court of Justice. ICJ Reports (2019). 96
Chorzow Factory case (*Case Concerning the Factory at Chorzow*). Permanent Court of International Justice. PCIJ Reports (1925) Ser. B, No. 3; PCIJ Reports (1928) Ser. A, No. 17. 146

Colombian-Venezuelan Frontier case. International Arbitration. *Reports of International Arbitral Awards* VI (1922). 101
Congrès du Peuple Katangais v. *Zaire*. African Commission on Human and Peoples' Rights. Communication No. 75/92 (1994–1995). 150
East Timor (*Portugal* v. *Australia*) case. International Court of Justice. ICJ Reports (1995). 149
Endorois case (*Centre for Minority Rights Development and Minority Rights Group International and Centre on Housing Rights and Evictions (on behalf of Endorois Welfare Council)* v. *Kenya*). African Commission on Human and Peoples' Rights. Communication 276/2003 (2009). 231, 235, 238
Frontier Dispute (Benin v. *Niger)* case. International Court of Justice. ICJ Reports (2005). 100
Frontier Dispute (Burkina Faso v. *Mali)* case. International Court of Justice. ICJ Reports (1986). 100–101, 103
German Settlers case. Permanent Court of International Justice. PCIJ Reports (1925) Ser. B, No. 6. 146
Gillot et al. v. *France*. Human Rights Committee. Communication No. 932/2000 (15 July 2002). UN Doc CCPR/C/75/D/932/2000. 166
Guinea Bissau v. *Senegal (Arbitral Award of 31 July 1989)* case. International Court of Justice. ICJ Reports (1991). 100
Hasan Ali and Meher Ali. Supreme Court of Myanmar. Criminal Miscellaneous Applications No. 155 (1959). 179
Hopu and Bessert v. *France*. Human Rights Committee. Communication No. 549/1993 (9 December 1997). UN Doc CCPR/C/60/D/549/1993/Rev. 1. 233
In Re the Thirteenth Amendment to the Constitution. Supreme Court of Sri Lanka. 2 SLR (1987) 319. 195
India/Pakistan Boundary Dispute case *(Boundary Disputes between India and Pakistan Relating to the Interpretation of the Report of the Bengal Boundary Commission)*. International Arbitration. *Reports of International Arbitral Awards* XXI (1950). 133
J. G. A. Diergaardt et al. v. *Namibia*. Human Rights Committee. Communication No. 760/1997 (25 July 2000). UN Doc CCPR/C/69/D/760/1997. 166
Karam Singh v. *The Union of Burma*. Supreme Court of Myanmar. BLR 25 (1956) SC. 179
Kasikili/Sedudu Island (Botswana v. *Namibia)* case. International Court of Justice. ICJ Reports (1999). 100
Kitok v. *Sweden*. Human Rights Committee. Communication No. 197/1985 (10 August 1988). UN Doc CCPR/C/33/D/197/1985. 165–166
Kosovo case *(Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo)*. International Court of Justice. ICJ Reports (2010). 148–150
Land and Maritime Boundary (Cameroon v. *Nigeria)* case. International Court of Justice. ICJ Reports (2002). 100

