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DOI:
10.1017/S2044251319000055

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Document Version
Peer reviewed version

Citation for published version (Harvard):
Shahabuddin, M 2019, 'Postcolonial boundaries, international law, and the making of the Rohingya crisis in Myanmar', *Asian Journal of International Law*, vol. 9, no. 2, pp. 334-358.
https://doi.org/10.1017/S2044251319000055

POSTCOLONIAL BOUNDARIES, INTERNATIONAL LAW, AND THE MAKING OF THE ROHINGYA CRISIS IN MYANMAR

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Key words: Postcolonial Boundaries, *uti possidetis*, British colonial rule, Rohingya, Arakan, Myanmar

Abstract:

The unique process of the 'making' of postcolonial states through the operation of international law is intrinsically connected to the suppression of ethnic minorities and the ensuing humanitarian catastrophes in these states. With the continuation of colonial boundaries in postcolonial states, international law facilitates many of these catastrophes. Exploring the questionable legal status of the *uti possidetis* principle in international law and the fallacy of its conflict-preventing potential, I argue that *uti possidetis* itself is a key problem. The continuation of arbitrarily-drawn colonial boundaries undermines the legitimate right to self-determination of numerous ethnic minorities. This paper specifically explores the extension of *uti possidetis* to Myanmar and demonstrates how it contributed to the Rohingya crisis by depriving the Rohingya of their legitimate right to self-determination. In the process, the inherent relationship between colonialism and international law and the way they shape the future of postcolonial states is also highlighted.

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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' when the Council chief asked: 'given the decades of statelessness imposed on the Rohingya, policies of dehumanising discrimination and segregation, and the horrific violence and abuse, along with the forced displacement and systematic destruction of villages, homes, property and livelihoods – can anyone rule out that elements of genocide may be present?'[2] And finally, in its final report of August 2018 the Independent Fact-Finding Mission on Myanmar established by the UN Human Rights Council concluded that Myanmar army has committed war crimes and crimes against humanity in Rakhine State, and also 'there is sufficient information to warrant the investigation and prosecution of senior officials in the Tatmadaw [Myanmar military] chain of command, so that a competent court can determine their liability for genocide in relation to the situation in Rakhine State'.[3]

International norms devised to protect the rights of minorities and to protect individuals from statelessness, together with the recently developed framework of Responsibility to Protect – all suggest that international law offers a solution to this tragic predicament of the Rohingya, the problem being the lack of enforcement. This paper, in contrast, is premised upon the general argument that international law, rather than being the solution, has paradoxically facilitated a number of similar or worse humanitarian disasters in recent times. This is because of how international law constructs postcolonial statehood. 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 win recognition. As 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.'[4] Similarly, Okafor argues that international legal doctrines such as 'peer-review' (as opposed to 'infra-review') in recognising new states and 'homogenization' of states have facilitated the process by which many African states have facilitated coercive nation-building and legitimised the construction and maintenance of large centralized states in Africa. In this way, international law and institutions have contributed to incidents of ethnic conflicts in Africa.[5]

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[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. See, UN News Centre at: www.un.org/apps/news/story.asp?NewsID=57490#.WduURFtSyUk (last visited on 9 October 2017).

[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. See, UN News Centre at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22488&LangID=E (last visited on 22 December 2017).

[3] UN Doc A/HRC/39/CRP.2 (2018).

[4] 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.

[5] See, 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.

Nation-building projects in most postcolonial states faced the challenging task of reconciling two diverging forces: "nationalism" and "liberal universalism". Nationalism not only served as the vehicle of liberation movements against colonial rule but was also the key to independent statehood. Post-WWII liberal universalism, in contrast, promised a post-ethnic world order and became a template for the internal organisation of postcolonial states. The post-WWII phase of international law was indeed set for reaffirming faith in and promoting certain crucial values: fundamental human rights, dignity and worth of individuals, equal rights of men and women and of nations large and small, among others.[6] In this new era, however, "progress" equated to liberal values, and universalism simply meant the imposition of these values at a global scale.[7] Thus, since the inception of the UN, an individualist notion of human rights has become the dominant vocabulary through which the concept of 'minority' is expressed. It appeared convincing to replace the minority protection system with the human rights regime exclusively centred on the universal protection of individual rights.[8]

These diverging forces operated within the political boundaries that were arbitrarily drawn by colonial powers and inherited by postcolonial states at the time of decolonisation. In the absence of stable democratic institutions, subsequent nation-building projects and the ensuing suppression of ethnic groups who were outside the state-sponsored national culture often went unchallenged. The difficulties of postcolonial statehood have been most notable in Africa, where boundaries were drawn with no regard for political and social realities on the ground. Similar problems, however, accompanied the independence of Asian countries from colonial rule. The recent Rohingya crisis in Myanmar is an archetypical example of this.

Postcolonial states are essentially the creation, via colonisation and decolonisation, of the international legal norms and associated rules crafted by Europe.[9] International law has contributed to the formation of postcolonial statehood and the ensuing atrocities in a number of ways, involving a wide range of issues, such as the drawing of postcolonial boundaries, responses to nationalist aspirations of the oppressed minority, the question of citizenship and statelessness, economic liberalisation and prioritisation of economic development over human rights, and humanitarian assistance, intervention and crisis management. The present paper deals with international law of postcolonial boundaries, and demonstrates how the continuation of colonial boundaries in postcolonial Myanmar is intrinsically connected to the Rohingya crisis.

The problem of colonial boundaries has been widely discussed in relation to conflicts in Africa. Those borders have been established in accordance with the legal principle of *uti possidetis* which dictates that colonial borders must be respected. This principle has been adopted in order to curtail ongoing ethnic conflict in Africa. In this article, exploring the origins of *uti possidetis* and its extension to Asia, I demonstrate the questionable legal status of the *uti possidetis* principle, and also the fallacy of its conflict-evading potential. In contrast

[6] See, the Preamble of the UN Charter (1945).
[7] Mohammad Shahabuddin, "Liberal Self-Determination, Postcolonial Statehood, and Minorities: The Chittagong Hill Tracts in Context," *Jahangirnagar University Journal of Law* 1(2013), 82-83.
[8] For an in-depth analysis of why the liberal individualist approach to minority protection was counter-productive by design, see Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics, and Practices* (Cambridge: Cambridge University Press, 2016), 136-164.
[9] See, Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

to the conventional wisdom that *uti possidetis* is essential for settling boundary disputes among postcolonial states and thereby maintaining peace and order, I argue that *uti possidetis* itself is a key problem. Far from being a corrective to 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. Its embrace by postcolonial Asian states, in this case Myanmar, has furthered rather than curtailed violence. In this connection, I also argue that the current violence suffered by the Rohingya cannot be understood except by studying the complex history of Rakhine State and its relationship with pre-colonial Burma and then, the British Empire. It is this history which created the colonial boundaries that are still enforced in ways that preserve an insecure postcolonial state which has systematically oppressed the Rohingya people. Genocide is the result.

I. INTERNATIONAL LAW AND POSTCOLONIAL BOUNDARIES

Following the Great War, when the then US President Woodrow Wilson declared the right to self-determination as one of the governing principles of the Paris Peace Conference of 1919, the Indian Home Rule League of America submitted a petition to the Great Powers of the Conference arguing a case for India's independence under this principle.[10] Abraham argues that the petition was also a response to the Wilsonian idea of self-determination that subjugated peoples need to 'conform to the identity of one people-one land-one state to be accepted as having legitimate claim to political personhood'.[11] Lacking these elements, protagonists of anticolonial nationalist movements in general 'sought to redefine the prime criterion for independent statehood as unified political control over a defined piece of land, or territorial sovereignty'.[12] Thus, refuting the proposition that India is not a 'nation' due to its racial and cultural diversity, the petition puts forward what it calls a 'modern' understanding of the nation based on Lord Acton's proposition on this subject: a nation is a moral and political being, developed in the course of history by the action of the State and the idea that a nation itself should constitute a State is contrary to modern civilization.[13] Based on Acton and relying on the promising prospect of the principle of federalism to unify multiple nationalities within the postcolonial Indian state, the petition concluded that 'to require races of India to coalesce into a nation with one religion and one tongue, is midsummer madness'; instead, a territorially defined Indian nation-state was the solution.[14] The petition fell on deaf ears, as we know, but the interwar principle of self-determination solidified the idea of the sovereign, territorially bound nation-state, wherein the majority got to control State apparatus while the minority found itself in a position of perpetual subordination, often under minority protection treaties.

[10] India Home Rule League of America, *Self-Determination for India* (New York: India Home Rule League of America, 1919).
[11] Itty Abraham, *How India Became Territorial: Foreign Policy, Diaspora, Geopolitics* (Palo Alto: Stanford University Press, 2014), 11.
[12] *Ibid.*, 12.
[13] India Home Rule League of America, *Self-Determination for India*, 9-10.
[14] *Ibid.*, 10.

