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The Distance Between Norms and Obligations

In this issue

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Distance Between Norms and Obligations

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Editorial: Inaugurating the Bangladesh Journal of International Law

Fahim Abrar Abid*

The Bangladesh Society of International Law was founded in April 2025 with a singular aim: to promote, democratise and advance international law among the next generation of legal minds in Bangladesh. From the outset we recognised that advocacy, however urgent, must be supported by indigenous legal scholarship — and that scholarship needs somewhere to go.

Sixteen months later, this journal is the initiative we had in mind from the first week and left until last, because a journal is the one thing an institution cannot begin with. It has to be earned.

What came before it is worth recording. We began with a book: *Bangladesh, International Law and Security in Post-July 2024*, now a two-volume collection with Springer, which taught us there was considerably more scholarship in and about this country than there were places willing to carry it. We curated a symposium on the July uprising for the Cambridge International Law Journal blog, written by the Society's advisers. We launched the Bangladesh Blog of International Law, which within a short span drew contributors and editors from seventeen countries — a reach no platform based in Bangladesh had previously achieved, and evidence of a real appetite for critical legal discourse originating from the Global South. We ran a summer school on international law, organised the country's first national maritime law moot court competition, and have since announced its refugee law counterpart. Each was a way of building the readership, the standards and the network a journal requires.

This first issue is published as an exclusive BSIL Member Edition. This was a deliberate choice, and we would rather state it plainly than have it noticed. A journal's first issue is a statement of who stands behind it, and we wanted the record to show, permanently and at the top of the archive, the members who built this institution before it had a journal to build.

From the next issue onward, submissions will be open to all, and every manuscript — including any by members — will pass through the same double-blind peer review. That is the standard we commit to here, in print, on the first page, so that it can be held against us. The

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editor's own contribution to this issue was reviewed independently, and he took no part in any editorial decision concerning it.

The five contributions span different sub-fields but converge on a single question: what happens in the space between a legal norm and the practice that is supposed to give it effect. In each case the obligation is real and the effect does not follow.

We begin with transitional justice in post-July 2024 Bangladesh, where the July National Charter entrenches guarantees of non-repetition through the very doctrinal form that has historically locked in narrow settlements rather than dismantling them — and leaves its rights guarantees judicially unenforceable. Then we turn to enforced disappearance, and to a state that acceded to the ICPPED and then permitted the implementing ordinance to lapse. The article shows that where a person's fate remains concealed, delay is not legally neutral: the violation continues, and so do the duties it generates. Next, we move from citizens to those the domestic order does not count, examining the right to education for Rohingya refugees, where the distance between customary international law and national practice is widest precisely for those with the least standing to close it. Afterwards, we then widen the frame to international criminal law and the prosecution of cyber-enabled crimes under the Rome Statute, where the gap sits inside international law itself: the Statute is already capable of reaching such conduct, and what is missing is prosecutorial discipline, attribution capacity and evidentiary practice. Capability is not accountability. Finally, the issue closes with a review essay on *Rivers Unbound*, and with the prior question underneath all four: whom, and what, the law is prepared to recognise as a bearer of rights at all.

We are aware of how new this is. A first issue proves only that a first issue was possible. What it can do is set the standard the second will be measured against, and invite the scholarship that ought to be here and is not yet.

Dhaka, July 2026

The Entrenchment Paradox: Constitutional Reform, Guarantees of Non-Repetition, and the Recurrence of Exclusion in Post-July 2024 Bangladesh

Fatim Bin Azad*

Abstract

Guarantees of non-repetition (GNR) treat constitutional reform as a forward-looking instrument for dismantling the conditions that made past atrocity possible. Where a reform places its core commitments beyond the reach of a future majority, it relies on entrenchment—heightened amendment thresholds, unamendable provisions or referendum locks. Bangladesh's post-July 2024 reform, culminating in the July National Charter 2025 and the referendum of 12 February 2026, is an explicit attempt to build GNR through counter-majoritarian entrenchment against the executive capture behind the 2024 killings. Existing commentary criticises the reform for the exclusivity of its process. This article instead shifts the analysis to entrenchment doctrine, advancing a narrower claim: in Bangladesh, entrenchment has historically been the mechanism by which abusive or partisan settlements were locked in, not the cure for them. The 2011 eternity clause and the reversals of 1975 show each generation's 'never again' entrenched through a narrow process and later inherited rather than dismantled. The Charter reproduces this pattern in three specific ways—a self-immunising validity clause, a bundled plebiscite and a partisan framing of justice—while leaving its rights guarantees judicially unenforceable. Read against Hungary and Colombia, the guarantee against repetition is thus delivered through the doctrinal form most likely to repeat.

Keywords: Guarantees of non-repetition; Constitutional entrenchment; Transitional justice; Bangladesh; Unamendability

1. Introduction

Transitional justice has long privileged backward-looking mechanisms such truth-telling, prosecutions, and reparations over the forward-looking task of ensuring that mass violence does not recur. Guarantees of non-repetition (GNR) occupy that comparatively neglected space. Unlike measures that redress past harm, GNR target the institutional architecture that made harm possible; and among the instruments available, constitutional reform is the most ambitious, because by restructuring power, entrenching rights and redefining the political

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community it purports to write the principle of 'never again' into the permanent law of the state.[1]

Bangladesh after the mass uprising of July 2024 presents a rare live instance of the attempt. The fall of Sheikh Hasina's government, after the killing of more than a thousand demonstrators, produced not merely a change of administration but an explicit constitutional project.[2] The interim government under Professor Muhammad Yunus, sworn in on 8 August 2024, established a Constitution Reform Commission chaired by Professor Ali Riaz, which reported on 15 January 2025.[3] A National Consensus Commission (NCC) was then formed on 12 February 2025 to translate the reform proposals into a cross-party settlement; its work produced the July National Charter 2025, a consolidation of eighty-four proposals, roughly half of them constitutional, adopted on 17 October 2025.[4] A Presidential Implementation Order of 13 November 2025 authorised a national referendum, held on 12 February 2026 concurrently with the thirteenth parliamentary election, at which the Bangladesh Nationalist Party secured a two-thirds supermajority and sixty-one percent of voters endorsed the reform package.[5]

The framing of the exercise was, from the outset, that of non-repetition. The Chief Adviser cast constitutional and electoral reform as essential to halting the recurring cycles of political violence and authoritarianism that had marked Bangladesh's history, and the Charter's own preamble invokes the sacrifices of July 2024 as the ground of a new settlement designed to prevent the return of 'fascist' rule.[6] The question this article addresses is whether the doctrinal means chosen to secure that guarantee are adequate to it.

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[1] Ellen Lutz, 'Transitional Justice: Lessons Learned and the Road Ahead' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (CUP 2006) 325.

[2] Office of the United Nations High Commissioner for Human Rights, *Human Rights Violations and Abuses Related to the Protests of July and August 2024 in Bangladesh* (OHCHR, 12 February 2025).

[3] Constitution Reform Commission (Bangladesh), 'Report' (2025); Muhammad Ekramul Haque and Sumit Bisarya, 'July Charter and Constitutional Reforms in Bangladesh' (*ConstitutionNet*, 1 December 2025) <https://constitutionnet.org/news/voices/july-charter-and-constitutional-reforms-bangladesh> accessed 20 June 2026.

[4] July National Charter 2025 (*ConstitutionNet)* <https://constitutionnet.org/sites/default/files/2025-11/Bangladesh%20July%20National%20Charter%202025%20%28English%20translation%29.pdf> accessed 9 March 2026.

[5] *July National Charter (Constitutional Amendment) Implementation Order 2025* (Presidential Order, 13 November 2025) (hereafter 'Implementation Order').

[6] July Charter (n 4), Introduction and 'Historical Context'.

A body of able commentary has already formed around the reform, and this article defines itself partly against it. Ridwanul Hoque has assessed the Constitution Reform Commission's proposals as pragmatically doubtful, questioning whether mega-structural changes such as bicameralism are implementable in a unitary state.[7] Arafat Hosen Khan has argued, most fully, that the process squandered its 'constitutional moment' through structural exclusion—an all-male consensus body, the exclusion of the Awami League and other formations and the entrenchment of that exclusion through the later statutory ban of the League, drawing on Ackerman, on Elkins, Ginsburg and Melton and on Amal Sethi's account of equitable elite bargaining.[8]

These accounts share an analytical centre: the *inclusiveness* of the constituent process, assessed against theories of legitimacy and endurance. The argument of this article is different, and deliberately narrower. It relocates the critique from the exclusivity of the process to the *doctrine of entrenchment* itself. Its claim is that the Charter's substantive design is a credible guarantee of non-repetition, but that the mechanism on which any such guarantee must ultimately rely—entrenchment beyond majoritarian revision—has in Bangladesh's own constitutional history been the instrument through which abusive and partisan settlements were locked in rather than dismantled. The reform therefore confronts an *entrenchment paradox*: to make 'never again' durable, it must entrench; yet entrenchment adopted through a narrow constituent process, and immunised against later revision, is precisely how each of Bangladesh's previous 'never agains' became the next generation's grievance. The paradox is doctrinal, not merely political, and it is visible in three specific features of the Charter and in the enforceability of its rights guarantees.

The argument proceeds as follows. Part II sets out the minimal theoretical apparatus, situating constitutional reform within GNR and identifying entrenchment as its characteristic

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[7] Ridwanul Hoque, 'Bangladesh at a Constitutional Crossroads: Reform or Overhaul?' (*NLSIR Online*, 20 May 2025) <https://www.nlsir.com/post/bangladesh-at-a-constitutional-crossroads-reform-or-overhaul> accessed 2 July 2026.

[8] Arafat Hosen Khan, 'Bangladesh's Constitutional Crossroads: Reforms, Exclusion, and the Quest for Democratic Legitimacy' *(IACL-AIDC Blog*, 27 March 2025) <https://blog-iacl-aidc.org/2025-posts/2025/3/27/bangladeshs-constitutional-crossroads-reforms-exclusion-and-the-quest-for-democratic-legitimacy> accessed 2 July 2026; Arafat Hosen Khan, 'Bangladesh's Broken Constitutional Moment: Part I' (*iconnectblog*, 8 May 2026) <www.iconnectblog.com/bangladeshs-broken-constitutional-moment-part-i-the-architecture-of-failure-the-national-consensus-commission-and-the-problem-of-selective-constitutionalism/> accessed 2 July 2026; Arafat Hosen Khan, 'Bangladesh's Broken Constitutional Moment: Part II' (*iconnectblog*, 9 May 2026) <www.iconnectblog.com/bangladeshs-broken-constitutional-moment-part-ii-the-bnps-inheritance-and-the-foreclosed-constitutional-moment-can-reform-be-salvaged/> accessed 2 July 2026.

device. Part III reconstructs the Charter's entrenchment architecture and reads it, sympathetically, as coherent non-repetition. Part IV develops the paradox through Bangladesh's amendment jurisprudence—the eternity clause of 2011 and the reversals of 1975. Part V isolates three doctrinal defects specific to the Charter. Part VI turns to enforceability. Part VII states the strongest realist counter-argument, and Part VIII replies. Part IX concludes.

2. Guarantees of Non-Repetition and the Constitutional Form

The category of guarantees of non-repetition entered the transitional-justice lexicon as the fourth of the state's obligations toward victims of gross violations, alongside truth, justice and reparation. Its defining orientation is prospective. Where prosecutions answer for what was done and reparations repair it, GNR ask what institutional conditions permitted the wrong and how those conditions may be altered so that it does not recur. As Lutz observes of the comparative record, the preventive goals of transitional justice are the most numerous and the most various: preventing former perpetrators from reasserting power, reconstructing a justice system that offers a legitimate alternative to violence and involving all sections of society in the design of the new order so that no community's exclusion becomes the seedbed of the next conflict.[9]

Constitutional reform is the most structurally ambitious GNR instrument because it operates on the architecture of power rather than on individual conduct. A constitution can disperse authority that was previously concentrated, entrench rights that were previously vulnerable and constitute a political community on terms designed to include those whom the prior order excluded. The United Nations' own formulations of GNR list, among the guarantees, civilian control of security forces, the independence of the judiciary and the reform of laws contributing to violations, each of which is, in the first instance, a constitutional question.[10]

That mapping is not merely rhetorical. As Juan Méndez has argued, the four transitional-justice obligations: truth, prosecution, reparation and institutional reform each translate into constitutional norms and processes, so that a constitution is one of the principal sites at which a society discharges or defaults on its non-repetition duties.[11] Comparative scholarship has begun to taxonomise the forms this takes. Cheng-Yi Huang distinguishes three

[9] Lutz (n 1) 325–27.

[10] ‘Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’ (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, principles 35–38.

[11] Juan E Méndez, 'Constitutionalism and Transitional Justice' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1270.

models of 'constitutionalizing transitional justice': written-in constitutions, in which non-repetition values are codified in the text itself, as in South Africa's 1994 interim epilogue, Poland's 'never again' preamble, or Article 66 of Colombia's Constitution; court-enforced constitutionalism, in which courts infer transitional-justice mandates from an otherwise silent text; and unilateral executive decisions, in which the chief executive dictates the mechanism without legislative participation.[12] Huang's own conclusion is pointed: the third, executive-decree model carries 'the weakest legitimacy of all three,' because its guarantee rests on a unilateral act that the executive may as handily amend as issue. That ranking becomes directly relevant to the Bangladeshi case in Part V.[13]

Yet constitutional GNR carries a distinctive difficulty absent from truth commissions or trials. A guarantee written into ordinary constitutional text is only as secure as the next amendment. The very majority whose capture of the state produced the original violations may, if it returns to power, unwind the guarantee by the same amendment power that any government commands. The classic response is *entrenchment*: raising the threshold for amendment, subjecting core provisions to referendum or placing certain commitments beyond amendment altogether through an eternity clause. Entrenchment is what converts a reform from a policy that a later majority may reverse into a guarantee that binds it. It is, in other words, the doctrinal device on which the durability of constitutional non-repetition depends.[14]

Whether entrenchment can actually secure a transitional settlement is, however, contested precisely in the transitional context. Gábor Halmai has asked directly whether unamendable provisions in transitional constitutions can protect the integrity of a post-transition order, and answers with heavy qualification: where a society lacks an established constitutional culture, elite-driven entrenchment may fail to prevent—and can even furnish the legal vocabulary for—subsequent backsliding, as the Hungarian experience shows.[15] This is the theoretical seam the present article works: entrenchment is indispensable to durable constitutional GNR and yet, in polities of thin constitutional culture, is exactly the device through which a later dominant actor captures or unwinds the guarantee. The quality of a reform's non-repetition guarantee therefore turns on the quality of its entrenchment on what is entrenched, by whom, and through what process.

[12] Cheng-Yi Huang, 'Constitutionalizing Transitional Justice' in Cheng-Yi Huang (ed), *Constitutionalizing Transitional Justice* (Routledge 2023) 1.

[13] ibid 5.

[14] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017); Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021).

[15] Gábor Halmai, 'Transitional Constitutional Unamendability?' (2019) 21 European Journal of Law Reform 259.

Spelled out, that distinction is the pivot of the argument: a guarantee entrenched by a broadly constituted authority, protecting genuinely foundational commitments and remaining open to inclusive revision, advances non-repetition. A guarantee entrenched by a narrow body, protecting a partisan settlement, and immunised against later revision, does the opposite: it locks in the conditions of future grievance and removes the ordinary constitutional means of addressing them. The remainder of this article applies that distinction to the July Charter.

3. The Charter's Entrenchment Architecture as Non-Repetition

Read against its own diagnosis, the Charter's substantive design is coherent GNR. The pathology it identifies is the concentration of power in a majoritarian executive able to colonise nominally independent institutions—the judiciary, the Election Commission, the Anti-Corruption Commission—and to distort the electoral and constitutional order to perpetuate single-party dominance.[16] Its remedies track that diagnosis, and several are explicitly counter-majoritarian.

The most important, for present purposes, is the heightened amendment rule. The Charter provides that constitutional amendment shall require a two-thirds majority in the lower house together with a majority in the proposed upper house, and that amendments to a defined core—including Articles 8, 48, 56 and 142, and the reintroduced caretaker-government provisions shall additionally require a national referendum.[17] This is the entrenchment limb proper: it seeks to remove the constitutional core from the reach of any single dominant party, answering the historic complaint that a government commanding a bare two-thirds of a unicameral parliament has enjoyed decisive and unchecked authority over constitutional change.[18]

Reinforcing this are three further counter-majoritarian devices. Bicameralism introduces a one-hundred-member upper house elected by proportional representation on the basis of national vote share, deliberately importing a veto point and minority representation that a single lower-house majority cannot easily override.[19] The dispersal of appointment power replaces prime-ministerial control over constitutional bodies with bipartisan selection committees, drawing in the Speaker, the Leader of the Opposition, and the judiciary for the Election Commission, the Ombudsman, the Public Service Commissions, the Comptroller and

[16] July Charter (n 4), 'Historical Context'.

[17] *July Charter*, proposal 3 ('Constitutional Amendment Procedure').

[18] M Rafiqul Islam and Muhammad Ekramul Haque (eds), *The Constitutional Law of Bangladesh: Progression and Transformation at Its 50th Anniversary* (Springer 2023).

[19] *July Charter*, proposals 17–19 ('formation, structure, and functions of the upper house').

Auditor General and a constitutionalised Anti-Corruption Commission.[20] And the revived caretaker-government system, to be entrenched behind the referendum lock, reinstates a non-partisan election-time administration whose abolition in 2011 is widely regarded as having precipitated the electoral-credibility crisis that culminated in 2024.[21]

Taken together, these are not symbolic gestures. They are hard institutional constraints designed to prevent the recurrence of executive capture, and on the substantive axis the Charter is a credible attempt to encode 'never again' into enforceable structure rather than aspirational preamble. The Charter also gestures toward the accountability limb that GNR theory pairs with structural reform: proposal 64 provides for an independent commission to investigate officials involved in the killings and repression of the July uprising and in electoral fraud and corruption, situating a truth-and-accountability mechanism within the reform instrument itself.[22]

If the analysis stopped here, the verdict would be favourable: a well-diagnosed reform deploying the standard counter-majoritarian toolkit, entrenched against the very majoritarianism it condemns. The difficulty emerges only when the entrenchment mechanism is examined against Bangladesh's own constitutional record.

4. The Entrenchment Paradox in Bangladesh's Amendment Jurisprudence

The claim of this Part is that entrenchment, in Bangladesh, has not functioned as a neutral preservative of foundational commitments. It has functioned as an instrument of capture—a means by which a dominant actor fixes its own settlement in place and forecloses later revision. Two episodes establish the pattern, and both bear directly on the Charter.

4.1 The Eternity Clause of 2011

The basic-structure doctrine was transplanted into Bangladeshi law in 1989, when the Appellate Division in *Anwar Hossain Chowdhury* invalidated the Eighth Amendment as inconsistent with the Constitution's basic structure.[23] In 2011 the Fifteenth Amendment went

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[20] ibid, proposals 38–42.

[21] ibid proposal 16. Fatima Zahra Ahsan Raisa and Suriya Tarannum Susan, 'Bangladesh Through the Prism of Doctrine' (*Verfassungsblog,* 11 September 2024) <https://verfassungsblog.de/bangladesh-through-the-prism-of-doctrine/> accessed 2 July 2026; Khan, 'Bangladesh's Constitutional Crossroads: Reforms, Exclusion, and the Quest for Democratic Legitimacy' (n 8).

[22] *July Charter* (n 4) proposal 64; Mahia Rahman, 'Can the Revised ICT-BD Ordinance Facilitate Transitional Justice for the Bangladesh Genocide?' *Global Human Rights Defence* (4 April 2025).

[23] Anwar Hossain Chowdhury v Bangladesh (1989) 41 DLR (AD) 165. Islam and Haque, *The Constitutional Law of Bangladesh* (n 18); Ridwanul Hoque, 'Eternal Provisions in the Constitution of Bangladesh: A Constitution

further, converting judicial doctrine into textual entrenchment: Article 7B rendered a large portion of the Constitution—by some estimates more than a third—permanently unamendable. On its face this is the strongest possible non-repetition device, an eternity clause protecting the constitutional core against future majorities.[24]

Yet the manner of its adoption inverts that appearance. The Fifteenth Amendment was passed by a governing party commanding a two-thirds majority; it scrapped the caretaker-government system without a referendum, though a referendum requirement was then in force; the parliamentary select committee that considered it sat without the principal opposition party, which boycotted; and the committee's recorded position in favour of retaining the caretaker system was reversed, on the record, after a reported meeting with the prime minister. Bangladesh's leading constitutional scholars have concluded that the entrenchment was itself of doubtful legitimacy—adopted through a narrow, majoritarian process, without the popular participation that alone could justify placing provisions beyond democratic revision, and without any mandate for the eternity clause in the governing party's election manifesto.[25]

The lesson is precise. Entrenchment did not protect a foundational consensus; it fixed one party's contested settlement in place and, by doing so, removed from later majorities the ordinary constitutional means of undoing it. Yaniv Roznai's distinction between *facile* and *demanding* amendment powers clarifies why this matters. An amendment procedure is 'demanding,' in the participatory sense, only when it draws the people meaningfully into constitutional change; a procedure that raises formal thresholds while excluding popular deliberation remains, in the sense that counts, facile—even when it is difficult to satisfy.[26] The 2011 eternity clause was formally demanding and democratically facile at once, and it is precisely that combination—high threshold, thin participation—that made it an instrument of entrenchment-as-capture rather than of non-repetition.

