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Compliance without Ratification: Applying Transnational Legal Process Theory to the Criminalization of Enforced Disappearance in Nepal

Nava Raj Sapkota
Joint Secretary, National Human Rights Commission

Article Info.
Corresponding Author
Nava Raj Sapkota

Email
nrsapkota@gmail.com

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Abstract

Enforced disappearance constitutes a grave violation of human rights, infringing multiple fundamental rights, including liberty, security, recognition before the law, and in many cases, life. The International Convention for the Protection of All Persons from Enforced Disappearance (CEDP) (2006) stands as the principal international instrument dedicated to preventing and addressing enforced disappearance. Although Nepal is not a state party to the CEDP and is therefore under no direct treaty obligation to incorporate its provisions into domestic law, it has nonetheless criminalized enforced disappearance under Section 206 of the National Criminal Code (2017). Existing scholarship generally explains the reception of international law through the traditional doctrines of monism and dualism. Moving beyond this dichotomy, this study examines the relevance of Harold Hongju Koh's transitional legal process theory to examine how international human rights norms permeate Nepal's domestic legal framework. Specifically, it assesses the extent to which the processes of interaction, interpretation, and internalization have influence Nepal's legal response to enforced disappearance despite the absence of treaty ratification. Particular attention is given to the landmark decision in *Rajendra Dhakal and others v. Government of Nepal* (2007), in which the Supreme Court directed the Government to criminalize enforced disappearance in accordance with international human rights standard. Employing a qualitative doctrinal methodology grounded in an extensive review of legislation, judicial decisions, international instruments, and academic literature, the study demonstrates how international human rights norms may permeate domestic legislation through judicial interpretation, legislative reform, and transnational legal processes even in the absence of binding treaty obligations.

Keywords: enforced disappearance, domestication, translational legal process, human rights and criminal code

Introduction

The International Convention for the Protection of All Persons from Enforced Disappearance (CEDP) is principal international human rights instrument dedicated to preventing and addressing enforced disappearance. Adopted in 2006, the Convention applies in all times, including during armed conflict, complement international humanitarian law and international human rights law by establishing a comprehensive legal framework for prevention, investigation, prosecution, and punishment of enforced disappearance (United Nations, 2006).

It further recognizes that the widespread or systematic practice of enforced disappearance may constitute a crime against humanity under international law. The International Committee of the Red Cross has emphasized that enforced disappearance violated multiple fundamental human rights and humanitarian law obligations, including right to liberty, security, recognition as a person before the law, and protection from torture and arbitrary detention (International Committee of the Red Cross [ICRC], 2024). Similarly, International Commission of Jurists has noted that when enforced disappearance is committed as part of widespread or systematic attack against a civilian population, it constitutes a crime against humanity under customary international law (International Commission of Jurists [ICJ], 2015.). Consequently, international legal norms require states to prevent enforced disappearance, investigate allegations promptly and effectively, prosecute perpetrators, and ensure victims' right to truth, justice, and reparation, and guarantees of non-recurrence (United Nations, 2006).

The implementation of international human rights treaties, however, depends not only on their adoption at the international level but also on their incorporation into domestic legal systems. Ratification or accession constitutes the formal expression of a state's consent to be bound by a treaty under international law. Nevertheless, effective implementation requires states to adopt legislative, administrative, institutional, and judicial measures capable of giving practical effect to treaty obligations. Galvis (2021) argues that meaningful implementation of the CEDP requires states to establish comprehensive preventive frameworks that include criminalization of enforced disappearance, the prohibition of secret detention, effective investigation mechanisms, institutional safeguards against arbitrary, and the removal of legal barriers that facilitate impunity. Consistent with this approach, Article 4 of the Convention requires each State Party to ensure that enforced disappearance constitutes an offence under its domestic criminal law (United Nations, 2006).

Nepal presents a particularly significant case for examining the domestic reception of international norms against enforced disappearance. Since the early 1950s, allegations of enforced disappearances have periodically emerged in Nepal, becoming increasingly prevalent during the Panchayat regime (1961–1989) and escalating dramatically throughout the decade-long (1996–2006) armed conflict between the Government of Nepal and the Communist Party of Nepal (Maoist). During the conflict, both state security forces and the Maoist insurgency were implicated in abductions and enforced disappearances, although the overwhelming majority of documented cases have been attributed to state authorities (Chapagain et al., 2008). By 2004, Nepal had recorded one of the highest numbers of unresolved enforced disappearance cases worldwide (OHCHR, 2012). Although the Comprehensive Peace Agreement formally ended the armed conflict in 2006, the fate and whereabouts of many disappeared persons remain unknown. Thousands of families continue to seek truth, justice, Reparations, and accountability, while investigations and prosecutions have progressed only minimally.

This study examines the extent to which Nepal has internalized the normative framework established by the CEDP despite not being a State Party to the Convention. Nepal has neither signed nor ratified the Convention and therefore is not directly bound by its treaty obligations under the international law. Under the Treaty Act (1990), treaties generally acquire domestic legal effect only after ratification or accession in accordance with constitutional procedures. Accordingly, Nepal is under no legal obligation to domesticate the provisions of the CEDP. Nevertheless, Nepal remains bound by other international human rights instruments that prohibit arbitrary detention, torture, and violations of the right to life and liberty, including the International Covenant on Civil and Political Rights, to which Nepal is a State Party. These treaty obligations, together with customary international law, constitutional guarantees of fundamental rights, and judicial interpretation by the Supreme Court of Nepal, provide an important normative foundation addressing enforced disappearance within domestic legal system.

