Introduction

The management of ethnic conflict has been crucial to the maintenance of international order – whether in the period of the League of Nations, when a minority treaty system was created in an attempt to resolve the problem of nationalism, or the time following the fall of the Soviet Union, when ethnic groups once again asserted their right to self-determination. More recently, the success of grand projects of 'nation building' that have been undertaken in countries such as Iraq and Afghanistan has depended crucially on the management of ethnicity – in this instance, religious differences. The propensity of nationalist claims and their accompanying tensions and conflicts to threaten global order is amply demonstrated by the complex chain of events originating in Balkan nationalism, which led to World War I. Despite this fact, no histories of international law explore the relationship between ethnicity and its significance for the development of the discipline. Rather, ethnic conflict and the legal response to it – which invariably entail creating a human rights regime designed to protect minority rights – are seen as a specialised area of international law. This book, then, undertakes the task of writing a history of international law that recognises and engages with the central issue of ethnicity and its impact on the making of international law.

One of the peculiarities of the post–Cold War moment of international law in relation to ethnicity remains in the fact that the collapse of the Soviet Empire is, on the one hand, celebrated as the triumph of liberalism, the End of History, and the harbinger of liberal-democratic progress and peace and, on the other hand, identified as the trigger for the eruption of violent 'ethnic' conflicts even in Europe. These developments brought the issue of ethnicity – a primitive notion in liberal understanding – to the forefront. Ethnic conflicts of various scales and intensities in Armenia, Bosnia, Bulgaria, Croatia, Hungary, Romania, Russia, Serbia, Slovakia, Turkey, Ukraine, and so on have also posed a threat to European stability. Even in a number of Western democracies, such as Belgium, Canada, Spain, and the United Kingdom, minority groups kept challenging the

existing state structures in one form or the other. Similarly, ethnic violence has been a defining feature of a number of Third World countries as a result of nation-building projects following decolonisation.

Despite this, liberal international lawyers failed to properly consider the normative significance of ethnicity and instead pursued the moral end of a post-ethnic world order that complied with the liberal individualist premise of international law. The liberal understanding of ethnicity is as something primitive and backward. At the same time, the relevance of ethnicity remained alive in the conservative tradition (within political philosophy that was translated into international law); indeed, ethnicity is perceived as the central element of political organisation of nation-states. Liberal international lawyers, driven by pragmatic needs, often seek to reconcile these conflicting traditions of understanding ethnicity. As a result, at the normative level, ethnicity remains a peripheral issue in international legal discourse and appears relevant only as a pejorative descriptive criterion, as in 'ethnic conflicts' and 'ethnic minorities'.

Ethnicity and International Law is an effort to reverse this understanding of the relationship between ethnicity and international law by tracing the central role that ethnicity plays in the historical development of international law. The central argument of the book is that the present-day hesitancy of liberal international law to engage with ethnicity in ethnic conflicts and ethnic minorities has its root in the way international law developed along the lines of the nineteenth century's liberal and conservative traditions of understanding the salience of ethnicity in political-identity formation. The development of international law since the nineteenth century is characterised by the inherent tension of the juxtaposition of these philosophical traditions of dealing with what might be termed the 'problem of ethnicity'. And the liberal ambivalence towards ethnic conflicts and ethnic minorities will continue, given that the hegemonic cultural connotation of liberalism leaves international law with rather few means to meaningfully engage with ethnicity within a normative framework, as opposed to the make-shift pragmatic arrangements which are currently in place. In international legal studies, the relevance of ethnicity, as well as the traditions of understanding it – the subject of my scrutiny in this book – lies in this fact.

Taking a historical approach, this book demonstrates the critical role played by ethnicity in nineteenth-century international laws about colonialism, the interwar minority protection regime, and the current discourse on minority protection and ethnic conflicts. Although all

thinking about ethnicity is characterised by the dichotomy of 'self' and 'other', when this dichotomy is seen through the prism of the liberal and conservative traditions, quite a different narrative of it appears in relation to these moments of international legal history. In this connection, this book also examines what happened to ethnicity when liberal individualism emerged as the dominant vocabulary of international law and how such individualism in international law interacted with the conservative notion of ethnicity in ethnic conflicts. In this sense, this book reveals the role of ethnicity in international legal history; this is a history of international law seen through these two nineteenth-century traditions.