The instability of the device is confirmed by its fate. In December 2024 a High Court bench declared Articles 7A, 7B and 44(2) of the Fifteenth Amendment void as inconsistent with the basic structure, and revived the Article 142 referendum requirement for amendments; the abolition of the caretaker system was reversed, and the caretaker system itself restored on

Once and for All?' in Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2019) 195.

[24] Constitution (Fifteenth Amendment) Act 2011, art 7B. Islam and Haque, *The Constitutional Law of Bangladesh* (n 18), and Hoque, 'Eternal Provisions in the Constitution of Bangladesh' (n 23).

[25] Islam and Haque, *The Constitutional Law of Bangladesh* (n 19), chapter on constitutional change.

[26] Islam and Haque (n 17); Roznai (n 13) ch 6.

review in November 2025.[27] That an eternity clause—the strongest entrenchment an order can deploy—was itself struck down within a few years of a change of regime is not a reassurance but a warning. It shows that in Bangladesh entrenchment does not settle a question beyond politics; it merely relocates the political contest to the moment of capture or the moment of judicial undoing. A guarantee of non-repetition that relies on entrenchment in such a system relies on a device that has repeatedly proven neither durable nor neutral.

4.2 The Reversals of 1975

The second episode shows the pattern operating in the domain of accountability rather than structure, and over time rather than in a single enactment. Bangladesh's first transitional-justice settlement after 1971 was substantial: special tribunals were established, tens of thousands were charged under a Collaborators Order and the International Crimes (Tribunals) Act was enacted in 1973.[28] Within a few years that settlement was dismantled. Following the assassination of Sheikh Mujibur Rahman in August 1975, the tribunals were disbanded, detainees pardoned, the Collaborators Order repealed and an Indemnity Ordinance enacted to shield those responsible for the assassination from prosecution. The International Crimes Tribunal was not revived until 2010, under a returning Awami League government—whereupon it attracted sustained criticism for departures from fair-trial standards and for its use as a partisan instrument.[29]

The 1975 reversals are not an entrenchment episode in the technical sense, but they establish the temporal dynamic that makes the entrenchment paradox acute. Each Bangladeshi settlement designed to secure 'never again'—the 1972 order, the 1973 tribunals, the 2011 restoration of the 1972 principles—was undone or captured by the succeeding majority, whether by repeal and indemnity or by entrenchment and instrumentalisation. The recurrence the reforms sought to prevent was, repeatedly, a recurrence enacted *through* the constitutional and legal forms themselves.

[27] On the December 2024 High Court decision striking arts 7A, 7B and 44(2) and reviving the art 142 referendum requirement, and the subsequent restoration of the caretaker system on review by the Appellate Division in November 2025, see the contemporaneous reporting collected in *The Daily Star* and *Dhaka Tribune* (December 2024–March 2026). The full-annulment challenge to the remainder of the Fifteenth Amendment remained pending at the time of writing.

[28] Asia Justice and Rights and Liberation War Museum, *Transitional Justice: Bangladesh* (2022), which sets out the 1972–74 prosecutions, the tribunals, and the subsequent reversals.

[29] Rahman, 'Can the Revised ICT-BD Ordinance Facilitate Transitional Justice for the Bangladesh Genocide?' (n 21); Asia Justice and Rights and Liberation War Museum (n 27).

The rhyme is not merely historical. The interim government's own protection order for those who acted against the prior regime between July and August 2024 was converted, by the elected Parliament in April 2026, into the July Mass Uprising (Protection and Liability Determination) Act—an instrument that distinguishes protected 'political resistance' from criminal conduct and gives the earlier indemnity measure permanent statutory form.[30] Whatever the merits of protecting those who resisted repression, the form is familiar: a transition once again secures its preferred account of lawful and unlawful conduct through an indemnity-type statute, exactly as the 1975 settlement did in the opposite political direction. The point is not that the two indemnities are morally equivalent—they are not—but that the *technique* of fixing a transition's account of justice through entrenchment and indemnity recurs across regimes of opposite character. That recurrence is precisely what should give the designer of a non-repetition guarantee pause.

4.3 The Comparative Pattern: Hungary and Colombia

The paradox is not a Bangladeshi peculiarity; comparative experience supplies both a warning and a qualification. The warning is Hungary. Its post-1989 transition entrenched a rule-of-law order, and successive measures wrote transitional-justice commitments into constitutional form; yet an established constitutional culture was absent, and once Viktor Orbán's party secured a two-thirds majority it rewrote the Fundamental Law—'in the name of transitional justice'—deploying the language and forms of the transitional settlement to dismantle the liberal constitutionalism the settlement was meant to secure.[31] Hungary is the entrenchment paradox in its purest comparative form: a settlement entrenched in a polity of thin constitutional culture became not a barrier to capture but the instrument of it, wielded by the very majoritarian actor it was meant to constrain.

The qualification is Colombia. There the 2012 'Legal Framework for Peace' amendment (Article 66) wrote transitional justice into the constitutional text, and the Constitutional Court, drawing on the victims' right to truth and on inter-American jurisprudence, both legitimated the negotiated settlement and policed its limits—upholding the peace framework while striking down attempts to convert it into a 'blank cheque' to remake

[30] *July Mass Uprising (Protection and Liability Determination) Act 2026* (passed 8 April 2026), giving statutory form to the interim government's October 2024 protection measure. The structural resemblance to the Indemnity Ordinance of 1975 lies in the use of a legal instrument to fix the protected status of one side of a transition; the political valence is, of course, opposite.

[31] Halmai (n 15) 259–77; Huang (n 12) 4–5; Gábor Halmai, 'Transitional Justice, Transitional Constitutionalism and Constitutional Culture' in Cheng-Yi Huang (ed), *Constitutionalizing Transitional Justice* (Routledge 2023).

the political system.[32] What made Colombian entrenchment a guarantee rather than a trap was not the entrenchment itself but the surrounding conditions Huang identifies: a codified, court-reviewable mandate and a 'deeply rooted legalist culture' in which the adversarial parties complied with judicial limits on the settlement. The contrast is instructive for Bangladesh. Entrenchment secures non-repetition where a strong, independent court can hold the settlement to its own terms and where the political actors accept that discipline; it becomes capture where the court's authority is itself contested and where the settlement is immunised against judicial review. The Bangladeshi Charter, as the next Part shows, sits on the wrong side of that line on both counts—precisely the constellation Halmai identifies as the condition under which transitional entrenchment fails.

This is the sense in which the Charter confronts a paradox rather than a mere risk. To make its guarantee durable it must entrench; but entrenchment in Bangladesh has been the medium of capture, and the more effectively the Charter entrenches, the more it forecloses the very revision by which a later, more inclusive majority might correct whatever the founding moment got wrong. The next three defects show the paradox operating in the Charter's own text.

5. Three Doctrinal Defects Specific to the Charter

5.1 The Self-immunising Validity Clause

The Charter's Pledge of Commitment contains a provision without obvious precedent in a document of this kind. The signatories undertake that they shall not, *under any circumstance*, raise before any court any question regarding the validity or necessity of the Charter, and shall ensure its full legal and constitutional protection at every stage of implementation.[33] The clause is a form of entrenchment—but of the most self-undermining kind. A guarantee of non-repetition is supposed to *restore* legality and justiciability after a period in which the executive placed itself above the law. Here the foundational instrument seeks to place *itself* beyond judicial scrutiny, foreclosing in advance the constitutional adjudication through which any rule-of-law order tests the validity of its own foundations.

The difficulty is doctrinal, not merely symbolic. Bangladesh's constitutional order rests on the supremacy of the Constitution under Article 7 and on judicial review as the mechanism

[32] Huang (n 12) 11–12.

[33] *July Charter*, 'Pledge of Commitment to the Implementation of the July National Charter 2025', cl 3.

that gives that supremacy effect.[34] A clause purporting to bar any court from questioning the Charter's validity is in tension with that structure at its root. It also sits awkwardly beside the Charter's own commitment to judicial independence and to the restoration of the rule of law: an instrument that constitutes an independent judiciary while simultaneously instructing that judiciary never to examine the instrument's own validity guarantees non-repetition with one hand and withdraws the means of enforcing it with the other. Whatever else it is, this is not the demanding, participation-anchored entrenchment that legitimate constitutional GNR requires; it is entrenchment by pre-emptive immunisation.

The concern deepens when one attends to the *instrument* through which the Charter's constitutional content was to acquire legal force. The substance was routed through a Presidential Order, the July National Charter (Constitutional Reform) Implementation Order 2025 which recited its own authority as flowing from the sovereign will expressed in the uprising, and which attached to the newly elected members a second oath as members of a Constitution Reform Council empowered to complete the amendments within a defined period.[35] Senior constitutional counsel warned that amending the Constitution through a presidential order would set a dangerous precedent, drawing the pointed comparison with General Yahya Khan's Legal Framework Order of 1970, an executive instrument that purported to prescribe the terms on which a constituent body might act.[36] The objection is doctrinal, and it compounds the validity-clause problem: a guarantee of non-repetition against executive over-reach, entrenched by an executive order whose own constitutional footing is contested and immunised against the courts that would ordinarily test it, borrows the very form, rule by decree over the constituent process that the reform exists to foreclose.

Placed within Huang's comparative typology, the significance of the instrument sharpens. A reform whose constitutional content is carried by a Presidential Order, ratified by a bundled plebiscite and shielded from judicial review is not a written-in constitutionalisation of the South African or Colombian kind, in which a codified, court-reviewable mandate anchors the settlement; nor is it court-enforced constitutionalism, since the courts are the very institution the validity clause seeks to exclude. It sits closest to the third, executive-decree

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[34] Nafiz Ahmed, 'Rhetorical Invocation of Constitutional Guardianship as a Justificatory Tool: The Case of Bangladesh' (2025) 58(2) Verfassung und Recht in Übersee / World Comparative Law 239.

[35] *Implementation Order* (n 5); ConstitutionNet translation; Haque and Bisarya, 'July Charter and Constitutional Reforms in Bangladesh' (n 3).

[36] Shakhawat Liton, 'Amending Constitution thru Presidential Order Will Set Dangerous Precedence: Dr Shahdeen Malik' (*The Business Standard,* 27 September 2025) <https://www.tbsnews.net/features/panorama/amending-constitution-thru-presidential-order-will-set-dangerous-precedence-dr> accessed 22 April 2026.

model—the model Huang identifies as carrying the weakest legitimacy of the three, because its guarantee rests on a unilateral act the executive may amend as handily as it issues.[37] That a non-repetition guarantee against executive over-reach should be delivered through the model of constitutionalising transitional justice with the weakest legitimacy—the unilateral executive act—is not a peripheral irony. It is the entrenchment paradox appearing at the level of institutional form: the reform reaches for the executive-decree route because it is the fastest way to entrench, and in doing so reproduces the very concentration of constituent authority that non-repetition was meant to disperse.

5.2 The Bundled Plebiscite

The referendum of 12 February 2026 was, in form, the popular participation that the 2011 entrenchment lacked. In substance it reproduced the same deficit. The Implementation Order condensed the Charter's constitutional proposals into four broad questions, which voters were required to answer as a single package rather than severally.[38] A single 'Yes' recorded at sixty-one percent was thereby taken to endorse a bundle of distinct and independently contestable constitutional choices, while binding future governments to the reform agenda as adopted.[39]

Assessed through Roznai's lens, the plebiscite is demanding in threshold but facile in deliberation. It supplies a majoritarian ratification for a project whose stated purpose was to constrain majoritarianism, and it does so through precisely the mechanism: an aggregate, take-it-or-leave-it popular vote that maximises the appearance of participation while minimising its deliberative content. Bundling foreclosed the disaggregated public reasoning that alone would make the entrenchment democratically 'demanding' in the sense that legitimacy requires.[40] The 2011 amendment entrenched without a referendum; the 2026 settlement entrenches with a referendum whose design drains the exercise of deliberative force. The form differs; the participatory deficit is continuous.

The deliberative thinness was compounded by a neutrality deficit. The interim government, whose defining claim was to non-partisan stewardship, actively campaigned for a 'Yes' vote, prompting the observation from senior constitutional counsel that it was wrong for

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[37] Huang (n 12) 4–5.

[38] *Implementation Order* (n 5), s 4; Hossain (n 5).

[39] Hossain (n 5); 'Bangladesh's Election and Referendum: Contesting Reform and Political Futures' (*NUS Institute of South Asian Studies,* 9 February 2026).

[40] Roznai (n 14) ch 6.

the government to campaign for one side in a referendum it was administering.[41] A ratifying plebiscite loses much of its legitimating force where the administering authority is not neutral between the options, and the point sharpens the doctrinal difficulty: the very body invoking popular sovereignty to entrench the settlement placed its thumb on the scale of the vote through which that sovereignty was said to speak.

5.3 The Partisan Framing Of Justice

The Charter's account of the wrong it exists to prevent is, in places, explicitly partisan. Its Pledge commits the signatories to justice for the victims of 'Awami fascism' and for killings committed by the 'fascist Awami League,' and the settlement was negotiated and declared with the Awami League excluded, the party having been banned under anti-terrorism legislation.[42] Khan has traced the subsequent conversion of the executive ban into statute by the incoming BNP-led legislature, describing the sequence as 'weaponised legalism'—the encoding of political exclusion into the legal architecture itself.[43] The subsequent record bears the description out with precision. When the ordinance banning the League was placed before the elected Parliament, the relevant committee recommended it for passage in *amended* form; Parliament nonetheless enacted the Anti-Terrorism (Amendment) Bill 2026 with no change to its substance, retaining the power to ban all activities of an entity. The party that had, during the interim period, opposed banning any political party by executive order thus moved, once in government, to fix that same ban into permanent statute—unchanged, and over its own committee's recommendation to amend it.[44]

This article accepts Khan's description of the phenomenon and locates it within the entrenchment paradox rather than within a theory of the constitutional moment. The point, in doctrinal terms, is that a 'never again' defined against a named party is not a general guarantee against the recurrence of atrocity but a specific guarantee against the recurrence of *one* set of perpetrators—and, entrenched, it fixes that partisan definition into the constitutional foundation. Comparative experience with post-authoritarian settlements that exclude the former ruling party suggests two characteristic failure modes: the excluded party's eventual

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[41] Shahdeen Malik, 'It's Wrong for the Government to Campaign for One Side in the Referendum', (*Prothom Alo*, 18 January 2026).

[42] *July Charter*, 'Pledge of Commitment', cl 5; Hossain (n 5).

[43] Khan, 'Bangladesh's Broken Constitutional Moment', Part II (n 8).

[44] On the passage of the Anti-Terrorism (Amendment) Bill 2026 (8 April 2026) without the amendments the committee had recommended, and on the earlier ordinance (11 May 2025) and gazette ban (12 May 2025), see *The Business Standard* and *The Daily Star* (May 2025–April 2026).

unconstitutional return, or the new dominant party's instrumentalisation of the settlement for factional advantage.[45] Either way, a guarantee framed as 'not them again' rather than 'never again' invites its own future contestation, and entrenchment ensures that the contestation, when it comes, must take an extraordinary rather than an ordinary constitutional form.

6. The Enforceability Limb: Entrenching the Unenforceable

Entrenchment secures a guarantee only if the guarantee is itself enforceable. A right that cannot be vindicated in court gains nothing from being made difficult to amend; entrenchment merely fixes its unenforceability in place. On this axis the Charter reproduces a long-standing structural weakness of the Bangladeshi Constitution that is directly relevant to non-repetition.

The Constitution divides its rights provisions between the Fundamental Principles of State Policy in Part II, which Article 8(2) renders judicially unenforceable, and the enforceable fundamental rights of Part III. Economic, social, cultural and environmental rights sit on the unenforceable side of that line, functioning as directives to the state rather than as claims a citizen may press.[46] The Constitution Reform Commission had proposed to collapse this distinction, unifying Parts II and III into a single enforceable charter of 'Fundamental Rights and Freedoms' subject to a general limitation clause and a proportionality test. The July Charter did not adopt that proposal. In its place it retained only a broadly worded commitment that the state shall take measures to expand, protect and implement citizens' fundamental rights—language whose vagueness leaves the enforceability question unresolved and, on the better reading, leaves socio-economic rights where they were: unenforceable.[47]

The significance for GNR is direct. Several of the structural conditions implicated in the 2024 crisis—inequality, the denial of economic and social entitlements, the vulnerability of marginalised communities—are precisely the conditions that enforceable socio-economic rights would address, and precisely the conditions that non-repetition, properly understood,

[45] For the comparative pattern, see the discussion of Adem Kassie Abebe's analysis of exclusionary post-authoritarian settlements in Khan, 'Bangladesh's Broken Constitutional Moment', Part II (n 8); and, on endurance and inclusiveness generally, Tom Ginsburg, James Melton and Zachary Elkins, *The Endurance of National Constitutions* (John M Olin Program in Law and Economics Working Paper No 511, University of Chicago Law School 2010).

[46] Constitution of the People's Republic of Bangladesh, arts 8(2), Parts II–III. On the consequences of relegating socio-economic and environmental rights to non-justiciable state policy, and the judiciary's partial workaround through an expansive reading of the right to life, see the sustained treatment in the post-July literature on environmental constitutionalism, which argues that a right located in the Fundamental Principles is "resilient" in name only.

[47] *July Charter* proposal 9; Haque and Bisarya, 'July Charter and Constitutional Reforms in Bangladesh' (n 3).

must reach. A reform that entrenches its counter-majoritarian architecture behind a referendum lock while leaving its rights guarantees in the non-justiciable domain entrenches the enforceable and leaves the unenforceable unenforceable. It is a selective entrenchment, and the selection tracks the distinction between the interests of political elites, whose competition the structural provisions regulate, and the interests of citizens, whose social entitlements the rights provisions would secure. That asymmetry is itself a feature of the paradox: entrenchment is deployed where it protects the settlement among parties, and withheld where it would protect the population against the parties.

7. The Counter-Argument: Process Realism in Transition

The strongest objection to this analysis is realist, and it deserves statement at full strength. Transitions are not constitutional seminars. They occur under acute time pressure, incomplete information and the standing threat of counter-mobilisation or renewed violence. On this view three replies blunt the paradox.

First, *entrenchment is the price of any guarantee at all*. A reform that declined to entrench, for fear of locking in the founding moment's imperfections, would leave the concentrated executive powers that produced the 2024 crisis fully available to the next majority. Between an imperfectly entrenched guarantee and no guarantee, the former prevents more future harm. The Charter's architects themselves describe it as one step in a longer journey rather than a completed settlement, which implies that later, more inclusive constituent stages can revisit what the founding moment fixed.[48]

A fourth reply, deeper than the other three, comes from the theory of transitions itself. Colleen Murphy locates the distinctiveness of transitional contexts in two forms of uncertainty that are pervasive in transitions and rare in consolidated democracies: existential uncertainty and uncertainty about authority\u2014about who is entitled to speak and decide for the political community.[49] On this account, the drive to entrench, to immunise and to lock in is not mere overreach but a rational response to radical uncertainty about authority: an interim body with contested legitimacy reaches for the strongest available devices precisely because its authority to decide is in doubt. Judith Heimbach's study of Libya adds the practical corollary that, where a transition is fragile and divided, pressing constitution-making and transitional-justice measures too hard can deepen division rather than resolve it, and that holding back may

[48] Haque and Bisarya, 'July Charter and Constitutional Reforms in Bangladesh' (n 3).

[49] Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge University Press 2017).

sometimes be the wiser course.[50] Together these suggest that the Charter's hard entrenchment may be the understandable product of a body acting under uncertainty about its own authority, and that the alternative—declining to entrench at all—carries its own risks of drift and reversal.

Second, *some exclusions are themselves guarantees of non-repetition*. Excluding a party credibly associated with the prior repression is, on this account, not a betrayal of 'never again' but an instance of it—closer to lustration or militant democracy than to erasure. A constitutional order may legitimately defend itself against those who would dismantle it, and the bundled referendum can likewise be defended as a means of preventing well-resourced spoilers from unpicking an interdependent package provision by provision.[51]

Third, *entrenchment self-corrects over time*. Because the elected parliament sits, under the Implementation Order, as a Constitution Reform Council charged with completing the amendments within a defined period, the initial narrowness of the constituent body is arguably transitional: future majorities inherit a structure that constrains them regardless of who was in the room at the founding, and the referendum lock protects the reform from casual reversal while ordinary politics resumes.[52]

8. Reply: Why the Defects Are Not Incidental

These replies are serious, and each is partly right. But each establishes only that the Charter's entrenchment defects were *understandable*; none establishes that they were *costless* for non-repetition specifically. The distance between those two propositions is where the paradox lives.