Judicial intervention has played a particularly significant role in this process. In the landmark decision *Rajendra Dhakal and others v. Government of Nepal* (2007), the Supreme Court recognized enforced disappearance as a grave violation of fundamental human rights and directed the Government to enact legislation criminalizing enforced disappearance in line with international standards. The Court further emphasized the state's obligations to investigate disappearances effectively, provide remedies to victims and their families, and establish institutional mechanisms capable of ensuring accountability. Beyond domestic jurisprudence, Nepal has also been subject to sustained international scrutiny. During successive cycles of the UN Human Rights Council Universal Periodic Review, numerous states recommended that Nepal ratify the CEDP and strengthen its domestic legal framework concerning enforced disappearance, recommendations that were reiterated during the third cycle in 2021 (UNHRC, 2021).

Responding to both domestic judicial directives and sustained international engagement, Nepal enacted the National Criminal Code (2017) which for the first time criminalized enforced disappearance. Section 206 prohibits any person from subjecting another individual to enforced disappearance, thereby establishing the offence within Nepal's criminal justice system. However, the effectiveness of this legislative development is substantially constrained by Section 210, which imposes six months statute of limitations, calculated from the date on which the disappearance is discovered or the disappeared person reappears. This limitation is inconsistent with international legal standards because enforced disappearance is widely recognized as a continuous offfence that persists until the fate or whereabouts of the disappeared person has been clarified (United Nations, 2006).

Nepal's broader transitional justice framework further illustrates the complexities of domestic implementation. The Commission on Investigation of Enforced Disappeared Persons (CIEDP) was established under the Enforced Disappearances of Enquiry, Truth, and Reconciliation Commission Act (2014) to investigate conflict-era disappearances alongside the Truth and Reconciliation Commission. Although the CIEDP has registered more than 2,500 complaints (Nepal, 2026), investigations remain incomplete, prosecutions have yet to commenced, and victims continue to experience prolonged delays in obtaining truth and justice. These institutional shortcomings demonstrate that legislative criminalization alone is insufficient unless accompanied by effective investigative, prosecutorial, and judicial mechanisms capable of enforcing the law in practice. This apparent divergence between Nepal's formal treaty position and its domestic legal developments exposes the limitation of explaining international law solely through the traditional dichotomy of monism and dualism. Conventional scholarship generally assumes that international norms become legally effective within domestic legal systems primarily through formal treaty ratification.

However, Nepal's criminalization of enforced disappearance despite remaining outside the CEDP suggests a more complex process of normative diffusion. To explain this phenomenon, this study employs Harold Hongju Koh's theory of the 'transnational legal process,' which argues that international legal norms become internalized through continuous interaction among domestic courts, governments, international organizations, civil society, and other transnational actors. Through repeated process of interaction, interpretation, and internalization, international norms may influence domestic legal systems even in the absence of formal teary obligations (Koh, 1996; Koh, 1997). Against this theoretical backdrop, the present study investigates the extent to which Nepal has internalized international norms concerning enforced disappearance through judicial interpretation, legislative reform, and institutional development. Rather than assessing treaty compliance alone, the study examines how domestic courts, international human rights institutions, and transnational advocacy have collectively shaped Nepal's evolving legal response to enforced disappearance. In doing so, it contributes to broader debates concerning the domestic reception of international human rights law, the operation of transnational legal processes, and the role of judicial constitutionalism in advancing human rights protection beyond the formal boundaries of treaty ratification.

Methodology, the study adopts a qualitative doctrinal research design grounded comprehensive literature review, statutory analysis, and qualitative content analysis. It examines constitutional provisions, the Nepal Treaty Act (1990), the National Criminal Code (2017), the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act (2014), recommendations of the United Nations Human Rights Council and the OHCHR, and relevant jurisprudence of the Supreme Court of Nepal. By integrating domestic legal materials with international human rights standards, the study evaluates the extent to which Nepal's legal framework reflects the interaction, interpretation, and internalization of international norms against enforced disappearance despite the absence of formal treaty ratification.

Modes and Theories of the Domestication of International Law

Broadly defined, the domestication of international law refers to the legal and institutional processes through which sovereign states give legal effect to international obligations within their domestic legal system (Dei-Tutu & Atuguba, 2023). Domestication enables international norms to become enforceable before national institutions and constitutes an essential mechanism through which states fulfill their international legal obligations. Although domestic legal systems differ considerably, two principal methods are generally employed. The first involves legislative incorporation, whereby parliament enacts legislation implementing treaty obligations into domestic laws. The second involves constitutional recognition, whereby international law is accorded with direct legal effect or constitutional status within the domestic legal hierarchy.

Conceptual Framework of Domestication: Monism and Dualism

The conceptual framework of domestication in international jurisprudence is often analyzed through two contrasting approaches: monism and dualism. These theories provide competing explanations of the relationship between international law and municipal law, particularly in determining which system takes precedence when conflicts arise.

International law governs relations among states, while municipal law regulates individuals and organizations within a state (Adhikari, 2009). The tension between potentially conflicting rules has been amplified by doctrinal disputes, with monist and dualist schools holding diametrically opposed views.