The first chapter provides the general framework of the ethnic dichotomy of 'self' and 'other' that is to be found in both the liberal and conservative traditions but with very different implications. Here I first explain various discourses on ethnicity and define it for the purpose of this book. This is followed by an etymological exposition, through which I demonstrate two things: how the notion of ethnicity travelled through time and, with the emergence of nationalism as a political language, came to depict the 'self-image' of a nation in the Romantic literature of the nineteenth century and how, in contrast, the liberal image of the national 'self' constantly attempted to depict ethnicity as something undesirable in a liberal culture and hence denied that ethnicity had any relevance to its making. In other words, while ethnicity is to be the central focus of the nation-building process in the conservative tradition by way of excluding non-ethnics, the individualist as well as the universalist end of the liberal nation dictates the marginalisation of ethnicity by way of assimilation into the liberal high culture. Next, I explain how both the liberal and conservative Romantic nationalist agendas sought 'scientific' justification in another dominant nineteenth-century doctrine, social Darwinism, for their respective projects of assimilation and exclusion. Having set the socio-political context, I then offer an in-depth analysis tracing the ethnic underpinning of nineteenth-century international law along the lines of these two traditions, a phenomenon that has remained omnipresent in the development of international law since then.

The modern versions of ethnic conflict are intimately related to the rise of nationalism in the eighteenth and nineteenth centuries. Nationalism developed a very clear sense of 'self' and 'other'. The liberal and conservative philosophical traditions in the nineteenth century took very different approaches to conceptualising and managing the relationship between 'self' and 'other'. My argument, then, is that these two traditions

have had an enduring significance for the creation of international legal regimes devoted to managing ethnic tension.

Chapter 2 examines the colonial policies of nineteenth-century France and Germany to explore how their respective liberal and conservative treatments of ethnicity in relation to the construction of the national 'self' distinctively informed their understanding of colonialism as well as their execution of colonial policies. Though based on two particular state philosophies and practices, this account presents the contrast between the liberal and conservative notions of colonialism and native relations and exposes how such interactions with the colonial 'other' were reflected back in the dynamic process of the construction of the 'self' in the metropolis. While providing this narrative, I also demonstrate how nineteenth-century international lawyers' perceptions of the state – the legal form of the national 'self' – in the liberal and conservative traditions were essentially reflected in their justifications for colonialism as well as the atrocities associated with it.

The relationship between nineteenth-century colonial practices and the legal approaches to managing twentieth-century ethnic conflicts has not been adequately recognised in the existing legal literature. My argument is that the two traditions of nineteenth-century nationalism and thinking about ethnicity need to be properly understood in order to appreciate subsequent developments.

Chapter 3 uses the example of the interwar minority protection regime to demonstrate how interwar international law relied on an ethnic discourse with three different layers that were expressed through the liberal and conservative traditions. First, the interwar minority protection system was the outcome of a compromise between the conservative notion of self-determination on the basis of ethnic identity and the liberal denial of that. Secondly, a dichotomy between the liberal West and the conservative Eastern 'other' was evident in the imposition of special minority protection obligations on Eastern and Central European (ECE) states, whereas minorities within Western Europe remained outside any international protection. And finally, the inherent drawbacks of the system that became evident in its operation demonstrated another layer of the 'self–other' discourse. In this layer, the agenda of mutual exclusion of the ethnic 'other' was brutally pursued, bypassing the international system, in the process of constructing an ethnic self-image along conservative lines in both Germany and Poland.

The last two chapters explain what happened to ethnicity with the emergence of liberalism as the dominant vocabulary of international law in the aftermath of World War II. While the minority protection regime

under the League was of a hybrid nature – incorporating both collective and individual rights – in the post–World War II moment the idea of replacing the minority protection system with a human rights regime exclusively centred on the universal protection of individual rights took hold. In this regard, Chapter 4 deals with three different aspects of the liberal hesitancy at the conservative notion of ethnicity in relation to minority protection. First, when a minority is juxtaposed with the majority within a given polity, the minority is defined as an ethnic phenomenon and therefore perceived as the primitive 'other'. On the other hand, given that in the liberal understanding ethnicity not only turns the minority into the victim of oppression by the majority but also undermines the individual rights of the minority group members, the liberal way of minority protection logically leads to the suppression of ethnicity through the individualist principles of equality and non-discrimination. In other words, the liberal individualist response to minority *protection* endeavours to remove this conservative notion of 'ethnicity' from 'minority'. Thirdly, in the post–Cold War European context, the dichotomy of the liberal West and the conservative Eastern 'other' again explains why the differentiated minority protection mechanism within Europe is very much in line with the interwar minority protection regime.

The fifth and final chapter of the book argues that international lawyers' treatment of ethnicity along the lines of the liberal and conservative traditions informs their respective responses to ethnic conflicts. It also demonstrates how international lawyers rely on a reconciliatory approach to these philosophical traditions in order to work out pragmatic solutions to ethnic conflicts yet deny the relevance of ethnicity within the normative liberal architecture of international law. This, in turn, shows that even in the era of normative primacy of liberalism, the liberal world view falls short in the face of violent conflicts defined by the protagonists themselves or by outsiders, or both, along ethnic lines. My argument, then, is that the success of any international legal engagement with ethnic minorities and ethnic conflicts largely depends on the means and extent of the reconciliation between these two traditions. In this connection, this chapter also discusses what normative issues this reconciliatory approach will have to overcome in the process.

