

NATIONAL AND INTERNATIONAL LAWS ADDRESSING THE ISSUES

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1.1 NATIONAL LAWS

1.1.1 Treaty Act, 2047

Section 9 of the Act states that treaty provisions are enforceable as good as laws.

Article 9 (1) of the Treaty Act, 2047, states that international treaty provisions are enforceable as good as laws. It conspicuously states that ‘any law of Nepal which contradicts with any treaty that is ratified by Nepal is null and void, to the extent it contradicts with’. Moreover, it is stated, in Article 9(2), that ‘though a treaty which has not been ratified, acceded 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.’

Through the Treaty Act, Nepal is obliged to follow international law, and customary international law, in a binding manner.

1.2 INTERNATIONAL LAWS

1.2.1 Asian Highway agreement, (Intergovernmental Agreement on the Asian Highway Network, 18 November 2003)

This agreement is concluded for the purpose of ‘access to sea for trading and transit for the landlocked nations and for their economic integration’. This highway (141,000 km long) is supposed to provide network to Asian land locked nations. This highway is being built with an intention to improve transport facilities throughout Asian nations and provide road link to Europe. The Asian Highway project comprises of three projects, the Trans-Asian Railway being another significant component. Nepal and India both are parties to this agreement and project. India and Nepal cover 11,432 km and 1,321 km respectively.² Blockade like Nepal is facing today is a violation of this agreement plainly. No project of Asian Highway and Trans-Asian Railway will succeed in practice by ‘indulgence of any country’ in act like blockade Nepal is facing. This agreement states that for landlocked countries, the Highway portends a revival of the cross-continent access that the legendary *Silk Route* provided in the early part of the First Millennium. The UN meeting in Almaty in 2003 served as additional impetus for agreement between land locked and transit countries on the importance of integrated transport and the possibilities for cooperation. Bangladesh, Nepal, India and Bhutan have ‘signed the Motor Vehicle Agreement’, on 15 June, 2015 in Thimpu. The agreement intends to regulate passenger, personal and cargo vehicular traffic. Aside from facilitating the cross-border movement of passengers and goods, the agreement is expected to promote safe, economic efficient and environmentally sound road transport in the sub-region, and to create an institutional mechanism for regional integration.³ The agreement is also expected to increase trade in the region by 60 percent.

The present blockade by India has raised serious doubts about practical viability and potential of such agreement to increase the trade-flow among South Asian nations. The blockade also raises doubts about ‘sincerity and honesty’ of India about implementation of such agreements. The

² See for detail, www.roadtraffick-technology.com/projects-highway-networ

³ See for detail, www.loc.gov/law/foreign-news/article/bangladesh-bhutan-india-nepal

customary international law theory that *'pacta sunt servanda'* has been obviously violated by the blockade. The negative scope of the 'blockade' is thus not limited to the hardship and difficulties to the people of Nepal and the bilateral relations between Nepal and India, it has indeed a wider impact on 'emerging trend of the South Asian economic integration'. The negative impact thus goes to the spirit of agreements mentioned above. The issue is thus having a regional dimension.

1.2.2 Resolution 1028(XI) Land-Locked Countries And The Expansion Of International Trade

The General Assembly of UN adopted this resolution on 20th February, 1957. Recognizing the need of land-locked countries for adequate transit facilities in promoting international trade, the resolution invited the Governments of Member States to give full recognition to the needs of Land-locked Member States in the matter of transit trade and, therefore, to accord them adequate facilities in terms of international law and practice in this regard, bearing in mind the future requirements resulting from the economic development of the land-locked countries.

Apparently, the Government of India, by imposing the blockade, not only has hampered the state's right to trade, but has also violated the resolution of the UN. Moreover, it has also violated the civilian's right to free trade and contract as well. With no sea ports, land locked countries depend greatly on the transit nation for international trade, and the blockade denies the right of adequate transit facilities.

1.2.3 Resolution 661(Situation between Kuwait and Iraq)

In the situation of Iraq invading Kuwait, the Security Council has asked for restoration of sovereignty and territorial integrity of Kuwait. The resolution 'condemns the Iraqi invasion of Kuwait' and 'demands that Iraq withdraw immediately and unconditionally all its forces...' The resolution focuses on the restoration of sovereignty and territorial integrity of Kuwait, claiming that the invasion by Iraq is in direct encroachment of the state's sovereignty. While the Indian government has done 'no direct attack through an invasion, but it has put Nepal's sovereignty in question, and thus the resolution can be applicable in the situation of blockade in Nepal as India's act of blockade has resulted in encroachment of Nepal's sovereignty.

1.2.4 Resolution 687 (1991)

This resolution was adopted by the Security Council at its 2981st meeting on April 3, 1991 regarding the restoration of Kuwait's sovereignty, independence, territorial integrity and the return of its legitimate government. Thus, states' sovereignty is the ultimate concern and cannot be derogated by any other sovereign state for fulfilling its political manifestation.

1.2.5 The Manual on the Law of Non-International Armed Conflict (*San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 1995)

Part IV of the manual highlights the methods and means of warfare at sea, particularly describing the situation of a blockade on Section II: claiming a blockade to be a method of war. The blockade thus cannot be resorted to without a serious emergency. The modern international law has taken it cautiously, and warns nations to use it only in state of extreme exception. Imposing blockade on that ground that 'the New Constitution' of Nepal failed to satisfy demands of some section of its population is a 'serious breach of international law'.

Paragraph 93 of the Manual states that 'a blockade must be declared and notified, and the paragraph 94 further stresses that the declaration must include the commencement, duration, location and the extent of the blockade'. It can be observed in the Indian blockade situation that these elements are not present; the Indian Government not having issued 'a formal statement of declaring the blockade as an intentional curtailment' has conspicuously failed to abide by the international law, and as such the situation can be described as a state of 'proxy blockade' rather than an act of war.

