

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.

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Mohammad Shahabuddin
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MINORITIES
AND THE MAKING
OF POSTCOLONIAL
STATES IN
INTERNATIONAL LAW

MOHAMMAD SHAHABUDDIN
University of Birmingham



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CONTENTS

<i>Foreword</i>	page xi
<i>Acknowledgements</i>	xv
<i>Table of Cases</i>	xvii
<i>List of Abbreviations</i>	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

CONTENTS

ix

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
<i>Bibliography</i>	305
<i>Index</i>	335

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[More Information](#)

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 (TWAAIL), 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

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TABLE OF CASES

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TABLE OF CASES

xix

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- 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
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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 international law
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

LIST OF ABBREVIATIONS

xxiii

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)

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