In the aftermath of the Second World War the idea of self-determination was primarily expressed through decolonisation. In fact, as Rosalyn Higgins demonstrates, before the claim for decolonisation gained prominence in the discourse on self-determination, the mention of self-determination in the UN Charter simply meant equal rights of all states to non-interference in their internal affairs.[15] It was through the activism of the new states of Asia and Africa in the General Assembly that the concept of self-determination turned into the moral and legal force behind decolonisation.[16]

However, at the same time, the nationalist elites often representing the majority interest in these countries saw themselves as the legitimate and sole successors of colonial rule, and conceived of the colonial state as a necessary mode of transition to a "modern" postcolonial state.[17] Abraham notes that as early as 1947, in the Asian Relations Conference in Delhi, all the delegates had consensus on the absolute acceptance of the nation-state mold.[18] Consequently, it also emerged that

> [t]he Asian political entities soon to be free were uniformly represented as states composed as national majorities joined by ethnic or cultural minorities. […] Communities marked by difference from these national majorities were being recast as aliens and outsiders, notwithstanding their long residence in these countries. […] Under these circumstances, all that could be hoped for was goodwill on the part of majority communities leading to legal and constitutional protections for these "new" minorities. The Asian Relations Conference made it clear that political independence for Asia would mean a state dominated by a nation defined in terms of an autochthonous majority community.[19]

The normative need for continuity from the colonial state to the postcolonial nation-state to be governed by nationalist elites, and the pragmatic need to avoid letting "chaos" arise from decolonisation were both addressed by the international law principle of *uti possidetis*, i.e., maintaining colonial borders for postcolonial states. Thus, while the ethnic notion of self-determination in the Paris Peace Conference of 1919 attempted to undo established borders in order to create states along ethnic lines, the post-WWII application of *uti possidetis* principles cemented the territorial borders that had been arbitrarily drawn by the colonial powers[20] and enforced the multi-ethnic composition of the postcolonial states.[21]

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[15] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), 111–114. See also, Shahabuddin, *Ethnicity and International Law*, 136-137.

[16] See, United Nations General Assembly, *Declaration on the Granting of Independence to the Colonial Countries and Peoples*, Res 1514 (XV), 947th Plenary Meeting, 14 December 1960; General Assembly, *Principles which should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for under Article 73 e of the Charter*, Res 1541 (XV), 948th Plenary Meeting, 15 December 1960; General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, Res 2625 (XXV), 25th Session, 24 October 1970. See also, Thomas D. Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997), 69-77, 91-96.

[17] See, Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (London: Zed Books Ltd., 1993 [1986]), 1–35; Dipesh Chakrabarty, *Provincializing Europe – Postcolonial Thought and Historical Difference* (New Jersey: Princeton University Press, 2000), 27-46.

[18] Abraham, *How India Became Territorial*, 69.

[19] *Ibid.*

[20] However, the option of changing territorial borders by voluntarily joining another State or by remaining in a constitutional relationship with the former colonial Power remained open. See, General Assembly, *Principles which should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for under Article 73 e of the Charter*, principles VI–IX.

[21] Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995), 149.

The Colonial Declaration of 1960 proclaimed that '[a]ll peoples have the right to self-determination' and that 'by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[22] But at the same time, the Declaration stipulated that all states shall faithfully and strictly respect the sovereign rights of all peoples and their territorial integrity, and also made it explicit that '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.[23] As the comment of the Moroccan delegate in the drafting process of the Declaration reveals, the Asian and African States that drafted the Declaration were concerned about the attempts by colonial powers – in line with their longstanding policy of 'divide and rule' – to carve up colonies that were in the process of achieving independence.[24] The emphasis on territorial integrity was a clear attempt to counter such colonial practices. However, this has simultaneously restricted the application of self-determination to various minority groups and their nationalist aspiration for independent statehood, and thereby reinforced the colonial borders in Asia and Africa.

As a matter of fact, General Assembly debates on the draft Declaration were taking place at a time when the crisis involving the Katangese secessionist attempt was unfolding. The Katanga crisis was explicitly referred to in the debate to highlight the salience of the provisions on territorial integrity in the declaration.[25] When the Republic of Congo got independence from Belgium in 1960, the mineral-rich province of Katanga too declared its independence from Congo with active support and protection from the Belgians.[26] Following the outbreak of a civil war, the Congolese government sought assistance from the UN, which asked Belgium to immediately withdraw its troops from Congo.[27] The UN position on the Katanga question made it very clear that the right to self-determination belongs to Congo as a whole and any breach of its territorial integrity was not permissible under any claim of self-determination by any other group. The Katanga case, in this sense, exemplifies an international consensus regarding the continuity of colonial boundaries and its limiting effect on the right to self-determination of other sub-national groups in the new postcolonial state.

Similarly, in the General Assembly debate on the Colonial Declaration, the Indonesian delegate made frequent references to the situation in West Irian (New Guinea) to highlight the importance of territorial integrity in the context of the right to self-determination.[28] Following more than 300 years of Dutch rule and a short period of Japanese occupation between 1942 and 1945 when Indonesia finally achieved independence in 1949, the former colonial power, the Netherlands, disputed the legal status of West Irian on the ground that the 700,000 inhabitants of the island were racially and culturally distinct from the

[22] *Declaration on the Granting of Independence to the Colonial Countries and Peoples*, Article 2.
[23] *Ibid.*, Articles 6 & 7.
[24] See, the Moroccan delegate's comments at UN Doc A/PV.947 (14 December 1960) 1284, paras 158-161.
[25] *Ibid.*
61.
[26] For details, see, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment of 14 Feb 2002* [2002] ICJ Rep 3 at paras 6-15, Judge Ad Hoc Bula, separate opinion.
[27] UN Doc S/4382 (13 July 1960) 1; SC Res 143, 14 July 1960; SC Res 161, 21 February 1961.
[28] See, UN Doc A/PV.936 (1960) 1153, paras 53-55.

Indonesians.[29] On the other hand, Indonesia argued that the foundation of the nation had a territorial, rather than a racial, basis and was rooted in common suffering endured during the Dutch colonial rule.[30] This territorial argument had some relevance, in that, as Anghie notes, given the artificiality of boundaries of most postcolonial states, having race as the legitimate basis of the postcolonial nation state would dismantle almost all Asian and African states.[31] However, Indonesia also relied on the colonial ideology of 'civilisation' in arguing that 'people of West Irian were too "primitive" to exercise the right of self-determination in a conventional way' – a comment that offended many African nations.[32] Although following the adoption of the Colonial Declaration, the Dutch position – supported by a group of francophone African states – was in favour of granting the people of West Irian the right to self-determination, Indonesia successfully used the General Assembly forum to press the demand for its territorial integrity under international law,[33] and finally turned to open realism by invading the island in May 1962.[34] Although under the US mediation, the people of West Irian got the right to express their free choice to decide on their political future, the actual expression took place only under direct influence of Indonesia – to the extent that only slightly more than 1% of the total West Irian population were selected by Indonesian Administration as special delegates, who overwhelmingly voted in favour of Indonesian rule. Despite knowledge of these irregularities, the UN refrained from any further action in this regard.[35]

Likewise, subsequent General Assembly Resolutions as well as decisions of the International Court of Justice also unequivocally declared the primacy of territorial integrity of states over ethnic claims for self-determination.[36] As Craven notes, 'the old opposition between self-determination and *uti possidetis* lost its decisive import by reason of the impossibility of self-determination meaning anything but independence within inherited borders – once the "self" had been identified, any determination could operate only within the parameters of its own existence.'[37] Franck sees this pattern as a move towards 'reconciliation'; in his words: 'The disintegration of Spanish imperialism in America produced the norm of *uti possidetis*. The end of the German, Austrian, and Ottoman empires [in the interwar period] gave rise to self-determination. In the post-1945 era *uti possidetis* and

[29] See, Thomas Franck, *Nation Against Nation* (New York: Oxford University Press, 1985), 77; see also, Anghie, "Bandung and the Origins of Third World Sovereignty," 544-546.
[30] United Nations, *Revue des Nations Unies* 6, no. 2 (1957), 67.
[31] Anghie, "Bandung and the Origins of Third World Sovereignty," 545.
[32] *Ibid.*, 546; see also, Michla Pomerance, "Methods of Self-Determination and the Argument of 'Primitiveness'," *Canadian Yearbook of International Law* 12 (1974), 51-52, 55. The Dutch vested interest in destabilising the region and thereby perpetuating its control cannot be ignored here. See, Kalana Senaratne, "Internal Self-Determination: A Critical Third World Perspective," *Asian Journal of International Law* 3, no. 2 (2013), 331-332.
[33] The resolution in favour of West Irian self-determination was marginally defeated by 53 votes to 41 votes with nine abstentions. See, UN Doc A/L.368 (27 Nov 1961).
[34] Franck, *Nation Against Nation*, 78.
[35] *Report of the Secretary General Concerning the Act of Self-Determination in West Irian*. UN Doc A/7723, Agenda item 98 (6 November 1969).
[36] See *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 1970. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, ICJ Reports (1971), para. 52; *Frontier Dispute (Burkina Faso and Mali) Case*, ICJ Reports (1986), para. 25.
[37] Matthew Craven, *The Decolonisation of International Law* (Oxford: Oxford University Press, 2007), 205.

self-determination were redefined and synthesised into a doctrine of decolonisation.'[38] In this 'reconciliation', however, *uti possidetis* clearly trumped over the principle of self-determination so far as minority groups, now entangled in postcolonial states, are concerned.