Monism

The monist theory maintains that domestic law inconsistent with international law is automatically null and void, and that international rules are directly applicable within the domestic legal systems (Malanczuk, 1997). This perspective emphasizes the unity of law and the supremacy of international norms in domestic spheres. In traditionally monist jurisdictions, constitutional provisions accord to international law with the same or higher status than domestic law, thereby eliminating the need for separate implementing legislation. Countries such as Italy, Netherlands, Belgium, the United States, France, and Mexico exemplify this model. For instance, Article VI, Clause 2 of the United States Constitution provides:

> "All treaties made, or which shall be made under the authority of the US, shall be the Supreme law of the land. And the Justices in every state shall be bound thereby, anything in the Constitution or law of any state to the contrary notwithstanding."

In the United States, treaties ratified by the Senate are placed on par with federal law, overriding conflicting state law and prior federal legislation. Nevertheless, such treaties may themselves be nullified by subsequent federal enactments, much like customary international law.

Dualism

By contrast, the dualist theory underscores the distinction between international and municipal law, treating them as separate domains of social science (Shaw, 2017). According to this view, international law acquires validity within municipal jurisdictions only when enacted by the national legislature (Adhikari, 2009). Dualism stresses the inviolability of sovereignty and the unlimited exercise of sovereign power. Consequently, international law cannot be applied in national courts unless it has been expressly incorporated into domestic legislation (Bashyal, 2066).

Jurisdictions such as the United Kingdom, Canada, Australia, New Zealand, India, and most Commonwealth countries adopt this orientation. English law, for example, recognizes international law as part of the law of the land, but if a statute conflicts with international law, courts initially attempt to harmonize the statute with the nation's international obligations. If reconciliation proves impossible, however, the statute prevails.

The automatic reception of international law into municipal systems reflects each country's interpretation and practice. Monism emphasizes the supremacy and direct applicability of international law, while dualism insists on legislative incorporation and the primacy of sovereignty. Together, these theories frame the doctrinal disputes that continue to shape the interaction between international and municipal legal orders.

Fitzmaurice's Compromise Theory

Recognizing the limitations of the strict monism-dualism dichotomy, Gerald Fitzmaurice proposed a more nuanced approach during 1950s. Rather than treating international and domestic law as competing legal orders, Fitzmaurice argued that they operate within separate spheres, each possessing supremacy within its own domain. International law regulates relations among states, whereas domestic law governs legal relationships within the state (Webber, 2012).

Under this approach, a state's reliance on domestic law cannot justify its failure to comply with international obligations. While domestic courts may continue to apply valid national legislation, the state nevertheless incurs international responsibility if such legislation conflicts with its international commitments. Fitzmaurice therefore shifted the debate away from hierarchical supremacy toward the international responsibility of states for non-compliance.

Transnational Legal Process Theory and Non-Party Compliance

While monism, dualism, and Fitzmaurice's compromise primarily explain how ratified treaties operate within domestic legal systems, they provide limited insight into situations in which states voluntarily adopt international norms despite not being parties to the relevant treaty. This article therefore employs Harold Hongju Koh's transnational legal process theory as its principal analytical framework.

The emergence of the transnational legal process reflects a broader shift in international legal scholarship away from a strictly state-centric understanding of international law. As Jackson and Sørensen (2013) observe, contemporary international relations extend beyond interactions among sovereign states to encompass transnational relationships involving individuals, courts, civil society organizations, international institutions, and other non-state actors. This pluralist perspective recognizes that international norms increasingly circulate through networks of actors operating across national boundaries rather than exclusively through formal intergovernmental agreements. Similarly, Martha Finnemore argues that international organizations influence domestic policy by promoting norms that states gradually adopt legitimate standards of governance.

Building upon this understanding, Harold Hongju Koh conceptualizes international law not as a static collection of rules but as a dynamic and continuous process through which public and private actors, including governments, domestic courts, international organizations, civil society organizations, and legal professionals interact across borders to create, interpret, and internalize international legal norms (Koh, 1996, 2017; Shaffer, 2010). According to Koh, repeated interaction generates a process of interpretation through which international norms are translated into domestic legal discourse. Over time, these interpreted norms become internalized within national legal and political institutions, ultimately shaping state behaviour even where no formal treaty obligation exists. Compliance therefore emerges not solely from legally binding commitments but also from judicial reasoning, institutional dialogue, normative persuasion, and repeated engagement with international standards.

The theory has subsequently been expanded within the broader scholarship on transnational legal ordering. Shaffer (2016) identifies three complementary dimensions of transnational legal ordering. The first concerns legal ordering through private actors and institutions operating beyond the state. The second examines the transnational processes through which legal norms are constructed, transmitted, and institutionalized across international, national, and local levels. The third reconceptualizes law itself by recognizing that legal authority increasingly develops through interactions involving both state and non-state actors. Collectively, these perspectives demonstrate that domestic legal change frequently results from continuous transnational engagement rather than formal treaty incorporation alone.

Within this framework, international legal norms become progressively "sticky", shaping domestic legal expectations and influencing legislative, executive, and judicial decision-making (Martin, 2018). States may therefore internalize international standards voluntarily to strengthen human rights protection, enhance institutional legitimacy, respond to domestic judicial and civil society advocacy, or align their legal systems with evolving international norms, notwithstanding the absence of treaty ratification (Friedman, 2021). Consequently, transnational legal process theory provides an explanation for compliance without ratification, illustrating how international legal norms may become embedded within domestic legal systems through socialization, persuasion, and institutional practice rather than through formal legal obligation.