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) case. International Court of Justice. ICJ Reports (1992). 101
Lansman et al. v. *Finland.* Human Rights Committee. Communication No 511/1992 (8 November 1994). UN Doc CCPR/C/52/D/511/1992. 165, 232–233
Lansman et al. v. *Finland (No. 2*). Human Rights Committee. Communication No. 671/1995 (22 November 1996). UN Doc CCPR/C/58/D/671/1995. 165, 232–233
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) case. International Court of Justice. ICJ Reports (1971). 97, 148
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case. International Court of Justice. ICJ Reports (2004). 149
Letto Law Danga v. *The Union of Burma*. Supreme Court of Myanmar. BLR 30 (1959) HC. 179
Lovelace v. *Canada*. Human Rights Committee. Communication No. 24/1977 (30 July 1981). UN Doc CCPR/C/OP/1. 16, 165
Mahuika et al. v. *New Zealand*. Human Rights Committee. Communication No. 547/1993 (15 November 2000). UN Doc CCPR/C/70/D/547/1993. 232–233
Maya Indigenous Communities of the Toledo District v. *Belize*. Inter-American Court of Human Rights. Report No. 40/04, Case 12.053 (2004). 231, 235–236
Mayagna (Sumo) Awas Tingni Community v. *Nicaragua*. Inter-American Court of Human Rights. Series C, No. 79 (2001). 235
Minority Schools in Albania case. Permanent Court of International Justice. PCIJ Reports (1935) Ser. A/B, No. 64. 146
Mohammad Badiuzzaman v. *Bangladesh and Others*. Supreme Court of Bangladesh. Law Guardian 7 (2010) HCD. 135–136, 186, 189, 193–195
Moiwana Community v. *Suriname*. Inter-American Court of Human Rights. Series C, No. 124 (2005). 237
Nationality Decrees Issued in Tunis and Morocco (French Zone) case. Permanent Court of International Justice. PCIJ Reports (1923) Ser. B, No. 4. 173
Nicaragua v. *Honduras* case *(Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea)*. International Court of Justice. ICJ Reports (2007). 101
O. Sara et al. v. *Finland*. Human Rights Committee. Communication No. 431/1990 (24 March 1994). UN Doc CCPR/C/50/D/431/1990. 165
Ogiek case *(African Commission on Human and Peoples' Rights* v. *Republic of Kenya)*. African Court of Human and Peoples' Rights. Application No. 006/2012 (2017). 236
Reference re Secession of Quebec. Supreme Court of Canada. 2 SCR (1998) 217. 148
Rights of Minorities in Upper Silesia (Minority Schools) case. Permanent Court of International Justice. PCIJ Reports (1928) Ser. A, No. 15. 146
Saramaka People v. *Suriname*. Inter-American Court of Human Rights. Series C, No. 185 (2008). 230–231, 235–237
Sawhoyamaxa Indigenous Community v. *Paraguay*. Inter-American Court of Human Rights. Series C, No. 146 (2006). 235

Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. *Nigeria*. African Commission on Human and Peoples' Rights. Communication No. 370/09 (2008). 237
Tamil Federal Party case. Supreme Court of Sri Lanka. SC SPL 03/2014 (2016). 195
Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. *The Government of the Libyan Arab Republic*. International Arbitration. *International Law Materials* 17, no. 1 (1978), 1–37. 214
The Gambia v. *Myanmar* case *(Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*. International Court of Justice (pending). 1
The Kichwa Peoples of the Sarayaku Community and Its members v. *Ecuador*. Inter-American Court of Human Rights. Series C, No. 245 (2012). 230
Upper Silesia case (*Case Concerning Certain German Interests in Polish Upper Silesia*). Permanent Court of International Justice. PCIJ Reports (1926) Ser. A, No. 7. 146
Western Sahara case. International Court of Justice. ICJ Reports (1975). 149
Yordanova and Others v. *Bulgaria*. European Court of Human Rights. Application No. 25446/06 (2012). 238

ABBREVIATIONS

AA	Arakan Army
ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ADB	Asian Development Bank
AFPFL	Anti-Fascist People's Freedom League
ARSA	Arakan Rohingya Salvation Army
ASEAN	Association of Southeast Asian Nations
BIOT	British Indian Ocean Territory
CAD	Constituent Assembly Debates (of India)
CDDH	Steering Committee for Human Rights, Council of Europe
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESR	Centre for Economic and Social Rights
CHT	Chittagong Hill Tracts
CITIC	China International Trust Investment Corporation
CoE	Council of Europe
COHRE	Centre on Housing Rights and Evictions
CSCE	Conference on the Security and Co-operation in Europe
ECE	Eastern and Central Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council
EU	European Union
FAO	Food and Agriculture Organization
FCNM	Framework Convention on National Minorities
FRUS	Foreign Relations of the United States
FtAIL	Feminist approaches to internationallaw
FWAIL	Fourth World Approaches to International Law
GDP	gross domestic product
HCNM	High Commissioner on National Minorities
HR	human rights
HRC	Human Rights Committee

IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
IFI	international financial institution
ILO	International Labour Organization
IOR	India Office Records and Private Papers
IMF	International Monetary Fund
KTA	Knappen Tippetts Engineering Co.
MSDP	Myanmar Sustainable Development Plan
NAIL	New approaches to international law
NATO	North Atlantic Treaty Organization
NGO	non-governmental organisation
NIEO	New International Economic Order
OAU	Organisation of African Unity (African Union)
OIC	Organisation of Islamic Cooperation
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PCJS	Parbattyo Chattagram Jana Samiti (The Chittagong Hill Tracts People Association)
PCJSS	Parbattya Chattagram Jana Sanghati Samiti (United People's Party of the Chittagong Hill Tracts)
PSNR	Permanent Sovereignty over Natural Resources
R2P	responsibility to protect
ROB	Royal Orders of Burma
SAP	Structural Adjustment Programme
SERAC	Social and Economic Rights Action Centre
SFRY	Socialist Federal Republic of Yugoslavia
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UEHRD	Union Enterprise for Humanitarian Assistance, Resettlement, and Development in Rakhine
UN	United Nations
UNCT	United Nations Country Team
UNDM	United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities
UNDP	United Nations Development Programme
UNDP-CHTDF	United Nations Development Programme Chittagong Hill Tracts Development Facility
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific, and Cultural Organization

UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees (The UN Refugee Agency)
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
USAID	United States Agency for International Development
USF	Unclassed State Forest
USSR	Union of Soviet Socialist Republics (The Soviet Union)
WFP	World Food Programme
WGM	Working Group on Minorities, United Nations
WHO	World Health Organization
WWII	World War II (Second World War)

Introduction

The recent persecution of the Rohingya minority in Myanmar has been described by the United Nations Human Rights Council, first, as a 'textbook example of ethnic cleansing'[1] and then, within a few months, as a potential case of 'genocide'.[2] The Independent International Fact-Finding Mission on Myanmar established by the Human Rights Council concluded that the Myanmar army (Tatmadaw) committed war crimes and crimes against humanity in Rakhine State, and also that there was 'sufficient information' to warrant the investigation and prosecution of senior officials in the Tatmadaw chain of command for their liability for genocide in Rakhine State.[3] In December 2019, the Republic of Gambia filed a case against Myanmar before the International Court of Justice (ICJ) under the Genocide Convention (1948).[4] Meanwhile, more than a million Rohingyas who survived and managed to flee to neighbouring Bangladesh are living like packed sardines in makeshift tents in thirty-two refugee camps built on an area of only 26 square kilometres.

While the Rohingya genocide is one of the worst incidents against minorities in recent times, 'ethno-nationalism' and minority oppression

[1] Statement made by the UN High Commissioner for Human Rights, Zeid Ra'ad Al-Hussein, before the UN Human Rights Council in Geneva on 11 September 2017, available at www.un.org.

[2] Statement made by the UN High Commissioner for Human Rights, Zeid Ra'ad Al-Hussein, before the UN Human Rights Council in Geneva on 5 December 2017, available at www.ohchr.org.

[3] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar* (17 September 2018), UN Doc A/HRC/39/CRP2.

[4] The Gambia filed the case before the ICJ, allegedly acting on behalf of the Organisation of Islamic Cooperation (OIC). See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, available at www.icj-cij.org/en/case/178.

in various forms and at various intensities are defining features of 'postcolonial states' in general.[5] A global study on peoples under threat in 2019 reveals that of the 115 countries that the study ranked by level of threat, 72 faced conflicts involving claims to self-determination.[6] All but a handful of the countries in the list are postcolonial states. Whereas the majority of states in the world, including Western liberal democracies, are not completely immune from ethno-nationalism, the question remains, why are postcolonial states more vulnerable to this phenomenon? Also, why do postcolonial states respond to ethnic tensions in the manner in which they do? And, what role does international law play in all of this? My motivation for writing this book emanates from these compelling questions.

Every major project has a humble beginning and the present work is not an exception. The writing of this book started with one of my tweets in the wake of the latest wave of the Rohingya massacre and displacement as well as international responses to these horrific events of August 2017. In that tweet, I wrote: 'To see the Rohingya crisis as a failure of international law enforcement is a wrong line of thinking. With *uti possidetis* [continuation of colonial boundaries], ambivalence with minority rights, and "developmentalism", international law has in fact facilitated this crisis.' This conflict-facilitating role of international law is not unique to the Rohingya crisis; the same applies to most ethnic violence in postcolonial states. Norms of international law devised to protect the rights of minorities and to protect individuals from statelessness, together with the recently developed doctrine of 'responsibility to

[5] By 'ethno-nationalism', I mean nationalist consciousness based on ethnic identities and ensuing claims towards statehood, regional autonomy, or other political arrangements. Ethnicity is understood here in the broadest sense of the term encompassing race, religion, language, culture, and so on. For the purpose of this book, 'postcolonial states' refer to those states that were under prolonged colonial rule and have subsequently gone through formal decolonisation. Most former colonies in Asia, Africa, and Latin America, which have now emerged as independent states, would come under this broad conventional definition. Although the term 'post' indicates a sense of temporality suggesting the hyphenated notion of 'post-colonial states', in this book I have consciously used the phrase without a hyphen precisely to dismantle that suggestion of temporality. For, postcolonialism as a phenomenon is omnipresent in the subjugation of post-colonial people long after formal decolonisation. It also needs to be noted that although countries, such as Thailand and Nepal, that were not formally colonised or so-called semi-colonial states like China fall outside the scope of the definition, the phenomenon remains relevant for these states too. However, as I make clear later on, my arguments in this book are made with reference to specific contexts and without making any claim of generality.