Uti possidetis was originally defined under Roman law in cases in which two individuals disagreed as to ownership. It was a provisional remedy based on possession and pending a final judicial determination. The principle reappeared in the early eighteenth century in conjunction with the concept of the *status quo post bellum* (the state of possession existing at the conclusion of war), though still connected with the fact of possession.[39] The modern formulation of the *uti possidetis* principle is traditionally associated with the decolonisation of Central and South America in the nineteenth century. When the newly independent Latin American states mutually agreed, in some cases, to adopt former Spanish administrative lines as their new international boundaries, the practice came to be seen as the implementation of the *uti possidetis* principle.[40]

The principle of *uti possidetis* reappeared again in the interwar period in relation to the dispute between Finland and Sweden over the Aaland Islands (*Ahuenanmaa*). Finland, including the Aaland Islands, was a part of the Swedish administrative region of Åbo (Turku) for more than six centuries beginning from 1159. It was only in 1809 that Czarist Russia under Alexander I took control of Finland from the Swedish kingdom. Following the Bolshevik Revolution of 1917 and the ensuing disintegration of Czarist Russia, Finland declared independence from Russia. The Aalanders demanded the right to break with Finland and re-unite with their co-ethnics in Sweden.[41] The League of Nations assigned the task of determining whether the dispute was international in nature, and therefore fell under the jurisdiction of the League, to a Commission of Jurists. This Commission questioned the proposition of an *ipso facto* application of the *uti possidetis* principle:

> The Aaland Islands were undoubtedly part of Finland during the period of Russian rule. Must they, for this reason alone, be considered as definitely incorporated *de jure* in the State of Finland which was formed as a result of the events described above? The Commission finds it impossible to admit this.[42]

However, the Commission of Rapporteurs, appointed subsequently by the League to prepare the way for a solution to this dispute, held the opposite view, on the grounds, inter alia, of the *uti possidetis* principle subject to guarantees obtained from the Finnish government for the protection of the Swedish language and culture of the Islanders.[43] In the opinion of the Rapporteurs, since the Aaland Islands were part of the Finnish Province of Åbo Björneborg under Czarist Russia, upon Finnish independence the application of *uti possidetis* principle

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[38] Franck, *Fairness in International Law and Institutions*, 147.
[39] See generally, Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of uti possidetis* (Montreal: McGill-Queen's University Press, 2002), 10-23.
[40] *Ibid*., 4.
[41] See generally, James Barros, *The Aland Islands Question: Its Settlement by the League of Nations* (New Haven, CT: Yale University Press, 1968).
[42] *Aaland Islands Case*, Report of the International Commission of Jurists, *League of Nations Official Journal*, Special Supplement No. 3 (1920), 9.
[43] The Commission of Rapporteurs took into consideration a number of other factors, including the small size of the island community as a claimant of the right to self-determination and also the security concerns for both Sweden and Finland. Their report also observed that the sheet of water, the skiftet with its numerous rocks and islets, which separated the islands from the Finnish mainland "would be a bad frontier between two States, extremely arbitrary from a geographical point of view." See, *Aaland Islands Case*, Report of the Commission of Rapporteurs (1921), League of Nations Council Doc B7 [C] 21/68/106, 3.

should guarantee Finland's pre-independence territory.[44] The League Council adopted the view of the Rapporteurs and finally recommended that the Aaland Islands should belong to Finland.

Against this backdrop, the centrality of the *uti possidetis* principle in the international legal imagination of boundaries of new states soon got a stronger foothold in the context of African decolonisation. When, in 1964, the member states of the Organisation of African Unity (OAU; now African Union) pledged to respect the colonial boundaries existing at the time of independence, the International Court of Justice and many commentators viewed the resolution as further evidence of the role of *uti possidetis* in the process of decolonisation.[45] Although prior to independence, many African political parties advocated the readjustment of these artificial boundaries to accord with local realities,[46] such revisionist claims lost ground as African colonies started emerging as independent states and prioritised a peaceful transition to statehood. The Charter of the OAU affirmed in Article 3(3) every member's adherence to 'respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence'.[47] In a meeting in Cairo the following year, the OAU adopted a resolution reaffirming 'the strict respect by all member States of the Organisation for the principles laid down in Article III, paragraph 3 of the Charter' and declared 'that all member States pledge themselves to respect the frontiers existing on their achievement of national independence'.[48] The Katanga experience was surely fresh in the minds of African leaders.

It is generally believed that this acceptance of the continuity of the colonial borders represents the Latin American principle of *uti possidetis* applied in the African context.[49] Thus, through the operation of international law the boundaries of colonial Africa drawn at the Berlin Conference of 1883–1885 without regard to demographics or culture but based on astronomical or mathematical criteria or by reference to prominent physical features came to be the permanent boundaries of postcolonial African states. As Griffiths notes, '[t]he political map of colonial Africa was virtually complete by 1914 and there has been little subsequent change. During the next 50 years, that colonial boundary mesh would become the almost exact basis for territorial division of independent Africa which would then be fossilised by the resolution of the Organisation of African Unity in 1964.'[50]

This view that the *uti possidetis* principle should be applied in governing postcolonial territorial delimitation was shared by the ICJ Chamber in the *Burkina Faso vs. Mali* case, in which the Chamber declared that *uti possidetis* was a 'general principle' and a 'rule of

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[44] *Aaland Islands Case*, Report of the Commission of Rapporteurs (1921), League of Nations Council Doc B7 [C] 21/68/106.
[45] Lalonde, *Determining Boundaries in a Conflicted World*, 4.
[46] For example, the resolution proclaimed by the All-African Peoples Conference held in Accra in December 1958, which called for the abolition or readjustment of colonial frontiers at an early date. See, Lalonde, *Determining Boundaries in a Conflicted World*, 103.
[47] Adopted in Addis Ababa on 25 May 1963, 479 UNTS 39.
[48] "OAU Resolution of Border Disputes," in *Basic Documents on African Affairs*, ed. Ian Brownlie (Oxford: Oxford University Press, 1971), 360. See also, Lalonde, *Determining Boundaries in a Conflicted World*, 104.
[49] See, for example, Brownlie, *Basic Documents on African Affairs*, 360; A. O. Chukwurah, "The Organisation of African Unity and African Territorial and Boundary Problems: 1963–1973," *Indian Journal of International* Law 13, no. 2 (1973), 181; Boutros Ghali, *The Addis Ababa Charter* (New York: Carnegie Endowment for International Peace, 1964), 29.
[50] Ieuan Ll. Griffiths, *The Atlas of African Affairs*, 2nd ed. (London: Routledge, 1995 [1984]), 51.

general scope' for all cases of decolonisation.[51] Although the first use of the principle involved the decolonisation process of the Latin American colonies belonging to a single colonial power, i.e., Spain, the principle of *uti possidetis*, the Chamber continued, 'is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.'[52] The Chamber, thus, concluded: 'It was for this reason that, as soon as the phenomenon of decolonisation characteristic of the situation in Spanish America in the 19th century subsequently appeared in Africa in the 20th century, the principle of *uti possidetis* […] fell to be applied.'[53]

However, this depiction of *uti possidetis* as the general principle of international law to be applied in all decolonisation situations has been challenged in recent scholarship. Ahmed, for example, argues that even in the Latin American context the key purpose of the *uti possidetis* principle in the nineteenth century was to avoid any possibility of *terra nullius* and, thereby, unify the entire Latin America in the face of a renewed threat of Spanish imperialism.[54] The argument therefore follows that *uti possidetis* was not a general principle of international law at the time of African decolonisation, and 'did not give rise to the concept of intangibility of inherited frontiers, and was as such inapplicable to Africa on independence'.[55] Hence, by accepting the pre-existing frontiers in the absence of any binding international rules, African states created new customary rules – an achievement that the ICJ erroneously undermined in the *Frontier case* by imposing the *uti possidetis* principle on Africa as a binding general principle of international law.[56]