This theoretical framework is particularly relevant to the present study. Nepal has neither signed nor ratified the CEDP. Nevertheless, the offence of enforced disappearance was incorporated into the National Criminal Code (2017), and the Supreme Court of Nepal has repeatedly relied upon international human rights principles, including those reflected in the CEDP in interpreting constitutional rights and directing legislative reform, most notably in *Rajendra Dhakal and Others v. Government of Nepal* (2007). These developments cannot be adequately explained through traditional monist or dualist theories, both of which presuppose formal treaty obligations as the basis for domestic legal effect. Rather, they illustrate the operation of a transnational legal process in which international human rights norms have influenced domestic legislation and judicial interpretation through sustained interaction, normative persuasion, and judicial engagement. Accordingly, Koh's Transnational Legal Process theory provides the most appropriate analytical framework for examining Nepal's internalization of international norms prohibiting enforced disappearance despite its status as a non-party to the CEDP.

The Global Legal Imperative against Enforced Disappearance

The codification of international norms prohibiting disappearance represents a significant development in the evolution of international human rights law and global accountability. The adoption of the CEDP established the first comprehensive treaty framework specifically dedicated to preventing, investigating, prosecuting, and remedying enforced disappearance (McCrory, 2007). The Convention not only criminalizes enforced disappearance but also establishes detailed state obligations relating to prevention, victim protection, investigation, prosecution, international cooperation, and reparations. Nevertheless, McCrory (2007) argues that the Convention's normative potential cannot be realized solely through its adoption at the international level. Its effectiveness ultimately depends upon states ratifying the Convention and implementing its obligations through domestic legislation, institutions, and enforcement mechanisms capable of preventing future violations and ensuring accountability.

International legal scholarship has subsequently refined the conceptual understanding of enforced disappearance as a distinct and continuing violation of human rights. Kyriacou (2025) defines enforced disappearance as one of the gravest violations of international human rights law, characterized by three essential elements: (a) the deprivation of an individual's liberty; (b) the direct or indirect involvement, authorization, support, or acquiescence of the state; and (c) the refusal to acknowledge the deprivation of liberty or disclose the fate or whereabouts of the disappeared person, thereby placing the individual outside the protection of the law. Although the precise wording differs among international instruments, including the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, the Inter-American Convention on Forced Disappearance of Persons, the Rome Statute of the International Criminal Court, and the CEDP, a broad consensus has emerged regarding these core constitutive elements. Among these instruments, the CEDP provides the most comprehensive legal framework by explicitly recognizing victims' rights to truth, justice, reparation, and guarantees of non-recurrence. Consistent with international standards on reparations, the Convention recognizes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition as integral components of effective remedies (United Nations, 2006).

Contemporary literature has also expanded the scope of enforced disappearance beyond traditional contexts of armed conflict and political repression. Duhaime and Thibault (2017) demonstrate that migrants have become increasingly vulnerable to enforced disappearance throughout migration routes and in destination countries. They argue that disappearances may occur during immigration detention, deportation procedures, migrant smuggling operations, and human trafficking, as well as through politically motivated actions by state authorities. Their analysis illustrates that enforced disappearance is no longer confined to authoritarian regimes or internal armed conflicts but has emerged as a transnational human rights challenge requiring coordinated responses across international human rights law, refugee law, and migration law. This broader understanding reinforces the universal relevance of the CEDP and underscores the need for states to establish effective domestic legal frameworks capable of preventing enforced disappearance in diverse contexts.

Collectively, this body of scholarship demonstrates that enforced disappearance has evolved from being viewed as an isolated human rights abuse into a distinct international crime requiring comprehensive legal regulation. The literature consistently emphasizes that effective prevention depends not only on international norm development but also on their meaningful domestic implementation through criminalization, independent investigative mechanisms, judicial accountability, and effective remedies for victims. These insights provide the normative foundation for examining Nepal's domestic legal framework and assessing the extent to which international standards concerning enforced disappearance have been internalized despite the country's non-ratification of the CEDP.

Judicial Activism and Statutory Limitations

Judicial intervention has played a significant role in advancing legal protection against enforced disappearance in Nepal, particularly in the absence of an adequate legislative framework. Adhikari (2008) argues that the judiciary took unprecedented steps to prevent state agencies from orchestrating or facilitating enforced disappearances through progressive constitutional interpretation and judicial directives. In particular, the Supreme Court's landmark decision in *Rajendra Dhakal and Others v. Government of Nepal* (2007) marked a departure from the Court's traditionally restrained approach to judicial review. The judgment has had enduring implications for Nepal's constitutional development, transitional justice process, and engagement with international human rights law.

Similarly, Wagle (2011) argues that one of the principal obstacles to addressing conflict-era human rights violations is the absence of an adequate domestic legal framework, particularly in light of the principle of legality (*nullum crimen sine* lege), which prohibits the retroactive application of criminal law. He contends that international law can provide a normative foundation for addressing legislative gaps, drawing upon comparative international practice. Nepal's experience reflects this approach. Recognizing the inadequacy of existing criminal legislation to address enforced disappearance, the Supreme Court, in *Rajendra*

Dhakal and Others v. Government of Nepal (2007), held that effective investigation and prosecution were impossible in the absence of specific legislation criminalizing enforced disappearance. The Court observed that Nepal's existing criminal laws failed to address the legal and institutional dimensions of enforced disappearance and therefore directed the Government to enact legislation defining and criminalizing the offence in accordance with the standards contained in the CEDP. Although Nepal was not a party to the Convention, the Court relied upon its provisions as persuasive international authority to guide domestic legal reform. This judgment represents a significant example of judicial engagement with international human rights norms and illustrates how courts can facilitate the domestic internalization of international standards beyond formal treaty ratification.