[6] Minority Rights Group International, 'Peoples Under Threat Data' (2019), available at www.peoplesunderthreat.org/data.

protect', suggest that internatonal law offers a solution to the tragic predicament of minorities. The problem would thus lie in the lack of enforcement. The ironic reality, however, is that international law facilitates ethnic violence in postcolonial states.

In *Minorities and the Making of Postcolonial States in International Law* I articulate the normative argument behind this claim. Offering an analysis of the geneses of ethno-nationalism in postcolonial states, I argue that nationalist elites address the problem of ethno-nationalism in general and minorities in particular by identifying the 'postcolonial state' itself as an 'ideology'. The ideological function of the postcolonial state vis-à-vis minorities takes three different yet interconnected forms: the postcolonial 'national' state, the postcolonial 'liberal' state, and the postcolonial 'developmental' state. As ideologies, the three visions of the postcolonial state inflict various forms of marginalisation on minorities but simultaneously justify the oppression in the name of national unity, liberal principles of equality and non-discrimination, and economic development, respectively. International law, as a core element of the ideology of the postcolonial state, contributes to the marginalisation of minorities. It does so by playing a key role in the ideological making of the postcolonial 'national', 'liberal', and 'developmental' states in relation to: continuation of colonial boundaries in postcolonial states, internal organisation of ethnic relations within the liberal-individualist framework of human rights, and the economic vision of the postcolonial state in the form of 'development' that subjugates minority interests. In other words, the book offers an ideology critique of the postcolonial state and examines the role of international law therein. My arguments in the book are substantiated with case studies. First, to develop a general framework of the ideology of the postcolonial state, I look at Indian nationalist movements and the question of minority protection. I then focus more specifically on the cases of the Rohingya minority in Myanmar and the hill people of the Chittagong Hill Tracts (CHT) in Bangladesh to expose the role of international law in the ideological function of postcolonial states.

Although statehood has always been a central element of international legal studies, the peculiarities of postcolonial states hardly drew any attention in the orthodox narrative of international law. The questions of self-determination and decolonisation, therefore, appear only en passant in the context of creating new states; the assumption is that as soon as these states are created, they will join the ranks of other sovereign states to be governed horizontally by the standard international legal regime. James Crawford's classic work, *The Creation of States in*

International Law, is an archetypical example of how traditional international law scholarship treats the question of postcolonial statehood as a peripheral item.[7] Most such works do not go beyond the law and practice of self-determination and decolonisation. In this way, the 'creation' of a postcolonial state ends as soon as it appears as a 'normal state', a new member of international society. More recent scholarship on self-determination and secession, specifically focused on postcolonial states in Africa, does not break with the trend either.[8]

Likewise, numerous scholars have analysed various aspects of minority rights under international law, including the right to self-determination and democratic participation in decision-making.[9] Following the eruption of ethnic violence in the post–Cold War period, the disciplines of international law, international relations, and security studies have experienced a corresponding eruption of writings on minority protection. A good number of these publications focused on regional studies of minority protection. While the literature on minority rights is thick, most of it adopts doctrinal approaches and makes interventions by re-interpreting existing provisions to expand horizons. As a result, these works fail to fully appreciate the complexities of minority issues in postcolonial states. More importantly, they conceive of international law essentially as a solution to the minority problem rather than as a part of the problem.[10] My previous monograph, *Ethnicity and International Law*, addressed this shortcoming by engaging with the concept of minority protection in a radically different way – by explaining international law's ambivalence towards minority rights within the

[7] James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Oxford University Press, 2007). See also Marcelo G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006), and Duncan French (ed.), *Statehood and Self-determination: Reconciling Tradition and Modernity in International Law* (Cambridge: Cambridge University Press, 2013).

[8] See, for example, Redie Bereketeab (ed.), *Self-determination and Secession in Africa: The Postcolonial State* (London: Routledge, 2015); Dirdeiry M. Ahmed, *Boundaries and Secession in Africa and International Law: Challenging* Uti Possidetis (Cambridge: Cambridge University Press, 2015).

[9] For example, Kristin Henrard and Robert Dunbar, *Synergies in Minority Protection* (Cambridge: Cambridge University Press, 2009); Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law* (The Hague: Martinus Nijhoff Publishers, 2009); Kristin Henrard, *Devising an Adequate System of Minority Protection* (The Hague: Martinus Nijhoff Publishers, 2000); Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991).