The 'price of any guarantee' argument proves too much. If any degree of entrenchment-through-narrow-process is licensed by the risk that a fuller process would fail, then GNR imposes no constraint on constituent method at all, and 'never again' reduces to whatever the strongest transitional bloc can entrench. The distinctive claim of constitutional GNR is that *how* a society entrenches its guarantee is part of the guarantee, because an entrenched settlement adopted over the exclusion of a major community writes that community's grievance into the foundation and then removes the ordinary means of addressing it. The self-correction reply concedes the premise it needs to deny: if the settlement genuinely required later inclusive revision, the referendum lock and the validity clause are the two features most calculated to obstruct it.

[50] Judith Heimbach, 'The Interaction Between Transitional Justice and Constitution-Making in a Conflict Setting: Reconciliation in Libya' (2023) 3 Journal of Comparative Law in the Middle East and North Africa 69.

[51] Roznai (n 14); Lutz (n 1) 327–28.

[52] *Implementation Order* (n 5); Riadul Karim, 'Yes Vote to Open Path to Reforms', (*Prothom Alo,* 30 January 2026) <https://en.prothomalo.com/bangladesh/government/kcx1fa4cjn> accessed 22 April 2026

The uncertainty-of-authority reply explains the impulse to entrench without excusing its form. That an interim body reaches for strong devices under uncertain authority is understandable; but the response to uncertain authority that a non-repetition settlement requires is to *broaden* the constituent base so that the settlement can be attributed to the community rather than to a faction, not to narrow it and then seal the result against challenge. Heimbach's Libyan study cuts the other way from the reply it is enlisted to support: her lesson is that *selective* transitional justice tends to spill into *selective* constitution-making, each narrowing the other in a spiral that deepens division.[53] A guarantee framed against a named party, negotiated over the exclusion of that party and of the women's commission, and then entrenched and court-proofed, is the selective-into-selective spiral in constitutional form. The correct inference from transitional uncertainty is not that entrenchment excuses exclusion, but that exclusion plus entrenchment is the most dangerous of the available combinations, because it fixes a contested authority-claim as if it were settled.

The lustration reply is sound for the banned party and unsound as a general defence. There is a coherent militant-democracy rationale for excluding, or conditioning the return of, a party credibly responsible for atrocity; that rationale is doctrinally distinct from erasure and may properly inform a non-repetition settlement. But it does not extend to the exclusion of the women's commission from the constituent body, for which no self-defence rationale exists, nor to the bundling of unrelated constitutional questions, nor to the immunisation of the Charter against judicial review.[54] Those defects are not instances of a constitutional order defending itself; they are instances of the founding settlement insulating itself from scrutiny and from inclusive revision. The militant-democracy frame, invoked to justify the one exclusion for which it fits, cannot be stretched across the others.

The self-correction reply is the most powerful, and it is double-edged in exactly the way Bangladesh's history predicts. Entrenchment locks in whatever was decided at the constituent moment, including its exclusions; and the higher the amendment threshold, the harder it becomes for a later, more inclusive majority to revisit a settlement struck by a narrow founding body. This is the through-line from Part IV. The 2011 eternity clause was defended, too, as a protection of foundational commitments; it functioned as the entrenchment of a contested, party-specific settlement adopted without popular deliberation, and it removed from later majorities the constitutional means of correction. A bundled, court-proofed 'Yes' that binds future governments to the reform agenda as adopted does not cure that pattern; it

[53] Heimbach (n 50).

[54] Hossain (n 5).

constitutionalises it. Entrenchment is a virtue for the substance the Charter gets right and a liability for the exclusions it carries, and the same referendum lock serves both functions indiscriminately.

The self-correction reply also assumes a smoothly functioning Council; the early record is less reassuring. When the Constitution Reform Council was to be convened, several formations—including Jamaat-e-Islami and others—declined the Council oath, and senior counsel argued that the mechanism attaching a second, Council oath to elected members by presidential order was, in substance, without valid legal foundation, describing the instrument as neither ordinance nor law.[55] A self-correcting mechanism whose very convocation is contested at the first opportunity is a thin reed on which to rest the claim that entrenchment's exclusions will be cured downstream. The more the entrenchment holds, the less the correction; and where the correction depends on a body whose own legal footing is in doubt, the reassurance the reply offers is largely notional.

It is worth marking precisely where this argument parts company with the existing commentary. Khan's critique is framed in the register of legitimacy and endurance: the process was insufficiently inclusive to constitute 'the People,' and constitutions built through exclusion endure less well.[56] That is persuasive on its own terms, but it is an argument about the *legitimacy of the process*. The argument here is about the *doctrine of entrenchment*: even granting, for the sake of argument, that the process was as legitimate as a transition allows, the entrenchment mechanism on which the guarantee depends has in Bangladesh reliably converted such settlements into instruments of capture, and the Charter's specific entrenchment devices—the validity clause, the bundled lock, the partisan framing, the selective enforceability—reproduce that conversion in its own text. The two critiques are complementary, but the doctrinal one survives even where the legitimacy one is contested, because it does not depend on a theory of who 'the People' are; it depends only on the observable behaviour of entrenchment in this constitutional order.

The paradox therefore survives the counter-argument in modified form. The realist is right that some entrenchment was unavoidable and that some exclusion may have been defensible; the GNR analyst is right that these particular entrenchment choices—an unreviewable validity clause, a bundled plebiscite, a partisan definition of the wrong and an

[55] On the refusal of the Council oath by several formations and the argument that the Council-oath mechanism was legally unfounded, see the reporting of the parliamentary sittings of March 2026 in Prothom Alo, Dhaka Tribune, and bdnews24. The point here is not to resolve that dispute but to note that the self-correcting mechanism on which the counter-argument relies was itself contested at the first opportunity.

[56] Khan, 'Bangladesh's Broken Constitutional Moment', Parts I–II (n 8).

enforceability line drawn to protect elites rather than citizens—are not the neutral costs of transition but latent grievances now fixed in the foundational order, behind the highest amendment threshold Bangladesh has ever adopted. 'Never again' is weakened, not fulfilled, when it is entrenched by the doctrinal means through which Bangladesh's previous guarantees were captured.

9. Conclusion

Post-July 2024 Bangladesh shows both the promise and the specific limit of constitutional reform as a guarantee of non-repetition. On substance, the July Charter is a genuine attempt to encode 'never again' into durable structure: it disperses appointment power, introduces counter-majoritarian friction through bicameralism and proportional representation, revives the caretaker system and raises the amendment threshold to protect the reformed core. These are the right instruments for the pathology the reform diagnoses.

But the durability those instruments require is supplied by entrenchment, and entrenchment is the point at which Bangladesh's constitutional history turns against the reform. The eternity clause of 2011 and the reversals that began in 1975 show that entrenchment here has been the medium through which contested and partisan settlements were fixed in place and later inherited, rather than dismantled, by their successors. The Charter reproduces the pattern in its own text: a validity clause that seeks to place the foundational instrument beyond judicial review; a bundled plebiscite that entrenches without deliberation; a definition of the wrong framed against a named party; and an enforceability line that entrenches the structural settlement among elites while leaving the population's socio-economic guarantees unenforceable. Each is a way of making the guarantee durable; each is also a way of making its defects durable.

The lesson is not that constitutional GNR is futile, nor that the Charter should not have entrenched. It is that the designers of a non-repetition settlement must treat the *mode of entrenchment* as part of the guarantee itself: what is locked, by whom, and whether the lock can later be opened by inclusive constitutional means. A guarantee against repetition entrenched through the doctrinal form most associated, in that polity, with capture carries the seed of the next rupture within its own foundation. For Bangladesh, whether the settlement of February 2026 becomes a durable 'never again' or a court-proofed 'not them again' will turn less on the elegance of its counter-majoritarian architecture than on whether the excluded the banned party where its return can be safely conditioned, the silenced women's commission, and above all the citizens whose enforceable rights the Charter declined to entrench can be brought back into the constitutional settlement before the referendum lock sets. The paradox is that the very device meant to guarantee the future may be the one that forecloses its correction.

Before Accountability Arrives: Enforced Disappearance, International Law and the Politics of Delay in Bangladesh

Mahia Rahman[*]

Abstract:

Bangladesh's accession to the International Convention for the Protection of All Persons from Enforced Disappearance marked a decisive break from years of official denial. However, accession followed by the lapse of the Enforced Disappearance Prevention and Redress Ordinance 2025 exposed a deeper concern—whether formal treaty acceptance can coexist with the weakening of the domestic framework intended to give it effect. To address the issue, this article investigates Bangladesh's obligations concerning unresolved enforced disappearances and develops the concept of post-accession implementation regression. A qualitative and doctrinal analysis of the ICPPED, the ICCPR, UNCAT, domestic constitutional and statutory frameworks, Commission of Inquiry findings, UN materials and comparative practice identifies the legal consequences of continuing concealment and the principal gaps in criminalisation, investigation, habeas corpus, victim protection, universal jurisdiction and memorialisation. The article argues that the ICPPED cannot ordinarily impose retroactive criminal liability for completed pre-accession conduct; nevertheless, where fate or whereabouts remain concealed, the continuing character of disappearance generates present duties of search, truth, investigation, reparation and non-recurrence. Bangladesh's movement through institutional denial, political rupture, provisional implementation and legislative retrenchment demonstrates that delay is not legally neutral. It can prolong family uncertainty, weaken evidence, preserve institutional control over information and entrench impunity. The article translates the Convention's requirements into domestic pathways, including permanent criminalisation, a dual-track liability model, an independent investigation authority, a National Search Mechanism, effective habeas corpus safeguards, protected archives, enforceable reparation and security-sector reform. Rather than treating disappearance as a single legislative defect, the proposed framework connects prevention, accountability, victim-centred remedies and institutional non-recurrence within one model suited to Bangladesh's post-accession transition and its particular history of institutional denial. Together, these measures provide a transitional architecture of disappearance justice capable of converting accession into durable compliance and preventing enforced disappearance from remaining an available technology of rule in Bangladesh.

Keywords: Enforced disappearance, ICPPED, Post-accession implementation regression, Continuing violations, Bangladesh, Transitional justice, Disappearance justice

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1. Introduction

Bangladesh's accession to the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) marked a decisive break from years of official denial.[1] Yet accession is not itself compliance. The more difficult question is how international law should understand a State that accedes to the ICPPED, begins constructing a domestic accountability framework, and then permits that framework to lapse while numerous disappearances remain unresolved. Bangladesh's recent experience may be understood through four successive phases: institutional denial, political rupture, provisional implementation and legislative retrenchment. This chronology provides the context for examining whether the weakening of a domestic implementation framework after treaty accession can prolong the legal and institutional conditions of enforced disappearance.[2]

This article characterises that process as post-accession implementation regression: a situation in which a State formally accepts an international obligation and initiates domestic implementation, but subsequently allows the resulting legal or institutional protections to weaken, lapse or become ineffective. The argument is not that the ICPPED applies retroactively to all disappearances preceding Bangladesh's accession. Rather, where the fate or whereabouts of a disappeared person remain concealed, the disappearance retains a continuing character and gives rise to present obligations of search, truth, investigation, reparation and non-recurrence.[3] Post-accession implementation regression is therefore particularly consequential: weakening the domestic accountability framework or allowing it to lapse may impede the discharge of those continuing obligations, prolong the uncertainty experienced by families and preserve the institutional concealment through which the disappearance remains unresolved. The problem is therefore not confined to criminalisation, but extends to disappearance justice: a legal order capable of preventing secret detention, locating disappeared persons, protecting families, prosecuting perpetrators, preserving memory and ensuring that enforced disappearance cannot again become a technology of rule.

[1] United Nations Treaty Collection, 'International Convention for the Protection of All Persons from Enforced Disappearance: Status of Treaties' (accessed 17 May 2026).

[2] গুম প্রতিরোধ ও প্রতিকার অধ্যাদেশ, ২০২৫ [Enforced Disappearance Prevention and Redress Ordinance 2025] (Ordinance No 73 of 2025).

[3] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED) arts 12 and 24.

2. The ICPPED Standard and Bangladesh's Temporal Problem

The ICPPED defines enforced disappearance as the deprivation of liberty by state agents, or by persons acting with state authorisation, support or acquiescence, followed by a refusal to acknowledge that deprivation or the concealment of the fate or whereabouts of the person, thereby placing that person outside the protection of law.[4] It prohibits enforced disappearance absolutely, including during war, internal instability or a public emergency.[5] It also requires criminalisation, investigation, superior responsibility, jurisdiction, detention safeguards, truth, reparation and guarantees of non-repetition.[6]

Bangladesh acceded to the ICPPED on 30 August 2024.[7] Accordingly, the Convention was not directly binding during most of the Awami League period or during the July–August 2024 uprising.[8] However, where a person's fate and whereabouts remain concealed, the disappearance has a continuing character.[9] Bangladesh must therefore search for victims, investigate unresolved cases, disclose truth, provide reparations and prevent recurrence.[10] This article does not invoke the Convention to impose retroactive punishment for past conduct; rather, it applies the Convention to Bangladesh's present obligations concerning continuing concealment, institutional impunity and continuing victimhood.[11]

3. Bangladesh's Four Political Phases

During the Awami League period, Bangladesh was not yet a party to the ICPPED, but it was already bound by the ICCPR and UNCAT.[12] The Human Rights Committee expressed concern in 2017 about enforced disappearances, extrajudicial killings, lack of accountability and

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[4] ibid art 2.

[5] ibid art 1.

[6] ibid arts 4–6, 9–12, 17–24.

[7] United Nations Treaty Collection (n 1).

[8] OHCHR, 'Preliminary Analysis of Recent Protests and Unrest in Bangladesh' (16 August 2024).

[9] Nikolas Kyriakou, 'The International Convention for the Protection of All Persons from Enforced Disappearance and its Contributions to International Human Rights Law' (2012) 13 *Melbourne Journal of International Law* 424.

[10] ICPPED arts 12 and 24.

[11] Amnesty International, 'Bangladesh: Signing of Convention on Enforced Disappearances is a much welcome first step' (30 August 2024).

[12] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

absence of truth or redress.[13] The Committee against Torture later treated unacknowledged detention and refusal to disclose fate or whereabouts as conduct capable of amounting to enforced disappearance, even where victims later reappeared.[14] These findings show that the ICPPED did not create Bangladesh's obligations from nothing; it sharpened duties already visible under general human rights law.

Odhikar records 747 alleged enforced disappearances between 2009 and 5 August 2024, including allegations involving RAB, DB police, ordinary police, DGFI and other agencies.[15] It records that 84 victims were found dead, 501 resurfaced alive and 162 remain unaccounted for.[16] Its statement to the Human Rights Council characterised enforced disappearance as a tool for suppressing political opponents and silencing dissent.[17] HRW and FIDH similarly documented patterns of denial, intimidation, political targeting and impunity.[18] The Commission of Inquiry later received more than 1,676 complaints and applied the framework set out in Article 2 of the ICPPED.[19] Its final report identified 1,569 potential enforced-disappearance complaints, 251 persons who never returned or were presumed dead, 36 bodies recovered and at least 287 deaths plausibly associated with disappearance.[20] These are inquiry findings, not judicial determinations, but they show that Bangladesh's problem is institutional rather than episodic.[21]

The July Revolution must be treated with temporal precision. The ICPPED was not yet binding during the crackdown.[22] Yet OHCHR documented serious violations during July–August 2024, including unlawful killings, arbitrary detention, torture and allegations of

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[13] Human Rights Committee, 'Concluding Observations on the Initial Report of Bangladesh' (27 April 2017) UN Doc CCPR/C/BGD/CO/1, paras 19–20.

[14] Committee against Torture, 'Concluding Observations on the Initial Report of Bangladesh' (26 August 2019) UN Doc CAT/C/BGD/CO/1, paras 14–18.

[15] Odhikar, 'Bangladesh: Enforced Disappearances 2009–2024 (AL Govt Period)' (Statistics, updated 2025) 1–2.

[16] ibid.

[17] Odhikar, 'Bangladesh: Government's Use of Enforced Disappearance as a Tool for Suppressing Political Opponents and Silencing Dissent' UN Doc A/HRC/48/NGO/118, 2.

[18] Human Rights Watch, '"Where No Sun Can Enter": A Decade of Enforced Disappearances in Bangladesh' (16 August 2021); FIDH, 'Vanished Without a Trace' (March 2019) 7–8, 48–55.

[19] Commission of Inquiry on Enforced Disappearances, 'Interim Report' (Dhaka, 14 December 2024) 10–12.

[20] Commission of Inquiry on Enforced Disappearances, 'Unfolding the Truth: A Structural Diagnosis of Enforced Disappearance in Bangladesh' (Final Report, 2026) 35–39, 62–64.

[21] ibid 44–45.

[22] United Nations Treaty Collection (n 1).

enforced disappearance.[23] Odhikar similarly described mass repression, arrests, torture and disappearance-related conduct against protesters.[24] The legal point is therefore not retroactivity. The July Revolution created the political and evidentiary rupture through which post-accession duties of truth, search, investigation and reparation became unavoidable.[25]

The interim government marked a clear break from denial. OHCHR welcomed accession and the Commission of Inquiry.[26] The WGEID recognised Bangladesh's acknowledgement after years of denial, but identified victim fear, institutional non-cooperation, alleged perpetrators remaining within security institutions, weak witness protection and the need to align domestic law with Articles 2 and 24.[27] Odhikar also recognised progress, while continuing to call for criminalisation, prosecution, reparation, NHRC reform and security-sector accountability.[28]

The current BNP-led government inherited this incomplete architecture after the February 2026 election.[29] The central legal problem is the lapse of the Enforced Disappearance Prevention and Redress Ordinance 2025.[30] The Ordinance was Bangladesh's first direct attempt to translate the ICPPED into domestic law through provisions on the definition of the offence, jurisdiction, investigation, tribunals, victim protection, compensation, database creation and confidentiality.[31] However, the official legal record states that it lapsed under Article 93(2) of the Constitution.[32] The government's position is that a stronger bill will follow, but Article 4 cannot be satisfied by a promise of future legislation.[33] Victims' representatives warned that the lapse removed the domestic legal definition of enforced disappearance, while outgoing NHRC commissioners warned that government forces may again investigate

[23] OHCHR (n 8); OHCHR, 'Human Rights Violations and Abuses Related to the Protests of July and August 2024 in Bangladesh' (12 February 2025).

[24] Odhikar, 'Three-Month Human Rights Report: July–September 2024' (14 November 2024) 5.

[25] ICPPED arts 12 and 24.

[26] OHCHR, 'Update on UN Human Rights Office work in Bangladesh' (30 August 2024).

[27] WGEID, 'Technical Advice on Bangladesh' (25 June 2025) paras 6–7, 39–42, 50–58.

[28] Odhikar, 'Annual Human Rights Report 2024' (10 February 2025) 4, 22–23, 30–31, 52; Odhikar, 'Annual Human Rights Report 2025' (4 February 2026) 18–20, 52–53.

[29] 'Tarique Rahman sworn in as Bangladesh's PM after landslide election victory' *Reuters* (17 February 2026).

[30] Enforced Disappearance Prevention and Redress Ordinance 2025 (n 2).

[31] ibid.

[32] 'Enforced Disappearance: Ordinance Flawed, There Will Be a Stronger Bill' *The Daily Star* (Dhaka, 6 April 2026) <https://www.thedailystar.net/news/bangladesh/news/enforced-disappearance-ordinance-flawed-there-will-be-stronger-bill-4144641> accessed 15 May 2026.

[33] ibid.

allegations against themselves.[34] This legal vacuum goes to the heart of Bangladesh's compliance with the ICPPED.

4. The Core Compliance Gaps

4.1 Criminalisation and Investigation

Article 4 requires enforced disappearance to be an offence under domestic criminal law.[35] Ordinary offences such as abduction, kidnapping, wrongful confinement, murder or torture may capture fragments of harm, but not the distinctive structure of disappearance: state involvement, denial, concealment and removal from legal protection.[36] This is why the CAT Committee specifically recommended that Bangladesh criminalise enforced disappearance as a distinct offence.[37] The lapsed Ordinance recognised this need, but its expiry returned Bangladesh to legal uncertainty.[38] The problem is sharpened by the fact that the International Crimes Tribunal can address mass disappearances amounting to crimes against humanity, but not isolated cases of enforced disappearance.[39] If enforced disappearance is recognised only as an international crime, individual cases may fall outside ordinary criminal accountability.[40] A future statute must therefore incorporate Article 2, recognise continuing disappearance, include superior responsibility, remove limitation barriers, prohibit amnesties and "good faith" immunities, and cover intelligence agencies even where they possess no formal arrest power.[41] It should criminalise orders, authorisation, support, acquiescence and concealment, because disappearance is normally produced through chains of custody, bureaucratic silence and institutional denial.[42]

[34] ibid; 'Ordinance Repeal Puts Disappearance Victims, July Fighters at Risk' *The Daily Star* (Dhaka, 13 April 2026) <https://www.thedailystar.net/news/bangladesh/news/outgoing-nhrc-commissioners-warn-legal-vacuum-after-ordinance-repeal-4150741> accessed 15 May 2026.