This interpretation is supported by other scholars. Kristjánsdóttir et al. (2012) argue that the Dhakal decision introduced several important principles of international human rights law into Nepal's domestic legal order. According to the authors, the judgment made three significant contributions. First, it recognized the right of families to know the fate and whereabouts of disappeared persons as an integral component of the right to an effective judicial remedy. Second, it affirmed the right of victims' families to receive compensation. Third, it directed the Government of Nepal to initiate criminal proceedings against those responsible for enforced disappearances and to establish an appropriate legal framework consistent with the standards of the CEDP. Collectively, these judicial directives laid the normative foundation for Nepal's subsequent legislative response to enforced disappearance.

A victim-centred perspective is also advanced by Bishwa Pathak (2016), who observes that more than fifty post-conflict countries have established truth commissions to investigate historical human rights violations. Among these, several commissions have focused specifically on enforced disappearance as a mechanism for uncovering the truth, combating impunity, and providing justice and reparations to victims' families. Drawing upon human security theory, Pathak argues that transitional justice mechanisms should prioritize the protection, dignity, and security of victims rather than the interests of perpetrators or political elites.

From a broader constitutional perspective, Bikash Baral and Prakash Basnet (2020) examine the theoretical foundations of monism and dualism and analyse comparative constitutional and judicial practices regarding the reception of international law. They argue that determining whether a state follows a monist or dualist approach requires an integrated assessment of its constitutional provisions, statutory framework, and judicial practice. Applying this analytical framework to Nepal, they conclude that the Treaty Act (1990), does not adopt a consistently monist or dualist position. Instead, Nepal's approach to the domestication of international law has evolved largely through judicial interpretation, particularly where courts have relied on international human rights norms to resolve gaps in domestic legislation. This jurisprudential development demonstrates that Nepal's legal system increasingly reflects a functional and pragmatic approach to international law rather than strict adherence to either traditional model.

Nepali Legal Framework on the Domestication of International Law

The Constitution of Nepal (2015) does not directly allow the domestication of international law, specifically concerning treaties to which the state is not a party. While Nepal displays characteristics of both monistic and dualistic schools of thoughts, its legal framework is generally oriented toward a dualist approach, requiring explicit transformation for international norms into national legislation to be enforceable.

The Nepal Treaty Act (1990) governs the reception of international law. Section 9 of the Act outlines the mechanism for giving effect to treaties ratified or approved by the parliament:

(1) In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament, inconsistent

with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.

(2) Any treaty which has not been ratified, accede to, accepted or approved by the Parliament, though to which Nepal or Government of Nepal is a party, imposes any additional obligation or burden upon Nepal, or Government of Nepal, and in case legal arrangements need to be made for its enforcement, Government of Nepal shall initiate action as soon as possible to enact laws for its enforcement.

While this Act provides a pathway for domestication of ratified international instruments, the Constitution itself, declaring all inconsistent law void. Crucially, both the Constitution and the Treaty Act remain silent on the status and direct applicability of how international instruments to which Nepal is not a party (Chapagai, 2009). This creates a normative vacuum, leaving the domestic application of such standards dependent on judicial interpretation rather than explicit legislative mandate.

Substantive Provisions and compliance under the CEDP

The CEDP serves as the first universally binding human rights instrument specifically addressing enforced disappearance. The Convention considers enforced disappearance to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law (OHCHR, 2010).

It establishes an absolute prohibition: "No one shall be subject to enforced disappearance without exception, even in time of war or other public emergency" (United Nations, 2006, Art.1). Similarly, Article 4-7 requires states to criminalize enforced disappearance under domestic law as an autonomous offense, punishing it with appropriate penalties that account for its extreme seriousness (OHCHR, 2010). The Convention mandates that state parties criminalize enforced disappearance and make it a punishable offence, ensuring penalties commensurate with its severity. It classifies enforced disappearance as a crime against humanity when perpetrated in a widespread or systematic manner (United Nations, 2006). Beyond criminalization, the CEDP imposes affirmative obligations upon states to investigate disappearances, locate the disappeared, and ensure victims have access to justice and reparation. Notably, the Convention establishes chain-of-command responsibility, denies the "superior orders" defense, and mandates universal jurisdiction for prosecution (OOHCHR, 2010).

The Compliance Gap: Statute of Limitations

Enforced disappearance as a continuous nature of the crime, Article 8 recognizes that the statute of limitations should be long-term and start only when the fate or whereabouts of the disappeared person is established (OHCHR, 2010). From Nepal's perspective, Section 210 of the National Criminal Code (2017) provides the six months' statute of limitations. This section states that "no complaint shall be entertained after expiry of six months from the date of having knowledge of commission of the offence or from the date of the disappeared person getting or being made public." This period is insufficient and inconsistent with international legal standards. Enforced disappearance as a grave violation of human rights, a six-month limit is regarded as "too short" to be considered a reasonable timeframe for investigation and prosecution of enforced disappearance offence.

The CEDP primarily provides responsibility for State agents, but Article 3 requires investigation of acts committed by non-State actors (OHCHR, 2010). Committee on Enforced Disappearances (2024) clarifies that acts by non-State actors exercising control over territory or acting in non-international armed conflicts fall under the Convention's scope. The Convention ensures the protection of individuals involved in investigation and search efforts, including victims, witnesses, and defense counsel, from intimidation or ill-treatment (Jovanović, 2025).

