

**Foreign Policy of Nepal: Past, Present and Future**

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The Professor Yadu Nath Khanal Inaugural Lecture

Ministry of Foreign Affairs, Kathmandu

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## Keynote Speaker

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Professor Dr Surya P Subedi ranks among an exceptional group of international jurists with practical experience of successfully navigating the political landscape in different countries and international organisations to bring opposing sides together to resolve conflicts. He has served in high-level positions in governments and national and international organisations with responsibility for policy formulation and advice.

He has been professor of international law at the University of Leeds, England, since 2004 and a visiting professor on the international human rights law programme at the University of Oxford since 2016. A barrister and a Queen's Counsel (QC) at Three Stone Chambers, Lincoln's Inn, London, he has advised governments in several countries on international legal matters and has acted as counsel in a number of cases before international courts and tribunals, including the International Court of Justice. He has published 12 books and more than 60 scholarly articles on international law.

Professor Subedi has served as the UN special rapporteur for human rights in Cambodia and as legal procedural adviser to the World Conservation Congress of the International Union for Conservation of Nature. He has also served as a member of the Task Force on Investment Policy of the World Economic Forum (known as the Davos Forum) in Switzerland. He was elected to the *Institut de Droit International* in 2011 and made a *Membre Titulaire* in 2015.

He obtained a DPhil (विद्यावारिधि) in Law with a prize from the University of Oxford in 1993 and was awarded Oxford's highest accolade, the degree of Doctor of Civil Law (DCL) (महाविद्यावारिधि), in 2019 in recognition of his contribution to the development of international law and the advancement of human rights. He obtained an LLB in 1981 from Tribhuvan University and an LLM in international law with distinction from the University of Hull in 1988.

Hon'ble Foreign Minister Dr Narayan Khadka

Foreign Secretary Mr Bharat Raj Paudyal

Excellencies

Distinguished Guests

Ladies and Gentlemen

Good afternoon!

I would like to begin by thanking the Government of Nepal for establishing an annual lecture series named after a seasoned and pioneer diplomat who was one of the architects of the foreign policy of Nepal in modern times, the late Professor Yadu Nath Khanal, and for inviting me to deliver the inaugural lecture in the annual lecture series.

My sincere thanks to Foreign Minister Dr Khadka for placing his trust and confidence in me, to Foreign Secretary Bharat Paudyal for his generous words of introduction and to Mr Bharat Regmi, Ambassador designate to the UN in Vienna, and the staff at the Ministry of Foreign Affairs for their warmth and hospitality extended to me.

I am honoured by the invitation and delighted to be here this afternoon. I am particularly pleased to deliver this lecture since both the late Professor Khanal and I come from a similar background – from the western part of Nepal – the land blessed by the snow-fed Marsyangdi River descending down from the Himalayas and its tributaries.

I have a particular fascination with the Gandaki river which is a major tributary to the River Ganges – the holy river. Early on in my academic career I published a book on international watercourses law for the twenty-first century, with

particular reference to the management, conservation, and equitable utilisation of the water resources of the Ganges River.<sup>1</sup>

Ever since my time as a legal officer in the International Law and Treaties Division of the Ministry of Law & Justice, I have sought to develop myself as an international lawyer ready and willing to serve the governments of Nepal on close to every major area of international law pertaining to the conduct of Nepal's foreign policy.

Today, I feel privileged to have this opportunity to present my views on Nepal's foreign policy to such an august gathering.