Paragraph 95 of the manual states that, 'a blockade must be effective'. However, the question as to whether 'a blockade is effective or not is a matter of fact, and it can be inferred that an effective blockade doesn't undermine the intentions behind it. Despite India's denial that the blockade does not exist, the fact shows that there is a blockade and people of Nepal are suffering from it. It is therefore natural to infer that 'the situation is a blockade'.

Paragraph 102 states that declaration or establishment of a blockade is prohibited if:

- (a) It has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
- (b) The damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

With the establishment of facts that the 'proxy blockade' has curtailed supplies to Nepal- including fuel and medication- which are considered essential for survival of people, it can be concluded that the current blockade is in fact of the 'prohibited nature and has a direct effect on the civilian population'. It is therefore against the international law and practice.

Paragraph 103 states that if the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

- (a) The right to prescribe the technical arrangements, including search, under which such passage is permitted; and
- (b) The condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

Paragraph 104 states that the blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted. Deliberate starvation of civilians as a method of warfare is forbidden.

Due to the nature of ‘proxy blockade in place’, the hospitals and dispensaries in Nepal have been facing a shortage on medical supplies⁴, and the treatment of sick people has been adversely affected. Medications for long term diseases- such as insulin for diabetic patients- have also been running low on supply which can be pointed on the curtailment of supplies on the passages. All these details about the practice of blockade, which is accepted by the international law only in the situation of belligerency, the attitude of the Indian government and its actions seem deplorable from the point of view of international law. The attitude and actions of the Indian Government have been obvious from ‘series of statements issued by the Ministry of Foreign Affairs of India, the statements issued by the Embassy of India in Nepal, the arguments of the Foreign Minister of India, and several opinions of the Indian political leaders who have offered criticism towards the acts of the Indian Government.

1.2.6 Montevideo Convention on Rights and Duties of States 26 Dec. 1933

Article 1 of the Convention defines “State” as a person of international law, which should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states. Nepal is a country with its long history, at least 2500 year’s recorded history of statehood. The “*Chanakya*”—a popular Delhi Doordarsan tele-drama has well presented the history of Nepal as an independent country that contributed in installing Chandra Gupta Maourya as an emperor of Maghad. It means that ‘Nepal existed as a prominent State at least 325 BC. Nepal in this sense is an independent nation before India emerged as an integrated nation in the South Asia.’⁵

Article 3 of the Convention says that ‘the political existence of the state is independent of recognition by the other states’. As a matter of fact, making constitution is an internal affair of Nepal, and Nepal in no way requires recognition of the Constitution of Nepal from India.

Article 4 states that ‘states are juridically equal, enjoy the same rights, and have equal capacity in their exercise’. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law’. The provision is self-evident. Nepal is a member of UN and SAARC, and many other international organizations. Nepal in the international community exists as an independent nation and functions independently. Existence of Nepal is neither depended on India nor does it require the latter’s recognition to exist as a nation.

Article 8 of the Convention states that, ‘no state has the right to intervene in the internal or external affairs of another’. Making constitution and adopting it in the way it deems appropriate is solely a ‘matter of internal affair of Nepal’. Nepal is politically competent to choose its Constitution, and be governed in accordance with it. Suggestions, recommendations and criticisms toward such a political act of an independent nation evidently amount to be interference in the internal affair’ of the State, which has specifically prohibited the Government of India, as per Article 51 of the Indian Constitution.

⁴ See for detail, <http://therisingnepal.org.np/news/7759>

⁵ Yubaraj Sangroula (Dr), “Past and Present of Nepal-India Relations: A Critical Examination of Problems, Challenges and Prospects” in Yubaraj Sangroula and Rohit Karki (eds), *Geo-Strategic Challenges to Nepal’s Foreign Policy and Way Forward*, 2015, Kathmandu School of Law.

Based on the above definition of 'a state', under Article 1 of the Montevideo Convention, it can be deemed that 'Nepal is a State, and has the rights to exercise its capacity as one as an equal entity to other states under international law. Based on the timelines of the statements issued by the Indian delegation⁶ in Nepal, the proxy blockade / aggression (it is a political interference than war) was put into place, consecutive to the promulgation of the new constitution- an act that India was not keen on⁷ and while it was shadowed by statements claiming a concern for security issues of the goods carriers, it can be seen that the blockage of supplies was not put to practice before considering that the Terai region of Nepal had been in a turmoil for a long time preceding the proxy blockade. The intention of India seems clear that 'Nepal has to follow the suggestions advanced by the Government of India'.

1.2.7 Vienna Program of Action for Land Locked Developing Countries for the Decade 2014-2024⁸

By recognizing the 'special development needs and challenges of land locked developing countries arising from being land locked, remoteness and geographical constraints in a more coherent manner and thus contribute to an enhanced rate of sustainable and inclusive growth⁹', the program instills obligations for landlocked states as well as transit states in relation to trade and transit, especially for the purposes for economic development.

The program has specified six specific areas for holistic development of the landlocked developing states, being:

- Priority 1: Fundamental transit policy issues
- Priority 2: Infrastructure development and maintenance
 - (a) Transport infrastructure
 - (b) Energy and information and communications technology infrastructure
- Priority 3: International trade and trade facilitation
 - (a) International trade
 - (b) Trade facilitation
- Priority 4: Regional integration and cooperation
- Priority 5: Structural economic transformation Priority 6: Means of implementation

The defined priorities emphasize reducing 'transit time and promoting infrastructure and maintenance, ensuring trade facilitation measures in an accelerated manner, besides linking them with the promotion of economic diversification, structural transformation, connectivity to global value chains and regional integration'.