The Article 12 of the CEDP ensures that the right to report disappearances is recognized, and investigations must start immediately, allowing family members to access information (OHCHR, 2006). The guiding principles for the search for disappeared persons which based on the CEDP, and other relevant international instruments provides that the search for a disappeared person should be conducted under the presumption that he or she is alive (UNCED, 2019). It also stipulates that the search is a continuing obligation. Nepal (2026) argues that according to 2020 CIEDP report, a list of 2,506 people allegedly forcibly disappeared, but Nepal has failed to determine what happened to a single victim, and nobody has been held accountable.

Equally, Nepal has been consistently receiving recommendations from the UN Human Rights Council to become a party to the CEDP (OHCHR, 2021). Similarly, in 2007, the Supreme Court ordered the government to enact legislation against criminalizing enforced disappearance in line with the Convention's standards. During the 3rd cycle of the UPR in 2021 and in 4th cycle in 2026 various countries have recommended Nepal to become the state party to enforced disappearance convention (OHCHR, 2021). In 3rd cycle, Argentina, Greece and Honduras (UNHRC, 2021) and in 4th cycle Mongolia, Thailand, Croatia, France, Malta, Niger, Peru and Japan recommended to take all necessary steps towards the ratification and signing of the CEDP (UNHRC, 2026).

UPR recommendations contribute to norm internationalization because they reinforce and diffuse international human rights standards across States. However, the recommendations themselves do not automatically mean that the norm has been fully internalized. States like Argentina encourage Nepal under UPR review to ratify convention, criminalize enforced disappearance, investigate cases, provide remedies to victims, and strengthen institutions. These spreads shared expectations regarding appropriate State behaviour.

Legal and Institutional Arrangements and International Oversight

Nepal has neither ratified the CEDP nor signed the Rome Statute. However, it has established national commissions and criminalized enforced disappearance through the National Criminal Code. Section 206 of the Code (2017) stipulates that no person shall subject to enforced disappearance. Subsection 2 defines "enforced disappearance" as:

(a) The arrest, detention, or control of a person by authorized personnel, followed by failure to produce the individual before a competent authority within twenty-four hours (excluding travel time), refusal to allow contact, or concealment of information regarding their whereabouts and condition.

(b) The abduction or deprivation of liberty by any person or group, accompanied by concealment of information about the reasons, location, or condition of detention.

While this represents progress in domesticating the CEDP, gaps remain. The definition inadequately addresses superior command responsibility, does not make the prohibition absolute, and prescribes penalties inconsistent with international standards (ICJ, 2017). The United Nations (2006) emphasizes that superiors are culpable if they knew or disregarded information about crimes, exercised effective control, should have known given their authority, or failed to take reasonable measures to prevent or prosecute violations.

Both CEDP and Nepali law recognize deprivation of liberty and concealment of information as core elements but diverge in scope. The CEDP requires a state-actor nexus, whereas Section 2(b) extends liability to non-state groups, blending enforced disappearance with ordinary abduction. Moreover, the CEDP stresses removal from legal protection as a defining consequence, while Nepali law focuses more narrowly on procedural failures, such as non-production before authorities within 24 hours.

The Supreme Court of Nepal has played a pivotal role in aligning domestic law with international standards. Between 2007 and 2020, it ordered the government to criminalize enforced disappearance and rejected amnesty provisions in the 2014 Truth and Reconciliation Commission Act (Schonveld & Bandi, 2014). Despite these rulings, Ahmed (2020) argues that legislation remains flawed, failing to ensure unconditional prohibition, robust investigations, or accountability for senior officials. Penalties also fall short of international standards.

The Disappeared Persons Enquiry, Truth and Reconciliation Commission Act (2014) classifies enforced disappearance as a grievous violation of human rights. The Commission is mandated to investigate such violations and recommend reparations. Section 14 empowers it to excavate suspected burial sites, conduct DNA testing or post-mortem examinations, and return identified remains to families—recognizing victims' rights to truth, dignity, and closure.

Following the 2024 amendment, the Act generally prohibits amnesty for serious human rights violations. The International Commission of Jurists (2024) notes that the Supreme Court has consistently ruled blanket amnesties for crimes such as torture, rape, and enforced disappearance unconstitutional.

Conclusion

Nepal, under its domestic legal framework, is not obligated to enforce instruments to which it is not a party. Nevertheless, it has voluntarily incorporated provisions from international instruments into national legislation. A notable example is the criminalization of enforced disappearance in the National Criminal Code, despite Nepal not being a party to the CEDP. The Supreme Court of Nepal has played a pivotal role in this process, particularly through its directive in *Rajendra Dhakal and Others v. Government of Nepal* (2007), which required the government to criminalize enforced disappearance in line with international standards. The Court has consistently acted as a driver of the transnational legal process, aligning domestic law with international norms. In addition, the UN Human Rights Council has recommended that Nepal consider signing and ratifying the CEDP.

The transitional justice process, shaped by the Disappeared Persons Enquiry, Truth and Reconciliation Commission Act (2014), provides for the establishment of a commission to investigate conflict-era disappearances. Following amendments in 2024, the Act generally prohibits amnesty for serious human rights violations. Despite this, the Commission has listed approximately 2,557 cases without conducting effective investigations or prosecutions under the Criminal Code.