[10] See, for example, Steven Wheatley, *Democracy, Minorities and International Law* (Cambridge: Cambridge University Press, 2005).

historical continuum of the liberal hesitancy vis-à-vis the allegedly 'primitive' concept of ethnicity.[11] Yet, it failed to pay adequate attention to the peculiarities of ethno-nationalism and the minority problem in postcolonial states.

It was Europe that crafted international legal norms, and postcolonial states are to a great extent the creation of these norms via colonisation, decolonisation, and associated rules. Third World Approaches to International Law (TWAIL) scholars have demonstrated how diverse political entities with their own complex characteristics were compelled to adopt a Western concept of 'statehood' – which embodies specific ideas of territory, the nation, and ethnicity – in order to gain recognition. As Antony Anghie notes, 'the embrace and adoption of the Western concept of the nation-state that was a prerequisite for becoming a sovereign state' demanded a transformation of indigenous perceptions of sovereignty and political communities, and 'not all new states were successful in making these changes without experiencing ongoing ethnic tensions and, in some cases, long and devastating civil wars'.[12] Similarly, Obiora Okafor argues that international legal doctrines such as 'peer-review' (as opposed to 'infra-review') in recognising new states and the 'homogenisation' of states have facilitated the process by which many African states have promoted coercive nation-building and legitimised the construction and maintenance of large centralised states in Africa. In this way, international law and institutions have contributed to incidents of ethnic conflicts in Africa.[13]

However, this understanding of international law engagements with postcolonial states, seen from minority rights perspectives, is largely confined to various formal formative aspects of statehood, such as recognition, self-determination, and territory – in line with the limited orthodox understanding of the role of international law in the creation of postcolonial states.[14] On the other hand, TWAIL scholarship on

[11] Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge: Cambridge University Press, 2016).

[12] Antony Anghie, 'Bandung and the Origins of Third World Sovereignty', in *Bandung, Global History, and International Law: Critical Pasts and Pending Futures*, eds. Luis Eslava, Michael Fakhri, and Vasuki Nesiah (Cambridge: Cambridge University Press, 2017), 544.

[13] Obiora Chinedu Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa', *Harvard International Law Journal* 41(2000), 503–528.

[14] See also Makau Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry', *Michigan Journal of International Law* 16, no. 4 (1995), 1113–1176.

other relevant issues, such as developmentalism and economic imperialism, largely focuses on the damaging role of international law in postcolonial states but often without paying adequate attention to the marginalisation of minority groups within those states.[15] In contrast, Hiroshi Fukurai, in his presidential speech at the 2017 Annual Conference of the Asian Law and Society Association, briefly identified the limits of TWAIL approaches in the context of indigenous peoples in Asia. To address such limitations, he proposed the Fourth World Approaches to International Law (FWAIL), but without engaging with the normative issues involved in the making of postcolonial states.[16]

This book addresses these shortcomings in the existing international law literature on statehood and minority rights – both in mainstream and critical genres – by offering a comprehensive analysis that puts both the 'minority' and the 'postcolonial state' at the centre of attention. Explaining the postcolonial state as an ideology, the book demonstrates how international law facilitates the ideological making and functioning of the postcolonial state as 'national', 'liberal', and 'developmental' states and, thereby, legitimises the marginalisation of minorities. Such engagements between international law and postcolonial states do not end with the formal creation of the latter as new subjects of international society. Instead, international law continues to maintain the colonial territorial definition of the state, to shape the internal organisation of ethnic relations through liberal individualism, and to nurture exploitative economic structures in postcolonial states. Thus, through the case studies, this book

[15] See B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd ed. (Cambridge: Cambridge University Press, 2017); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movement and Third World Resistance* (Cambridge: Cambridge University Press, 2003); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); Celine Tan, *Governance through Development : Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (London: Routledge, 2011); Sundhya Pahuja and Luis Eslava, 'The State and International Law: A Reading from the Global South?' *Humanity: An International Journal of Human Rights, Humanitarianism and Development* 11, no. 1 (2020), 118–138; Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge: Cambridge University Press, 2015).

[16] Hiroshi Fukurai, 'Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law', *Asian Journal of Law and Society* 5 (2018), 221–231.

also highlights how international law operates in the material realm by altering the very mode of production and thereby social relations themselves. Each of the international law interventions has important, enduring, and often devastating implications for minorities. International law's involvement with the ideology of the postcolonial state is incessant, as is the anguish of minorities as a result.