⁶ See for detail, http://www.mea.gov.in/press-releases.htm?dtl/25825/Statement_on_the_situation_in_Nepal

⁷ http://www.mea.gov.in/press-releases.htm?dtl/25821/Statement_on_the_situation_in_Nepal

⁸ Second United Nations Conference on Land locked Developing Countries Vienna, 3-5 November 2014. A/CONF.225/L.1

⁹ *Ibid*, para 21

However, the program doesn't have provisions for 'sanctions and only call upon the General Assembly to 'continue to undertake reviews of the implementation of the present Program of Action through reports of the Secretary-General'.¹⁰

1.2.8 Convention on the Law of Sea (UNCLOS)¹¹

Article 39 (1) (a) of UNCLOS states that, all goods carrying vehicles are to 'proceed without delay through or over the strait. Article 39 (1) (b) further states that they must 'refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.'

The proxy blockade issued by the Indian Government has been effective since 21 September, 2015¹² and the country faces fuel shortages till date with most of its fuel supply being stopped at the border by the SSB- an act that has been causing hindrance in transport and extreme delay in supply.

Furthermore, as per article 39 (1) (b), the use of force against a sovereign country is prohibited, and obligations to respect territorial integrity is imposed. However, the SSB force entering Nepalese borders without the latter's permission has gone against this clause.

Article 39 (1) (c) states that vehicles must 'refrain from any activities other than those incident to their modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress'.

The state of proxy blockade doesn't coincide with and natural disasters that would justify it. Ironically, the blockade prevents relief to be distributed (only 40% of the aid has been transported) to the victims of the earthquake that Nepal was hit by on 25 April, 2015¹³. Also, while India is seeking the defense of distressing situations on the border after the promulgation of the constitution which is barring the transport of good, these riots existed prior to it during which no problems were encountered with transit- thus bringing to question the transit state on grounds of good faith and the principle of good neighborliness.

Part X of UNCLOS, namely article 124 to article 132, is based on the 'Right of Access of Land Locked States' to and from the Sea and Freedom of Transit. As per article 124 (1) and 124 (2), Nepal and India can respectively be denoted as a land locked state and a transit state. The following provisions in this regard are worth mentioning:

- Article 124 (1) (a): "land-locked State means a State which has no sea-coast;
- Article 124 (1) (b): "transit State" means a State, with or without a sea coast, situated between a land-locked State and the sea, through whose territory traffic in transit passes;
- Article 124 (1) (c): "traffic in transit" means transit of person, baggage, goods, and means of transport across the territory of one or more transit States, when the passage across

¹⁰ *Ibid*, para 76

¹¹ UN General Assembly, Convention on the Law of the Sea, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html> [accessed 13 December 2015]

¹² See for detail, http://www.mea.gov.in/press-releases.htm?dtl/25821/Statement_on_the_situation_in_Nepal

¹³ See for detail, <http://thehimalayantimes.com/business/fuel-crisis-disrupts-aid-supplies-to-quake-hit-nepalis/>

such territory, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport, is only a complete journey which begins or terminates within the territory of the land-locked State;

- Article 124 (1) (d): “means of transport” means (i) railway, rolling stock, sea, lake, and river crafts and road vehicles; (ii) where local conditions so require, porters and pack animals.
- Article 125 (1): Land-locked States shall have the rights of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of the mankind. To this end, land-locked States shall enjoy freedoms of transit through the territory of the transit States by all means of transport.
- Article 127 (1): Traffic in transit shall not be subjected to any custom duties, taxes, or other charges except levied for the specific services rendered in the connection with such traffic.
- Article 127 (2): Means of transport in transit and other facilities provided for and used by land-locked States shall not be subjected to taxes or charges higher than those levied for the use of means of transport of the transit State.

The right of land-locked State is evidently a right provided for by the international law. It means that ‘the right cannot be taken as a ‘mercy or concession’ of the transit State. Nepal and India are both parties to the 1982 Sea Convention, and thus are obliged to have fullest respect to the enforcement of the Convention.

1.2.9 Convention on the High Seas 1958¹⁴

Article 3 (1) states that ‘in order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea coast should have free access to the sea. To this end States situated between the sea and a State having no sea coast shall by common agreement with the latter, and in conformity with existing international conventions’. The 1958 Convention exists no longer, after the 1982 Convention has been adopted. However, the Convention is significant in the context that ‘the right of land-locked State’ is a matter of recognition for a very long period of time. The provisions of the 1982 Convention mentioned above evidently show that ‘Nepal as landlocked country has freedom to enjoy unrestricted transit’ of goods through the territory of India, and, hence, the acts of border security force of India have no right to stop ‘Nepal-bound’ means of transport in any excuse. Can India then argue that ‘the insecurity of movement in Nepal’ justifies the stoppage of the goods at the entry points? The answer is ‘absolutely’ no. The following justifications can be put forward in favor of this argument:

- a. The supplies carried out by the means of transport are covered by the agreement between entrepreneurs, which essentially covers the insurance policy in case of harms or damage.

¹⁴ Convention on the High Seas Geneva, (29 April 1958), United Nations, *Treaty Series*, vol. 450, p. 11 (Entry into force: 30 September 1962, in accordance to article 34), (Registration: 3 January 1962, in accordance with article 34), (Status: signatories: 46, parties: 63)

- b. The trade is an issue of parties involved. The partners engaged in trade and transit of goods are protected by the 'law of respective countries to engage in businesses', and any obstructions from the part of the administration does occur the fundamental rights of citizens to engage in trade under the Constitutions of the respective countries. If the parties from two countries are satisfied that 'the situation is normal for movement', the administration cannot volunteer to intervene and impose stoppage in transit and trade.
- c. The responsibility to ensure peaceful and safe movement of the traffic lies on the land-locked country. If the land-locked country has taken responsibility to protect the traffic and provide a safe journey, the coastal State does not have right to unilaterally decide and put stoppage in the movement of traffic.