[35] ICPPED art 4.

[36] ibid art 2; Declaration on the Protection of All Persons from Enforced Disappearance, UNGA Res 47/133 (18 December 1992) arts 4 and 17.

[37] CAT Concluding Observations (n 14) paras 14–18.

[38] Enforced Disappearance Prevention and Redress Ordinance 2025 (n 2).

[39] 'Ordinance Repeal Puts Disappearance Victims' (n 34).

[40] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 7(1)(i).

[41] ICPPED arts 2, 4 and 6; Commission of Inquiry, Final Report (n 20) 44–45.

[42] UN Working Group on Enforced or Involuntary Disappearances, 'General Comment on Enforced Disappearance as a Continuous Crime' in 'Report of the Working Group on Enforced or Involuntary Disappearances' (26 January 2011) UN Doc A/HRC/16/48, para 39.

In addition, Article 12 requires prompt, thorough and impartial investigation wherever there are reasonable grounds to believe that enforced disappearance occurred.[43] In Bangladesh, the problem is a structural conflict of interest. Odhikar attributes alleged disappearances to RAB, DB police, ordinary police, DGFI and other agencies.[44] The Commission identifies a security architecture involving police, RAB, DB, CTTC, DGFI, NSI and BGB.[45] A disappearance regime cannot be credibly investigated by agencies structurally connected to the practice. The CAT Committee recommended independent investigation of unacknowledged detention, disappearance and death in custody.[46] The WGEID warned of victim fear, institutional non-cooperation and alleged perpetrators remaining within police, military and intelligence bodies.[47] In *Radilla-Pacheco v Mexico*, the Inter-American Court rejected military or internal jurisdiction for enforced disappearance involving security forces.[48] Bangladesh therefore needs an independent disappearance investigation authority or special prosecutor-led mechanism with the power to subpoena documents, inspect detention sites, access intelligence records, protect witnesses, preserve evidence and refer cases for prosecution.[49]

4.2 Habeas Corpus and Secret Detention

Next, another gap lies in habeas corpus and secret detention. Article 102 of the Constitution empowers the High Court Division to examine unlawful detention.[50] However, enforced disappearance exposes the limits of ordinary habeas corpus because its defining feature is official denial. If the State denies custody and no central detention register exists, the court is forced to adjudicate in a factual vacuum. In *Velásquez Rodríguez*, habeas petitions

[43] ICPPED art 12; Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, paras 15 and 18.

[44] Odhikar (n 15) 1–2.

[45] Commission of Inquiry, Final Report (n 20) 44–45.

[46] CAT Concluding Observations (n 14) paras 16–18.

[47] WGEID, 'Technical Advice' (n 27) paras 39–42, 50–58; UN OHCHR, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016) paras 22–25.

[48] *Radilla-Pacheco v Mexico* Inter-American Court of Human Rights Series C No 209 (23 November 2009).

[49] *El-Masri v The Former Yugoslav Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012) paras 191–93.

[50] Constitution of the People's Republic of Bangladesh 1972, art 102(2)(b)(i); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA Res 43/173 (9 December 1988) principles 11, 12, 15, 16 and 32.

failed because state authorities concealed the victim's fate and whereabouts.[51] The relevance to Bangladesh is direct: a writ remedy exists, but it becomes ineffective where agencies deny having made an arrest, transfer victims through unofficial locations or produce them later in ordinary proceedings. The fact that victims reappear does not erase the prior disappearance.[52] Articles 17–22 therefore require Bangladesh to prohibit secret detention, maintain a central detainee register, require that families be notified immediately, guarantee access to lawyers and doctors, preserve custody logs and punish false denials.[53] Habeas corpus must become an evidentiary tool against denial, not merely a formal writ against admitted custody.

4.3 Victims, Jurisdiction and Memory

Another gap concerns victims. Article 24 defines a victim broadly and recognises the rights to know the truth and to obtain reparation and compensation.[54] This matters because enforced disappearance injures not only the person taken, but also the family left in suspended uncertainty. In *Quinteros*, the Human Rights Committee recognised the anguish of the mother of a disappeared person as a violation in itself.[55] In *Sarma*, a case concerning Sri Lanka, the Committee similarly treated family suffering as legally relevant.[56] Odhikar's recommendations therefore fit the Article 24 framework: disclosure of fate, legal arrangements allowing spouses and children to manage bank accounts and property, withdrawal of false charges against survivors and prosecution of responsible persons.[57] A family should not have to declare a disappeared person dead simply to access inheritance, guardianship, pension, banking or property rights.[58] Nor should resurfaced victims remain burdened by fabricated cases or coerced confessions generated during disappearance.[59]

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[51] *Velásquez Rodríguez v Honduras* Inter-American Court of Human Rights Series C No 4 (29 July 1988); *Varnava and Others v Turkey* App nos 16064/90 and others (ECtHR, 18 September 2009) paras 148–49.

[52] *Yrusta v Argentina*, Communication No 1/2013, UN Doc CED/C/10/D/1/2013.

[53] ICPPED arts 17–22.

[54] ibid art 24.

[55] *Quinteros v Uruguay*, Communication No 107/1981, UN Doc CCPR/C/19/D/107/1981.

[56] *Jegatheeswara Sarma v Sri Lanka*, Communication No 950/2000, UN Doc CCPR/C/78/D/950/2000.

[57] Odhikar, 'Statement on the International Week in Remembrance of the Victims of Enforced Disappearances' (May 2025).

[58] Basic Principles and Guidelines on the Right to a Remedy and Reparation, UNGA Res 60/147 (16 December 2005) paras 18–23.

[59] *Mariam Sankara et al v Burkina Faso*, Communication No 1159/2003, UN Doc CCPR/C/86/D/1159/2003 (Human Rights Committee, 28 March 2006), paras 12.2–12.3.

Moreover, there is a gap concerning universal jurisdiction and extradition. Articles 9–11 require jurisdiction where the offence occurs in the State's territory, where the alleged offender is a national, and where the alleged offender is present and not extradited or surrendered.[60] This creates a treaty-based form of presence jurisdiction, supported by the principle of *aut dedere aut judicare*.[61] Bangladesh's future law must ensure that alleged perpetrators cannot avoid accountability by leaving the country. It must also preserve files, custody records, witness statements and Commission archives in a form usable for mutual legal assistance and foreign proceedings. The WGEID's study on universal criminal jurisdiction recommends autonomous criminalisation, specialised units, evidence-sharing, victim participation and removal of amnesty, limitation and immunity barriers.[62] Orentlicher's principles similarly treat archives, prosecution, extradition and international cooperation as components of efforts to combat impunity.[63]

The final gap is memory. Enforced disappearance is a crime of erasure: it removes the victim from the legal order and attempts to remove the event from the public record. Salvioli describes memorialisation as a fifth pillar of transitional justice.[64] The WGEID specifically recommended that Bangladesh preserve Commission archives, publish reports in Bengali and design places of memory, including at former detention sites where appropriate.[65] This is significant because alleged secret detention sites such as *Aynaghar* have become part of the public vocabulary of disappearance.[66] Memorialisation should include a public victims' register, preservation of detention-site evidence, public education, public access to Commission findings and consultation with families. Argentina's *Nunca Más* experience shows how truth reports, archives, prosecutions and memory may reinforce each other.[67] Nepal shows that family-led memorialisation may preserve truth where formal transitional justice is

[60] ICPPED arts 9–11.

[61] ibid art 11.

[62] WGEID, 'Universal Criminal Jurisdiction in Cases of Enforced Disappearance' UN Doc A/HRC/60/CRP.2 (2025).

[63] Diane Orentlicher, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' UN Doc E/CN.4/2005/102/Add.1, principles 19–30; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, paras 94–95.

[64] Fabián Salvioli, 'Memorialization Processes' UN Doc A/HRC/45/45 (9 July 2020).

[65] WGEID, 'Technical Advice' (n 27) paras 47–48, 61–62; *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 219 (24 November 2010) paras 211–12, 228–29.

[66] SMY Arafat and others, 'Aynaghar ("House of Mirrors")' (2026) 36(1) *Torture* 21.

[67] Emilio Crenzel, *Memory of the Argentina Disappearances* (Routledge 2011).

delayed.[68] For Bangladesh, memory is part of repairing the legal and social disappearance produced by the crime itself.[69]

5. Overcoming the Gaps: A Transitional Architecture of Disappearance Justice

The way forward is not to treat enforced disappearance as a single legislative defect curable by one criminal provision. Bangladesh needs a transitional architecture of disappearance justice, integrating prevention, search, investigation, prosecution, reparation and memory.

5.1 Permanent Criminalisation and the Search Function

First, Bangladesh should enact a permanent Enforced Disappearance Prevention and Redress Act. The new law should preserve the Ordinance's core premise—that Bangladesh needs a dedicated disappearance statute—while improving its alignment with the Convention.[70] It should adopt the ICPPED definition, recognise enforced disappearance as a continuing offence, include superior responsibility, and criminalise participation through orders, support, acquiescence, concealment and obstruction.[71] It should not make disappearance dependent on proof of death; the offence is complete when liberty is denied, custody is concealed and the person is placed outside legal protection.[72] Nor should accountability depend only on the crimes-against-humanity threshold. Article 5 recognises widespread or systematic disappearance as a crime against humanity, but Article 4 separately requires ordinary criminalisation.[73] Bangladesh therefore needs a dual-track model: ordinary criminal liability for individual disappearances, and liability for international crimes where the practice becomes widespread or systematic.

Secondly, Bangladesh must separate search from prosecution without disconnecting them. The CED Guiding Principles require immediate search, family participation, preservation of evidence and coordination with criminal investigation.[74] Families need truth even where prosecutions are delayed; prosecutors need evidence that search bodies may

[68] Ram Kumar Bhandari, 'Formal but Local Transitional Justice' (2025) 17(3) *Journal of Human Rights Practice* huae038.

[69] UNESCO, 'The Right to Memory: Archives and Human Rights' (2015) 7–10.

[70] Enforced Disappearance Prevention and Redress Ordinance 2025 (n 2).

[71] ICPPED arts 2, 4 and 6.

[72] ICPPED art 2; *Yrusta* (n 52).

[73] ICPPED arts 4 and 5.

[74] Committee on Enforced Disappearances, 'Guiding Principles for the Search for Disappeared Persons' UN Doc CED/C/7, principles 1–5, 7, 11 and 13.

uncover. Bangladesh should create a National Search Mechanism with authority to inspect suspected detention sites, access prison and police registers, examine intelligence-linked custody records, collect DNA samples, coordinate forensic identification and maintain a central database. The Commission's files, witness statements, site visits and institutional findings should be preserved in a protected archive and transferred, where appropriate, to prosecutors.[75] A commission that only produces a report may create acknowledgement; a commission whose evidence is preserved and used in investigations may create accountability.

5.2 Custody Safeguards and Effective Habeas Corpus

From the custodial perspective, Bangladesh must make habeas corpus effective against denied custody. The High Court should be able to order the production of detention registers, summon agency heads, direct the independent inspection of suspected detention sites and sanction false affidavits.[76] The point is not to replace criminal investigation with constitutional litigation. Rather, it is to prevent the first hours and days of secret detention from becoming legally invisible. Habeas corpus must operate not only after detention is admitted, but as a judicial mechanism for piercing denial.

5.3 Reparation, Jurisdiction and Non-Recurrence

In terms of reparation, Bangladesh's law must anticipate cross-border accountability. Articles 9–11 require jurisdiction where an alleged offender is present and not extradited or surrendered.[77] This matters where suspects flee, evidence is transferred or witnesses relocate. Bangladesh should draft the new Act with extradition and mutual legal assistance in mind, preserve the chain of custody for Commission materials, digitise archives and allow cooperation with foreign prosecutors where jurisdictional conditions are satisfied.[78] Universal jurisdiction should not be imagined as a foreign substitute for domestic justice; it changes incentives by making disappearance unsafe beyond borders.

Additonally, reparation must be enforceable rather than discretionary. Article 24 requires truth, reparation and compensation, but reparation should include restitution, rehabilitation, satisfaction, psychosocial support, legal aid, educational support for children, official apologies, correction of records and removal of false charges.[79] Victim participation

[75] Commission of Inquiry, Interim Report (n 19) 42–44.

[76] Constitution of Bangladesh (n 50) art 102(2)(b)(i); ICPPED arts 17–22.

[77] ICPPED arts 9–11.

[78] WGEID, 'Universal Criminal Jurisdiction' (n 62).

[79] ICPPED art 24.

must be central. Families should participate in designing the statute, search mechanism, memorialisation process and reparation scheme. The WGEID's victim-centred approach reflects the point that victims are rights-holders, not beneficiaries of state charity.[80]

Finally, institutional non-recurrence requires security-sector reform. Bangladesh must review the mandates of RAB, DGFI, NSI, DB and other agencies implicated in disappearance allegations; prohibit intelligence bodies from detaining civilians; require inspections of detention sites; strengthen the NHRC under the Paris Principles; and enact witness and human-rights-defender protection laws.[81] Comparative practice supports this architecture. Sri Lanka shows the value of a humanitarian missing-persons body; Mexico shows the danger of fragmented search and weak forensic capacity; Colombia shows the value of separating truth, justice, reparation, search and non-repetition; and the Philippines provides an Asian statutory model for criminalisation and compensation.[82] Bangladesh should borrow from these examples without transplanting them mechanically.[83] Its model must respond to its own history: disappearance as a state-security practice, denial as a governing technique and families as the first custodians of truth.

6. Conclusion

Bangladesh has not yet fully complied with its obligations under the ICPPED. The Awami League period produced the legacy of alleged institutionalised disappearance; the July Revolution made continued denial politically untenable; the interim government began constructing the architecture of compliance; and the current BNP-led government faces the decisive test of whether that architecture will be strengthened or diluted. The lapse of the 2025 Ordinance exposes the central contradiction of Bangladesh's ICPPED posture: formal accession without stable disappearance justice. It therefore exemplifies post-accession implementation regression: formal acceptance of the Convention followed by the weakening of the domestic framework intended to give it effect. Compliance requires more than a new

[80] WGEID, 'Technical Advice' (n 27) paras 39–42.

[81] Odhikar, 'Annual Human Rights Report 2025' (n 28) 52–53.

[82] International Convention for the Protection of All Persons from Enforced Disappearance Act, No 5 of 2018 (Sri Lanka); Vishakha Wijenayake, 'The Office on Missing Persons in Sri Lanka' (2017) 99(905) International Review of the Red Cross 641; Committee on Enforced Disappearances, 'Report on its Visit to Mexico' UN Doc CED/C/MEX/VR/1 (18 May 2022); Final Agreement between Colombia and the FARC-EP (24 November 2016); Anti-Enforced or Involuntary Disappearance Act of 2012, Republic Act No 10353 (Philippines).

[83] Alison Bisset, 'Transitional Justice in Nepal: The Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014' (2014) 13(1) Chinese Journal of International Law 149.

offence. It requires a legal order in which no person can be secretly detained, no family is left without truth, no agency investigates itself, no archive disappears and no future government can inherit enforced disappearance as an available technology of rule.

Critical Analysis of the Right to Education for Rohingya Refugees: Bridging Customary International Law and Domestic Legal Frameworks in Bangladesh

Md Sakib Khondoker*

Abstract

The Right to Education is a fundamental human right guaranteed for all by the standards and principles set out under the leading international instruments, including the Universal Declaration of Human Rights and the International Covenant of Economic, Social and Cultural Rights. However, despite being an international custom, education is a mere directory provision under the constitution of Bangladesh and is judicially unenforceable. While citizens of the country face difficulties in accessing education, it becomes more challenging to ensure this right for the Rohingya refugees living in miserable conditions. In such context, the primary objective of this research is to identify the challenges to providing education to refugees under the legal framework of Bangladesh. Consequently, the central question of this article is how Bangladesh's national laws address these challenges in accordance with the International Refugee Law. The research hypothesized that the core reasons behind such challenges are the need for specialized law, policy restrictions, and not adopting international standards of the Refugee Convention. In order to address the question and to test the hypothesis, the article analyzes the factors deriving the challenges behind providing education to the Rohingyas within the ambit of the legal framework of Bangladesh by applying a doctrinal, analytical and qualitative methodology. Based on this critical analysis, the research recommends Bangladesh act consistently with international standards to ensure this basic human rights component by enacting a specialized law to govern the issues related to the refugees, withdrawing restriction policies on their education and adopting the Refugee Convention.

Keywords: Right to education, Rohingya, Refugee education, International Refugee Law.

1. Introduction

The Right to Education is an essential yet challenging for vulnerable populations, including refugees. This research sheds light on the legal challenges to access education in the Rohingya context of Bangladesh. The introductory chapter provides a brief overview of the importance of the right in the context of Rohingya crisis in Bangladesh. In addition, this chapter includes the central research question, literature review, and the scope and methodology of the research. The article is divided into five chapters. After the introduction (section 1), the status of the Right to Education will be scrutinised under the refugee legal framework (section 2) by

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exposing the challenges in the Rohingya context (section 3). Then, appropriate solutions will be recommended (section 4) before drawing the conclusion (section 5).

1.1 Importance of Right to Education

Education plays a crucial role in uplifting individuals from impoverished conditions and addressing social inequalities. It is a fundamental human right and indispensable for exercising other human rights.[1] The importance of the Right to Education is widely recognized by the principles set out under the leading international instruments. But it is difficult to determine that the right has been ensured for all.[2] There are still 244 million children worldwide who are not attending school due to multiple factors.[3] Hence, Education holds a paramount position in the Education 2030 Agenda of UNESCO due to its recognition as an inherent human right and fundamental bedrock for fostering peace with the ultimate goal of guaranteeing inclusive and equitable learning opportunities for all individuals, including refugees.[4] In 2018, the global refugee population reached 25.9 million, with over half of them being individuals under the age of 18.[5]

1.2 Background of Refugee Crisis in Bangladesh

A refugee is someone unable or unwilling to return to their origin due to fear of persecution based on race, religion, nationality, social group, or political opinion.[6] The Rohingya refugees, a Muslim ethnic minority group originally belonging to Myanmar, are the world's largest stateless population.[7] Myanmar passed a citizenship law in 1982 depriving the Rohingyas of

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1 'What You Need to Know about the Right to Education' (*UNESCO*, April 20, 2023) <https://www.unesco.org/en/articles/what-you-need-know-about-right-education> accessed 1 November 2023.

2 Sarah Elizabeth Dryden-Peterson, 'Refugee Education: The Crossroads of Globalization' (Harvard Library, 2016) <https://dash.harvard.edu/handle/1/30194044> accessed 1 December 2023.

3 'The Right to Education' (UNESCO, December 12, 2023) <https://www.unesco.org/en/right-education>.

4 Rolla Moumne and Sakai Leticia, 'Protecting the Right to Education for Refugees' (2017) United Nations Educational, Scientific and Cultural Organization <https://unesdoc.unesco.org/ark:/48223/pf0000251076> accessed 12 November 2023.

5 Sarah Dryden- Peterson and Hania Marien, 'Part VI Refugee Rights and Realities Ch 54 The Right to Education' in Cathryn Costello, Michello Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OSAIL 2021)

6 Convention Relating to the Status of Refugees 1951, art 1 (A) (2).

7 'Rohingya Refugee Crisis Explained' (*USA for UNHCR*, 23 August 2023) <https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/ > accessed 17 October 2023.

their nationality.[8] Rohingyas have suffered decades of violence and discrimination including limitations on their movement, physical assaults, unjustifiable arrests, custodial torture, sexual violence and gang rape by the military coup in Myanmar. These acts have been categorized as a clear instance of ethnic cleansing by the OHCHR chief.[9] With over 960,000 refugees in Bangladesh, the majority are children, and support to host communities is essential for peaceful coexistence.[10] A study by a Harvard professor on refugee education from World War II to the present reveals refugee children find themselves in a predicament where they are torn between the worldwide commitment to uphold the rights of all individuals.[11]

1.3 Central Research Question

The Rohingya refugee crisis in Bangladesh is intensifying, as the country grapples with the challenge of accommodating 1 million refugees. Consequently, Rohingya children often have limited access to education[12] and the right remaining unfulfilled[13] making the central research question of this article - how does Bangladesh's national legal framework address challenges to ensure the Right to Education for Rohingya Refugees? To address this primary question, it is necessary to discover the following sub-questions: first, how is the Right to Education guaranteed under the national legal framework of Bangladesh? And, second, to what extent do Bangladeshi laws follow the International Refugee Law standards in terms of the Right to Education?

1.4 Literature Review

The primary literature for this research is the International Conventions related to the Right to Education and the rights of the refugees. In addition, another source of primary literature is the relevant domestic laws of Bangladesh dealing with education right of the refugees and case

[8] 'The Rohingya Crisis: Explained' (*Save the Children*) <https://www.savethechildren.org/us/what-we-do/emergency-response/rohingya-crisis> accessed 3 November 2023.