I would like to take this opportunity to pay my tribute to successive rulers of Nepal since its unification, including King Prithvi Narayan Shah the Great, the unifier of the nation who laid the foundation of Nepal's foreign policy, Rana Prime Ministers Jung Bahadur Rana and Chandra Shamsheer JBR who successfully safeguarded Nepal's independence during the period of aggressive colonisation of Asian and African territories by the European powers, King Mahendra and Prime Minister BP Koirala who strengthened Nepal's external relations on the basis of sovereign equality with its immediate neighbours and extended Nepal's relations with countries far and wide, King Birendra for his innovative proposal to have Nepal declared as a Zone of Peace, and Prime Minister Deuba and former Prime Ministers Girija Prasad Koirala, Krishna Prasad Bhattarai, K.P. Oli, Sushil Koirala, Prachanda, Madhav Nepal, Jhalanath Khanal, and Dr Baburam Bhattarai for taking wise decisions to safeguard Nepal's national interests on major foreign policy issues of the day.

I should state here that the 104 years of old Rana oligarchical rule hindered Nepal's progress to modernity and King Mahendra was wrong to dissolve an

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<sup>1</sup> Surya P. Subedi (ed.), *International Watercourses Law for the 21st Century: The Case of the River Ganges Basin* (Ashgate Publishing, Aldershot, 2005) (editor and lead author).

elected parliament, derail Nepal's journey to democracy, and imprison B.P. Koirala and many other elected representatives of the people. However, that does not diminish the significance of many bold decisions he took on foreign policy matters to assert Nepal's freedom of action and defend the sovereignty and independence of the country during tumultuous time in South Asia. Therefore, history is grateful to Rana Prime Ministers Jung Bahadur Rana, Chandra Shamsheer JBR, and King Mahendra with regard to their contribution to foreign policy matters.

I propose this afternoon, if I may, to present my analysis of 'Nepal's foreign policy: past, present and future'. My analysis is informed by my own research in international law aspects of Nepal's external relations and those of others who have laboured in this area including Professor Yadu Nath Khanal.

## The Past

Nepal is an ancient State that has existed in various forms for more than 2500 years. The existence of Nepal is mentioned in religious scriptures of ancient Hindu and Buddhist civilisations. Neolithic tools found during excavations in the Kathmandu Valley indicate that people were living in the Himalayan region in the far distant past. The *Mahabharat* and other legendary epics mention geographical names and ethnic groups associated with Nepal, such as the Kiratas of Nepal. As I have outlined in my recent book on '*Human Rights in Eastern Civilisations*' (published by Edward Elgar in the UK),<sup>2</sup> the international law concept of *Panchsheel* has its roots in Nepal, the land of Lord Buddha.

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<sup>2</sup> Surya P. Subedi, *Human Rights in Eastern Civilisations: Some Reflections of a Former UN Special Rapporteur* (Edward Elgar Publishing, Cheltenham, 2021).

The Principles of *Panchsheel* were not invented but were developed over time based on Hindu-Buddhist philosophies, including notions such as “live and let live”, “the world is one family” (वसुधैव कुटुम्बकम्) and the Buddhist *Pañcasīla* or Five Virtues, including non-violence.

From studying the *Shanti Parva* of the *Mahabharat* and other scriptures, it becomes clear that this part of the world has had some form of the law of nations or *jus gentium* dealing with matters of inter-state negotiations, conclusion of treaties and humanitarian law or the laws of war before the development of modern international law in Europe.

The history of modern Nepal began in the 16th century with the founding of the House of Gorkha by Dravya Shah in the western hills of Nepal in 1559. When Prithvi Narayan Shah ascended to the throne of Gorkha, he began a campaign to unify the country which had remained divided into several principalities. He largely succeeded in his campaign and his coronation as the King of Nepal took place in 1768. This was the time when the American Revolution for independence was gathering pace and Britain had asserted control over vast swathes of land across the globe.

Prithvi Narayan Shah’s description of Nepal as “a yam between two stones”, referring to the Celestial Empire of China to the North and the 'Emperor of Seas' to the South, i.e., British India, summed up Nepal’s position at the time. It is the first major statement on Nepal’s foreign policy which has not only entered the psyche of the people of Nepal but has also guided foreign policy makers.