Similarly, examining many of the constitutions of and treaties between Latin American states in the period following independence, Lalonde challenges the mainstream position that the Latin American republics consistently accepted the *uti possidetis* principle in determining their new boundaries.[57] She highlights various conflicting versions of the principle within Latin America, such as *uti possidetis juris* (claimed by most Spanish colonies) and *uti possidetis de facto* (claimed for example by Brazil, which happened to be a Portuguese colony), as evidence of inconsistent state practice.[58] These conflicting claims, together with practical difficulties encountered in the application of the principle and international awards based on alternative principles, led Lalonde to conclude that *uti possidetis* never achieved the status of a general principle of international law emanating from the Latin American experience of decolonisation.[59] Likewise, she found the application

[51] ICJ Reports 1986, 565.
[52] *Ibid*.
[53] *Ibid*.
[54] Dirdeiry M. Ahmed, *Boundaries and Secession in Africa and International Law: Challenging Uti Possidetis* (Cambridge: Cambridge University Press, 2015), 20-24. He relies on a number of cases that support this claim: Colombian-Venezuelan Frontier case, *Reports of International Arbitral Awards* (RIAA), VI 1922, 223; Beagle Channel case [*Case concerning a Dispute between Argentina and Chile concerning the Beagle Channel*] (1977) XXI RIAA 1, 81–82; El Salvador/Honduras case [*Case concerning the Land, Island and Maritime Frontier Dispute*] (Judgment, 1992), ICJ Rep 315, 387; Nicaragua/Honduras case [*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*] (Judgment, 2007), ICJ Rep 659, 707.
[55] Ahmed, *Boundaries and Secession in Africa and International Law*, 46.
[56] See generally, *ibid*., 11-46.
[57] See generally, Lalonde, *Determining Boundaries in a Conflicted World*, 24-60.
[58] *Ibid*., 31-34.
[59] *Ibid*., 58-60.

of *uti possidetis* in the African context driven rather by a practical sense of necessity, and not by any sense of legally binding nature of the principle.[60]

Yet, *uti possidetis* continued to dominate the international legal imagination in relation to boundary making. The principle was applied even in a non-colonial context following the break-up of the Socialist Federal Republic of Yugoslavia. When Lord Carrington, the President of the Conference on Yugoslavia, referred to the Badinter Commission the question of whether the Republics' declaration of independence amounted to secession from the SFRY, the Commission held that 'in the case of a federal-type state, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the state implies that the federal organs represent the components of the Federation and wield effective power'.[61] Given that the Republics had declared their independence, and the composition and workings of the essential organs of the Federation ceased to meet the criteria of participation and representation inherent in a federal state, the Commission decided in Opinion no. 1 that the SFRY was in the process of dissolution.[62] This Opinion was accompanied by the recognition of the Republics as independent States by the European Community and the US, subject to the provisions stipulated in the twin declarations on the guidelines for recognition of these states.[63] The Opinion of the Commission and the recognition policy of the West cemented the statehood of these new States, and thereby turned the ostensibly ethnic conflict into an international conflict – an issue of Serbian aggression. As a corollary, the Commission declared in Opinion no. 3 (concerning the question of whether the internal boundaries between Croatia and Serbia and between Bosnia and Herzegovina and Serbia should be regarded as frontiers for the purpose of public international law) that in the circumstances of the emergence of new states following the dissolution of the SFRY, both the external and internal frontiers of the SFRY had to be respected.[64] The Commission categorically mentioned that this conclusion followed from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*, which, though initially applied in settling decolonisation issues, was recognised as a general principle, as stated by the International Court of Justice in the *Burkina Faso–Mali* case.[65] In other words, the **internal** boundaries of the SFRY were converted to protected

[60] *Ibid*., 103-137.
[61] Conference on Yugoslavia, Arbitration Commission Opinion No. 1 (1991), *European Journal of International Law* 3 (1992), 182.
[62] *Ibid*., 183. In its Opinion No. 8 on 8 July 1992, the Commission declared that the process of dissolution of the SFRY was complete. See Arbitration Commission Opinion No. 8 (1992), *European Journal of International Law* 4 (1993), 87–88.
[63] See, the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991), *European Journal of International Law* 3 (1993), 72; the Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991), *European Journal of International Law* 3 (1993), 73.
[64] Arbitration Commission Opinion No. 3 (1991), *European Journal of International Law* 3 (1992), 185. The Commission, in its support, specifically referred to the principles stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act.
[65] *Ibid*. See also, *Frontier Dispute (Burkina Faso and Mali) Case*, ICJ Reports (1986).

international frontiers, which could only be altered by an agreement. In an approving note, Pallet writes that the application of this principle was indispensable for maintaining peace.[66]

The commission, thus, moved away from the conservative, ethnicity oriented political organisation of these new states and offered a liberal international legal vision of post-conflict regional order in the Balkans. By considering the dissolution of the SFRY to be a breaking up of the federal units and then endorsing the existing boundaries of the republics, the commission envisaged Bosnia and Herzegovina as a non-ethnic unit in which Bosniac, Croat, and Serb ethnic groups would continue to live together.[67] The Commission's liberal non-ethnic vision of the nation-state was essentially in conflict with the conservative ethnic notion of the right to self-determination as claimed by Bosnian Serbs and Croats, who were keen to join their co-ethnics in Yugoslavia and Croatia, respectively. The Commission had to address this issue formally when Lord Carrington requested the Commission's opinion on whether the Serbian population in Croatia and Bosnia and Herzegovina, as one of the constituent peoples of Yugoslavia, had the right to self-determination. In conformity with its earlier Opinions, the Commission held in Opinion no. 2 that 'whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence *(uti possidetis juris)* except where the states concerned agree otherwise'.[68] In this regard, the commission did not deviate from the general international legal attitude towards this issue, as we have seen in relation to a number of cases and international instruments especially in the context of decolonization. At the European level, the International Commission of Jurists in the Aaland Island case declared the right to self-determination, in the conservative sense, legally inapplicable as long as it challenges state sovereignty and international peace and stability.[69] Similarly, although the Helsinki Final Act (1975) of the OSCE recognised that the right to self-determination goes beyond the colonial context, it nonetheless reiterated the primacy of the norms of territorial integrity and preservation of existing boundaries in international law.[70] Thus, the Badinter Commission endorsed the *uti possidetis* principle as the governing principle of international law in the process of decolonisation, and went even further by reinforcing the application of this principle in delimiting international boundaries beyond the colonial context.

In other words, despite questionable universality of *uti possidetis*, the principle continued to dominate the international legal imagination regarding the making of postcolonial boundaries. The proposition that the continuation of colonial boundaries will avoid territorial conflicts between and among postcolonial states informed invariably all

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[66] He further asserts that 'the principle is not as rigid as some might feel it ought to be. Stability does not mean intangibility. Although States are prohibited from acquiring a territory by force, they might freely decide, as the Committee made clear, to a modification of their frontiers "by agreement"'. See, Alain Pellet, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples," *European Journal of International Law* 3 (1992), 180. For a critical perspective on the 'Badinter frontiers Principle', see, Peter Radan, "Post-secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission," *Melbourne University Law Review* 24 (2000), 50-76.

[67] See, Shahabuddin, *Ethnicity and International Law*, 207.

[68] Arbitration Commission Opinion No. 2 (1991), *European Journal of International Law* 3 (1992), 184.

[69] See, *Aaland Islands Case*, Report of the International Commission of Jurists, *League of Nations Official Journal*, Sp. Supp. No. 3 (1920); cf. *Aaland Islands Case*, Report of the Commission of Rapporteurs (1921), League of Nations Council Doc. B7 [C] 21/68/106. However, the commission held that the right to self-determination can be applied when statehood itself was in question.

[70] Cf. Principles IV and VI and Principle VIII of the Helsinki Final Act.

postcolonial and, also, non-colonial boundary settlements for new states. Even the critics of the universality of the *uti possidetis* principle do not always break with this pragmatic relevance of the principle. Thus, while Ahmed refuses to accept the application of the Latin American *uti possidetis* principle in the context of African decolonisation as a general principle of international law, he, nonetheless, does not generally dismantle the continuity of colonial boundaries – understood as a unique and novel creation of a African customary international law – for the pragmatic need of avoiding "chaos" emanating from decolonisation.[71]

This consensus on the pragmatic need of the continuation of the colonial boundaries, along with the normative pull of the doctrine in general, is problematic. For, as I argue, far from being a corrective to potential "chaos", 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. As we shall see in the following section, the boundaries of present-day Myanmar were crafted by the British colonial administration. These boundaries were then used by default for postcolonial Myanmar, in complete defiance of historical realities. I will demonstrate that the principle of the continuation of colonial borders for postcolonial statehood has deprived the Rohingya of their right to self-determination, and eventually led to the present crisis.