The organisation of the book builds on four key questions: (i) Why and how does ethno-nationalism take root in postcolonial states? (ii) How do postcolonial states then respond to this phenomenon? (iii) What role does international law play in the process? (iv) What is the way forward?

The book responds to these questions in two parts. Part I, consisting of Chapters 1 and 2, deals with the first two questions in order to develop the normative framework within which I then respond to the remaining questions in subsequent chapters. Chapter 1 analyses the roots of ethno-nationalism in postcolonial states by highlighting three key elements of ethno-nationalist politics: the modernist response to primordial attachments in the process of nation-building, the active role and passive consequences of colonialism, and the influence of bourgeois and petty bourgeois classes under the material condition of capitalism. My analysis in this chapter underscores that to a great extent ethno-nationalism in postcolonial states is an outcome of a combined force of all three elements.

Against this backdrop of the geneses of ethno-nationalism, Chapter 2 examines how postcolonial states then respond to ethno-nationalism in general and minorities in particular. I argue that nationalist ruling elites conceive of the postcolonial state itself as an 'ideology', claiming that the unified national state, its liberal constitutional structure, and the developmental agenda will solve the trouble of ethnic parochialism and, hence, the problem of minorities. Here, I rely on John Thompson's notion of 'ideology' as a set of ways in which ideas and meanings help create and sustain relations of domination through a series of general modes of operation and strategies of symbolic construction.[17] I elaborate this specific meaning of ideology and then develop my argument that the ideology of the postcolonial state functions in three different forms: the postcolonial 'national' state, the postcolonial 'liberal' state, and the postcolonial 'developmental' state.

In asserting faith in the healing power of the postcolonial state, the nationalist elites conveniently avoid crucial questions as to the continuation of the colonial political order, the class character of the economic

[17] See John B. Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Cambridge: Polity Press, 1990).

organisation, and the hegemony of nation-building projects – factors that lead to ethno-nationalism in the first place. In other words, the idea that the postcolonial state itself will solve the minority problem obscures and glosses over the real reasons for the problem and shifts attention to issues – national unification, liberal individualism, and development – that help maintain asymmetric power relations between the minority and the majority. In this way, the postcolonial state performs the ideological function of suppressing minority group identities, but simultaneously obscures and validates further marginalisation of minorities. Taken together, Chapters 1 and 2 offer a normative framework of the 'ideology of the postcolonial state' for my analysis of the role of international law in the rest of the book.

My arguments in Part I, in relation to the geneses of ethno-nationalism as well as the three ideologies of the postcolonial state, are substantiated with case studies on anticolonial nationalist movements in India and the ensuing minority rights discourse in Indian Constituent Assembly debates between 1946 and 1950. This critical engagement with the broader context of the Indian nationalist movement and the treatment of minorities in the constitutional architecture of the postcolonial Indian state offers a useful backdrop for my more focused case studies on the Rohingya in Myanmar and the hill people of the CHT in Bangladesh in Part II. Given the intertwined colonial experience and history of India, on the one hand, and Myanmar and Bangladesh, on the other, the case studies on the Rohingya and the CHT hill people make better sense once contextualised within the broader narrative of the nationalist movement and the ideology of the postcolonial Indian state at the moment of decolonisation. The prolonged process of Indian decolonisation ultimately vivisected the entire region to beget multiple postcolonial states, including Myanmar and Bangladesh and, thereby, multiplied the problem of minorities.

Part II of the book, consisting of Chapters 3, 4, and 5, engages with the third key question, which constitutes the main focus of the book: what role does international law play in the ideological function of the postcolonial state in marginalising minority groups? By international law, here I mean 'an ensemble of rules, policies, institutions, and practices that directly and indirectly affects the daily lives of millions of people all over the world'.[18] In recent years, a growing network of international institutions has constituted what B. S. Chimni calls a 'global state', which is designed to safeguard

[18] 1 *International Law from Below*, 2.

the vested interests of the transnational capitalist class to the disadvantage of subaltern classes globally.[19] Hence, in Part II I put international institutions in the field of human rights, development, and finance – along with various international norms, rules, and principles – under close scrutiny in order to gauge their impacts on minorities.