The campaign of territorial expansion, which was started by Prithvi Narayan Shah, was extended by his successors towards the east and west of Nepal through the Himalayan belt for almost 1,500 kilometres from the western boundary of Garhwal, India, through the territory of Sikkim in the east. However, much of the territory gained had to be ceded to British India under the Treaty of Sugauli in the

early nineteenth century when Nepal lost the Anglo-Nepalese War of 1814–16. The war broke out mainly as a result of the British campaign for expansion of their Empire in South Asia. The British desire was to bring all smaller territories south of the Himalayas within its control to consolidate British rule in India.

Nepal resisted the aggression but was forced to sign a peace agreement with unfavourable terms. This is the second milestone in the annals of Nepal's external relations. The boundary set by the Treaty of Sugauli remains valid to this day, and it has defined the place of Nepal in its dealings with its southern neighbour ever since. All successive governments of Nepal pursued a policy of isolation and some kind of rapprochement with the rulers of British India. Pleased with the cooperation received from Nepal, the British establishment went as far as to confer upon Rana Prime Minister Chandra Shamsheer JBR the honorary degree of Doctor of Civil Law (DCL), the highest accolade of the University of Oxford, in 1908 and he received it from the hands of Lord Curzon, the Chancellor of the University, during his visit to Great Britain.

By maintaining cordial relations with British India, Nepal regained some of the lost territory and was able to secure a formal recognition of its independence and sovereignty through the 1923 treaty concluded with Britain during the height of the British imperial power. This is the third major development in the history of international relations of Nepal.

The fourth major development in Nepal's international relations took place in the immediate aftermath of the Second World War and the establishment of the UN when Nepal established diplomatic relations with the United States, concluding a treaty of friendship and commerce on 25 April 1947.

The fifth event of significance for Nepal is the conclusion of the 1950 Treaty of Peace and Friendship with independent India following the British withdrawal from South Asia. This treaty is significant for two main reasons: first it was more or less a modified version of the 1923 Treaty with Britain, and second it defines the nature and scope of Nepal's relations with India. This treaty remains controversial for several reasons. My article on this treaty, which was published in 1994 in the *Asian Survey*,<sup>3</sup> the journal edited by the legendary Professor Leo Rose of the University of California, is widely regarded as an authoritative statement on the status, nature, and scope of this treaty. I refer anybody interested in this subject in greater detail to this article.

The sixth major milestone in Nepal's external relations is its membership of the United Nations in 1955, which was followed by an ambitious extension of Nepal's external relations under the leadership of King Mahendra and Prime Minister BP Koirala; and both of them benefited greatly from the wisdom and foresight of a number of luminaries of the time, including Professor Yadu Nath Khanal in whose honour we are holding this lecture today.

Nepal's attempt to protect itself from any untoward developments in the region and any potential outside interference led to the proposition by King Birendra in that Nepal be declared as a Zone of Peace. It was an innovative idea designed to seek international endorsement of Nepal's status as a peace-loving, independent, and traditionally neutral country when South Asia was going through challenging times. The proposal was also consistent with the centuries old foreign policy of Nepal pursued since the time of King Prithvi Narayan Shah. The support of a

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<sup>3</sup> Surya P. Subedi, 'India-Nepal Security Relations and the 1950 Peace and Friendship Treaty: Time for New Perspectives', 34(3) *Asian Survey* (University of California Press, 1994), pp.273–284.

considerable number of states, including the United States, for this proposal was a major triumph for Nepal's foreign policy.

Nepal has reached out to other nations and played an important role in international organizations such as the United Nations. Nepal is a regular contributor to the peacekeeping operations of the UN. As a land-locked country, Nepal has been at the forefront of the efforts to secure the rights of land-locked countries in international law, especially during the negotiations on the 1982 UN Convention on the Law of the Sea. Overall, the conduct of Nepal's foreign policy has largely met the three essential conditions - or three Cs - of a sound foreign policy, i.e., continuity, consistency, and credibility. Most of the decisions taken by various successive governments on major international issues, whether within the United Nations or outside, have been principled, demonstrating Nepal's faith in international law, including the principles of the Charter of the UN.