1.2.10 Convention on Transit Trade of Land-Locked States, 1965

The convention lays out '8 principles to take into account concerning the rights and duties of both the landlocked state and the transit state'. Principle I states that 'the recognition of the right of each land-locked State for free access to the sea is an essential principle for the expansion of international trade and economic development.' Principle III states that 'in order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea...' These both principles have been violated by the ongoing blockade by India.

The article 2 of the Convention deals with 'freedom of transit'. The sub-article (4) states that 'the Contracting States shall permit the passage of traffic in transit across their territorial waters in accordance with the principles of customary international law or applicable international conventions and with their internal regulations.' In accordance with this article, Nepal and India are both obliged by international customary law, and the treaties that they have ratified, to ensure free trade and transit across the borders. Neither customary international law, nor the treaties, allows the transit state to sanction the landlocked country.

Article 12 of the convention states about exceptions in case of an emergency, stating that 'the measures of a general or particular character which a Contracting State is obliged to take in case of an emergency endangering its political existence or its safety may, in exceptional cases and for as short a period as possible, involve a deviation from the provisions of this Convention on the understanding that the principle of freedom of transit shall be observed to the utmost possible extent during such a period.'

The key ideas of this clause are a state of 'emergency endangering its political existence or its safety' and for 'as short as possible'. While there has been no issue to endanger the political existence of India, even though the Madhesi riots have been cited as cause, the blockade has gone on far too long to be justifiable. The political turmoil in Nepal has nothing to do with the existence of India.

Article 16 deals with the 'settlement of disputes', stating that 'any dispute which may arise with respect to the interpretation of application of the provisions of this Convention which is not settled by negotiation or by other peaceful means of settlement within a period of nine months shall, at the request of either party, be settled by arbitration'.

While the blockade has just been installed for the last 3 months, the issuing party has not responded positively to the negotiation process. Furthermore, with the conditions suffered by the lack of essential products visible, waiting 9 months for it to be resolved is far stretched.

1.2.11 General Assembly Resolution 2131 (XX) of 21 December 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty

Article 1 paragraph 2, of the Charter of the United Nations establishes the principles of equal rights and self-determination of peoples as a foundation of “friendly relations among nations”. The Resolution 2131 (XX) goes on, in its preamble, expressly to cite resolution 1514 (XV) on States’ “inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory and ... [to] freely determine their political status and freely pursue their economic, social and cultural development.” Any interference or attempt to interference is thus an issue of the violation of the UN principle of friendly relations between States. The State’s freedom to choose, in accordance with the UN Charter 2, its political, economic and administrative system is absolute’. No other state can dictate on such matters. India’s attitude about Nepal’s affair of making Constitution cannot be accepted by Nepal as an independent nation, and any efforts on the part of India to coerce Nepal to follow its advice results in violation of the principle of ‘friendly relations’ mooted out by the UN Charter. India, as a nation seeking induction in the Security Council, must be highly sensitive in such issues. Making neighboring countries fearful of its attitude with a tendency of dominance, India forfeits itself its moral strength to demand induction into the Security Council.

Article 2, paragraph 7, of the Charter of the United Nations thus became the master-clause, in legal terms, on non-intervention as imperative legal principle of contemporary international law, though containing its own in-built antimony that it should not prejudice the application of enforcement measures under Chapter VII of the Charter.

Paragraph 1: “No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned”.

Paragraph 2: “No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights, or to secure from its advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State”.

The Indian delegation, by visiting the Nepali government, had made clear that it did not want the Constitution to be promulgated yet¹⁵, and expressed its dislike through economic sanction the day after it was promulgated. Furthermore, reports of Indian nationals entering borders during

¹⁵ See for detail, <http://www.thehindu.com/opinion/lead/rakesh-sood-writes-making-friends-influencing-nepal/article7689720.ece>

trifles with the Nepali police have been plenty- with an Indian national even being killed¹⁶ during their participation.

Paragraph 5: “Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”

While there has been no hands-on intervention, the blockade in itself is a way of molding Nepal to fit into India’s liking, the blockade being issued as soon as the Constitution was promulgated. India has shown a trend of imposing economic blockade on Nepal through various time zones to get what it has wanted, which is a direct form of interference in the political matters of Nepal, and by default its economic matters as well.

Paragraph 6: “All States shall respect the right of self-determination and independence of peoples and nations, to be freely expressed without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.”

The economic sanctions in place have not only been pressurizing the government, but also breaching the civilian’s basic human rights and fundamental freedoms. Due to the blockade and the heavy fuel shortage, citizens are being curtailed of their rights to food, health and education and medicines are running on a short supply as they cannot be imported¹⁷. Furthermore, with the winter fast approaching, the make shift shelters of earthquake victims no longer are a sanctuary, and the blockade has made aid reaching them near impossible.

Another significant issue which Nepal cannot afford accepting is the ‘India’s move to divide Nepal’s population by region’. The Terai is an integral part of Nepal, and the population dwellings in that part of Nepal are ‘Nepalese’. An Indian attempt to ‘define them as Nepali citizens of Indian origin’ is not only unacceptable interference in Nepal’s socio-cultural structure, it is also deplorable. *Madhesi* are indigenous population of Nepal. They are not migrants from India. Hence, the act of India, which tends to make its guardian to people of an independent nation, is unacceptable in any terms. This act of India is vulnerable to ‘instigate racial tension among different ethnic groups within Nepal, and as such violates the spirit of the paragraph 6 of the UN Charter Article 2.