Chapter 3 deals with the role of international law in the ideology of the postcolonial 'national' state. With its ambition of achieving a homogeneous and unified sovereign entity, the postcolonial state essentially relies on international law principles for the continuity of colonial boundaries (*uti possidetis*), territorial integrity, sovereign equality, and non-interference in internal affairs. Contrary to the conventional wisdom that the *uti possidetis* principle helps in the maintenance of peace and order, I argue that *uti possidetis* is a key problem. Far from being a corrective mechanism halting potential 'disorder' emanating from decolonisation, the continuation of arbitrarily drawn colonial boundaries undermines the legitimate right to self-determination of numerous ethnic minorities in postcolonial states and often results in violent ethnic conflicts. The argument for *uti possidetis* in international law is also normatively inconsistent as it depends upon the capacity of the postcolonial state to efface ethno-nationalism while simultaneously allowing the state to produce its own sustaining nationalist ideology in majoritarian terms. The minority problem is thus embedded in the very ideological making of the postcolonial 'national' state in international law.

Chapter 4 demonstrates how the post–WWII liberal vision of international law feeds into the ideology of the postcolonial 'liberal' state in the form of 'individualism', thereby dominating the discourse on minority protection. One direct implication of the dominance of liberal individualism in the postcolonial constitutional architecture of rights is the denial of protection for minority *groups*. The liberal human rights regime is designed to diffuse cultural groups into individual units, so as to facilitate their assimilation into a homogeneous national (read majoritarian) identity. This chapter explains how international law, with its liberal underpinning, shrinks the scope of the right to self-determination and thereby perpetuates the vulnerability of, or in some cases even leads to the extinction of, minority groups. In this connection, I also highlight the peculiar challenge that postcolonial states face in reconciling the diverging forces of 'liberal individualism' and majoritarian 'ethno-nationalism'. The former

[19] B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', *European Journal of International Law* 15, no. 1 (2004), 1–37.

emanates from the liberal international legal order, the latter from the nationalist discourse of allegiance, entitlement, and legitimacy. The issue of citizenship and statelessness is also discussed in this context.

And finally, Chapter 5 explains how the ideology of the postcolonial 'developmental' state relies on the language of economic progress and development to undermine the minority question. The idea that economic development is the answer to all social problems is embedded in the very logic of international law's engagement with postcolonial states. I, therefore, offer a critical, in-depth, and multi-layered analysis of the complex interrelationship between minorities, postcolonial states, and dominant international actors with reference to 'development' and international law. The analysis is organised under two major rubrics: I first examine the treatment of minorities in the international law of development and then examine how international law discourse on minority and group rights addresses the issue of economic development. In both cases, critically engaging with central themes in the discourse on both 'development' and 'minority rights' under international law, I argue that international law provides a framework within which international actors and postcolonial states suppress minority interests in the name of economic development and that politically marginalised minorities suffer the most due to such development activities. In this way, international law involvement in the ideological function of the postcolonial 'developmental' state not only results in further marginalisation of already vulnerable minorities but also serves to legitimise and gloss over asymmetric power relations that produce such marginalisation.

In light of the foregoing arguments, the conclusion of the book calls for a renewed international law approach to minority rights and the question of statehood – one that takes into account the unique nature and background of postcolonial states and, at the same time, pays attention to minority perspectives going beyond state-centrism, liberal individualism, and neoliberal developmentalism. It is only through this approach that international law can finally make sense of humanitarian catastrophes in postcolonial states and its involvement therein.