### The Present

Nepal's foreign policy tends to be in the pursuit of three main objectives: first, asserting and protecting Nepal's freedom of action and maintaining its own equilibrium vis-à-vis its two larger neighbours; second, economic development; third, upholding the principles of *Panchsheel* and the Charter of the UN, and strengthening the rules-based international order. However, Nepal's foreign policy continues to be affected by its geo-strategic location between the two giants of Asia and preoccupied by its attempt to maintain a balance between these powerful neighbours. This does not have to be so.

Like any other nation, Nepal has its own challenges and opportunities offered by the fast-changing world events and the dynamics of the rapidly evolving formal

and informal alliances of nations for various purposes. Professor Yadu Nath Khanal wrote about the “somewhat sombre mood”,<sup>4</sup> caused by the fact that as a least developed country with a small volume of international trade and not much to offer by way of give-and-take, Nepal has little to offer to countries such as the United States to attract adequate attention.<sup>5</sup> However, his assessment that the Nepalese ambassador to Washington DC, among the ambassadors of prosperous and powerful countries, was a lonely ambassador, was informed by the conditions that prevailed in the 1960s and 1970s.

Today’s world is very different. Nepal as “a yam between two stones” is a story of yesterday. It is a constraining notion that limits Nepal’s global ambitions and restricts Nepal to managing bilateral relations between the immediate neighbours. Nepal does not have to be shackled by this mind-set in today’s world of globalisation of thoughts, ideas, and connectivity in different areas of human activity.

Globalisation and social media have revolutionised human civilisation in the past few decades. There is an ever-growing global interest in the values of the East since Eastern concepts such as non-violence, yoga, vegetarianism, nirvana, karma, meditation, and mindfulness, all informed by the teachings of Buddha, have become global phenomena. Hence, Nepal as the land of Buddha, has much to offer to the world and the world is increasingly attracted to Nepal.

Materialistic wealth is not the only form of wealth. Therefore, Nepal should overcome the underdeveloped, insignificant, and small-state syndrome. In terms of the size of the population, Nepal is a middle power by global standards. I share the optimism of the British historian Perceval Landon about Nepal’s past, present, and future beautifully narrated in his book on ‘Nepal’ published in two volumes

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<sup>4</sup> Y.N. Khanal, *Essays in Nepal’s Foreign Affairs* (Murari Prasad Upadhyay, Kathmandu, 1988), p.6 (Introduction).

<sup>5</sup> Y.N. Khanal, *op.cit.*, pp.134-135.

in London in 1928 and reprinted in 1993. He states: “[Nepal] alone among Asiatic powers has never suffered either the galling triumph of the Moslem or the political or commercial results of Christian expansion.”<sup>6</sup>

Nepal can be proud of its past and ambitious for the future for itself and for the region. It wants to come out of the Sino-Indian preoccupation of its foreign policy and go even beyond the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) and the currently dysfunctional South Association for Regional Cooperation (SAARC).

### The Future

Nepal ought to have a vision and strategy in place to make constructive contributions to regional and global affairs and benefit from globalisation. Nepal is well-placed to do so, thereby earning its place and respect in the galaxy of nations that it deserves. The current version of the document outlining the aims and objectives of Nepal’s foreign policy adopted some three years ago is comprehensive. However, Nepal would do well by focussing on a few areas in which it has the capacity to deliver results and the areas in which it has a comparative advantage. This is what smaller countries like Austria, Switzerland, Singapore, and the Netherlands have done.