[9] Noor Nanji, 'UN Secretary-General urges end to Rohingya violence' *The National News* (Abu Dhabi, 14 September 2017) accessed 22 December 2023.

[10] 'Rohingya Refugee Crisis' (*UNICEF*) <https://www.unicef.org/bangladesh/en/rohingya-refugee-crisis> accessed 7 November 2023.

[11] Sarah Elizabeth Dryden-Peterson, 'Refugee Education: The Crossroads of Globalization' (Harvard Library, 2016) <https://dash.harvard.edu/handle/1/30194044> accessed 1 December 2023.

[12] M Mahruf C Shohel, 'Education in Emergencies: Challenges of Providing Education for Rohingya Children Living in Refugee Camps in Bangladesh' (2020) 13(1) Education Inquiry 104.

[13] Jobair Alam, 'The Status and Rights of the Rohingya as Refugees under International Refugee Law: Challenges for a Durable Solution' (2020) 19 Journal of Immigrant & Refugee Studies 128.

precedents. For further interpretation, the study relies on secondary sources including scholarly write-ups, reports of UN agencies and others.

UDHR[14] and ICESCR[15] have guaranteed the Right to Education for all without any discrimination. Though these soft laws do not have any binding effect, over the years these documents have gained the status of CIL.[16] 155 countries of the world made education mandatory in their respective jurisdictions.[17] This right has also been particularly upheld for the refugees in the CSR and PSR,[18] but neither Bangladesh is not a party to these conventions[19] nor it has any specific law.[20] Stephen Knight[21] and Beiter[22] argues that the right to education qualifies as a customary norm of international law, referring its application at the regional level and judicial decisions. Furthermore, de la Vaga argues the bindingness of this right on the governments[23] in light of a US Supreme Court Decision.[24]

Article 17 of the Constitution directs the state to take effective measures to ensure the Right to Education.[25] However, it is a mere recommendary provision for the government for not having any judicial enforceability.[26] Bangladesh's RRRC Commissioner denied the opportunities for higher education for Rohingya people because of their non-citizenship.[27] The

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[14] Universal Declaration of Human Rights, art 26.

[15] The International Covenant on Economic, Social and Cultural Rights, art 13.

[16] Constance de la Vega, 'The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?' (1994) 11 (1) Harvard Blackletter Law Journal, 24.

[17] 'What You Need to Know about the Right to Education' (n 1).

[18] The Convention Relating to the Status of Refugees, art 22(1).

[19] *Refugee and Migratory Movements Research Unit (RMMRU) vs. Government of Bangladesh* (2020) 72 DLR 402.

[20] Ashraful Azad, 'Foreigners Act and the Freedom of Movement of the Rohingyas in Bangladesh' (2017) 5 Griffith Journal of Law and Human Dignity 183.

[21] Stephen Knight, 'Proposition 187 and international human rights law: Illegal discrimination in the right to education' (1995) 19 (1) Hastings International and Comparative Law Review, 183.

[22] Klause D Beiter, *The Protection of the Right to Education by International Law* (Brill 2006).

[23] Constance de la Vega, 'The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?' (1994) 11(1) Harvard Blackletter Law Journal, 24.

[24] *San Antonio Independent School District v. Rodriguez* (1973) 411 US 1.

[25] Constitution of the People's Republic of Bangladesh 1972, art 17.

[26] Shakhawat Liton, 'How the Controversial 15th Amendment Curtailed People's Power' *The Daily Star* (Dhaka, 12 September 2012) <https://www.thedailystar.net/news/how-the-controversial-15th-amendment-curtailed-peoples-power> accessed October 15, 2023.

[27] Kamruzzaman., 'Lack of Higher Education Fuels Frustrations Among Rohingya in Bangladesh.' (*Anadolu Agency*, 24 Mar. 2023, <www.aa.com.tr/en/asia-pacific/lack-of-higher-education-fuels-frustrations-among-rohingya-in-bangladesh/2854805> accessed 29 November 2023.

policies implemented by the government also reaffirm this statement.[28] On contrary, Jobair Alam that states can protect refugee rights through their constitutions, challenging Hobbes' theory that states only protect citizens,[29] mentioning The Supreme Court of Bangladesh adopting the CPR principle.[30] This research investigates legal provisions, policies, and implementation, contributing to the discourse on refugee education and human rights, providing insights for policymakers and advocates by responding to rohingya's urge- "Are We Not Humans?"[31]

1.5 Scope and Methodology of the Research

This research aims to assess the Right to Education in Bangladesh's legal framework and its alignment with International Refugee Law in the context of the Rohingya refugee crisis. It will analyze specific legislation and policies to address the Rohingya education issue in Bangladesh, identifying gaps and challenges. Discussions of other country's laws, supplementary rights, or diplomatic dialogue are beyond the scope but will provide a limited perspective. Furthermore, it is important to acknowledge the limitations of this paper, as a single study cannot comprehensively cover every legal dimension of the crisis. Specifically, this research explicitly excludes and does not fall under the frameworks of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) or the Convention on the Rights of the Child (CRC). Instead, the theoretical framework is firmly and exclusively defined by Customary International Law (CIL). The core focus and legal nexus of this study are demonstrated strictly from the perspective of CIL.

The research follows a doctrinal, analytical and qualitative methodology. This desk-based research will examining primary and secondary sources such as international treaties, national laws of Bangladesh, case studies, and discussions with renowned global scholars in prestigious journals, including books, edited books, articles, and newspapers. The research hypothesizes that although Bangladesh's national legal framework acknowledges the Rohingya refugees' right to education to some extent, it is not consistent with the International Refugee Law.

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[28] Guidelines on Informal Education Programming (GIEP) for Children of Forcibly Displaced Myanmar Nationals (FDMN) in Bangladesh.

[29] Frances Nicholson and Judith Kumin, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No 27* (Inter-Parliamentary Union and UNHCR, 2017) 34, 261.

[30] *Refugee and Migratory Movements Research Unit (RMMRU) vs. Government of Bangladesh* (n 19).

[31] 'Are We Not Human? Denial of Education for Rohingya Refugee Children in Bangladesh' (*Human Rights Watch,* 3 December 2019) <https://www.hrw.org/report/2019/12/03/are-we-not-human/denial-education-rohingya-refugee-children-bangladesh> accessed 1 December 2023.

Specifically, despite having an obligation under the CIL and scope under Constitution, the absence of concentrated legislation, policy restrictions, and not adopting the Refugee Conventions are the causes of the inconsistencies. While this paper relies strictly on a CIL framework, it is acknowledged that other scholars employ alternative theoretical models to examine this issue. For instance, recent scholarship utilizes an intersectional analysis—specifically, an intersectional gender analysis—to highlight the unique, overlapping vulnerabilities present in Rohingya girls' education.

2. Status of Right to Education under Refugee Law Framework

Though universally guaranteed, the status of Right to Education varies in different jurisdiction. Specifically, it has been challenging to argue that a refugee is equally entitled to the Right to Education like any other person. To identify exactly where the refugee's right to education belongs, this chapter will discuss the International Refugee Law framework with regard to the Right to Education and then it will explore the National Legal Framework of Bangladesh. Finally, a sub-chapter will be dedicated to scrutinizing the nexus of Domestic Law and International Law.

2.1 International Law

The Right to Education is a fundamental human right guaranteed for all by the standards set out in UDHR AND ICESCR. Article 26 of the UDHR states that "Everyone has the right to education in the elementary and fundamental stages, and it shall be equally accessible to all on the basis of merit."[32] UDHR is one of the pioneer documents in the field of human rights advocacy. In 2023, 75 years of UDHR has been globally celebrated. But the question remains whether this instrument has actually succeeded. Attention to the wording of the above-mentioned article indicates that the UDHR has not made any dividends in terms of guaranteeing the right. Education shall be compulsory but in reality, that is not the case.

Another leading instrument ICESCR, in Article 13 (1), ensures widespread practice of Right to Education despite being a soft law.[33] Education aims to develop human personality, appreciate dignity, respect human rights, and fundamental freedoms, empowering individuals to engage in a democratic society. It fosters mutual understanding among diverse nations and contributes to the United Nations' efforts in global peace and stability.[34]

[32] Universal Declaration of Human Rights (n 14) art 26.

[33] International Covenant of Economic, Social and Cultural Rights, art 13 (1).

[34] ibid.

Two instruments discussed above specifically mention that the Right to Education shall be accessible to all regardless of any class dividend and discrimination, and apparently, it extends to the refugees too. However, there is specific instruments upholding the education rights of the refugees. Protection for the refugees is globally ensured through two international instruments: the 1951 Refugee Convention and its 1967 Protocol.[35] Article 22 (1) of the CSR reads, the states shall equally provide education the refugees and its nationals.[36] Though this provision specifically guarantees the education rights of the refugees, unfortunately, Bangladesh is not a party to this convention.

2.2 National Law

Before discussing the status of refugee education in Bangladesh, it is important to understand the status of the right to education in the country in general. Article 17 of the Constitution guarantees fundamental education to all individuals[37] with a non-discriminatory education policy ensuring a uniform curriculum across the country.[38] However, the stateless refugees are not encompassed within the scope of the national education policy.[39] Numerous scholars have engaged in the discourse surrounding the notion that the aforementioned attitude exhibits inherent self-contradiction.[40] This contradiction arises when a State, in accordance with the principle of non-refoulement, permits stateless refugees to remain within its territorial boundaries yet concurrently imposes restrictions on their access to state services.[41] The regulation of refugee matters in the country has been governed by the FA, exposing the absence of a dedicated legal framework addressing the Rohingya Crisis.[42] While refugees have obligations to comply with existing laws and regulations towards their host country,[43] they are

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[35] Jobair Alam, 'Refugee Protection Under the Constitution of Bangladesh: The Rohingya Refugees in Context' in M Rafiqul Islam and Muhammad Ekramul Haque (eds), *The Constitutional Law of Bangladesh.* (Springer Nature Singapore 2023) 283.

[36] The Convention Relating to the Status of Refugees 1951, art 22 (1).

[37] The Constitution of the People's Republic of Bangladesh, art 17.

[38] Umme Habiba Fahmina Karim, 'No Education – Lost Generation: The Right to Education of Stateless Rohingyas in Bangladesh' (*INCLUSIVE CITIZENSHIP & HUMAN RIGHT*, 15 June 2023) <https://doi.org/10.25133/jpssv312023.042> accessed December 3, 2023.

[39] ibid.

[40] Umme Habiba Fahmina Karim, 'Refugee Education in Bangladesh: A Nation-State Paradox' (2023) 31 Journal of Population and Social Studies 762.

[41] ibid.

[42] Azad (n 20).

[43] Convention Relating to the Status of Refugees 1951 (entered into force April 22, 1954) 189 UNTS 150, art 2.

also entitled to different rights during the asylum application process or after gaining refugee status.[44] However, in all cases, general human rights law applies to all refugees, including the right to education.[45]

2.3 Nexus of Domestic Law and International Law

As a sign of its constitutional commitment to human rights, Bangladesh ratified the ICESCR in 1998.[46] But the country is still far behind in exercising its rights and carrying out its obligations under the ICESCR, as the review study of NHRC shows.[47]

Bangladesh operates under a dualist system,[48] meaning treaties do not have self-executing status within the country's domestic legal sphere.[49] Bangladesh's government is not legally obligated to fulfill responsibilities outlined in international treaties until they are formally integrated into the country's domestic legal framework.[50] The government's responsibility remains until the provisions are incorporated into the domestic legal framework.[51] Hence, despite being a party to UNHCR EC, Bangladesh may not feel obligated to comply with CPR and PSR, but here CIL and the Constitution may come into play.[52] The Constitution places significant importance on fostering international peace and collaboration, with Article 25 explicitly endorsing the principles outlined in the UN Charter.[53] Moreover, the Supreme Court of Bangladesh has applied the principle of international law.[54] Also, those principle have gained the status of CIL.[55]

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[44] Hilary Evans Cameron, 'Refugee Status Determinations and the Limits of Memory' (2010) 22 (4) International Journal of Refugee Law 469–511.

[45] Alam (n 35).

[46] M Zakir Hossain, 'The International Covenant on Economic, Social and Cultural Rights: A Study on Bangladesh Compliance' (*National Human Rights Commission, Bangladesh*, 2012).

[47] ibid.

[48] Sumaiya Khair, 'Bringing International Human Rights Law Home: Trends and Practices of Bangladesh Courts' (2011) 17 Asian Yearbook of International Law.

[49] Muhammad Ekramul Haque, *Current International Legal Issues: Bangladesh* (Brill 2019).

[50] Sheikh Hafizur Rahman Karzon and Abdullah-Al Faruque, 'Status of International Law Under the Constitution of Bangladesh: An Appraisal' (1999) 3 (1) Bangladesh Journal of Law.

[51] Haque (n 49).

[52] Alam (n 35).

[53] The Constitution of the People's Republic of Bangladesh 1972, art 25.

[54] *HM Ershad v Bangladesh and others* 21 BLD (AD) (2001) 69.

[55] *Refugee and Migratory Movements Research Unit (RMMRU) vs. Government of Bangladesh* (n 19)

3. Challenges in Rohingya Context

This chapter will be critically identify the specific legal challenges to ensure Right to Education in Rohingya context.

3.1 Legal Status of the Rohingyas

Bangladesh, a country with a large number of Rohingya refugees,[56] has been grappling with the consequences of Myanmar's 1982 Citizenship Law.[57] The Rohingya population, who have been displaced by state-patronized suppression, has been officially recognised as refugees in Bangladesh between 1991 and 1992.[58] However, the government imposed restrictions on Rohingya refugee registration in 1994, counting only 36,000 officially recognised refugees in Bangladesh.[59] Consequently, 906,686 Rohingyas are registered as FDMN, meaning having no refugee status.[60] The legal implications of FDMN are not publicly available, but it does not imply "refugee status."[61] This raises questions about the interpretation of FDMN, as it could be seen as an illegal migrant, breaking state laws related to immigration and passport control.[62] As a result, Rohingyas may be treated as criminals and imprisoned, with their rights to access services being largely dependent on their home country's laws.[63]

3.2 Lack of a Specialized Law

As evident from the discussion, one of the vital factors driving the challenges is a lack of a specialized law to govern the refugee issues. Since 2017, almost every day Bangladesh has been receiving Rohingya refugees. However, it shows the lack of visionary mindset of the authorities as they could not adopt a law to govern these matters. In fact, they could not foresee the scenario and the impact of it which has resulted in suffering them significantly.

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[56] Karim (n 40).

[57] Jessica Olney, Nurul Haque and Roshid Mubarak, 'We must prevent a lost generation: Community-led education in Rohingya camps (PRIO Paper)' (2019) Peace Research Institute Oslo <https://www.prio.org/publications/11387> accessed 19 November 2023.

[58] Jasques P Leider, 'Conflict and mass violence in Arakan (Rakine State): The 1942 Events and Political Identity Formation' (2017) ISEAS–Yusof Ishak Institute, 193.

[59] Kazi Fahmida Farzana, *Memories of Burmese Rohingya Refugees: Contested identity and belonging* (Springer, 2017).

[60] 'Rohingya Refugee Crisis' (n 10).

[61] Karim (n 40).

[62] ibid.

[63] ibid.

The Bangladesh Citizenship (Temporary Provisions) Order 1972 addresses the inadequacies of the Citizenship Act 1951, allowing the government to grant citizenship to any person from Europe, North America, or other states.[64] However, the Bangladesh Constitution does not provide any scope for local integration for the Rohingya refugees. The judiciary plays a pivotal role in expanding indirect constitutional protection to the Rohingya, as they can exert influence in interpreting constitutional provisions, such as the right to life.[65] Article 32 guarantees citizens and non-citizens the right to a decent and healthy life, which is a life worth living.[66] Thus, the right to life clause guarantees other rights like health and livelihood, regardless of whether these rights are granted to non-citizens or not.[67] There have been instances in the past where individuals who are not citizens have submitted a writ petition under Article 102, such as the Rohingyas, can assert their fundamental rights by adhering to the appropriate legal process. Some notable cases are Md. Abid Khan and others v The Government of Bangladesh and others,[68] and Bangladesh v Prof. Golam Azam.[69]

3.3 Non-compliance with International Law

Drawing on the discussion from Chapter 2, another major issue behind the challenge is Bangladesh's non-compliance with the International Law i.e., the Refugee Convention. Bangladesh's Constitution, being the supreme law of the land, overrides both national and international law, with national law prevailing in conflict situations.[70] However, it was held in *Hussain Muhammad Ershad v Bangladesh* that "it is [true] that Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national Courts. But if their provisions are incorporated into the domestic law, they are enforceable in national Courts."[71] In Bangladesh, customary international law is binding as long as it doesn't contradict domestic law, and courts tend to adhere to municipal

[64] Bangladesh Citizenship (Temporary Provisions) Order 1972, art 2B (2).

[65] Alam (n 35).

[66] Adv Zulhas Uddin Ahmed v Bangladesh (2010) 15 MLR (HCD) [18]; Dr Mohiuddin Farooque (BELA) v Bangladesh 55 DLR (HCD) 69 [23].

[67] Alam (n 35).

[68] *Md. Abid Khan and others v The Government of Bangladesh and others* (2003) 55 DLR 318.

[69] *Bangladesh v Prof. Golam Azam* (1994) 46 DLR (AD) 192.

[70] Bianca Karim and Tirza Theunissen, 'Bangladesh' in Dinah Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2012).

[71] *Hussain Muhammad Ershad v Bangladesh* 21 BLD (AD) (2001) 69

law when enforcing either law.[72] Hence, despite having the scope, not complying with international law is creating further challenges to tackling the refugee issue since Bangladesh is not a party to CPR and PSR.

3.4 Policy Barrier

States frequently pass laws and policies that restrict services to refugees while upholding the bare minimum of goals when managing refugees under the pretence of realistic humanitarianism.[73] In Bangladesh, these political strategies are also employed. For example, the National Education Policy of Bangladesh excludes the rohingyas from receiving education above sixth standards. Bangladesh has signed a memorandum of understanding with Myanmar for repatriation of Rohingya refugees, but political challenges and the military's active role in persecution in Myanmar have hindered the formal repatriation process.[74] In these circumstances, barring the higher education of the refugees with newly implied policy creates a traumatizing situation for them. The FPSP of Constitution with regard to Right to Education does not explicitly mention 'citizens', suggesting that Bangladesh's responsibility extends to noncitizen children, including Rohingya children. The FPSP should be read alongside the corresponding legislation, such as the Primary Education (Compulsory) Act 1992. The AD has enforced FPSP through harmonious interpretation with fundamental rights in several cases, notably in *Ain O Salish Kendra (ASK) v Government of Bangladesh and others*[75] and *Faizul Islam (Md.) and Others Vs. Bangladesh and Others*.[76] As a result, the Bangladesh Constitution provides scope for implementing human rights for Rohingya children, but geopolitical factors can deprive them of their rights. The government has endorsed the GIEP for Children of FDMN in Bangladesh, providing informal learning structures.[77] Though the govt has given a statement

[72] M Sanjeeb Hossain, 'Bangladesh's Judicial Encounter with the 1951 Refugee Convention' (2021) 67 Forced Migration Review 59–61.

[73] Bina D Costa, 'The Rohingya and the denial of the 'right to have rights.' (*ReliefWeb*, 4 July 2012) <https://reliefweb.int/report/myanmar/rohingya-and-denial-%E2%80%98right-haverights%E2%80%99 > accessed 17 November 2023.

[74] Alice Cuddy, 'Myanmar coup: What is happening and why' *BBC News* (London, 1 April 2021) accessed 12 December 2023.

[75] *Ain O Salish Kendra (ASK) v Government of Bangladesh and others* (1999) 4 MLR (HC) 358.

[76] *Faizul Islam (Md.) and Others Vs. Bangladesh and Others* (2016) LEX/BDHC/0100/2016

[77] Guideline for Informal Education Program (GIEP) For Children of Forcibly Displaced Myanmar Nationals (FDMN) in Bangladesh accessed 1 December 2023.

of taking multiple initiatives[78] and since January 2020, Rohingya children in Bangladesh have received formal education in the Burmese language and follow Myanmar's national curriculum, there are still the above-mentioned policy barriers exist due to certain limitations imposed that obstruct the applicability of the initiatives taken.

4. Recommendation

4.1 Legal Reform

The most efficient recommendation would be adopting a specialized refugee law by the Bangladesh government. Regardless of the fact that the state authorities are facing difficulty in tackling with the issue and are unwilling to keep them for longer, they have to accept the fact that they have miserably failed to create international pressure on Myanmar for the safe return of the Rohingyas. Hence, in these circumstances, a specialized law is required to govern the refugee issues that will not only solve education issues but also cover up all other necessary aspects.

Moreover, Bangladesh shall comply with the international standards by adopting the Refugee Convention. The country itself, once being a refugee nation, shall be more empathetic towards the current refugees by following these steps.