II. THE ROHINGYA AND THE COLONIAL MAKING OF POSTCOLONIAL MYANMAR

Rakhine State, located in western Myanmar, is one of the poorest states in Myanmar, fraught with ethnic conflicts between the Buddhist Rakhine and the minority Rohingya communities. Most Rohingya are Muslims, while a minority follow Hinduism. Although the Rakhine State as a whole face discriminatory treatment by Myanmar, the Rohingyas in northern Rakhine experience double-discrimination as they are historically subject to oppression by Rakhine Buddhists as well. Of around 1 million Rohingyas in Myanmar, nearly 700,000 are currently refugees in neighbouring Bangladesh, following successive military crackdowns, the one in August 2017 being the worst, genocidal in nature.

During the British rule Rakhine state was known as 'Arakan' and I will be using this term hereinafter for the sake of clarity. The Rohingya were called Indo-Arakanese. In the Bengali literature of the medieval period, Arakan was referred to as 'Roshang'.[72] The historian of medieval Bengal Abdul Karim argues that the word 'Rashang' turned into 'Rohang' in the colloquial use, and the people of the area thus came to be known as 'Rohingi'

[71] For a contrary argument, see, Makau Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry," *Michigan Journal of International Law* 16, no. 4 (1995), 1113-1176.

[72] For instance, Syed Alaol's reference to Arakan as 'Roshang' in his epic *Padmabati* (1651), or in Abdul Karim Khandkar's preamble to his translation of the Persian story *Dulla Majlish* in 1698. See, Mofidul Hoque (ed.), *The Rohingya Genocide: Compilation and Analysis of Survivors' Testimonies* (Dhaka: Center for the Study of Genocide and Justice, 2018), 64-65.

or 'Rohingya'.[73] The specific reference to the Rohingya as Muslims is a relatively recent phenomenon.

Arakan, separated from the rest of Myanmar by a chain of mountains, maintained a distinct political identity for most of its history. In the official British narrative of the first Anglo-Burma War of 1824-1826, the century-old fort in Arakan and its defence arrangements received an admiring mention.[74] Independent Arakan kingdoms can be traced back to antiquity and the last of them was established in 1430, with its capital in Mrauk U.[75] Situated on the border between Buddhist and Muslim Asia, the kingdom had strong economic, trade and other relations with the Sultanate of Bengal.[76] The relationship between Arakan kingdom and Bengal Sultanate deepened when the Arakanese king Min Saw-Mun (also known as Narameikha) was temporarily deposed of power by the Burmese and forced to take refuge in Bengal under the protection of Sultan Ghiasuddin Azam Shah. During his 20 years of exile in Bengal, the Arakanese king was so influenced by the coexistence of Persian, Arabic and Bengali cultures and traditions in the then Bengal that upon his return to power in 1426 with the help of Sultan's army, the Arakanese king took with him several thousand Muslim courtesans and skilled persons from Bengal Sultanate.[77] According to Phayre, the restored Arakanese king agreed to be a tributary to the Sultan of Bengal and even adopted an Arabic name and title for himself, i.e., Sulaiman Shah or Sawmun Shah, initially in fulfilment of the promise made to the Sultan.[78] The practice continued for nearly two hundred years to show the matching grandeur of the Sultan of Bengal.[79] However, the influence of Bengal Sultanate did not last for long. As Phayre notes, Sawmun Shah's successor – his brother Meng Khari (known as Ali Khan) – did not submit to the authority of the Sultan; instead, taking full advantage of the weakness of the Sultanate, he took possession of territories in Bengal (e.g., Ramu in present-day Cox's Bazar). Later, his son Basoahpyu annexed the post city of Chittagong in 1459 and kept under Arakanese control until the Mughals took it back, as we shall see later.[80]

The medieval Bengali poet Syed Alaol (1607-1673), the court poet of the King of Arakan, in his epic *Padmabati* (1652) described Mrauk U as a truly cosmopolitan city where people of all faiths and races from all places had gathered.[81] Buddhism reached Arakan

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[73] See, Abdul Karim, *The Rohingyas: A Short Account of Their History and Culture* (Dhaka: Jatiya Sahitya Prakash, 2016), cited in Hoque (ed.), *The Rohingya Genocide*, 66. The Buddhist Rakhines were, however, popularly known as 'Maghs' to the Bangalees.

[74] Horace H. Wilson, *Narrative of the Burmese War, 1824-1826* (London: W. H. Allen and Co,. 1852), 155-156.

[75] The Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine* [Final Report of the Advisory Commission; also known as the Annan Commission], August 2017, 18.

[76] *Ibid.*

[77] Hoque (ed.), *The Rohingya Genocide*, 62.

[78] Arthur Phayre, *History of Burma* (London: Trubner & Co., 1883), 78.

[79] Hoque (ed.), *The Rohingya Genocide*, 62. This was also a common practice in the Chakma tribe of the hill tracts of Chittagong under the control of the British East India Company. For example, the 18th century Chakma chief was named Sher Daulat Khan, his son Jan Baksh Khan, and his Deputy Rono Khan. See, Mohammad Shahabuddin, "The Myth of Colonial Protection of Indigenous Peoples: The Case of the Chittagong Hill Tracts under British Rule," *International Journal on Minority and Group Rights* 25, no. 2 (2018), 231.

[80] Phayre, *History of Burma*, 78.

[81] Alaol specifically mentions of people from Arabia, Egypt, Syria, Turkey, Abbysinia (Ethipia), Rome, Khurasan (greater Persia), Uzbekistan, Lahore, Multan, Sindh, Kashmir, Deccan, Hindustan (North India), Bengal, Karnal, Malaya, Kochi, Achi, and Karnataka. See, Hoque (ed.), *The Rohingya Genocide*, 64.

earlier than the interior of Burma. Given that Arakanese Buddhism served as an inspiration for the Buddhism in the rest of Burma, the Swiss Pali scholar and archaeologist Emanuel Forchhammer called Arakan the 'Palestine of the Farther East' in a publication of 1891.[82] Islam was introduced to Arakan beginning in the ninth century as Arab merchants arrived and carried trade with local Arakanese markets. Smart's *The Burma Gazetteer* records that in the early ninth century '[s]everal ships were wrecked on Ramree island and the crews said to have been Mohammedans were sent to Arakan proper and settled in villages'.[83] The Arab merchants gradually connected Arakan to the trade routes with the Middle East and the Far East, and thereby paved the way for long-lasting Arab and Islamic influence in Arakan.[84] As Charney notes, they hardly formed any well-orginsed community given their small number.[85] However, he argues that large scale Muslim settlement took place in the sixteenth and the seventeenth centuries when the Arakanese and Portuguese communities started to raid southern Bengal transferring thousands of Bangalees to Arakan as slaves. According to his estimation, the Portuguese took around 147,000 captives between 1617 and 1666.[86]

François Bernier's *Travels in the Mogul Empire, 1656-1668* informs that for many years the kingdom of Arakan was the home of several Portuguese settlers, a great number of Christian slaves, and half-caste Portuguese or other Europeans collected from various parts of the world.[87] Many of them were involved in piracy. The King of Arakan, who lived in perpetual dread of the Mughals, kept these foreigners as advance guards for the protection of his frontier, even permitting them to occupy the Chittagong sea-port (in the south-eastern part of Bengal) within the Mughal territory.[88] These pirates also invaded neighbouring seas, entered numerous arms and canals of the Ganges, and ravaged the islands of Lower Bengal.[89] Thus, when the Mughal Emperor Aurungzeb's uncle, Shaista Khan, was sent to Bengal as the General of the Army and later elevated to the rank of the Governor of Bengal, his natural priority was to deliver Bengal from the cruel and incessant devastations of these pirates. Shaista Khan finally managed to free the port city of Chittagong from the control of pirates and isolate the pirates from Arakanese influence by threatening force and more effectively by offering a better life in Dhaka.[90] However, in 1757, the defeat of the regime in Bengal against the British in the Battle of Plassey paved the way for British East India Company's rule, first, in Bengal and gradually, in the rest of India.