As a relatively small nation territorially, Nepal has to have an outstanding, distinctive international agenda as part of its foreign policy to promote itself and to help further good causes in the wider world, so that the world looks to Nepal for specialism and leadership in the chosen areas. I propose to highlight some of the possibilities for Nepal. In my opinion, if Nepal has a positive message to

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<sup>6</sup> Perceval Landon, *Nepal* (first published in London in 1928 and AES Reprint 1993 (New Delhi, Asian Educational Services), vol.1, p.v (Preface).

convey to the world and leads in converting this message into actions, it will elevate its status globally.

Nepal is well placed to shout loud from the top of the world a global message of change for the better and the world is bound to listen to Nepal's authoritative, legitimate voice of reason. As Dr Sarvepalli Radhakrishnan said, the gates of the future are wide open for any individuals and nations determined to succeed in their mission.<sup>7</sup>

### Diplomacy for Development

As Nelson Mandela once said, while poverty persists, there can be no meaningful freedom<sup>8</sup> and this is also true for Nepal. Although Nepal's centuries-old Hindu-Buddhist tradition embodied many early elements of human rights, such as respect for personal liberty, the country remains impoverished. The prosperity of developed nations is underpinned by values such as competition, fair play, the rule of law, personal liberty, and a strong work ethic; and they are as vital for Nepal as they are for other nations. Therefore, the foreign policy of Nepal should be geared to advancing economic development grounded in these values.

Nepal has experienced manifold tragedies, political upheavals, and insurgencies since it emerged in the 1950s from its centuries-old self-imposed isolation under various oligarchical rules. However, since the adoption of a new democratic and inclusive constitution in 2015, the country has been on the road to some degree of political stability and today stands on the threshold of a new life. Nepal may be a conservative country culturally, but politically it is a liberal country, and the

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<sup>7</sup> S. Radhakrishnan, *The Principal Upanishads* (Harper Collins, London, 2012), p.9.

<sup>8</sup> Nelson Mandela, 'While poverty persists, there is no freedom', *The Guardian*, 4 November 2006, p.30.

Nepali people have a universalist outlook to life. The Nepali people deserve their peace dividend, and the foreign policy of Nepal ought to be designed to achieve this purpose. Diplomacy for economic development should not only be about attracting more foreign aid or increasing tourism, but it should also be about readying the country to benefit from globalisation and international treaties on trade and investment and the protection of the environment.

### Attracting, managing, and retaining foreign investment

In order to attract and manage foreign investment in the best interests of the country and maximize the benefits from it, Nepal needs to have political stability and a strong rule of law supported by an independent judiciary and respect for human rights. The experience of many countries shows that attracting foreign investment is a means to an end, not an end in itself. Securing foreign investment is not the end goal, it is a means used to reach a goal. The goal could be to boost a certain area of industry or economic activity or create a vital infrastructure or empower the people in certain sectors of the economic activity or to stimulate the economy.

Many countries which attracted foreign investment without a fixed solid goal for the investment, have not benefitted much from the investment in long-term. Therefore, the challenge for Nepal is to have a sensible national legal and policy framework in place to attract, manage and retain foreign investment to maximize the benefits of the investment for the country. For this purpose, a bilateral investment treaty must include provisions concerning, *inter alia*, the transfer of technology, employment of local people in meaningful positions, use of local raw material, requirement to reinvest a certain percentage of the profits in the country,

contribution to the local economy, protection of the local environment and respect for human rights.

Because of Nepal's strategic location, its favourable climatic conditions, its reputation as a tourist haven, as a gateway to the Tibet Autonomous Region of China, as a country which traditionally pursues a policy of neutrality or non-alignment *vis-à-vis* not only its immediate neighbours but also other major powers outside of the region, Nepal is well placed to attract foreign investment.

Nepal, like any other country, when involved in concluding bilateral investment agreements or preferential trade agreements, ought to be fully up to date not only with the practice of treaty-making by other states but also with the recent trends in jurisprudence or case-law. For example, the meaning accorded to a principle of international investment law today by an international investment tribunal could be different from that accorded 10 or 20 years ago. We are living in a fast developing and rapidly changing world. Even the bilateral investment treaty known as BIPPA concluded with India only about a decade ago is already looking outdated. India itself is going through a process of review of its foreign investment policy.