Bangladesh does not have a domestic legal system in place to address the issue of RSD. Therefore, international law can be employed to establish the criteria for RSD and provide protection for refugees.[79] The Supreme Court of Bangladesh frequently employs international law to interpret legal provisions, as demonstrated in the RMMRU v. Bangladesh case, where the High Court Division relied on the principle of non-refoulement.[80] In 1993, the Bangladesh government and UNHCR entered into a Memorandum of Understanding, which aimed to guarantee the protection and well-being of the Rohingya population both within and outside the camps.[81] At present, there are 33,956 Rohingyas who have completed the registration process and are residing in camps, while the rest are classified as registered refugees. The Rohingyas have the option to assert their rights through suitable legal processes. However, the

[78] 'Regarding Misrepresentation of Bangladesh Government's arrangement of learning facilities for the Rohingya children.'(Press Release Ministry of Foreign Affairs of Bangladesh, May 05, 2022)

[79] Borhan Uddin Khan and Muhammad Mahabubur Rahman, 'Country Fiche - Bangladesh: Global Asylum Governance and the European Union's Role' *(Country Fiche Bangladesh,* October 2020) <https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_Bangladesh_Final_Pub.pdf> 23 accessed 19 December 2023.

[80] *RMMRU v. Bangladesh* (2016) Writ Petition No 10504.

[81] 'Human Rights by Country: Bangladesh' (*OHCHR*, 2018) accessed 21 December 2023.

crucial provision for safeguarding refugees, as outlined in part II, is article 25. This article permits the utilization of international human rights law and customary international law to protect vulnerable groups.

4.2 Adopting Best State Practice

The refugee issue is visible in most of the countries of the world and many states have successfully dealt with the issue. However, not every example can be fitted in the context of Bangladesh considering its struggling economy and over-crowding population. However, there are indeed some state practices that can be implemented by Bangladesh. One of the such practices is to introduce an alternative education system. Considering that one of the major barriers is that there are not expert teachers who can teach the refugees in Burmese language. Instead, the authority can train educated people within the refugee camps who can be useful to teach other. Whatever education are provided to them, there is no scope of certification.[82] Moreover, in this era of digital technology, it would not be very difficult to provide them with digital learning methods. Though there are obstacles but proper policy adoption can efficiently overcome the problems. Furthemore, there are universities that specifically provides scholarships for students with refugee status. Bangladesh govt can built its network with those universities and send rohingya refugee students in different programs. In this regard, Bangladesh shall be cooperated by the United States and other countries to provide scholarship programs and enable Rohingya students to access higher education abroad or through online courses, despite challenges in accrediting the Myanmar Curriculum Program.[83] Refugees possess inherent and essential entitlements as human beings, such as the right to life, freedom, respect, and the opportunity to work, even if these rights are not expressly outlined in the constitutions of countries like India[84] and Malaysia.[85] On contrary, Part III of Bangladesh's Constitution lists 18 fundamental rights, applicable to both citizens and non-citizens, with all rights for citizens and seven for non-citizens, excluding education rights.[86]

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[82] Md. Mahbubur Rahman and others, 'Structural barriers to providing basic education to Rohingya children in the Kutupalong refugee camp, Cox's Bazar, Bangladesh' (2022) 3 Bangladesh International Journal of Educational Research Open.

[83] Daniel P Sullivan, 'Hope amid Despair: Finding Solutions for Rohingya in Bangladesh, REPORT' (*Refugees International,* 13 December 2022) <https://www.refugeesinternational.org/reports-briefs/hope-amid-despair-finding-solutions-for-rohingya-in-bangladesh/> accessed 10 December 2023.

[84] *Louis De Raedt v Union of India* (1981) AIR SC 1886 (12)

[85] *Ali Salih Khalaf v Taj Mahal Hotel* (2014) 4 Indian Law Journal 20 (9)

[86] Alam (n 35).

4.3 Regional and International Collaboration:

International collaboration is essential when developing nations, such as Bangladesh, are compelled to accommodate a significant influx of refugees without sufficient resources.[87] Only four countries in South and Southeast Asia, namely Afghanistan, Cambodia, Philippines, and Timor-Leste, have signed the Refugee Convention, which a total of 145 countries globally have signed.[88] The absence of dedication to the rights of refugees and asylum seekers frequently leads to the disregard of their needs and well-being. Countries such as Malaysia, Nepal, Indonesia, Thailand, and India do not have comprehensive national legal systems in place to deal with forced migration, resulting in a failure to differentiate between refugees and other migrants.[89]

The lack of international or domestic legal frameworks in the region indicates that regional organizations play a crucial role in establishing and enforcing norms for protecting refugees.[90] SAARC, the primary multilateral organizations in the area, have a restricted impact when it comes to dealing with forced migration concerns.[91] Their focus on the state as the central actor implies that the organizations have little capacity to create a framework for regional protection.[92] The Rohingya crisis, involving multiple countries, has been predominantly portrayed as a bilateral matter rather than a transnational or multilateral one. SAARC lacks a legally binding or policy-based structure to deal with matters related to forced migration.[93] Therefore, Bangladesh needs to strengthen regional and international collaboration in addition to working on its legal framework, which may extend to work more intensively with humanitarian organizations. The possibility of resettlement appears improbable due to the absence of enthusiasm from neighboring nations, and the establishment of a sustainable

[87] Nicholson and Kumin (n 29) 261.

[88] 'Asia Refugee Policy Analysis' (*Reliefweb*, 14 September 2018) <https://reliefweb.int/report/bangladesh/asia-refugee-policy-analysis> accessed 16 December 2023.

[89] Omar Grech, 'Migrants' and refugees' rights: a brief international law perspective' in Omar Grech and Wohlfeld (eds.), *Migration in the Mediterranean: human rights, security and development perspectives* (Mediterranean Academy of Diplomatic Studies 2014), ch 4.

[90] Treaty of Amity and Cooperation in Southeast Asia 1976, art 2.

[91] Charter of the South Asian Association for Regional Cooperation 1985, art II.

[92] Ibid, art X.

[93] 'Asia Refugee Policy Analysis' (*Reliefweb*, 14 September 2018) <https://reliefweb.int/report/bangladesh/asia-refugee-policy-analysis> accessed 16 December 2023.

regional initiative necessitates the implementation of a comprehensive national and regional framework.[94]

5. Conclusion

Despite several challenges, there have been initiatives taken by Bangladesh. However, multifaceted challenges, particularly the effect of politics over law has been a matter of genuine concern for the Rohingya issue in Bangladesh. The findings of the research shows that the national legal framework of Bangladesh is yet to reach the global standard for refugee protection. However, from the aspect of the scope of CIL and Constitution, it is very much possible to ensure a good lifestyle for the Rohingya including upholding their right to education. Apart from socio-political and economic issues, Bangladesh shall strengthen the legal function by covering the loopholes identified and collaborating with other stake holders. The UNHCR EC emphasizes that respect for human rights and humanitarian principles is the responsibility of all members of the international community.[95] South Asian countries including Bangladesh should address refugee issues unitedly,[96] focusing on regional reforms instead of domestic initiatives while considering the international legal paradigm for global community concern.[97] Only this combination of individual and collective effort can ensure a world without any homeless person.

[94] Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' (2019) 39(1) Journal of Muslim Minority Affairs, 18.

[95] Executive Committee of the High Commissioner's Programme, Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Infux Situations No. 100 (LV) – 2004 (2004) accessed 17 December 2023.

[96] Maya Than and Tin Mung Mung Than, 'ASEAN Enlargement and Myanmar' in Mya Than and Carolyn Gates (eds), *ASEAN Enlargement: Impacts and Implications* (Institute of Southeast Asian Studies 2001) 249–61.

[97] Jobair Alam, 'The Rohingya Minority of Myanmar: Surveying Their Status and Protection in International Law' (2018) 25 International Journal on Minority and Group Rights 157–182, 177.

Cyber-Enabled Crimes under the Rome Statute: Jurisdictional, Substantive and Evidentiary Challenges

Mahbuba Kamal*

Abstract

Cyber operations can cause or facilitate harm of a scale traditionally associated with kinetic violence, but their use does not create a fifth international crime. The International Criminal Court's Office of the Prosecutor now treats 'cyber-enabled crimes' as a factual description of genocide, crimes against humanity, war crimes, aggression and offences against the administration of justice when committed or facilitated through cyber means. This article examines how the technology-neutral Rome Statute can apply to such conduct and where its application remains difficult. It distinguishes ordinary cybercrime, State responsibility and the prohibition of force, international humanitarian law governing cyber operations during armed conflict, and individual criminal responsibility under the Rome Statute. Using a doctrinal, qualitative and analytical method, it reassesses Stuxnet, the 2015 Ukrainian power-grid incident, cyber operations linked to aggression and attacks affecting medical services without presuming that any incident automatically satisfies a Rome Statute offence. The article then analyses subject-matter and territorial jurisdiction, attribution to natural persons, modes of liability, digital evidence, presence at trial and the gravity threshold. It argues that existing international criminal law is capable of addressing cyber-enabled conduct, but effective accountability depends on an elements-based analysis, reliable attribution, specialist technical capacity, preservation and authentication of digital evidence, and cooperation between the ICC, States and private technology providers. Remaining uncertainty concerns non-physical loss of functionality, the legal status of civilian data, civilian hackers, private infrastructure and cross-border evidence. The appropriate immediate response is therefore not a new cyber-war offence, but clearer prosecutorial practice, stronger cooperation and disciplined application of existing law.

Keywords: Cyber-Enabled Crimes, International Criminal Court, Rome Statute, International Criminal Law, Digital Evidence.

1. Introduction

The digitalisation of military and civilian infrastructure has expanded the means through which serious harm may be inflicted. The International Committee of the Red Cross (ICRC) describes

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cyber operations during armed conflict as operations against or through computers, computer systems and networks, and stresses that international humanitarian law (IHL) limits them in the same manner as other means and methods of warfare.[1] Cyber means may disable power, water, communications or medical services, manipulate information, collect intelligence or facilitate physical operations. They may also be used outside armed conflict, where ordinary cybercrime rules, the law of State responsibility and the prohibition of force may be more immediately relevant.

The legal problem is therefore one of classification rather than technological exceptionalism. Harmful cyber activity can constitute domestic cybercrime, an internationally wrongful act of a State, a breach of IHL, or conduct attributable to an individual that satisfies a Rome Statute crime. The same operation may engage more than one regime, but the elements and consequences of each remain distinct.[2] Conflating these regimes produces categorical conclusions unsupported by jurisdiction, context, intent or individual attribution.

In December 2025, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) issued its *Policy on Cyber-Enabled Crimes under the Rome Statute*. The Policy treats the Rome Statute as technology-neutral and uses 'cyber-enabled crime' as a factual expression for existing crimes committed or facilitated through cyber means, not as an additional legal category.[3] The Court's subject-matter jurisdiction remains confined to genocide, crimes against humanity, war crimes and aggression, together with offences against the administration of justice.[4]

The Policy is a prosecutorial framework rather than a judicial holding. It records the OTP's present approach, remains open to revision and does not create legal rights.[5] Nevertheless, it materially alters the appropriate research question. The issue is no longer whether 'cyber warfare' should be declared an autonomous international crime, but how cyber conduct may satisfy the jurisdictional, contextual, material and mental elements of crimes already recognised by the Statute. Chatham House similarly concludes that no new substantive

[1] International Committee of the Red Cross, *International Humanitarian Law and Cyber Operations during Armed Conflicts: ICRC Position Paper* (November 2019) 3–5.

[2] Elizabeth Wilmshurst, Harriet Moynihan and Tsvetelina van Benthem, *Securing Justice for Cyber-Enabled International Crimes: Legal Foundations and Practical Routes to Prosecution* (Chatham House 2026) 4–7.

[3] Office of the Prosecutor, International Criminal Court, *Policy on Cyber-Enabled Crimes under the Rome Statute* (December 2025) paras 3–6, 19.

[4] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) arts 5 and 70.

[5] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) para 11.

offence is required to capture core international crimes committed by cyber means, while emphasising substantial investigative and prosecutorial obstacles.[6] This article therefore asks under what jurisdictional, contextual, material and mental conditions cyber-enabled conduct may constitute an existing Rome Statute crime, and what evidentiary and institutional obstacles continue to impede its effective investigation and prosecution.

Accordingly, this article analyses the application of existing international criminal law to cyber-enabled conduct. It first separates the relevant legal regimes and identifies unresolved substantive questions. It then examines jurisdiction, individual responsibility, evidence, trial and admissibility before proposing practical reforms. National cybercrime policy, general human-rights analysis and broader criticism of the ICC fall outside its scope except where necessary to clarify the boundaries of individual criminal responsibility.

This separation has practical consequences throughout the analysis. A finding that a State has breached the Charter or IHL does not automatically establish that a natural person committed a Rome Statute crime. Conversely, the absence of a sufficiently attributable State act does not necessarily preclude individual liability for genocide, crimes against humanity or war crimes committed through a non-State organisation. The governing question at each stage is therefore who is responsible, under which legal regime, for which precisely defined conduct. Maintaining that sequence prevents the language of cyber warfare from obscuring the Court's limited subject-matter jurisdiction and the principle of legality.

2. Cyber-Enabled Conduct under International Criminal Law

2.1 Conceptual and Regulatory Framework

International criminal law imposes responsibility on natural persons for conduct recognised as crimes under international law. The Nuremberg judgment stated that crimes against international law are committed by individuals rather than abstract entities and that international law is enforced by punishing those individuals.[7] The Rome Statute institutionalises that principle through the jurisdiction and applicable-law provisions of the ICC.[8]

The Statute defines the four core crimes, while the Elements of Crimes assist the Court in interpreting and applying their legal requirements.[9] Cyber means do not displace those

[6] Wilmshurst, Moynihan and van Benthem (n 2) 2–5.

[7] Judgment of the International Military Tribunal (1947) 41 AJIL 172, 221.

[8] Rome Statute (n 4) arts 5, 21 and 25.

[9] International Criminal Court, *Elements of Crimes* (2013) general introduction and arts 6–8 bis.

requirements. A digital operation must still be connected to the relevant protected interest, prohibited conduct, context, consequence and mental element. Technology may change how harm is caused and proved, but it does not lower the threshold of criminality.

IHL governs cyber operations only when an armed conflict exists and the operation is sufficiently connected with it. In that setting, the principles of distinction, proportionality and precautions remain applicable. Parties must distinguish civilians and civilian objects from military objectives, refrain from indiscriminate or disproportionate attacks and take feasible precautions.[10] The ICRC's 2024 Challenges Report confirms both the applicability of IHL to cyber operations and the continuing disagreement over how established rules apply to data, network functionality and digitally dependent civilian services.[11]

The Tallinn Manual 2.0 is an influential expert restatement of how international law may apply to cyber operations, but it is not a binding treaty, judgment or official NATO position.[12] Its value lies in exposing areas of consensus and disagreement. The Tallinn Manual 3.0 project should also be acknowledged as a continuing revision designed to reflect later practice and technological developments, not as law already adopted.[13]

2.2 Existing International Crimes and Cyber Means

The Court's subject-matter jurisdiction remains confined to genocide, crimes against humanity, war crimes and aggression.[14] The expression 'cyber-enabled crime' does not create another category; the OTP uses it for existing crimes committed or facilitated by cyber means.[15] In the OTP's view, the Statute is technology-neutral.[16] Accordingly, cyber-enabled conduct is prosecutable only when the same actus reus, causation, mens rea and standard of proof applicable to conduct by other means are established.[17]

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[10] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) arts 48, 51, 52 and 57.

[11] International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Building a Culture of Compliance for IHL to Protect Humanity in Today's and Future Conflicts* (ICRC 2024) 57–60.

[12] Michael N Schmitt (gen ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, CUP 2017) 2–3.

[13] NATO Cooperative Cyber Defence Centre of Excellence, *2022 Training Catalogue* (CCDCOE 2021) 83.

[14] Rome Statute (n 4) art 5.

[15] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) para 19.

[16] ibid para 3.

[17] ibid paras 4 and 49–51.

Ordinary cybercrimes such as unauthorised access, fraud or interference with computer systems remain outside the ICC's jurisdiction unless the conduct independently fulfils a Rome Statute crime.[18] This distinction prevents gravity, novelty or cross-border effects from being treated as substitutes for the legal elements. It also avoids treating State responsibility for an internationally wrongful cyber operation as equivalent to the criminal responsibility of a particular natural person.

2.3 Illustrative Incidents and Legal Qualification

Stuxnet illustrates the need for a fact-specific assessment. A technical report found that Iran decommissioned and replaced approximately 1,000 IR-1 centrifuges at the Natanz Fuel Enrichment Plant and regarded Stuxnet as a reasonable explanation for the apparent damage, while stressing uncertainty about its precise effects.[19] Those facts do not by themselves establish a Rome Statute violation. A war-crime finding would require proof of a qualifying armed conflict and nexus, a protected object or other prohibited target, the relevant consequence and the accused's intent and knowledge.[20] Any ICC case would additionally require a statutory jurisdictional basis and an identifiable mode of individual responsibility.[21]

The 2015 Ukrainian power-grid incident is also significant but cannot automatically be labelled a crime against humanity. The cyber operation interrupted electricity for approximately 225,000 customers, and affected several distribution companies.[22] Article 7 requires one of the listed acts to form part of a widespread or systematic attack directed against a civilian population, pursuant to or in furtherance of a State or organisational policy, with the accused's knowledge of the attack.[23] The outage is evidence of potentially serious civilian harm, but the scale of one incident, its attribution and its relationship to a broader attack must

[18] ibid paras 5–6.

[19] David Albright, Paul Brannan and Christina Walrond, 'Did Stuxnet Take Out 1,000 Centrifuges at the Natanz Enrichment Plant? Preliminary Assessment' (Institute for Science and International Security, 22 December 2010) 1, 7.

[20] Rome Statute (n 4) art 8(2)(b)(ii); International Criminal Court, *Elements of Crimes* (n 9) art 8(2)(b)(ii), elements 1–5.

[21] Rome Statute (n 4) arts 12–13, 25 and 30.

[22] Cybersecurity and Infrastructure Security Agency, 'Cyber-Attack Against Ukrainian Critical Infrastructure' (ICS Alert IR-ALERT-H-16-056-01, 25 February 2016).

[23] Rome Statute (n 4) art 7(1) and (2)(a); International Criminal Court, *Elements of Crimes* (n 9) art 7, introduction, paras 1–3.

be proved before Article 7 can apply. The OTP likewise treats the contextual elements and the possible role of organised hacker groups as questions requiring evidence, not presumptions.[24] The prohibition of force under Article 2(4) of the UN Charter belongs primarily to the law governing interstate conduct.[25] It does not convert every harmful cyber operation into the individual crime of aggression. Article 8 bis requires an act of aggression by a State that, by character, gravity and scale, constitutes a manifest Charter violation, together with planning, preparation, initiation or execution by a person effectively controlling or directing the State's political or military action.[26] Cyber activity therefore amounts to aggression only in exceptional circumstances and only where State attribution, the armed-force threshold, manifest violation and leadership requirements are satisfied.[27]

Medical units require a similarly careful analysis. The Second Geneva Convention principally concerns wounded, sick and shipwrecked members of armed forces at sea; it is not the general source of protection for civilian hospitals. Civilian hospitals are protected by the Fourth Geneva Convention, and medical units receive specific protection under Additional Protocol I.[28] A cyber operation that disrupts medical services may be unlawful under IHL and may, where the elements and armed-conflict nexus are established, support a war-crime charge. It cannot be classified solely from the identity of the affected institution or the seriousness of disruption.[29]

Two substantive uncertainties remain especially important. First, experts disagree about whether a cyber operation causing loss of functionality without physical damage constitutes an 'attack' for IHL and Rome Statute purposes. Secondly, there is no settled answer on whether civilian data, as distinct from the physical infrastructure storing them, qualify as protected objects.[30] The ICRC identifies these issues as operationally significant because modern civilian life depends on the availability and integrity of digital infrastructure and data.[31]

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[24] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 62 and 66–70.

[25] Charter of the United Nations art 2(4).

[26] Rome Statute (n 4) arts 8 bis(1)–(2) and 25(3) bis.

[27] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 97–102.

[28] Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 art 18; Additional Protocol I (n 10) arts 12 and 15.

[29] International Committee of the Red Cross, *International Humanitarian Law and Cyber Operations during Armed Conflicts* (n 1) 4–5.

[30] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 90–91.

[31] ICRC, *2024 Challenges Report* (n 11) 57–60.