Meanwhile, the last independent kingdom of Arakan, after thriving for more than 350 years as a prosperous trading hub, came under Burmese control in 1784-85. By the late eighteenth century, the Burmese had developed a sense of proto-nationalism with a common

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[82] Emil Forchhammer, *Report on the Antiquities of Arakan* (Rangoon: Government Printing and Stationary, 1891), 3.
[83] R. B. Smart, *Burma Gazetteer* (Rangoon: Government Printing and Stationary, 1917), 19.
[84] Hoque (ed.), *The Rohingya Genocide*, 61.
[85] Michael W. Charney, *Where Jambudipa and Islamdom Converged: Religious Change and the Emergence of Buddhist Communalism in Early Modern Arakan (Fifteenth to Nineteenth Centuries)*, PhD dissertation, University of Michigan, 1999, 147.
[86] *Ibid*., 164-165.
[87] François Bernier, *Travels in the Mogul Empire, 1656-1668* (*Histoire de la dernière révolution des états du Grand Mogol*, 1671), trans. Irving Brock, rev. ed. Archibald Constable (Westminster: Archibald Constable and Company, 1891).
[88] *Ibid*.
[89] *Ibid.*
[90] *Ibid*.

language, a common religion and a common set of legal and political ideas and institutions; even a shared written history existed throughout the core area of the Ava kingdom (Upper Burma – Mandalay).[91] Thus consolidated and unified, the Ava Kingdom enjoyed unprecedented power internally and externally, and by the turn of the nineteenth century, the court of Ava could claim a series of spectacular successes on the battlefield.[92] It was as part of this expansionist campaign towards the Western front that the annexation of Arakan took place.[93] This annexation was indeed a massive operation, under the command of the Crown Prince, with three land forces of 13,706 armed men, 1,103 horsemen, 5,804 gunners, 300 cannons, 8,412 visses[94] of gun powder, and 41,686 cannonballs and also a naval force of 1,848 gunners, 4,396 armed men, 165 boats carrying cannons, 633 cannons, 41,400 cannon balls, 769,500 gun shots and 16,185 flints.[95] Political prisoners and criminals were also sent along with regular forces.[96] The Arakanese capital city was taken and its King and many of his followers were captured on 20 January 1785. As soon as the victory was reported to the Burmese King, he ordered a great celebration on 26 January 1785 to mark this triumph over Arakan.[97]

The war against Arakan was officially conceived as a religious war – a mission to re-Buddhicise Arakan.[98] Since Buddhism was on the wane there, the now-powerful Buddhist Kingdom of Ava took on the responsibility of re-establishing Buddhism in the region. Like many imperial powers throughout history who have brought historic artefacts to their centres of power as a physical demonstration of authority and/or a part of the official narrative of a glorious past and its revival under their leadership, the Burmese King moved Mahamuni (the iconic Great Image of Buddha), from Kyauktaw in North Arakan to Amarapura – the capital of Ava (presently in Mandalay).[99] A Royal Order of Burma dated 16 October 1784 makes the point clear: '[The] Crown Prince shall march as Commander-in-Chief of Arakan Campaign to restore proper conditions in Arakan for the prosperity of the Buddha's Religion.'[100] Although instructions on the conduct of Burmese forces in this campaign prohibited the forcible taking of any young women or taking anything from the local people without payment, the Crown Prince was explicitly instructed to 'clear the place of all bad characters' so that Buddhism might prosper again in Arakan.[101] A series of Buddhist missions were also sent to Arakan following annexation with the task of re-Buddhicizing the area, and local authorities were repeatedly ordered to extend full support to these missions so that they could build Ordination Halls at places of their choice.[102] Various other political changes were also imposed. A Royal

[91] Thant Myint-U, *The Making of Modern Burma* (Cambridge: Cambridge University Press, 2001), 88.
[92] *Ibid*., 94.
[93] *Ibid*.
[94] A viss is a Burmese unit of measure for weight, equivalent to approximately 1.6.
[95] For details, see, Than Tun (ed.), *The Royal Orders of Burma, AD 1598-1885*, part IV (1782-1787) (Kyoto: Kyoto University Centre for Southeast Asian Studies, 1988), 75-83.
[96] See, Royal Orders of 28 September 1784 and 2 October 1784.
[97] See, Royal Orders of 26 January 1785 in *ibid*., 54.
[98] See generally, Than Tun, "Paya Lanma – Lord's Highway, over the Yoma - Yakhine Range," *Journal of Asian and African Studies* 25 (1983), 233-241.
[99] Tun (ed.), *The Royal Orders of Burma, AD 1598-1885*, part IV (1782-1787), xvii. The raft that brought Mahamuni arrived at the Amarapura jetty on 27 April 1785.
[100] *Ibid*., 75, 83.
[101] *Ibid*., 83, 84.
[102] See, Royal Orders of 25 July 1787 in *ibid*., 152 and Royal Orders of 3 October 1787 in *ibid*., 180.

Order of 14 October 1787 makes clear that since Arakan was now part of the Burmese kingdom, the people of Arakan must not continue using their former seals and coins.[103]

Unsurprisingly, following the Burmese invasion, great numbers of the native population 'fled from the cruelty and oppression of their conquerors, and either found an asylum in the British territory of Chittagong, or secreted themselves amongst the hills and thickets, and alluvial islands along its southern and eastern boundaries'.[104] These Arakanese occasionally launched attacks on the invading Burmese in Arakan from Chittagong, thereby triggering tension between the Burmese kingdom and its new neighbour – the British.[105] At the same time, Myint-U notes, this conquest brought a significant number of ritualists, astronomers and other learned men from Arakan into the Ava court. The Arakanese had close contact with centres of knowledge in India and the wider Islamic world and introduced important religious and secular texts on science, medicine and astrology to the Burmese.[106]

With military, cultural and intellectual rejuvenation, the Burmese kingdom engaged more assertively, though still cautiously, with the British. Captain T. H. Lewin, the Deputy Commissioner of the Chittagong Hill Tracts under the Government of Bengal in 1866–1869 and 1871–1874, records two letters dated around 24 June 1787 and sent by the King of Burma and the Rajah of Arakan to the British administration in Chittagong (among the earliest written communication between them). The first letter, from the Rajah of Arakan (now a vassal of the Burmese King) claims:

> [Some inhabitants of Arakan] have absconded and taken refuge near the mountains within your border, and exercise depredations on the people belonging to both countries. […] It is not proper that you should give asylum to them or the other Mughs who have absconded from Arracan, and you will do right to drive them from your country, that our friendship may remain perfect, and that the road of travellers and merchants may be secured. If you do not drive them from your country and give them up, I shall be under the necessity of seeking them out with an army, in whatever part of your territories they may be.[107]

To substantiate this threat of invasion, the Rajah mentions in the same letter that he took similar actions earlier when the British refused to hand over another Arakanese fugitive, named Keoty.[108] The second letter came from the King of Burma himself:

> As the country of Arracan lies contiguous to Chittagong, if a treaty of commerce were established between me and the English, perfect unity and alliance would ensure from such engagements. I therefore have submitted it to you that the merchants of your country should resort hither for the purpose of purchasing pearls, ivory, wax, and that in return my people should be permitted to resort to Chittagong for the purpose of trafficking in such commodities as the country may afford; but as the Mughs [from Arakan] residing at Chittagong have deviated from the principles of religion and morality, they ought to be corrected for their errors and irregularities […]. I have accordingly sent four

[103] *Ibid*., 182.
[104] Wilson, *Narrative of the Burmese War, 1824-1826*, 3-4; see also, A. K. M. Ahsan Ullah, "Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalisation," *Journal of Immigrant & Refugee Studies*, 9 (2011), 143.
[105] Wilson, *Narrative of the Burmese War, 1824-1826*, 3-4.
[106] Myint-U, *The Making of Modern Burma*, 96.
[107] See, T. H. Lewin, *The Hill Tracts of Chittagong and Dwellers Therein with Comparative Vocabularies of the Hill Dialect* (Calcutta: Bengal Printing Company Ltd., 1869), 29.
[108] *Ibid*. This Burmese claim can be corroborated by the official British narrative of the first Anglo-Burma War. See, Wilson, *Narrative of the Burmese War, 1824-1826*, 8.

elephants' teeth under the charge of 30 persons, who will return with your answer to the above proposals and offers of alliance.[109]

The threats were in fact real, for almost immediately after this correspondence a force of armed Burmese entered Chittagong from Arakan. This incursion was reported to the Governor-General Lord Cornwallis in the same month, June 1787, by the Chief of Chittagong.[110] Again in 1795, a Burmese Army of 5,000 men invaded Chittagong to pursue some rebellious Chiefs from Arakan.[111] It is therefore evident that tension was building up between the Burmese and the British authorities around the emigration of certain Arakanese Chiefs and the ensuing Burmese raids into the British territories. At the macro level, there was a general sense of fear within the Burmese power-circles about the East India Company's incessant expansion in India. During the first two decades of the nineteenth century, the Burmese sent a number of missions to the Mughal court and established contacts with Nepal, Punjab and the Marathas, apparently to suggest forming an anti-British alliance, although no such alliance resulted.[112] The principal Burmese aim was to annex the area to the north of Arakan. A Burmese Royal Order of 16 September 1817 reveals their claim to a large area under British control: 'It is not correct [for the East India Company] to take Chittagong, Panwa (Cossimbazar), Dacca and Murshidabad, as English; they are Arakanese and as Burmese has now taken Arakan, these places become Burmese; the English has no right to collect taxes there.'[113] A similar claim was made in an earlier Royal Order of 18 February 1817 that also expected the Company to send back all Arakanese fugitives in Chittagong.[114]