In this sense, this is a book on the historical relationship between ethnicity and international law within the framework of the 'self' and 'other' and as defined by the liberal and conservative traditions in each

epoch of international law's development. In other words, this book can be perceived as an ethnicity-informed alternative politico-legal history of modern international law with reference to key events of each epoch. Although the relationship between international law and history may be understood in terms of the 'history of international law' (a narrative of its origins, development, progress, or renewal), 'history in international law' (the role that historical events or personae play in discussions and arguments about law), or 'international law in history' (the way international law and its proponents are involved in creating history), it turns out that in practice it is difficult to maintain such a categorisation of this relationship, for 'each type of engagement with history and international law will interweave various different types of historical narrative'.[1] Yet, this categorisation remains useful to point 'to the typically multi-layered nature of international lawyers' engagement with the past'.[2] In discussing international legal history in relation to ethnicity, my approach in this book has been to deal with both the history of international law and history in international law, especially the roles that individuals have played in shaping this discipline.

Given that the idea of ethnicity is not itself a legal concept but rather a notion that shapes international law in a wide range of ways, from the outset my narrative of international law's engagement with the key events develops within the relevant socio-political contexts of various events and texts that I examine. In this sense, my approach to history in this book accommodates certain elements of the Cambridge School of intellectual historiography, which emphasises the role of historical texts as political interventions in the particular socio-political contexts in which they were produced and warns against the use of past texts to make sense of present concepts, debates, and discourses – in short, against anachronism or 'presentism'.[3] Nevertheless, my approach to history can be equally condemned as being anachronistic, in that my narrative of the historical engagement between ethnicity and international law is largely genealogical: although I pay due attention to relevant socio-political contexts of the texts that I discuss in the book, far from confining them merely to those

[1] Matt Craven, 'Introduction: International Law and Its Histories' in *Time, History and International Law*, ed. Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (Leiden: Martinus Nijhoff, 2007), 7.
[2] Craven, 'Introduction', 8.
[3] See, for example, Quentin Skinner, 'Meaning and Understanding in the History of Ideas', *History and Theory* 8 (1969), 3–53. For a general discussion, see Q. Skinner, *Visions of Politics,* Volume I: *Regarding Method* (Cambridge: Cambridge University Press, 2002).

specific contexts, I rather consider the way they have played a crucial role across time and space. As a matter of fact, so far as the political promise of critical international legal scholarship is concerned, international legal history within this genre is inherently genealogical in its approach, for, in the words of Orford: 'To refuse to think about the ways in which a concept or text from the remote past might be recovered to do new work in the present is to refuse an overt engagement with contemporary politics.'[4]

Besides international legal history, this book can also be described as a work on the international law of minority protection. In Chapters 3 and 4, I use the theoretical framework described in the first two chapters to underscore how minorities are first perceived as the conservative 'other' in relation to the liberal West and, then, how the liberal project of minority protection uses an individualist approach of suppressing ethnic conservativeness – an approach that results in the diffusion of ethnic groups into a collection of individuals. And the final chapter, in this connection, explains the fallacy of such a project of suppressing ethnicity in relation to ethnic conflicts, wherein mere individualism leaves rather few options for international law to deal with ethnicity in ethnic conflicts.

This book, however, has been developed in the shadow of the discourse on self-determination – a concept that I perceive through my theoretical framework as an expression of the continuity of the ethnic dichotomy of 'self' and 'other' within the liberal and conservative traditions. On the one hand, the conservative notion of ethnicity defines the self-image of a nation that exercises an external right of self-determination, that is, sovereign equality, territorial integrity, and so on, as a state. Simultaneously, on the other hand, ethnicity not only identifies the 'other' – minorities, for example – within the ethnic nation-state but also provides that 'other' with the potential for nationalist claims in conservative terms. In this continuity, the internal 'other' then constructs the ethnic self-image to claim a homogeneous political unit of its own. Conversely, liberal self-determination counts on a concept of the state that accommodates the liberal nation as a territorial expression. In conformity with the principles of Enlightenment, here self-determination in the internal context means the rights of individual citizens to participate in governance, while in the external context it allows the state a set of privileges to be enjoyed along with other members of the international community. An understanding of national self-determination is, therefore, informed by the views one takes about the self-image of

[4] Anne Orford, 'On International Legal Method', *London Review of International Law* 1 (2013), 166–197.

a nation.[5] It is, thus, not unexpected that in this book several references have been made to the right to self-determination, albeit without getting into any detailed discussion of the concept, while discussing minority rights as a compromise between the liberal and conservative versions of self-determination. Similarly, many of the ideas that this book deals with have implications for the rights of indigenous peoples. However, given that indigenous peoples fall under a very different legal regime and that discourses on their special rights evolved in a distinct way, my discussion of minority rights does not engage directly with this, otherwise significant, field of study.