3. Cyber-Enabled Crimes before the International Criminal Court

3.1 Jurisdiction

Article 5 limits the Court's subject-matter jurisdiction to the four core crimes, while Articles 11-13 regulate temporal jurisdiction, territorial or personal preconditions and the mechanisms by which jurisdiction is exercised.[32] The absence of an express reference to cyberspace does not create a jurisdictional gap because the OTP applies those ordinary provisions to cyber-enabled conduct.[33]

Cyber operations nevertheless complicate territorial analysis. The operator, command infrastructure, compromised servers, targeted systems and legally relevant consequences may be distributed across several States. The decisive question is whether conduct or a consequence forming part of the crime establishes the nexus required by Article 12, not whether data happened to transit a server in a State Party. The OTP regards both subjective and objective territoriality as potentially relevant while rejecting mere data transit as a sufficient basis.[34] Chatham House similarly notes that concealed locations and distributed effects can create multiple plausible jurisdictions and substantial coordination problems.[35]

The ICC may also rely on the nationality of an accused who is a national of a State Party or a State accepting jurisdiction, or on a Security Council referral. Aggression remains subject to the distinct jurisdictional conditions in Articles 15 bis and 15 ter. The relevant inquiry is therefore whether the facts satisfy an existing crime and a statutory jurisdictional route, rather than where 'cyber warfare' belongs as a separate offence.[36]

3.2 Individual Criminal Responsibility

The Rome Statute imposes responsibility on natural persons who commit, order, solicit, induce, aid, abet or otherwise contribute to crimes, and it separately regulates superior responsibility. Intent and knowledge are generally required unless the Statute provides otherwise.[37] Cyber operations complicate these rules because technical execution may be divided among commanders, intelligence personnel, malware developers, infrastructure providers and operators who know only part of the overall plan. The OTP therefore emphasises the ordinary

[32] Rome Statute (n 4) arts 5 and 11–13.

[33] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 38–48.

[34] ibid paras 43–46.

[35] Wilmshurst, Moynihan and van Benthem (n 2) 30–36.

[36] Rome Statute (n 4) arts 12(2)–(3), 13, 15 bis and 15 ter.

[37] Rome Statute (n 4) arts 25, 28 and 30.

modes of liability and the need to connect each person's contribution and mental state to the relevant crime.[38]

State attribution and individual criminal responsibility must not be collapsed. Proof that an operation is attributable to a State does not establish which natural person bears criminal responsibility, while failure to attribute conduct to a State does not necessarily prevent prosecution of members of a non-State group. The crime of aggression is exceptional because it requires a State act and leadership status. Other crimes may be committed by State agents, organised armed groups or private individuals if the statutory elements and modes of liability are met.

The expanding involvement of civilian hackers and private technology companies makes this distinction practically important. The ICRC's 2025 report focuses on individuals, hacker groups and technology companies whose activities may blur the civilian-military distinction and expose civilian people and infrastructure to risk.[39] Under the Rome Statute, their liability cannot rest on association alone. A prosecutor must prove the contribution required by the relevant mode of liability and the corresponding knowledge or purpose. Chatham House identifies assistance through infrastructure, cloud services or platforms as a possible complicity issue but cautions that ordinary commercial provision and criminal participation are not equivalent.[40]

3.3 Evidence and Trial

Cyber-enabled cases depend heavily on digital evidence. Logs, malware samples, server images, subscriber information, communications, command records and open-source material may establish conduct, attribution, causation and mental elements. Yet such evidence is volatile, distributed, encrypted and vulnerable to manipulation. Investigators must preserve provenance, document the chain of custody, validate forensic methods and distinguish technical indicators from proof of individual criminal responsibility.[41]

The Rome Statute requires the Prosecutor to investigate incriminating and exonerating circumstances equally and permits the Court to assess relevance, probative value and

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[38] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 109–116.

[39] International Committee of the Red Cross and Geneva Academy of International Humanitarian Law and Human Rights, *IHL and the Growing Involvement of Civilians in Cyber Operations and Other Digital Activities During Armed Conflict* (ICRC 2025) 2–4.

[40] Wilmshurst, Moynihan and van Benthem (n 2) 23–29.

[41] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 149–165.

prejudicial effect.[42] Cyber evidence may require urgent preservation orders and cooperation from States and private providers before data are deleted or altered. Chatham House consequently recommends specialist cyber expertise, secure facilities for storing and analysing large evidentiary datasets and cooperation across investigative bodies.[43]

The burden of proof remains unchanged. At confirmation of charges, the Chamber must find substantial grounds to believe that the person committed each charged crime; at trial, guilt must be established beyond reasonable doubt.[44] Technical sophistication may explain why specialist evidence is necessary, but it does not justify inferential shortcuts on attribution, intent or causation.

The accused's presence must also be described accurately. Article 63(1) requires the accused to be present during trial, but Article 61(2) permits confirmation-of-charges proceedings in the accused's absence in specified circumstances, including waiver or flight where reasonable steps have been taken to secure appearance and provide notice.[45] The difficulty of identifying or apprehending a cyber operator may therefore impede proceedings, but the Statute does not impose an absolute presence requirement at every pre-trial stage.

Institutional capacity remains a serious constraint. The OTP's approach requires trained investigators, forensic tools, secure data management and continuing cooperation with cybercrime units, international organisations and private entities.[46] These needs create resource demands, but they are a challenge of implementation rather than proof that the Rome Statute is legally obsolete.

3.4 Admissibility and Gravity

Jurisdiction does not by itself make a case admissible. Under Article 17, a case may be inadmissible because of genuine national proceedings, prior disposition, or insufficient gravity.[47] Gravity is assessed through the scale, nature, manner of commission and impact of the potential crimes. The cyber character of conduct neither automatically satisfies nor defeats that threshold.

A cyber operation may have exceptional gravity where it causes deaths, serious injury, prolonged denial of essential services, large-scale displacement or forms part of a broader

[42] Rome Statute (n 4) arts 54(1)(a) and 69(4).

[43] Wilmshurst, Moynihan and van Benthem (n 2) 37–57.

[44] Rome Statute (n 4) arts 61(7) and 66(3).

[45] Rome Statute (n 4) arts 61(2) and 63(1).

[46] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 143–145 and 158–165.

[47] Rome Statute (n 4) art 17(1).

campaign against civilians. Conversely, many intrusions, disruptions and data compromises, though unlawful under domestic law or State-responsibility rules, will not meet the ICC threshold. The OTP treats gravity as a holistic assessment and recognises that digital effects must be evaluated together with physical, psychological and societal consequences.[48]

The assessment must remain case-specific. It would be equally mistaken to exclude non-physical cyber harm categorically or to assume that disruption of critical infrastructure is necessarily sufficiently grave. The proper approach links documented consequences to the elements of the alleged crime and to the Court's limited institutional mandate.

This approach also preserves proportionality in prosecutorial selection. Cyber operations vary from brief and reversible interference to conduct that disables essential services for prolonged periods or forms part of a coordinated campaign of violence. Treating all of them as one category would weaken both the gravity inquiry and the distinction between international crimes and ordinary cyber offences. The Prosecutor should identify the protected population or object, the legally relevant consequence, the scale and duration of harm, the broader criminal context and the accused's contribution before deciding that the Court's exceptional jurisdiction is warranted.

4. Recommendations

First, the ICC should implement the 2025 Policy through offence-specific guidance rather than seek an immediate amendment creating a cyber-war offence. Existing international criminal law applies to cyber-enabled conduct; the priority is to clarify how the elements of Article 5 crimes operate in recurring digital scenarios.[49] Guidance should address loss of functionality, civilian data, causation through interdependent systems, the evidential distinction between technical and legal attribution, and the relationship between State attribution and individual liability.

Secondly, the OTP should maintain permanent cyber expertise within multidisciplinary investigation teams. Cyber specialists should participate from the earliest stage in preservation, collection and analysis, while lawyers define the legal propositions that technical evidence must prove. Standard operating procedures should cover forensic imaging, hashing, chain of custody, metadata preservation, validation of tools and disclosure of technical limitations.[50]

[48] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 128–132.

[49] Wilmshurst, Moynihan and van Benthem (n 2) 58–63.

[50] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 149–169.

Thirdly, cooperation arrangements should be strengthened before incidents occur. States should designate contact points capable of responding rapidly to preservation and assistance requests; private technology providers should maintain lawful and transparent processes for preserving and producing evidence; and international organisations should facilitate joint investigation, deconfliction and technical assistance. The Statute already requires general cooperation and authorises assistance in identifying persons, collecting evidence and preserving records.[51] The OTP's Policy and Chatham House both regard sustained cooperation with private entities as indispensable to effective cases.[52]

Fourthly, complementarity should remain central. States should ensure that domestic legislation covers Rome Statute crimes when committed or facilitated by cyber means and that investigators can lawfully obtain and authenticate cross-border digital evidence. National proceedings will often be better placed to access suspects, infrastructure and service providers. ICC engagement should support rather than displace capable national investigations.

Domestic implementation should not be limited to inserting the word 'cyber' into criminal codes. Prosecutors need authority and technical capacity to preserve remote data, obtain evidence across borders, protect sensitive intelligence, disclose material fairly and present complex technical conclusions in an intelligible form. States should also ensure that ordinary cybercrime investigations can be escalated when evidence reveals a connection to a broader campaign of international crimes. Clear referral pathways between cybercrime units, war-crimes units and national points of contact for ICC cooperation would make complementarity operational rather than merely formal.

Fifthly, policy development must protect the civilian character of digital infrastructure. States should avoid drawing civilians into hostile cyber activity where feasible, communicate IHL obligations to civilian hacker groups and assess the risks created when private technology services are integrated into military operations.[53] These preventive measures do not determine criminal liability, but they reduce ambiguity, preserve evidence and limit foreseeable civilian harm.

Finally, the Tallinn Manual 2.0 may continue to inform legal analysis, while the Tallinn Manual 3.0 process should be monitored as an expert project. Neither should be treated as binding law. Courts and prosecutors should prioritise the Rome Statute, Elements of Crimes,

[51] Rome Statute (n 4) arts 86 and 93(1).

[52] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 180–194; Wilmshurst, Moynihan and van Benthem (n 2) 54–63.

[53] ICRC and Geneva Academy, *IHL and the Growing Involvement of Civilians* (n 39) 2–4.

applicable treaties and judicial decisions, using manuals and institutional reports as persuasive aids where genuine interpretative uncertainty remains.[54]

5. Conclusion

Cyber-enabled crimes do not require recognition of a fifth crime under the Rome Statute. The Statute's technology-neutral offences can apply when cyber conduct satisfies their jurisdictional, contextual, material and mental elements. The gravity or novelty of a cyber operation does not, by itself, establish international criminality, and cybercrime, State responsibility, IHL and individual criminal responsibility must each be assessed under their distinct legal tests.

A disciplined elements-based approach changes the assessment of prominent incidents. Stuxnet cannot be declared a Rome Statute violation without proving jurisdiction, armed-conflict nexus, object status, consequences, attribution and mens rea. The Ukrainian power-grid outage affected about 225,000 customers, but Article 7 still requires proof of a widespread or systematic attack, policy and knowledge. Cyber operations amount to aggression only where the stringent State-act, manifest-violation and leadership requirements are met. Civilian hospitals are protected under the Fourth Geneva Convention and Additional Protocol I, not generally by the Second Geneva Convention, and the Charter prohibition of force is Article 2(4).

Existing law is therefore applicable but not frictionless. Uncertainty persists over non-physical loss of functionality, whether civilian data are protected objects, how technical indicators support legal attribution, and when assistance by civilian hackers or private technology providers satisfies a mode of liability.[55] Digital evidence also requires rapid preservation, specialist validation and cooperation across States and private networks. The ICRC identifies the dependence of civilians on digital systems and the growing involvement of civilian actors as continuing interpretative and operational concerns.[56]

The appropriate response is not to presume the inadequacy of the Rome Statute or to make a new convention the immediate condition of accountability. It is to apply existing crimes rigorously, develop focused guidance, invest in technical capacity, strengthen complementarity and secure cooperation from those who hold digital evidence. This approach preserves legality

[54] Schmitt (n 12) 2–3; NATO CCDCOE, *2022 Training Catalogue* (n 13) 83.

[55] ICC OTP, *Policy on Cyber-Enabled Crimes* (n 3) paras 90–91 and 109–116.

[56] ICRC, *2024 Challenges Report* (n 11) 57–60; ICRC and Geneva Academy, *IHL and the Growing Involvement of Civilians* (n 39) 2–9.

while making international criminal justice responsive to the means through which contemporary atrocities may be committed or facilitated.

Rivers Unbound – Rights, Personhood and the Currents of Ecocentric Law

Rivers Unbound: Exploring Social Currents, Legal Tides, and Stories of Flow. **By Ananth Padmanabhan, Nabeela Siddiqui, and Gnana Sanga Mithra S [Routledge, 2025, ISBN: 9781041123484, Hardback, 292 pp.]**

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1. Introduction

Rivers have historically shaped human societies and served as a source of life, commerce, and spiritual significance.[1] With evolution of time, they have also become a focal point of legal innovation and ethical debate centering around *inter alia* State boundaries, climate change and indigenous rights etc. *Rivers Unbound: Exploring Social Currents, Legal Tides, and Stories of Flow* is a timely edited volume emerging from the International Conference on Rivers 2024, compiling 40 chapters that captures this transformation while traversing themes from community water initiatives to high politics of transboundary treaties.[2] At its core, the book grapples with a pressing question: how should and can law recognise and protect the multifaceted values of rivers in an era of ecological crisis? This review focuses on the volume's treatment of rights of rivers, legal personhood, and ecocentric jurisprudence, assessing how its contributions advance (or complicate) these debates. It also critically examines the book's comparative breadth and structure – including its geographic and doctrinal scope, interdisciplinary balance, and relevance to transboundary river governance under climate change crisis. The reviewer writes from a position of disclosed interest, being a contributor to the volume, yet aims to provide an objective scholarly appraisal.

The recognition of rivers as having legal rights or "personhood" has moved in recent years from imaginative theory to tangible (if controversial) reality. From the Colombian Constitutional Court's landmark *Atrato River* decision in 2016 recognising that river as a "subject of rights",[3] to New Zealand's pioneering grant of legal personhood to the *Whanganui*

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[1] Ananth Padmanabhan, Nabeela Siddiqui and Gnana Sanga Mithra S (eds). *Rivers Unbound: Exploring Social Currents, Legal Tides, and Stories of Flow* (1st ed., Routledge 2025) Preface.

[2] ibid.

[3] *The Atrato River case (Center for Social Justice Studies et al v. Presidency of the Republic et al.*) [2016] Constitutional Court of Colombia T-622/16 <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2016/20161125_T-62216_judgment.pdf> accessed 13 September 2025. para. 9.32.

River in 2017,[4] to Bangladesh Supreme Court's revolutionary judgement of 2020 in *Turag River* Case to appoint the National River Commission as the legal guardian of rivers,[5] to experiments in India's courts, the rights of rivers paradigm challenges traditional anthropocentric legal frameworks. *Rivers Unbound* situates itself squarely in this emerging discourse with several chapters explicitly addressing the move from treating rivers as objects of human use to acknowledging them as bearers of rights and interests. The volume thereby offers an illuminating snapshot of global and regional currents in ecocentric law – even as it raises questions about how far these currents have carried us toward a paradigm shift.

2. Rights of Rivers: Legal Personhood from New Zealand to South Asia

The idea that a river could hold legal rights – once a radical proposal by Christopher Stone in 1972[6] – has now gained traction through key legal milestones. The book's contributors chronicle and analyse these milestones, providing both celebration and critique. In Chapter 36, "*Debating Legal Rights of Rivers*," Siddiqui, Dash, and Beg survey the global landscape of the Rights of Nature movement and its application to rivers. They recount how Ecuador's 2008 Constitution first enshrined rights of nature, followed by Bolivia's 2010 "Mother Earth" law, and how New Zealand's Parliament in 2017 passed the *Te Awa Tupua Act*, granting the *Whanganui River* legal personhood.[7] This statute, rooted in a settlement with the *Māori iwi*, made the *Whanganui* a legal entity with "all the rights, duties and liabilities" of a person.[8] It exemplifies an ecocentric legal ethos, recognising the river as valuable in its own right and not merely for its use to humans.

The New Zealand example is placed in comparative relief with developments in South Asia and Latin America. The volume gives due regard to Colombia's Constitutional Court decision on the *Atrato River Case*, which took an unprecedented ecocentric approach.[9] That

[4] Najeed Naved Siddiqui, Amisha Dash and Mirza Shaaz Beg 'Debating Legal Rights of Rivers' in Ananth Padmanabhan, Nabeela Siddiqui and Gnana Sanga Mithra S (eds), *Rivers Unbound: Exploring Social Currents, Legal Tides, and Stories of Flow* (1st ed., Routledge 2025) 239.

[5] Fahim Abrar Abid, 'When 'National Interest' leads to Ecocide: The Unseen Constitutional Violation of Environmental Laws in Bangladesh' (Oxford Human Rights Hub, 10 October 2024). <https://ohrh.law.ox.ac.uk/when-national-interest-leads-to-ecocide-the-unseen-constitutional-violation-of-environmental-laws-in-bangladesh/> accessed 20 September 2025.

[6] Visa A.J. Kurki, 'Can Nature Hold Rights? It's Not as Easy as You Think' (2023) 11(3) TEL 525, 528.

[7] ibid 242.

[8] ibid.

[9] 'River Atrato First River in Colombia to be Awarded Rights' (*ABColombia*), <https://www.abcolombia.org.uk/constitutional-court-sets-global-precedent/> accessed 23 August 2025.

court declared the Atrato River to be a rights-bearing entity and appointed the state and ethnic communities as guardians to act on the river's behalf.[10] By invoking indigenous cosmologies and the precautionary principle amid grave pollution from mining, the *Atrato* judgment sought to secure the river's protection in conjunction with the rights of local communities.[11] *Rivers Unbound* highlights this case (and others in Latin America, South Asia and Africa) as part of a "Global South" turn towards recognising rivers as subjects of rights.[12] Indeed, Chapter 12 by Bandopadhay and Im – pointedly titled "*From Anthropocentrism to Ecocentrism: The Legal Journey of the Asia-Pacific Region and Indian Judiciary's Tryst with Rights of Rivers*" – explicitly frames the rights of rivers movement as a culturally grounded global phenomenon, noting that countries like Bangladesh and Colombia have already granted legal personhood to rivers, from which India might draw inspiration.[13]

The Indian experience with rights of rivers is critiqued and analysed at length. Several chapters recount the landmark decisions in 2017 by the High Court of Uttarakhand, which declared the sacred *Ganga* and *Yamuna* rivers to be legal persons with corresponding rights.[14] India's Supreme Court stayed those orders, but they ignited a vigorous discussion on the practical and doctrinal implications of personifying nature. While the Uttarakhand orders were *symbolically significant*, they also exposed "troubling gaps" in execution and enforcement.[15] Who, for instance, would bear liability on behalf of a river-person for harms like flooding? How would conflicting human and riverine interests be adjudicated? These questions are taken up by the contributors with a critical eye. Siddiqui observed that Indian courts, in attempting to "recontextualise" environmental law through rights-based orders, almost did not consider the new institutional and legal frameworks that will be required to manage the rights and responsibilities they have conferred.[16] Notably, the Punjab & Haryana High Court's 2020

[10] *The Atrato River case* (n 3).

[11] ibid.

[12] Siddiqui, Dash and Beg (n 4) 242.

[13] Somabha Bandopadhay and Jina Im, 'From Anthropocentrism to Ecocentrism: The Legal Journey of the Asia-Pacific Region and Indian Judiciary's Tryst with Rights of Rivers' in Ananth Padmanabhan, Nabeela Siddiqui and Gnana Sanga Mithra S (eds), *Rivers Unbound Exploring Social Currents, Legal Tides, and Stories of Flow* (1st ed., Routledge 2025) 73.

[14] *Salim v. State of Uttarakhand*, Writ Petition [2017] Writ Petition (PIL) No.126 of 2014.

[15] Amrita Pankaj Satija, 'Legal personhood to sacred rivers: The ruling gave symbolism, not solutions' (*Policy Circle*, 27 April 2025) <https://www.policycircle.org/opinion/legal-personhood-to-ganga-river/> accessed in 23 August 2025.

[16] Siddiqui, Dash and Beg (n 4) 242.

decision declaring a northern Indian lake (Sukhna Lake in Chandigarh) a legal entity[17] – an order issued by the same Justice who had decided the Uttarakhand river case is also discussed.[18] Such judicial moves, while well-intentioned, remain judicial decrees that may lack follow-through. The volume's contributors seem to concur that rights of nature must be buttressed by clear frameworks for guardianship, accountability, and community involvement if they are to move from paper to practice.