Many States have declared that they now want to review the bilateral investment treaties (BITs) concluded in the past and some states have even withdrawn from the 1966 International Convention on the Settlement of Investment Disputes (ICSID), claiming that the mechanism for investor-state disputes settlement under bilateral investment treaties has worked in favour of big foreign companies and undermined the sovereignty of developing States.

From the experience of a number of countries which sought to attract foreign investment, I gather that the decisive factors for foreign investors when choosing a country for investment are political stability, impartial implementation of the rule of law, independent judiciary, sound regulatory regime, control of

corruption, and transparency in decision making. Nepal ought to address comprehensively each of these components if the country hopes to attract major foreign investment to improve its infrastructure. Therefore, Nepal's foreign policy cannot be separated from the domestic policy of strengthening democracy and upholding the rule of law and human rights.

### Developing Nepal as an international financial services centre

Another possibility would be to develop Nepal as a financial services centre along the lines of Switzerland, Singapore, Andorra, Jersey, or even the Isle of Man. As the people in both of Nepal's neighbouring countries grow richer, they would be looking to deposit their money in a safe, neutral country. With a traditional image of a relatively neutral country which cannot at the same time go against the basic interests of either China or India, Nepal could be an attractive place for people for safeguarding their savings.

If properly developed within an acceptable level of an international legal framework and if managed and regulated well, the role of a financial services centre can become a sizeable source of revenue generation for Nepal. International experience has shown that those who are well off wish to spread their wealth by depositing their wealth into bank accounts in different safe and secure locations. For this, Nepal should maintain a strict and strong equilibrium with both of its neighbours, present itself as a safe and neutral venue to do business in and have a robust framework of laws designed to protect investment and regulate the financial services industry according to international standards.

### Developing Nepal as a Transit State

Regardless of the boundary or territorial disputes between them, the volume of trade between China and India has increased rapidly in the recent past and it is bound to accelerate in the years and decades to come. Therefore, Nepal should strive to develop its infrastructure to serve as a transit state for the trade of goods and services between these two countries and invest in making various passes along the Himalaya range more accessible and suitable for the carriage of goods for cross border trade. The Government should establish a powerful inter-ministerial committee led by the Ministry of Foreign Affairs to work out the details, including an international legal framework for this purpose. It is by developing their port and airport services or other areas of service sectors that countries and cities like Singapore, Hong Kong, and Rotterdam have prospered. Nepal can do the same vis-à-vis the cross-border trade and supply of services between China and India.

The proposal to build a railway tunnel under the Himalayas to link western Tibet with Kathmandu<sup>9</sup> is visionary and exciting, provided that it can be done without causing significant harm to the Himalayan ecology. If China, India, and Nepal can work together to take the Himalayan railway line from Tibet to the Indian cities bordering Nepal, it will be a game changer in this part of the world.

### Establishing a Centre for Himalayan Peace Studies

Although modernity has transformed the Kathmandu valley over the past half-century and it now struggles with the impact of pollution and overcrowding, it remains a Shangri-la; and the country traditionally known as the land of meditation and contemplation (ज्ञान भूमि - तपो भूमि) still offers abundant opportunities to work towards achieving peace both within the region and beyond. Therefore, Nepal would do well by establishing a centre for Himalayan peace studies similar

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<sup>9</sup> 'China to tunnel beneath Himalayas for Nepal link', *The Times* (of London), 23 June 2018.

to the International Centre for Integrated Mountain Development (ICIMOD) already operating in Kathmandu. The new centre that I have proposed can act as an important vehicle to promote peace in this region.