Case: *Nicaragua* :- In the mid-1980s, the International Court of Justice, taking jurisdiction over petition of the Nicaraguan Government which had complained of active military, logistical and other support by the United States to *Contras* rebel groups within Nicaraguan territories established an important principle concerning internal affair of an independent Nation. In its Judgment, *inter alia*, to resolution 2131 (XX) (*Military and Paramilitary Activities in and Against Nicaragua, I.C.J. Reports*, 1986, p. 107, para. 203), the Court held that ‘American support to the rebels of Nicaragua did amount interference in the internal affair of Nicaragua.

1.2.12 .The United Nations Charter

¹⁶ See for detail, <http://www.india-forums.com/news/nepal/719034-dont-interfere-in-our-internal-affairs-nepal-pm-warns-india.htm>

¹⁷ See for detail, <http://therisingnepal.org.np/news/7759>

Article 2(4) of UN Charter states that, ‘all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of United Nations’.

The blockade, though not a direct use of force, has violated the ‘political independence of Nepal by trying to impose India’s views on latter’s Constitution’. Making Constitution by popularly elected Constituent Assembly is an exercise of sovereignty by the people. The Constituent Assembly is thus competent authority to ‘decide on what type of Constitution to make’. This is a political independence of people or nation. No country in the world can impose its idea or choice in affair of making Constitution by the people of an independent country’. Furthermore, the Indian security force, as well as many Indian nationals participating on riots¹⁸, has encroached the country’s territorial integrity, and with the security force itself entering border without the consent of the Nepalese government, it can be linked with the use of force as well.

1.2.13 1970 Declaration On Principles Of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations (Gar 2625) Adopted By The Un General Assembly Resolution 2625 (XXV) Of 24 October 1970

Principle 3 of the Declaration imposes duty on States not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.

The matters relating to the promulgation of the constitution are a state’s privy matters, and no other foreign bodies are allowed to meddle with the values and principles that state holds-however may it contradict to their own. By imposing the proxy blockade, and reportedly inciting the *Madhesi* movement by penetrating its own nationals¹⁹, India has been encroaching within the domestic jurisdiction of Nepal.

1.2.14 Vienna Convention on Laws of Treaties, 1969

Article 18 of the Convention states that ‘a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delay’.

This clause instills upon states to abide by the law that they have willingly agreed upon without deviations. Considering the numerous treaties signed by both states, both multi-lateral and bilateral, accenting to the ideas of good neighborliness, free trade and sovereignty, it can be seen that the Indian Government has violated many laws that it had agreed to follow.

¹⁸ See for detail, <http://myrepublica.com/society/story/31851/13-ssb-personnel-arrested-for-entering-nepal-released.html>

¹⁹ See for detail, <http://myrepublica.com/society/story/31851/13-ssb-personnel-arrested-for-entering-nepal-released.html>

Article 26 of the convention brings the idea of *pacta sunt servanda* stating that ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’.

The prolonged economic blockade on Nepal, and the encroachment of sovereignty in the border areas not only brings to question the fact of whether the laws are abided, but questions about the good faith of the party is on test. Nepal and India have several bilateral treaties signed, and have agreed to fulfill the duties imposed on them by such treaties. However, the act of India to put blockade on Nepal has diminished the sanctity of the duty to ‘carry on faithful enforcement of the obligations put forward by such treaties’.

1.2.15 Paris declaration 1856 (Paris Declaration Respecting Maritime Law During the time of war (belligerent parties))

Paragraph 4 of the Paris Declaration states that blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Paris Declaration defined the blockade during the times of war. While Nepal and India are not at war, the definition does not fit completely, but as customary international laws states a blockade is an act of war. With the trade not being completely blocked- with 10-15% of goods being sent in- the blockage, while not whole heartedly, can be said to be a proxy blockade, and therefore an act of proxy aggression.

1.2.16 . London Declaration, 1909

(Declaration concerning the laws of naval war 1909)

Article 1 of the declaration states that, ‘a blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.’ Article 2 of the declaration further states that ‘in accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective - that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline.’

In accordance with the Paris Declaration 1865, the London Declaration defines an economic blockade during the times of war. While the blockade hasn’t prohibited all goods from entering the country, it has been maintained for three months and is majorly effective.

1.2.17 . United Nations General Assembly Resolution no. 46/212 of 20 December, 1991

The resolution on specific actions related to the particular needs and problems of land locked developing countries ‘reaffirms the right of access of land locked countries to and from the sea and freedom of transit through the territory of transit states by all means of transport, in accordance with international law’ and ‘calls upon both the land locked developing countries and their transit neighbors... to implement measures to strengthen further their cooperative and collaborative efforts in dealing with their transit problems’. As a remedy, the resolution ‘appeals to all states, international organizations and financial institutions to implement, as a matter of

urgency and priority, the specific actions related to the particular needs and problems of land locked developing countries...’

The resolution states the rights of access of land locked countries to the sea and through transit states, a right which at the current situation has been curtailed, and asks countries to mitigate their differences in a collaborative and cooperative effort- but negotiations at the current stage have been deemed to be unfruitful. It is thus time to resort to urging other states, international organizations and financial institutions to help in relieving Nepal from the sanctions as it is a matter of urgency and priority.