Yet the tone of the book is not cynical about rights of rivers. It is cautiously optimistic, delineating how these legal ideas *expand the imaginative horizons* of environmental law. Several chapters highlight the benefits of the Rights of Nature approach, such as easing procedural hurdles for environmental litigation by allowing suits *in the name of the river* itself.[19] The personhood model, it is argued, could facilitate "defense of the environment in courts" by shifting standing doctrines and compelling judges to consider ecological harms more directly.[20] Through case studies and legal analysis, Rivers Unbound advances the conversation by acknowledging these advantages while also probing the challenges. For example, the risk that such rights are merely symbolic; declaring a river a legal person is ultimately a legal fiction: since a river cannot act or bear duties itself, any "personhood" inevitably operates through human representatives and thus might collapse into an *indirect* protection mechanism.[21] The book engages with this critique by examining how different jurisdictions structure the guardianship of river-entities. In New Zealand, for instance, the *Whanganui River*'s interests are represented by official guardians (one appointed by the Crown, one by *Māori*) under the *Te Awa Tupua* framework – a co-governance model deeply informed by indigenous values.[22] By contrast, the Indian court experiments lacked such clear guardian's *ex ante*, leading to uncertainty. Through such comparisons, the volume contributes nuanced insights into the design of legal personality for nature. Rather than treating "rights for rivers" as a monolith, the chapters emphasise context: cultural, political, and ecological. A recurring

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[17] *Court on its own motion v. Chandigarh Administration*, CWP No. 18253 of 2009 & other connected petitions (P&H H.C).

[18] Bandopadhay and Im (n 13) 75.

[19] Siddiqui, Dash and Beg (n 4) 243.

[20] Ibid.

[21] Kurki (n 5).

[22] Miriama Cribb, Elizabeth Macpherson and Axel Borchgrevink, 'Beyond legal personhood for the Whanganui River: collaboration and pluralism in implementing the Te Awa Tupua Act' (2024) TIJHR <https://www.tandfonline.com/doi/full/10.1080/13642987.2024.2314532#abstract> accessed 18 September 2025.

theme is that legal rights for rivers must connect with local social currents – including indigenous worldviews and community stewardship – to be effective.

3. Ecocentrism and Legal Pluralism: Indigenous Currents in Law

Moving beyond formal rights and personhood, *Rivers Unbound* delves into the broader shift towards *ecocentric jurisprudence*. Ecocentrism calls for placing ecosystems, rather than human interests, at the center of legal reasoning.[23] In practice, this shift often entails revitalising non-Western or indigenous understandings of human–nature relationships within law. Several contributions explore how indigenous epistemologies and rights-of-nature intersect, especially in the South Asian context. Chapter 6, "Indigenous Voices in River Conservation: Legal Barriers and Pathways in India" by Kasturi Bhagat, examines how India's legal and policy framework has historically failed to both utilise the knowledge and uphold the rights of tribal communities in river governance.[24] The chapter chronicles, for example, how large dam projects like the Narmada and the Northeastern hydropower schemes proceeded with scant regard for the spiritual and livelihood connections that Adivasi (indigenous) groups have with rivers.[25] Bhagat's analysis underscores a form of legal pluralism: alongside state law's dominance, there exist customary and cultural norms in indigenous communities that treat rivers as sacred kin or ancestors. However, these norms rarely inform state decision-making. Environmental laws and water policies in India, the author finds, often prioritise state-led development over indigenous rights, leading to displacement and loss of traditional stewardship. By reviewing constitutional provisions (such as Schedule V and VI protections for tribal lands) and key court rulings, the chapter argues for an integrated approach – one that would reconcile indigenous governance systems with environmental regulation, thereby marrying human rights with ecocentric values.[26] The proposal is essentially to weave indigenous perspectives (which inherently value rivers as living entities) into formal law, achieving a more "equitable and sustainable future for Indigenous peoples and river ecosystems".

[23] Sairam Bhat and Lianne D'Souza, 'Eco-Centrism and the Right to Development: Bridging the Dichotomy' (2022) CULJ 11(1) 43.

[24] Kasturi Bhagat, 'Indigenous Voices in River Conservation: Legal Barriers and Pathways in India' in Ananth Padmanabhan, Nabeela Siddiqui and Gnana Sanga Mithra S (eds), *Rivers Unbound Exploring Social Currents, Legal Tides, and Stories of Flow* (1st ed., Routledge 2025).

[25] ibid 34.

[26] Ibid 32.

This theme is echoed in other contributions that highlight *legal pluralism* and the role of indigenous or local knowledge. For instance, chapter 14 sheds light on the plight of the Jumma peoples in the Chittagong Hill Tracts.[27] The Kaptai hydroelectric dam, built in the 1960s, submerged vast areas of indigenous land, creating what the authors poignantly call a "Lake of Tears." While not explicitly about granting personhood to nature, the narrative lays bare the human rights tragedy of ignoring indigenous voices – a cautionary tale that effective river governance cannot be achieved by technocratic means alone. The implication, tying back to the rights of nature discourse, is that recognising a river's legal rights in isolation is insufficient if the rights and worldviews of riverine communities are ignored. One might draw a comparison to the Whanganui model, where the Maori tribe's cosmology underpins the river's personhood – essentially a legal transplant of an indigenous worldview into statute. *Rivers Unbound* invites readers to consider similar synergies in South Asia: could, for example, the legal personality of the Ganga or Brahmaputra be grounded in the cultural reverence those rivers command, thereby empowering local custodians as part of the governance structure?

Bandopadhay and Im's Chapter 12 directly tackles the *dichotomy within Indian jurisprudence* on ecocentrism.[28] They observe that India's higher judiciary has, in some rulings, endorsed ecocentric principles – moving away from a strictly human-centered approach – but this evolution has been halting and sporadic. The authors trace the lineage of ecocentrism in Indian case law back to the Supreme Court's *T.N. Godavarman (1996)* judgement which advanced forest conservation via expansive "public interest" directives.[29] Siddiqui also credits the visionary judgment in *Animal Welfare Board of India v. Nagaraja*[30] for articulating the moral standing of animals and nature in constitutional terms.[31] Despite these strides, the chapter notes that Indian jurisprudence remains largely anthropocentric at the ground level – with ecocentrism embraced mainly in *obiter dicta* or in a few High Court experiments.[32] In explaining why India has not gone as far down the ecocentric path as, say, New Zealand or Colombia, the authors point to institutional and cultural factors. On one hand, India lacks explicit statutory recognition of nature's rights (Parliament has not yet codified such concepts),

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[27] Fahim Abrar Abid and Mahbuba Kamal 'Kaptai Dam as the Lake of Tears: An Injustice to the *Jummas'* Rights' in Ananth Padmanabhan, Nabeela Siddiqui and Gnana Sanga Mithra S (eds), *Rivers Unbound Exploring Social Currents, Legal Tides, and Stories of Flow* (1st ed., Routledge 2025) 86-92.

[28] Bandopadhay (n 13).

[29] Ibid.

[30] *Animal Welfare Board of India vs A. Nagaraja & Ors* [2017] Civil Appeal No. 5387 of 2014.

[31] Siddiqui, Dash and Beg (n 4) 243.

[32] ibid.

leaving the heavy lifting to judges. On the other hand, they argue that India's development imperatives and bureaucratic inertia have tempered radical judicial impulses. Tellingly, Justice P.S. Narasimha of the Supreme Court recently remarked that India was "the first country…to shift from an anthropocentric to an eco-centric approach" in jurisprudence,[33] citing the Court's acceptance of ecocentric submissions in environmental cases as a watershed. *Rivers Unbound* provides a nuanced view of this claim: yes, the language of ecocentrism is making inroads (as seen in National Green Tribunal conferences and judicial speeches, but the practice of environmental governance in India is still catching up. The volume thereby complicates any simple celebratory narrative – illuminating the gap between *rhetoric and reality* in ecocentric jurisprudence.

Importantly, the book situates these legal developments in a broader ethical context. The move toward rights-of-nature is shown to intersect with discourses on environmental ethics, intergenerational justice, and the revival of *Earth jurisprudence*. Several chapters implicitly draw on the idea that Western legal systems need a paradigm shift akin to a new Copernican revolution, where human beings are no longer the sole center of legal concern. This aligns with the writings of scholars like Cormac Cullinan and Thomas Berry, who have long advocated for law to acknowledge the intrinsic value of Earth's communities.[34] While the volume itself is an edited collection of conference papers (and thus does not offer a singular theoretical treatise), its diverse contributions collectively endorse an ecocentric reorientation of law – tempered by pragmatic considerations of implementation. The presence of chapters examining gender fluidity and "trans-ecology" (Ch. 11) or analysing literature about riverine lives (Ch. 15), adds further layers, reminding the reader that cultural narratives and identities are also part of this pluralistic legal-ecological tapestry. By drawing in these interdisciplinary insights, *Rivers Unbound* strengthens the case that a purely positivist, one-dimensional approach to river governance is inadequate. Law must engage with culture, ecology, and multiple knowledge systems.

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[33] 'Indian Supreme Court first to shift from human-centric to eco-centric approach, says judge' (*The Economic Times*, 30 March 2025) <https://economictimes.indiatimes.com/news/india/indian-supreme-court-first-to-shift-from-human-centric-to-eco-centric-approach-says-judge/articleshow/119761896.cms?from=mdr> accessed 18 September 2025.

[34] Jess Tyrrell, 'Earth Jurisprudence, Wild Law, and the Global Movement for Rights of Nature' (*Heinrich-Böll-Stiftung*, 23 January 2025) <https://www.boell.de/en/2025/01/23/earth-jurisprudence-wild-law-and-global-movement-rights-nature> accessed 18 September 2025.

4. Transboundary Currents: Rivers Unbound or Bound by Politics?

Beyond rights-of-nature, a substantial portion of *Rivers Unbound* addresses the hard realities of transboundary river governance in South Asia. Several chapters examine India's river disputes and cooperative frameworks with neighboring countries, providing a critical test of whether lofty ecocentric principles can influence interstate water management. Chapter 19, for example, scrutinises the protracted diplomacy (or lack thereof) over the *Teesta River* between India and Bangladesh.[35] The Teesta, crucial for Bangladesh's agriculture, remains without a final water-sharing treaty due to political deadlock – notably opposition from a key Indian state. The authors outline the challenges and opportunities in breaking this impasse, implicitly questioning whether emerging norms like the human right to water or ecological flow requirements might offer new entry points for negotiation. While not overtly framed as a rights-of-nature issue, the underlying theme is similar: moving beyond zero-sum, state-centric mindsets to more holistic, equitable outcomes.

In Chapter 23, attention shifts to the iconic *Ganges Water Treaty* of 1996 between India and Bangladesh, now at a crossroads after nearly three decades.[36] Salekin and Khatun call for reconsidering classical international water law principles (like absolute territorial sovereignty versus community of interests) in light of new hydrological realities. This resonates with the ecocentric approach: rather than viewing the Ganges simply as a resource to be divided, the authors suggest that cooperative management should prioritise the *river's health* as a basis for sustaining both nations' needs. Such a perspective finds some support in global law (e.g., the UNECE Water Convention's emphasis on ecosystem protection), but South Asian treaties have traditionally lacked explicit environmental flow guarantees. The volume's analysis here is a welcome interdisciplinary blend – combining legal doctrine with hydrology and climate science to critique existing treaties. It underscores that the rights-of-rivers conversation is not only about domestic law or indigenous cosmologies, but also about reimagining international agreements to be more ecologically attuned.

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[35] Vijeta Verma, Tanvi Sharma, Aryan Clement, Aiswarya Sai and Christos Aidan Samuel 'Teesta River Diplomacy: Challenges and Opportunities in Transboundary Water Governance Between India and Bangladesh' in Ananth Padmanabhan, Nabeela Siddiqui and Gnana Sanga Mithra S (eds), *Rivers Unbound Exploring Social Currents, Legal Tides, and Stories of Flow* (1st ed., Routledge 2025) 123-128.

[36] Masrur Salekin and Mst. Nila Khatun 'The Ganges Treaty at a Crossroads: Reconsidering International Water Law Principles for Future Cooperation' in Ananth Padmanabhan, Nabeela Siddiqui and Gnana Sanga Mithra S (eds), *Rivers Unbound Exploring Social Currents, Legal Tides, and Stories of Flow* (1st ed., Routledge 2025) 155-160.

Perhaps the most geostrategic of the cases studied is the Indus Waters Treaty, examined in Chapter 32 ("Transboundary Waters Under Pressure: Climate Risks and the Indus Water Treaty" by Renuka and Wani).[37] The Indus Treaty of 1960 between India and Pakistan, often lauded as a model of resilience (surviving wars and hostilities), is revealed to be increasingly strained under climate stress. Glacial melt in the Himalayas, shifting river flows, and growing water demand are testing the treaty's allocation scheme. The authors argue that while the Indus treaty has robust dispute resolution mechanisms, it is fundamentally a product of the mid-20th century mindset, with no mention of climate change or environmental protection.[38] As the river's patterns "unbind" themselves from historical averages, the risk of discord grows. The chapter proposes political cooperation between the two countries and international organisations to establish adaptive management mechanisms to inject long-term ecological considerations into treaty governance.[39]

Across these transboundary analyses, *Rivers Unbound* demonstrates an admirable breadth of doctrinal coverage. Public international law principles, such as equitable and reasonable utilisation and the no harm rule, are discussed alongside national water policies and local realities. The interdisciplinary balance is evident: legal argument is bolstered with political context and environmental data. However, a critical reader will notice that the comparative scope of the book, despite the ambitious preface invoking "*Indus to Amazon, Nile to Ganges*," is heavily weighted toward South Asia. The Nile and Amazon themselves receive only passing reference in the introductory blurb; the volume contains no dedicated case study from Africa or South America beyond mention of Colombia. This is perhaps unsurprising given the conference origins and the editors' regional expertise, but it does point to a limitation on the book's global reach. Scholars looking for extensive treatment of, say, the recent rights-of-nature constitutional litigation in Ecuador's courts, the emerging rights-of-the-Amazon River initiatives, or the Australian *Yarra River Protection Act 2017* (which, while not granting personhood, created a voice for the *Yarra* based on Aboriginal inclusion) will not find those here. The focus is firmly on South Asia with selective excursions to New Zealand and Latin America for comparison. As a result, the volume's comparative analysis sometimes relies on secondary summaries rather than original case experience from those regions – for example, the discussion of the *Whanganui* and *Atrato* cases is illuminating but relatively brief. A deeper

[37] Renuka and Showkat Ahmad Wani 'Transboundary Waters Under Pressure: Climate Risks and the Indus Water Treaty' in Ananth Padmanabhan, Nabeela Siddiqui and Gnana Sanga Mithra S (eds), *Rivers Unbound Exploring Social Currents, Legal Tides, and Stories of Flow* (1st ed., Routledge 2025) 216-221.

[38] ibid 217.

[39] ibid 220.

engagement with voices from those jurisdictions might have enriched the discussion of how transferable these models are across cultures and legal systems.

5. Structure and Scholarship: A Critical Appraisal

As an edited compilation, *Rivers Unbound* inevitably presents a mosaic of perspectives. The 40 chapters range from 5 to 12 pages in length – concise contributions that often read like policy briefs or case notes. On the one hand, this allows the book to touch an impressive array of topics, from *Jal Saheli* women's water conservation groups (Chapter 1) to the use of artificial intelligence in river monitoring (Chapter 25). On the other hand, the brevity of chapters means some analyses feel underdeveloped. The reader occasionally yearns for a more robust engagement with theory: for instance, the normative foundation of according legal rights to rivers is asserted by some authors but could have been probed with reference to counterarguments (such as the concern that human responsibilities might be obscured by shifting focus to nature's rights). To its credit, the volume's Chapter 39 by Tiina Paloniitty – "*Negotiating Rivers, Law and Boundaries: Towards a More Nuanced Understanding of River Management for the Sustainability Era*" – attempts a synthesis. In just a few pages, Paloniitty (a scholar outside the South Asian context) reflects on the overarching theme that emerges when considering law's treatment of rivers across jurisdictions.[40] She emphasises that *boundaries* (be they territorial, disciplinary, or conceptual) often hinder sustainable river governance. By advocating a breaking down of boundaries, e.g., between ecology and law, or between state-centric and community-centric governance – this closing chapter aptly echoes the book's title: "Rivers Unbound." It suggests that truly *unbinding* rivers mean freeing our legal and policy thinking from old silos and embracing more integrative, ecocentric approaches.

From a doctrinal standpoint, the book's center of gravity is environmental law and water law, but it effectively incorporates constitutional law (fundamental rights to water and healthy environment in India, human rights (as seen in the Atrato case discussion linking river rights to the rights of indigenous and Afro-Colombian communities, and even private law analogies (the use of corporate personhood as an analogy for environmental personhood, though this is contested). The interdisciplinary balance is generally strong: legal analysis is frequently grounded in history, sociology, and science. For example, the chapters on gender

[40] Tiina Paloniitty 'Negotiating Rivers, Law and Boundaries: Towards a More Nuanced Understanding of River Management for the Sustainability Era' in Ananth Padmanabhan, Nabeela Siddiqui and Gnana Sanga Mithra S (eds), *Rivers Unbound Exploring Social Currents, Legal Tides, and Stories of Flow* (Taylor & Francis 2024) 258-262.

and rivers (Ch. 11 and Ch. 38) bring in social science research on how water scarcity and pollution disproportionately affect women – reinforcing the book's message that river governance is as much about social currents as legal tides. The inclusion of literary and cultural analysis (the "third-space theory" reading of a river novel in Ch. 15) might surprise a law journal audience, but it enriches the tapestry by illustrating how rivers figure in the human imagination and identity.

One structural critique is that the book could have benefited from sectional divisions or an editorial conclusion. Without explicit parts, the reader must discern thematic groupings on their own. Rights-of-rivers and ecocentric jurisprudence, the focus of this review, are threaded through a handful of key chapters (notably 12, 36, and a few others). Other chapters address hydro-diplomacy and transboundary issues (e.g., 4, 7, 19, 23, 32, 33) or community-level governance and human rights (e.g., 1, 6, 8, 9, 14, 30). An introductory roadmap or concluding synthesis by the editors might have drawn these threads together, highlighting complementarities and tensions among the contributions. For instance, there is an implicit tension between the *rights of nature* approach and the *human right to water* approach: the former centers nature's interests, the latter human needs. Both appear in the volume (Chapter 8 discusses the fundamental human right to clean water in India),[41] but a reader might wonder how they converge or conflict in practice. A more explicit comparative evaluation of these paradigms would have been valuable. Similarly, while some chapters extol legal personhood for rivers, others focus on community management and say little about rights – the relationship between granting rights to rivers and empowering communities is an area ripe for exploration, and one that the book touches on tangentially (for example, in chapters on participatory democracy in river management, Ch. 29, or the role of self-help groups, Ch. 9) but does not systematically analyse. These critiques, however, are perhaps asking for a different kind of book. As a conference volume, *Rivers Unbound* succeeds in providing a platform for a multitude of voice and case studies, leaving the reader with ample material for reflection and further research.

6. Conclusion

In style and substance, *Rivers Unbound* mirrors the rivers it discusses – at times meandering, at times forceful, rich in local color yet part of a global current. For scholars, lawyers, and

[41] Tilak Raj Sharma and Vikash Sharma 'Clean Water as a Fundamental Human Right in India: Challenges and Solutions' in Ananth Padmanabhan, Nabeela Siddiqui and Gnana Sanga Mithra S (eds), *Rivers Unbound Exploring Social Currents, Legal Tides, and Stories of Flow* (1st ed., Routledge 2025) 43-48.

activists interested in the evolving concept of river rights and ecocentric law, the book offers a compendium of contemporary developments, particularly in the Indian subcontinent. Its greatest contribution lies in foregrounding the *thematic triad* of rights-of-rivers, legal personhood, and ecocentrism, and demonstrating how these ideas are taking shape on the ground through litigation, legislation, and community action. The comparative references to New Zealand's *Whanganui River* and Colombia's *Atrato River* – alongside discussions of India's own journey – help situate South Asian jurisprudence in the wider movement recognising that *nature, too, can be a rights holder*. The book's engagement with indigenous perspectives and cultural narratives adds depth to the legal analysis, underscoring that rivers are not only units of ecology or economy but also entities of sacred and social significance.

As debates on environmental personhood and rights-of-nature proliferate in academic journals and courtrooms alike, this volume's practical case studies and doctrinal critiques make a timely contribution. It will especially resonate with readers of the *Journal of Environmental Law* attuned to the complexities of translating ecocentric philosophy into legal practice. If there is a cautionary takeaway, it is that recognising the "rights" of a river is not a panacea, such rights must be operationalised through institutions, guardians, and a supportive societal ethos. In one sense, *Rivers Unbound* leaves us with a paradox: to truly protect rivers, we may need to both elevate their status in law *and* ground our legal approaches in the lived realities of those who know the rivers best (local communities, indigenous peoples, and the rivers' own ecological rhythms). The book's multidisciplinary insights reinforce this point, making a compelling case that the future of river governance lies in breaking silos and embracing a more holistic, ecocentric paradigm.

In sum, *Rivers Unbound* is a valuable and thought-provoking assemblage. It advances the discussion on river rights by documenting how far the idea has come, from the bold legislative act in New Zealand, to judicial experiments in South Asia, to academic debates across the Global South. At the same time, it acknowledges how much work remains in reconciling these novel legal currents with on the ground governance and transboundary complexities. For a field in flux, this book offers both inspiration and prudent reflection. It invites us to imagine rivers not as bounded resources over which we quarrel, but as living threads of the biosphere – threads that legal systems must learn to weave into their very fabric, across jurisdictions and cultures, if we are to navigate toward a more just and sustainable future.