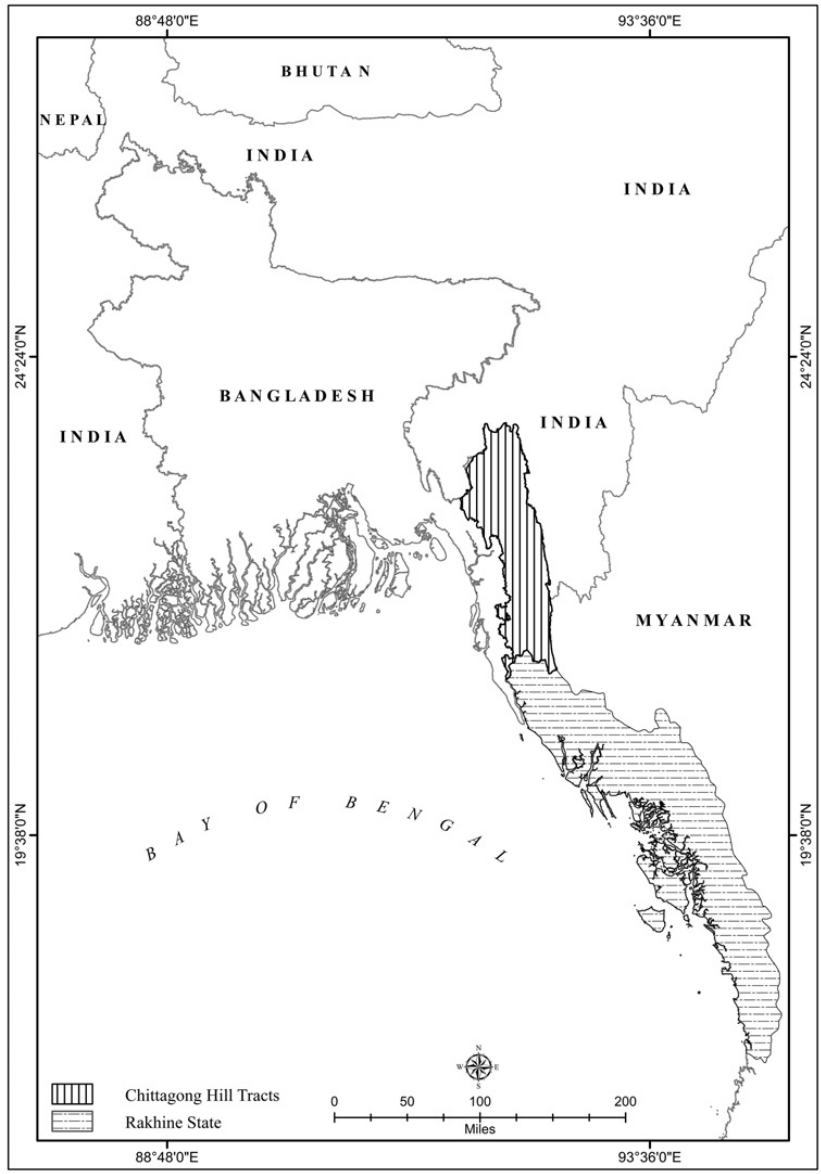
As mentioned earlier, my arguments about the role of international law in the ideological function of postcolonial states are substantiated with in-depth case studies on the Rohingya minority in Myanmar and the CHT hill people in Bangladesh. The states of Myanmar (formerly known as Burma) and Bangladesh (formerly known as East Pakistan), albeit neighbouring countries, are quite different in their geopolitical outlook and culture. While Bangladesh has always had its historic, political, and

cultural roots in the Indian sub-continent or South Asia, Myanmar is seen rather as a Southeast Asian nation and belongs to the Association of Southeast Asian Nations (ASEAN). Their common ground is their shared experience of colonialism under British rule, which fundamentally shaped ethnic relations and the attitude towards respective minorities in both countries. Myanmar was colonised and annexed to British India following three Anglo-Burma wars in the nineteenth century. It was separated from British India in 1935 and eventually granted full independence in 1948. On the other hand, Bangladesh was part of Pakistan from 1947 – the time of colonial India's independence from the British and partition into the states of India and Pakistan – until it achieved independence following the liberation war of 1971. Thus, the colonial origin of the minority problem in both Myanmar and Bangladesh can be traced to the same historical sources, as we shall see in Chapter 3.

Apart from the shared colonial experience under the British, what makes the case studies on Myanmar and Bangladesh intriguing is the pre-colonial interactions between the minority groups under scrutiny here. However, as things stand today, the Rohingya are a Muslim minority in a predominantly Buddhist country, while the CHT hill people are traditionally Buddhist in a largely Muslim country.[20] Despite differences in their geopolitical and socio-cultural orientations, both Myanmar and Bangladesh are hostile towards their respective minorities, although the degree and extent of oppression varies. This book takes up the challenge of demonstrating how international law – through its various roles in the ideological function of postcolonial states – facilitates similar types of minority oppression in these otherwise socio-culturally diverse states.

On this score, it is necessary to note the complicated legal status of the Rohingya and the CHT hill people in their respective countries. As we shall see later, the Rohingya in Myanmar are not recognised as one of the 135 official 'national ethnic races'. Instead, they are treated as illegal Bangalee immigrants, whereas Rohingyas have identified themselves as historical inhabitants of the country for centuries. They are not even allowed to describe themselves as the 'Rohingya' lest that legitimise their claim to indigeneity. On the other hand, the hill people of the CHT identify themselves as *pahari* (hill people), who are indigenous to the land. However, to deny the hill people access to the more robust international legal regime for indigenous peoples, Bangladesh has an official

[20] Many hill peoples in the CHT have been converted to Christianity in recent years. Also, a small group of the Rohingya follows Hinduism.



Map 1 Chittagong Hill Tracts and Rakhine State in the regional context
This map was developed specially for this book by Professor Md. Shahedur Rashid and Mr Md. Ashraful Habib of the Department of Geography and Environment at Jahangirnagar University.