A combination of frontier troubles and increasingly belligerent designs by the Burmese on adjacent British territory led to the first Anglo-Burma War of 1824–1826. The war was so significant in opening many new and interesting regions to European access that the Government of Bengal published a series of official documents about the war. The Oxford Professor of Sanskrit, H. Horace Wilson, was entrusted with the task of collecting, editing, and publishing these documents.[115] The British defeated the Burmese and the two sides met on 3 October 1825 to determine the terms of peace.[116] As principal conditions of peace, the British demanded the cession of the four provinces of Arakan, and the payment of two crores[117] of rupees as an indemnification for the expenses of the war. One crore was to be paid immediately, and the Tennasserim provinces (the present-day Tanintharyi Region of Myanmar, bordering Thailand) were to be retained until the liquidation of the other. 'The

[109] See, Lewin, 30-32.
[110] *Ibid*., 32.
[111] Charles Macfarlane, *A History of British India, from the Earliest English Intercourse to the Present Time* (London: George Routledge & Co., 1853), 355.
[112] Myint-U, *The Making of Modern Burma*, 99.
[113] Than Tun (ed.), *The Royal Orders of Burma, AD 1598-1885*, part VII (1811-1819) (Kyoto: Kyoto University Centre for Southeast Asian Studies, 1988), 136.
[114] *Ibid*., 103.
[115] See, Wilson, *Narrative of the Burmese War, 1824-1826*, vii-viii.
[116] The British were represented by Major General Sir A. Campbell, Commodore Sir J. Brisbane, Brigadier-general Cotton, Captain Alexander, Brigadier McCreagh, Lieutenant-colonel Tidy, and Captain Snodgrass. The chiefs representing the government of Ava were Sada Mengyee Maha Mengom-KyeeWoongyee, Munnoo Rutha Keogong Lamain Woon, Mengyee Maha Menla Rajah Atwenwoon, Maha Sri Senkuyah Woondok, Mengyee Maha Menla Sear Sey Shuagon Mooagoonoon, Mengyee Attala Maha Sri Soo Asseewoon. See, *ibid*., 204-205.
[117] One crore equals 10 million.

court of Ava was also expected to receive a British resident at the capital, and consent to a commercial treaty, upon principles of liberal intercourse and mutual advantage.'[118] The refusal of these demands by the court of Ava, which quite naturally found the idea of conceding territories an indignation and the payment of any pecuniary indemnification humiliating, led to another round of war and another round of defeat for the Burmese.[119] The court of Ava finally submitted to British demands and concluded a treaty on 24 February 1826 allowing the British to annex Arakan and Tennasserim and subsequently incorporate them into British India.[120]

This was a significant moment in the political future of Burma, for the first-ever precise boundaries of Arakan were drawn up by the British in the aftermath of this war. Indeed, following the annexation of Arakan by Burma in 1785, the Burmese attempted to demarcate boundaries between Mrouk U and Thandwe on the Arakan side and Salin beyond the Arakan Mountain Range in the east. As the Royal Order of 14 October 1787 reveals, the key motivation for this was to revive the land route from Mrouk U to Ba Ai across the Arakan Range. Mrouk U officers were given the responsibility to keep this road open and well-maintained down to Dalet, and Thandwe (Sandoway) officers had the same responsibilities from Dalet to Ba Ai.[121] Therefore, some sort of internal boundary demarcation was necessary. Two more Royal Orders, on 26 November 1787 and 14 December 1787, indicate further attempts at a more detailed account of the demarcation of boundaries between Mrouk U, Thandwe, and Salin based on pre-war Arakanese records of 1783.[122] Various local headmen lodged complaints against the proposed demarcation, which led to the Royal Order for further investigation into the matter.[123] These Burmese attempts at boundary demarcation were inward looking and different in nature from what the British would achieve following the war of 1825. The boundaries drawn by the British demarcated the lines between Arakan, the Burmese Kingdom and the Tennasserim, as well as Arakan's administrative boundary with Bengal.[124] In other words, the precise territorial demarcation of Arakan and its external boundaries with both the kingdom of Burma and colonial India are essentially the creation of the British.

Burmese defeat in two more Anglo-Burma Wars in 1852 and 1885 resulted in complete British control over all of Burma; in 1886 Burma formally became a province of British India. Although there was a Rohingya community in Arakan before the Burmese invasion of 1785, its size increased rapidly during colonial times as a result of the British policy of expanding rice cultivation in Arakan.[125] Rice cultivation required intensive labour and the need for a trained agricultural workforce was largely met by Muslim workers from Bengal. While many of these workers came on a seasonal basis, some settled down

[118] Wilson, *Narrative of the Burmese War, 1824-1826*, 205.
[119] *Ibid*., 210-257.
[120] *Ibid*., 257. See also, Myint-U, *The Making of Modern Burma*, 100.
[121] Tun (ed.), *The Royal Orders of Burma, AD 1598-1885*, part IV (1782-1787), 182.
[122] See, *ibid*., 196, 203.
[123] *Ibid*., 203.
[124] Myint-U, *The Making of Modern Burma*, 220.
[125] *Final Report of the Advisory Commission*, 18. This was in line with the general British colonial policy of encouraging settlement cultivation as opposed to the traditional slash and burn cultivation in all hill regions of South Asia. This policy was necessary for the colonial administration to ensure a stable generation of revenue. See, Shahabuddin, "The Myth of Colonial Protection of Hill Peoples under British Rule," 210-235.

permanently, thereby altering the demographic composition of the area. As various censuses of British Burma reveal, from the 1880s to the 1930s the size of the Rohingya community in Arakan doubled, from about 13 to 25 percent.[126] Around that time, many Rohingyas who left Arakan following the Burmese conquest of 1785 returned under British protection.[127] The same pattern would be seen during WWII: when the Japanese occupied Burma in 1942 and expelled the British from Arakan, a sizeable proportion of the Rohingya fled Arakan and took refuge in Bengal.[128] In this sense, the political fate of the Rohingya since the first Burmese conquest of 1785 was linked to the rise and fall of British colonial power.

It is, therefore, no surprise that in the colonial policy discourse in the 1930s on separating Burma from Indian colonial administration and making it a Crown colony, the issue of immigration appeared to be the Burmese nationalist leaders' main concern.[129] In the British Parliamentary Roundtable Conference of 1931–1932, the statement of delegates representing the majority interests of Burma highlights immigration as the root cause behind the suffering of the majority.[130] The statement concluded that the 'diseased condition' of Burmese society thus created by uncontrolled immigration could be cured only by severing ties with the Indian administration and offering the Burmese the right to self-government.[131]

It soon became clear during the round-table that the delegates representing minority interests were not equally keen for the separation from India.[132] The delegate for the Indian community in Burma demanded 'adequate and effective representation in the Legislative Council and the executive appointments; that it shall have adequate representation in the public services of the country, and that the constitution of Burma shall be such as to prevent any majority community from abusing their legislative power with a view to enacting laws which would create discrimination between one citizen and another.'[133] As a rationale, the spokesperson for the delegation offered a detailed account of the extent to which the Indian community is in charge of many important aspects of Burmese economic life. Ironically, this also substantiates the frustrations that the majority delegation expressed in the conference.

The British finally separated Burma from British India in 1937, making it a Crown colony of Britain, and granted the colony a new constitution calling for a fully elected

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[126] *Report on the Census of British Burma*, Part I: The Enumeration and Compilation of Results, 1881; *Report on the Census of India 1931*, vol. XI: Burma, Part I, 1933.
[127] Ullah, "Rohingya Refugees to Bangladesh," 143.
[128] E. Pittaway, "The Rohingya Refugees in Bangladesh: A Failure of the International Protection Regime," in H. Adelman (ed.), *Protracted displacement in Asia: No Place to Call Home* (Surrey: Ashgate, 2008), 83-106.
[129] The British decision was primarily driven by student uprisings for national autonomy triggered by the world depression of the 1930s and the ensuing economic hardship in the country. The decision was also motivated by the need to protect the jewel in the crown of the British Empire – India. Burma was seen as a handy buffer zone in the face of increasing French presence and influence in Southeast Asia. The separation of Burma from India was officially recommended by the authors of the Montagu-Chelmsford Report, by the Statutory Commission, and by the Government of India. The Burma sub-Committee of the Indian Round Table Conference, 1930 endorsed the principle of separation. See, House of Commons Parliamentary Papers, *Proceedings of the Burma Round Table Conference*, 27 November 1931 to 12 January 1932 (London: His Majesty's Stationery Office, 1932), 18.
[130] Statement read by U Ba Pe, and signed by U Chit Hlaing, U Ba Pe, U Maung Gyee, U Ohn Ghine, U Tun Aung Gyaw, U Ba Si, Dr. Thein Maung, Miss May Oung, U Tharrawaddy Maung Maung, Tharrawaddy U Pu and U Ni. See, *Proceedings of the Burma Round Table Conference*, 31.
[131] *Ibid*., 32.
[132] See generally, *Proceedings of the Burma Round Table Conference*, 20-25.
[133] Statement read by N. M. Cowasjee. See, *ibid*., 47.