1.2.18 . SAARC Framework Agreement For Energy Cooperation (Electricity) (27th November, 2014)

The framework agreement was brought about ‘regarding the cross border electricity exchanges and trade optimal utilization of regional electricity generating resources, enhanced grid security, and electricity trade arising from diversity in peak demand.’ The agreement provides for dispute settlement through SAARC Arbitration council. The blockade has negatively affected the scope of implementation of the agreement.

1.2.19 . Treaty of Peace and Friendship between the Government of India and the Government of Nepal. Signed at Kathmandu, on 31st July 1950

Article 2 of the Treaty states that, ‘the two Governments hereby undertake to inform each other of any serious friction or misunderstanding with any neighboring State likely to cause any breach in the friendly relations subsisting between the two Governments.’

Article 5 states that ‘the Government of Nepal shall be free to import, from or through the territory of India, arms, ammunition or warlike material and equipment necessary for the security of Nepal. The procedure for giving effect to this arrangement shall be worked out by the two Governments acting in consultation.’

By this agreement, it was established that both governments would inform each other of a serious misunderstanding. However, India has been resorting to sanctioning Nepal rather than going through a negotiation process. The treaty also states that Nepal is free to import through the Indian Territory, and the procedure in effect should be decided by the consultation of the two governments. However, the blockade imposed has neglected any form of negotiation efforts.

1.2.20 . Resolution 687 (1991) adopted by the Security Council at its 2981st meeting on 3 April 1991

Resolution 687 (1991), deals with the matters regarding Kuwait’s sovereignty, independence and its territorial integrity. It states that a state’s sovereignty is its ultimate concern and cannot be derogated by any other sovereign state for fulfilling its political manifestation.

By issuing an economic blockade against Nepal, India has grossly violated Nepal’s sovereignty, as latter has underlying demands regarding the constitution of Nepal. The fact that the blockade

was put into place a day after the promulgation of the constitution is plain evidence of blockade is intentional.

1.2.21 Agreement of South Asian Free Trade Area (SAFTA)

The agreement of SAFTA and the SAARC Agreement on Trade in Services promote trading in the SAARC nations and look over issues regarding trade, transport and easy access and liberalization, also station that no state can block the goods of others.

Both India and Nepal are members of SAARC, and have agreed to the agreements, and are therefore obliged to follow it. The current action of India has casted doubt on effectiveness of such agreements.

1.3 TRENDS OF ENJOYMENT OF TRANSIT RIGHTS BY THE LANDLOCKED STATES

There are number of bilateral treaties between landlocked and port states for transit. For instance in the Europe the Agreement dated March 23, 1921, between Czechoslovakia and Italy provided for 'concessions and facilities' to Czechoslovakia by Italy in the port of Trieste. The Agreement of 1958 on international transport by road was concluded between Austria and Belgium. Likewise in 1959, an Agreement on transport of goods and on non-scheduled bus services was concluded between Austria and the Netherlands. There are also treaties between Hungary and Yugoslavia in 1962 for establishing regulation for the transport of goods by lorry or similar motor vehicle and the agreement on customs procedures. In 1965 treaty was concluded concerning cooperation and mutual assistance on customs matters. There is also a treaty between Czechoslovakia and Hungary signed in 1963 on trade and navigation through Danube.

There are also regional regimes that facilitate the transit rights in Europe, for instance the Convention regarding the 'regime of navigation on the Danube, 1948 (1948 Danube Convention). This convention establishes the regime applied to the navigable part of the Danube River that crosses a set of land-locked states in the Eastern Europe, which includes inter alia, Hungary, Slovakia and Serbia. According to Article 1 of the 1948 Danube Convention, the navigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all States²⁰. The said regional regime explicitly provides for 'the exercise of right of access of land-locked states to the sea guaranteed by the provisions of Part X of the UNCLOS²¹. None of the coastal states in Europe have practiced the blockade.

In case of Africa, almost all of sub Saharan Africa became independent after 1956. Until then only Liberia and Ethiopia were independent. As a matter of fact, until 1956, most bilateral agreements were signed between colonial powers seeking free access to the sea for their colonies.

²⁰ CONVENTION 1 REGARDING THE REGIME OF NAVIGATION ON THE DANUBE Article 1 - Navigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping. The foregoing shall not apply to traffic between ports of the same State.

²¹ Rana Kumar Ramesh , "Right of access of land-locked state to the sea by the example of bilateral agreement between land-locked sate –Nepal and port state –India", Small master's thesis ,Masters of Law in Law of the Sea , University of Toronto , Faculty of Law , Fall 2010.

After decolonization began, the African landlocked states began signing their 'own bilateral agreements with transit neighbors'. In the present context, there are many transit corridors²² servicing the trade of landlocked countries functioning through various mechanisms. Amongst these transit based mechanisms, the agreement of June 8, 1963, between Mali and Senegal seems to be highly significant. In the treaty, it is stated that the 'port installations of Darkar and Kaolack would constitute as free zones for transit to and from Mali. It is provided that the customs authorities of both states would supervise entry and exit, by creating a free zone for the land-locked state Mali. This agreement seems more generous than the 'bilateral agreements that would merely provide warehousing facilities'²³.

In South America, the landlocked states Bolivia and Paraguay have established bilateral relations with their neighbors regarding the transit facilities. Bolivia and Chile signed a treaty²⁴ in 1904, after Bolivia lost its war to Chile. In this treaty, Chile granted Bolivia "in perpetuity", the most extensive and unrestricted right of commercial transit across its territory to its pacific ports. This treaty also allowed Bolivia to maintain custom offices in Arica and Antofagasta²⁵. After the Chaco war²⁶, in which attempts were made to restrict the passage of provisions for Bolivia through Chilean ports, Bolivian transit rights were strengthened by the convention of August 16 1937, which guaranteed full and free transit for any type of merchandise at any time. Similar agreements with other neighboring countries granted Bolivia free transit across their territories. The recent example of Neighbor granting Bolivia access to sea is Peru giving a patch of its shoreline to Bolivia to build and operate a small port about 10 miles from Peru's Southern port of Ilo²⁷.

