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