Nepal's approach reflects the application of the transnational legal process in domesticating international standards on enforced disappearance. While definitions have been incorporated into the Criminal Code, the "internalization" phase remains limited, creating a gap between international obligations and domestic accountability. Section 206 of the Criminal Code prohibits enforced disappearance, and the CEDP similarly requires states parties to criminalize and punish the offense. This demonstrates Nepal's partial alignment with international standards, though challenges persist in enforcement, prosecution, and compliance with the broader obligations envisioned under international law.

References

Adhikari, P. (2009). An overview of constitutional and legislative provisions of Nepal concerning internalisation of international law. *Nepal Law Review*, *17*(1), 21.

Ahmed, I. (2020). A comparative analysis of laws and mechanisms against enforced disappearance in Pakistan and Nepal in light of the international human rights instruments [Master's thesis, Mahidol University].

Baral, S., & Basnet, S. (2020). Domestication of International Law with special reference to the Statutory and Judicial Assessment of Nepal. *NYAYADUT, 51*(243), 45-68.

Bashyal, B. (2066). *Public international law*. Lumbini Prakhashan.

Chapagai, R. P. (2009). National application of international human rights law: A Nepali perspective. *NJA Law Journal*, *3*(1), 113-121.

Chapagain, B., Ojha, P., & Shrestha, S. (2008). *Impaired accountability: State of disappearance in Nepal: A brief assessment of implementation of UN WGEID recommendations*. Informal Sector Service Centre (INSEC). https://insecresources.org.np/pages/download_progress.php?ref=38128&size=&ext=pdf&k=5a042e2cc7.

Committee on Enforced Disappearances. (2024). Statement on non-State actors in the context of the International Convention for the Protection of All Persons from Enforced Disappearance. United Nations.

Dei-Tutu, S., & Atuguba, R. A. (2023). The domestication of international law in African settings: Seven normative options in Ghana. 10.1515/icl-2023-0020.

Duhaime, B., & Thibault, A. (2017). Protection of migrants from enforced disappearance: A human rights perspective. *International Review of the Red Cross*, *99*(905), 569-587. https://doi.org/10.1017/S1816383118000097.

Friedman, A. (2021). Compliance without ratification: Using international law in non-binding scenarios. *Revue québécoise de droit international*, 137–157. https://doi.org/10.7202/1079426ar.

Galvis, M. C. (2021). *The work of the Committee on Enforced Disappearances*. Geneva Academy of International Humanitarian Law and Human Rights. https://geneva-academy.ch/wp-content/uploads/2025/09/The-Work-of-the-CED.pdf.

Human Rights Watch. (2007). *Nepal: Supreme Court orders action on "disappearances"*. https://www.hrw.org/news/2007/06/15/nepal-supreme-court-orders-action-disappearances.

International Commission of Jurists. (2015). *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction: A Practitioners Guide*. https://www.icj.org/wp-content/uploads/2015/12/Universal-Enforced-Disappearance-and-Extrajudicial-Execution-PGNo9-Publications-Practitioners-guide-series-2015-ENG.pdf

International Commission of Jurists. (2017). *No more "missing persons": The criminalization of enforced disappearance in South Asia*. https://www.icj.org/wp-content/uploads/2017/08/South-Asia-Enforced-Disappearance-Publications-Reports-Thematic-Reports-2017-ENG.pdf.

International Commission of Jurists. (2024). *A brief review of Nepal's transitional justice (TJ) law: Donors and supporters must be vigilant to ensure compliance with Nepal's international legal obligations, while supporting its implementation*. ICJ Briefing Paper. https://www.icj.org/wp-content/uploads/2025/03/A-Brief-Review-of-Nepals-Transitional-Justice-TJ-Law.pdf.

International Committee of the Red Cross. (n.d.). *Domestic law and IHL*. ICRC. https://www.icrc.org/en/law-and-policy/domestic-law-and-ihl

Jackson, R., & Sørensen, G. (2016). *Introduction to international relations: Theories and approaches* (6th ed.). Oxford University Press.

Jovanović, I. (2025). Enforced disappearances in armed conflict through the lenses of the International Convention for the Protection of All Persons from Enforced Disappearance. In G. Baranowska & M. Kolaković-Bojović (Eds.), *Enforced disappearances: On universal responses to a worldwide phenomenon* (19-46). Cambridge University Press. DOI:10.1017/9781009461719.002.

Koh, H. H. (2017). Transnational legal process. In. (Ed), *The nature of international law* (pp. 311-338). Routledge.

Kristjansdottir, E., Nollkaemper, A., & Ryngaert, C. (Eds.). (2012). *International law in domestic courts: Rule of law reform in post-conflict states*. Intersentia.

Kunwar, T. N. (2019). The application of the Geneva Conventions in Nepal: Domestication as a way forward. In S. Linton, T. McCormack, & S. Sivakumaran (Eds.), *Asia-Pacific Perspectives on International Humanitarian Law* (23-36). Cambridge University Press. file:///C:/Users/dell/Downloads/RS122_Application%20of%20Geneva%20Conventions%20in%20Nepal%20Domestication%20as%20a%20way%20forward%20-%20Tek%20Narayan%20Kunwar.pdf. Kyriacou, N. (2025). Enforced disappearances in international human rights law: Definitions, violations and remedies. *Journal of Disappearance Studies*, *1*(1), 38-56. https://doi.org/10.1332/30498414Y2025D000000008.

Malanczuk, P. (1997). *Akehurst's modern introduction to international law* (7th ed.). Routledge.