assembly. With this split between British India and British Burma, the border between the two took on a semi-international status for the first time.[134] In the aftermath of WWII and following fierce nationalist resistance to British rule, Burma became 'an independent country' in January 1948 under the Independence Act (1947) – a British legislation – 'as a country not within His Majesty's dominions and not entitled to His Majesty's protection.'[135] However, the boundaries of this newly independent nation, crafted by His Majesty's colonial administration, remained as they were. The semi-international boundaries became the fully international borders of Burma. **T**he administrative boundary between Arakan and Bengal, as well as Tennasserim's boundary with Siam (Thailand), became international frontiers of postcolonial Burma. As Myint-U asserts, over the first couple of decades of colonial rule in Upper Burma following the third Anglo-Burma War of 1885, 'the remainder of the new country's frontiers were carefully negotiated and surveyed: in deciding what was Assam, Burma, Tibet and China, the diplomats and cartographers of Fort Williams [in Calcutta] set the Indian–Burmese–Chinese borders of today. Modern Burma thus included the entire heartland of the old kingdom […] or the land of the "Myanma". But the map also included some, though not all, of her erstwhile tributaries and frontier regions, as well as places never even claimed let alone ruled by the Court of Ava.'[136]

Although the kingdom remained independent for hundreds of years before the British occupation of Arakan in 1825, and was under Burmese rule for a mere 40 years, the right to self-determination or any other alternative political future for the people of Arakan in general and the Arakanese Muslims (the Rohingya) in particular was never given a serious thought during the decolonisation process although reference to the right to self-determination was made on a couple of occasions. On the eve of Burma's independence, separatist movements demanding at least an autonomous status for Arakan as a whole developed from strength to strength throughout 1947. A mass meeting held on 15 June 1947 in Rangoon specifically highlighted the historical existence of Arakan as an independent Kingdom for nearly 4,000 years and also its geographical separation by mountains from Burma proper, and concluded that should be granted the absolute right of determining her own destiny as an Autonomous State.[137] When one of the key figures behind such movement, the Buddhist monk U Seinda, was arrested, violence broke out all over Arakan to the extent that a combined military and police operation was ordered by the Government of Burma. However, the Government consistently branded such separatist movements as communist anarchy or even robbery and mass looting or simply lawlessness.[138] In the British official circle at the Burma Office, however, there was an awareness of ongoing separatist movement and the Government of Burma's efforts to obscure it. A Burma Office Minute Paper of 8 July 1947 reveals this fact.[139] The said Paper also indicates recognition of the relevance and historical basis of the

[134] Ullah, "Rohingya Refugees to Bangladesh," 141.
[135] Refer to the full title of the Act. See also, Article 1.
[136] Myint-U, *The Making of Modern Burma*, 220.
[137] India Office Records and Private Papers, 'Letter from U Hla Tun Pru, Chairman, All Arakan Representative Working Committee to the Secretary of State for Burma, dated 21 June 1947,' IOR/M/4/2503, 18-19.
[138] See, Government of Burma Press Communique published in *The Times of Burma*, dated 20 November 1947. India Office Records and Private Papers, 'Law and Order: Arakan (12 April -1 December 1947), IOR/M/4/2503.
[139] India Office Records and Private Papers, 'Burma Office Minute Paper (B/C 1235/47),' IOR/M/4/2503, 10-11.

Arakanese demand for self-determination. Nevertheless, the British took side with the ruling Burmese elites in the Government and discredited the separatist movement as a creation of the main Burmese opposition party for their own vested interest.[140] The Burma, crafted by the British colonial administration including Arakan within its territory, was seen as the only natural makeup of the nascent postcolonial state. Importantly, in his note on the Minute Paper (dated 9 July 1947), the Under-Secretary for Burma Arthur Henderson specifically mentioned that 'the separatist movement in Arakan as a whole must be distinguished from that among the Moslems of North Arakan' but he never deviated from the perception of Arakanese separatism as a menace from political opposition in Burma.[141]

The incorporation of Arakan into independent Burma was unfortunately seen as the default position. As in the case of many other ethnic minorities within new postcolonial states in Africa and Asia, the political future of the Rohingya was thus made permanently subordinate to the state of Burma, the latter being the legitimate subject of international law and legally protected against challenges to its territorial integrity.[142] The postcolonial boundaries of present-day Myanmar, unjust and an outcome of colonial imagination and convenience, have as their source of legitimacy international law. This is also a stark reminder of how international law perpetuates colonial legacies and thereby further disempowers already vulnerable groups, such as the Rohingya, leading to humanitarian catastrophes.

However, political resistance to the incorporation of Arakan into Burma was very quick to follow. Shortly after Myanmar's independence in 1948, a rebellion led by Rohingya Muslims erupted in Arakan, demanding equal rights and an autonomous Muslim area in the north of the state.[143] It is also claimed by the Burmese nationalists that at the time of Burma's independence, the Rohingya not only formed their own army but also approached Muhammad Ali Jinnah – the key architect of the Islamic Republic of Pakistan – 'asking him to incorporate Northern Arakan into East Pakistan [present-day Bangladesh]'.[144] These events were in turn used by the Burmese ruling elites as excuses for questioning the Rohingyas' political allegiance to Myanmar. In post-independence Myanmar, the Rohingya have always been referred to as 'Bengali foreigners' and therefore denied citizenship. It is an irony that Myanmar claimed territorial sovereignty over Arakan without actually giving citizenship to a section of people, who have been living there long before the creation of the state in its present form. The Rohingya currently make up the largest community of stateless persons in the world. Myanmar even has an official policy of not using the term "Rohingya", as this might potentially endorse the indigenous origin of the community. During a recent meeting with the US Ambassador Scot Marciel in October 2017, the Myanmar army chief Senior General Min Aung Hlaing referred to the Rohingya as "Bengalis" and commented that

[140] *Ibid.*
[141] *Ibid*., 12.
[142] See, Article 2 of the Charter of the United Nations; General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, Res 2625 (XXV), 25th Session, 24 October 1970. Principles of unilateral humanitarian intervention, the responsibility to protect, and remedial self-determination are often seen as 'legitimate' (as opposed to legal) exceptions to the general rule of non-intervention and territorial integrity in exceptional cases.
[143] *Final Report of the Advisory Commission*, 18.
[144] Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (London: Zed Books, 1991), 41.

British colonialists were responsible for the problem: 'The Bengalis were not taken into the country by Myanmar, but by the colonialists; […] they are not the natives'.[145] Since independence, various forms of government oppression and the systematic marginalisation of the Rohingya have met with organised and armed resistance by a fraction of the Rohingya – though the degree and nature of such resistance has varied. The 2017 crackdown in Arakan by the Myanmar army, in collaboration with local Rakhine Buddhist civilians, was a brutal and disproportionate response to one such armed attack by the Arakan Rohingya Salvation Army against Myanmar security forces.

III. CONCLUSION

The continuation of colonial boundaries in the politico-legal imagination of postcolonial statehood is an established norm of international law. Although some international lawyers challenge this general application of the *uti possidetis* principle as a legally binding rule of international law, they nonetheless accept the pragmatic need for this principle for maintaining peace and stability. Ironically, as the example of the Rohingya crisis reveals, what seemed to be a solution at the time of decolonisation turned out to be a recipe for humanitarian catastrophe as the postcolonial nation-building process failed.

It would be inappropriate to settle on the *uti possidetis* principle as the obvious reason behind this kind of crisis in postcolonial states in general. Various other important elements, such as international law's ambivalence with minority rights, evasiveness vis-à-vis the right to self-determination for minority groups, limited involvement with the question of citizenship and statelessness, or neo-liberal economic premise, often contribute to this situation. There is also a need for further research on how, in the absence of stable democratic institutions, nation-building projects and the suppression of ethnic groups go unchallenged in postcolonial states. Moreover, it needs to be exposed how, due to its normative reliance on individualism as well as weak enforcement mechanisms, international law often fails to offer any adequate protection to the vulnerable groups. The Rohingya crisis in Myanmar provides a perfect illustration of these arguments, offering a powerful reminder of the deep, enduring crisis of postcolonial statehood and its problematic engagement with international law in general. The foregoing discussion on the role of international law in the making of postcolonial boundaries and the Rohingya crisis in Myanmar sets the necessary premise for this potential larger project on postcolonial statehood and international law. The normative significance of the present paper beyond the Rohingya crisis lies in this fact.

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[145] Robert Birsel and Thu Thu Aung, "Myanmar army chief says Rohingya Muslims 'not natives', numbers feeling exaggerated," *Reuters*, 12 October 2017.