Similarly, Paraguay has also concluded various agreements with its surrounding neighboring Countries which grant Paraguay a freedom of free transit across their territories. In 1943, Paraguay and Argentina signed the first treaty under which Argentina ceded Paraguay 'free zones' in the ports of Buenos Aires and Rosario²⁸. In 1944, the Paraguay signed a similar treaty with Brazil establishing a free zone in Concepción, followed by another in the Paranaquia in 1956. Paraguay signed similar agreements with other bordering countries, including one on March 25, 1976, with Uruguay concerning use of grain silos, a transit warehouse, and a free zone at Nueva Palmira. On November 12, 1976, Paraguay's navigation and ports authority took

²² Some example of such transit corridors include the Port of Dar es Salaam and the central corridor , the port of Mombasa and the northern corridor , the port of Djibouti and the Djibouti-Ethiopia Corridor etc , see United nations Conference on Trade and Development(UNCTAD) , THE WAY TO THE OCEAN (Transit corridors servicing the trade of landlocked developing countries) Technical report by the UNCTAD Secretariat , United nations , New York and Geneva ,2013.

²³ Kishor Uprety , *The Transit Regime for Landlocked States* , International law and development perspectives , World bank , 1818 H Street , NW Washington DC 20433,2006, p 121.

²⁴ The treaty of peace and Friendship between Chile and Bolivia and convention for Construction and operation of railroad from Arica to La Paz October 20 1904

²⁵ Article 6 - The Republic of Chile grants to that of Bolivia in perpetuity the amplest and freest right of commercial transit in its territory and its pacific ports Article 7 - The republic of Bolivia has the right to establish custom agencies in the ports which it may designate for its commerce

²⁶ The Chaco War was fought between Bolivia and Paraguay over control of the northern part of the Gran Chaco region of south America (1932-1935)

²⁷ On October 19 2010 , The Peruvian president Alan García, and his Bolivian counterpart, Evo Morales signed a deal allowing Bolivia to build a port near Ilo, on Peru's Pacific coast. (1.4 square mile patch of sand that La Paz will lease from Lima for 99 years)<http://www.theguardian.com/world/2010/oct/20/peru-gives-bolivia-pacific-shore>

²⁸ On November 29, 1979 Paraguay concluded another agreement with Argentina that gave Paraguay the use of a wharf at Rosario for the receipt of duty-free imports and exports

possession of a free zone in the port of Montevideo for storage and distribution of Paraguayan imports and exports. Due to the successful negotiations with its neighboring countries, Paraguay established the National Navigation and Ports Authority (*Administración Nacional de Navegación y Puertos* or ANNP), that administers the national ‘warehouses and free zones at Río Grande do Sul, Paranaguá, Santos, Buenos Aires, Rosario, Montevideo, Nueva Palmira, and Antofagasta²⁹.

Similar agreements were concluded by landlocked states in Asia. For instance, in order to facilitate their transit trade, Lao PDR and Thailand signed an agreement that guarantees freedom of transit of goods throughout both countries. The goods benefited from the rights and privileges of transit according to the principles and exceptions provided by the Barcelona Statute. There are also regional regimes which facilitate the transit rights of Lao PDR with its neighboring states, GMS cross-border transport agreement (Greater Mekong Sub-region Cross-Border Transport Facilitation Agreement) 1999 is an example of it which grants the contracting parties (Lao PDR, Vietnam and Thailand) the freedom of transit to or from their territories³⁰. Another example concluded by landlocked state in Asia is the Afghanistan-Pakistan trade transit agreement (APTTA 2010), through which each State grants to the other freedom of transit for traffic to or from the territory of the other³¹.

3.4. BILATERAL TREATIES

The first treaty between Nepal and India dealing with trade and transit was signed on July 31, 1950. It recognized without reservation the right of free transit of goods through the territory and the ports of India (it was renegotiated in 1960, 1971 and 1978). The 1978 treaties were supposed to be renewed when they expired on March 31, 1989, but in March, due to some political issues that had surfaced between the two countries, renewal was postponed³². This certain political issue between Nepal and India had surfaced because of Nepalese government’s decision to import armaments from the People’s Republic of China that India considered should have been bought from India. It was two years later, after the formation of a completely new Nepalese government in 1991, that the Indo-Nepal treaties were signed.

The trade treaty between Nepal and India (2009) states that ‘the contracting parties should grant maximum facilities and must take measures for free and unhampered flow of goods between the countries³³. It includes provisions related to exemption from basic custom duty³⁴, and other

²⁹ Kishor Uprety, *The Transit Regime for Landlocked States*, International law and development perspectives, World bank, 1818 H Street, NW Washington DC 20433, 2006, p 126

³⁰ GMS Cross –border transport agreement 1999 Article 8: Transit Traffic (a) The Contracting Parties grant freedom of transit through their territory for Transit Traffic to or from the territory of the other Contracting Parties (b) Transit Traffic shall be exempt from any customs duties and taxes.

³¹ Afghanistan –Pakistan Trade transit Agreement 2010 Article 3 (1) –There shall be freedom of transit through the territory of each contracting party via the pre-settled routes most convenient for international transit, for traffic in transit to or from the territory of other contracting party. No distinction shall be made which is based on flag of vessel, the place of origin, departure, entry, exit or destination, or on any other circumstances relating to the ownership of goods, vessels or other means of transport.