Martin, C. (2018, February 26). Symposium: The assumptions of Koh's transnational legal process as counter-strategy. *Opinio Juris*. https://opiniojuris.org/2018/02/26/symposium-the-assumptions-of-kohs-transnational-legal-process-as-counter-strategy/.

McCrory, S. (2007). The international convention for the protection of all persons from enforced disappearance. *Human Rights Law Review*, *7*(3), 545-566. https://doi.org/10.1093/hrlr/ngm021

Nepal, D. (2026,). From accord to action: Evaluating Nepal's transitional justice mechanism over two decades of waiting. *Human Rights Research Center*. https://www.humanrightsresearch.org/post/from-accord-to-action-evaluating-nepal-s-transitional-justice-mechanism-over-two-decades-of-waiting

Office of the United Nations High Commissioner for Human Rights. (n.d.). *Human rights recommendations: Enforced disappearance recommendations for Nepal*. Universal Human Rights Index. Retrieved June 20, 2026, from https://uhri.ohchr.org/en/search-human-rights-recommendations?countries=17578535-38b0-428a-a9bc-4fa64451ae1c&searchText=enforced+disappearance&mechanismsOpened=b2b5b669-14-05-419d-8603-7826b15d69e1.

Office of the United Nations High Commissioner for Human Rights. (n.d.). *International human rights law*. https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law.

Office of the United Nations High Commissioner for Human Rights. (2010). *Background: International Convention for the Protection of All Persons from Enforced Disappearance*. OHCHR. https://www.ohchr.org/en/treaty-bodies/ced/background-international-convention-protection-all-persons-enforced-disappearance

Office of the High Commissioner for Human Rights. (2021). United Nations Universal Human Rights Index. https://uhri.ohchr.org/en/search-human-rights-recommendations?

Office of the High Commissioner for Human Rights. (2026). *Treaty body database: Ratification status for Nepal*. United Nations. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=122&Lang=EN

Parajuli, S. (2025). Rethinking Nepal's transitional justice process through a feminist and intersectional lens. *The Informal: South Asian Journal of Human Rights and Social Justice*, *2*(1), 1–18. https://doi.org/10.3126/informal.v2i01.82393

Pathak, B. (2016). World's disappearance commissions: An inhumanious quest for truth. World Journal of Social Science Research, *3*(3), 274-306. https://humiliationstudies.org/documents/PathakWorldsDisappearance2016.pdf.

Rajendra Dhakal and Others vs. Government of Nepal. Supreme Court of Nepal. Case no.3575 (2007).

Schonveld, B., & Bandi, G. (2014). Nepal's Supreme Court lays down the gauntlet. International Commission of Jurists *Asia*. https://www.icj.org/resource/nepals-supreme-court-lays-down-the-gauntlet/

Shaffer, G. (2010). *Transnational legal process and state change: Opportunities and constraints* (IILJ Working Paper 2010/4). International Law and Justice Working Papers, Institute for International Law and Justice, New York University School of Law.

Shaffer, G. (2016). Theorizing transnational legal ordering. *Annual Review of Law and Social Science*, *12*(1), 231-253. https://doi.org/10.1146/annurev-lawsocsci-110615-085128

Shaw, M. N. (2017). *International Law* (8th ed.). Cambridge University Press.

Singh, R. (2005). The use of international law in the domestic courts of the United Kingdom. *Northern Ireland Legal Quarterly*, 56(2), 119-134. https://nilq.qub.ac.uk/index.php/nilq/article/view/794/628

The Constitution of Nepal (2015).

The Constitution of the United States, 1787.

The Disappeared Persons Enquiry, Truth and Reconciliation Commission Act, 2071.

The National Criminal Code, 2017.

The Nepal Treaty Act, 1990.

United Nations. (2006). *International Convention for the Protection of All Persons from Enforced Disappearance*. Office of the United Nations High Commissioner for Human Rights. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced

United Nations Committee on Enforced Disappearances. (2019). *Guiding principles for the search for disappeared persons* (CED/C/7). https://www.ohchr.org/en/documents/legal-standards-and-guidelines/guiding-principles-search-disappeared-persons

United Nations Human Rights Council (UNHRC). (2021, July 28). *Outcome of the universal periodic review: Nepal* (A/HRC/DEC/47/107). United Nations. https://docs.un.org/en/A/HRC/DEC/47/107.

United Nations Human Rights Council. (2026). *Report of the Working Group on the Universal Periodic Review: Nepal* (A/HRC/62/9). United Nations. https://docs.un.org/en/A/HRC/62/9.

Uprety, K. (2008). Against Enforced Disappearance: the Political Detainees' case before the Nepal Supreme Court. *Chinese Journal of International Law*, *7*(2), 429-457. https://doi.org/10.1093/chinesejil/jmn015.

Wagle, R. (2011). Judicial activism and the use of international law as gap-filler in domestic law: The case of forced disappearances committed during the armed conflict in Nepal. *International law in domestic courts: Rule of law reform in post-conflict states, (pp.* 83-106). https://doi.org/10.1017/9781839700729.006

Webber, C. W. A. (2012). *The decline of dualism: The relationship between international human rights treaties and the United Kingdom's domestic counter-terror laws* [Doctoral thesis, University of South Africa]. https://www.semanticscholar.org/paper/The-Decline-of-Dualism%3A-The-Relationship-Between-Webber/94039c6e1e46525f29cd30bb58058eddabf562c4