My approach to international law in terms of its relationship with ethnicity is informed by the postcolonial scholarship in the field of international law. Especially, major recent works on the colonial character of international law, for example, by Antony Anghie,[6] Matthew Craven,[7] Karen Knop,[8] Martti Koskenniemi,[9] Sundhya Pahuja,[10] and Ralph Wilde,[11] set the premise

[5] Koskenniemi sees the incompatibility of these two notions of self-determination in relation to the legitimacy of states: while the liberal notion of self-determination, 'classic' to use his term, recognises only states as the legitimate holders of various goods of collective personhood, the Romantic notion values statehood to the extent that it represents the communal identification of the nation within it. See Martti Koskenniemi, 'National Self-determination Today: Problems of Legal Theory and Practice', *International and Comparative Law Quarterly* 43, no. 1 (1994), 250. See also *Aaland Islands Case*, Report of the International Commission of Jurists, *League of Nations Official Journal*, Special Supplement No. 3 (1920); *Aaland Islands Case*, Report of the Commission of Rapporteurs (1921), League of Nations Council Doc. B7 [C] 21/68/106; Conference on Yugoslavia Arbitration Commission, Opinion No. 1, *European Journal of International Law* 3 (1992), 182–183; Opinion No. 2 (1992), 183–184; Opinion No. 3 (1992), 184–185.

[6] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005). Cf. James Thuo Gathii, 'International Law and Eurocentricity', *European Journal of International Law* 9 (1998), 184–211; J. Gathii, 'Imperialism, Colonialism, and International Law', *Buffalo Law Review* 54, no. 4 (2007), 1013–1066.

[7] Matthew Craven, *Decolonization of International Law* (Oxford: Oxford University Press, 2007).

[8] Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002).

[9] Martti Koskenniemi, *Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002).

[10] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

[11] Ralph Wilde, *International Territorial Administration – How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2008). See also R. Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', *American Journal of International Law* 95, no. 3 (2001), 583–606; R. Wilde, 'Representing International Territorial Administration: A Critique of Some Approaches', *European Journal of International Law* 15, no. 1 (2004), 71–96.

for my project to understand international law in a new light, in this case through its relationship with ethnicity. As a result, despite being influenced by Anghie and Koskenniemi, my narrative of nineteenth-century colonialism deviates from theirs to the extent that it is seen through the framework of the treatment of ethnicity in the liberal and conservative traditions. This narrative goes beyond the monolithic idea of Europe and its colonial project. Rather, it demonstrates how the assimilationist thrust of liberal international lawyers as expressed in the notion of a 'civilising mission' was much different from the exclusionist project of German colonialism as endorsed by the international lawyers in the conservative Romantic camp. Similarly, while providing a narrative of the interwar international law of minority protection, I relied to some extent on the works of Nathaniel Berman on the interwar-modernist experimentation with nationalism but at the same time endeavoured to grasp much deeper complexities that the contrasting liberal and conservative traditions of perceiving ethnicity had produced at three different levels.

In offering my narrative, I have adopted David Kennedy's approach of historicising law: an approach of standing back at times and systematically exploring how various actors with various priorities played their part in the international plane and, at the same time, engaged with each other in a complex way. An essential character of such an intellectual cartography is its focus on the wide range of consequences – both desired and undesired – which emanated from this complex interaction of actors and their priorities for certain norms.[12] One can, therefore, trace the influence of Kennedy's powerful methodology while reading this book, in that without siding with any particular school of thought, I attempted to unpack ethnicity and various other notions, going beyond their conventional meanings, and then grasp the complex ways in which international lawyers engaged with these notions and the outcomes such interactions have engendered.

However, to meet the doctrinal thrust of this book, I concerned myself less with 'primary' knowledge construction than with the analysis of discourses. Whenever I had to tackle literatures of relatively wide

[12] Some of his representative works include David Kennedy, 'International Human Rights Movement: Part of the Problem?', *Harvard Human Rights Journal* 14 (2002), 101–126; D. Kennedy, *Dark Sides of Virtue: Reassessing International Humanitarianism* (to Princeton, New Jersey: Princeton University Press, 2004); D. Kennedy, *Of War and Law* (Princeton, New Jersey: Princeton University Press, 2006); D. Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream', *New York University Review of Law and Social Change* 3 (2007), 441–459; D. Kennedy, 'The Mystery of Global Governance', *Ohio Northern University Law Review* 34 (2008), 827–860.

breadth, I tried to identify the major representative discourses so that the width and depth of my analysis remain in harmony. The same is true for the architecture of the book as a whole: it portrays a huge landscape but at the same time sticks to the in-depth analysis of the notion of ethnicity that, running beneath the surface, links the major building blocks of international legal history.