³² Kishor Uprety, *The transit regime for landlocked states*, international law and development perspective, World bank, 1818 H Street, NW Washington DC 20433, 2006, pg.127-129.

³³ Article 2-The contracting parties shall endeavor to grant maximum facilities and to undertake all necessary measures for the free and unhampered flow of goods, needed by one country from other, to and from their respective territories.

provisions which are supposed to promote, facilitate, and expand trade between the two countries.

The transit treaty (1999) includes provisions in relation to freedom of transit across respective territories³⁵, exemption from custom duties and from transit duties except for reasonable charges³⁶, providing warehouse or shed, for storage traffic in transit³⁷, provisions regarding the access and enjoyment of rights to high seas for Nepal³⁸. The treaty also provides for the traffic in transit not to be subjected to avoidable delays or restrictions³⁹. Although this treaty has conferred the transit facility to Nepal has failed to recognize that Nepal is a landlocked country, and as such has a right of free access to and from the sea. This has made Nepal's transit right as matter of reciprocity which is not reliable with the concept of right of free of access of landlocked state. According to Article 125 of the UNCLOS, the right of free access to and from the sea is not subjected to reciprocity, but it is unilaterally and solely available to land -locked states.

Nepal has also concluded various bilateral treaties in relation to trade and transit with other neighboring states which includes treaties with Bangladesh, China and Pakistan. There are two agreements signed between Nepal and Bangladesh (Trade and payments agreement between Nepal and Bangladesh 1976 and Transit agreement 1976), the transit agreement includes exemption from custom duty and from transit duties⁴⁰, also includes freedom of transit between the two countries⁴¹, the protocol to the transit agreement between the two countries provides

³⁴ Article 4-The contracting parties agree, on a reciprocal basis, to exempt from basic custom duty as well as from quantitative restrictions the import of such primary products as may be mutually agreed upon, from each other.

Article 6 – With a view to facilitating greater interchange of goods between the two countries, the government of Nepal shall endeavor to the maximum extend compatible with their development needs and protection of their industries.

³⁵ Article 1 – The contracting parties shall accord to “traffic-in-transit” freedom of transit across their respective territories through routes mutually agreed upon. No distinction shall be made which is based on flag of vessels, the places of origin, departure, entry, exit, destination, ownership of goods or vessels.

³⁶ Article 4- Traffic-in-transit shall be exempt from custom duties and from all transit duties or other charges, except reasonable charges for transportation and such other charges, as are commensurate with the costs of services rendered in respect of such transit.

³⁷ Article 5- For convenience of traffic in transit , the contracting parties agree to provide at point or points of entry or exit , on such terms as may be mutually agreed upon and subject to relevant laws and regulations prevailing in either country , warehouse or sheds , for the storage of traffic-in transit awaiting customs clearance before onward transmission.

³⁸ Article 7- In order to enjoy the freedom of high seas merchant ships sailing under the flag of Nepal shall be accorded , subject to Indian laws and regulations , treatment no less favorable than that accorded to ships of any other foreign country in respect of matters relating to navigation , entry into departure from the ports, use of ports and harbor facilities , as well as loading and unloading dues , taxes and other levies , except that the provisions of this article shall not extend to coastal trade.

³⁹ Article 6- Except in cases of failure to comply with the procedure prescribed, such traffic-in-transit shall not be subject to avoidable delays or restrictions.

⁴⁰ Article 3-Traffic-in-transit shall be exempt from customs duty and from all transit duties or other charges except reasonable charges for transportation and such other charges as are commensurate with the costs of services rendered in respect of such transit.

⁴¹ Article 1- The contracting parties shall accord “traffic-in-transit” freedom of transit across their respective territories through routes mutually agreed upon.

various points of entry and exit for movement of traffic-in-transit through there ports by all means of transportations⁴².

There are also two bilateral agreements signed in between Nepal and China (The trade and Payment Agreement 1981 and the Trade and other related issue agreement 2002). The trade and payment agreement 1981 includes provisions which are intended towards developing trade and economic relation between the two countries. It states the provision in which the two states have agreed to utilize certain trading points for enhancing and developing the trade⁴³. The provision for trade overseas between the two countries has also been mentioned in this certain agreements which state the usage of ports in relation to overseas trade⁴⁴. The bilateral agreement with Pakistan (The trade agreement with Pakistan 1982) includes provision through which Pakistan could allow to use warehousing facilities as available in Karachi port⁴⁵.

⁴² Protocol to the transit agreement between Nepal and Bangladesh - With reference to Article 1: It is agreed that the government of people's republic of Bangladesh shall designate the following points of entry and exit for movement of traffic-in-transit through her ports and other territory ,by all means of transportation:

- a. Khulna-Chalna Port
- b. Chitagong port
- c. Biral
- d. Banglabandh
- e. Chilhati
- f. Benapole

⁴³ Trade and payment Agreement (Nepal and china) Article 7- In order to develop the trade overland between the two countries the two contracting parties agree to utilize the following trading points along their frontiers:

- a) Kodari/Nyalam
- b) Rasuwa/keyrong
- c) Yari (Humla) Purang

⁴⁴ Article 10- The trade overseas between the two countries shall be, in the case of export from China, on the basis of C.I.F Calcutta or other ports on which both Parties have agreed, or of F.O.B China's port; and in case of export from Nepal on the basis of F.O.B Calcutta or other port on which both parties have agreed or of C.I.F. China's port.

⁴⁵ Trade agreement with Pakistan 1982 Article 8(3) – The government of Pakistan will allow use of warehousing facilities as available from time to time at Karachi port / airport of Nepalese cargo for movement to up-country in Pakistan and for trade with third country.