Nepal could play a constructive role to promote peace in this region and create an environment conducive to facilitating negotiations and hopefully ultimately resolving many long-standing and potentially explosive boundary or territorial disputes in this part of the world, whether between India and Pakistan or between China and India. Supported by the work of this proposed new centre, Nepal could aspire to be an objective, independent, and impartial peace negotiator, and peace broker. Judicial mechanism is not the only option at the disposal of States to settle their territorial or boundary disputes. International law provides a wide range of flexible techniques to resolve international disputes and any of these techniques could be developed and deployed for the benefit of the countries concerned.

There is a general ambivalence on the part of Asian countries to resort to international judicial mechanisms such as the International Court of Justice to settle major territorial or boundary disputes for a number of reasons, including the traditional perception of their Euro-centric or Western-dominated character both in terms of the manner in which the law has been interpreted and applied by these institutions and the culture that prevails in the workings of these institutions. Nepal's role as an impartial peace broker can become a catalyst in resolving some of these long-standing major boundary or territorial disputes in this part of the world and enhance Nepal's prestige regionally and internationally.

What I have suggested may sound a tall order, but if Nepal wishes to be ambitious in the conduct of its foreign policy, playing a role of this nature is by no means impossible. In the *Shakuntal Mahakavya*, written by the great poet of Nepal, Mahakavi Devkota, the advice given by the learned but not wealthy father to his daughter when sending her off to the wealthy and powerful household of her

husband, हामी छौ तपका धनि मन ठुलो जानेर आफ्नो पनि (meaning – remember that we are rich intellectually and be proud of it when dealing with others in your new household), is also good advice for Nepal, a country with a rich cultural heritage that can aspire to become a force for good in the region.

A ‘force for good’ can be characterised as an action inspired by a genuine concern with others. From experience, I know that positive impact can be achieved on all levels by manifold actions.

### Establishing a Centre for International Law

When I was a doctoral scholar at Oxford we used to debate the role of law in the international community, in the Trinity term seminars led jointly by Professor Sir Ian Brownlie, Professor of International Law, and Professor Sir Adam Roberts, Professor of International Relations. We debated whether international law dictated international relations or vice versa. The view was of course divided but I personally held the belief that faith in international law was *sine qua non* for the survival of nations, and especially for smaller and weaker states, and of the rules-based international order. Professor Yadu Nath Khanal rightly states that “(t)rying to keep abreast of international law is a worthy goal of Nepal. Both national and international conditions demand this.”<sup>10</sup>

International law is the ultimate refuge for states and especially for smaller and weaker states. I remember the following statement of a leader of one of the Latin American States: “Disrespect for international law leads to the law of jungle, and in that jungle we Latins are not the lion.”<sup>11</sup> In South Asia, Nepal is not the lion. It

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<sup>10</sup> Y.N. Khanal, *Essays in Nepal's Foreign Affairs* (Murari Prasad Upadhyay, Kathmandu, 1988), p.30.

<sup>11</sup> Former President of Argentina Raul Alfonsin in the *Time* magazine of 29 January 1990, p.2.

can roar, but its roar may remain unheeded. Therefore, reliance on international law is certainly a safe and prudent option for Nepal, whether it is in relation to territorial or boundary disputes or other issues affecting the country.

International law will have an increasingly meaningful role to play in the years and decades to come. Therefore, Nepal must pay serious attention to the study and research of international law and strengthen its capacity to utilise the tools of international law to achieve its foreign policy objectives. It is not only a matter of understanding international law *per se* but also a matter of understanding how the various principles of international law have been interpreted and applied by international courts and tribunals.

Cardinal Richelieu is reported to have said: “I do not care so much who makes the laws or what the laws are, so much as who interprets and applies the laws!” That indeed is the key to the current challenges for many developing countries which have not invested enough in the study of international law. Developing countries like Nepal must develop their capacity to make the most of international law. Nepal should endeavour to transit from a ‘rule taker’ to a ‘rule shaker’ and finally to a ‘rule maker’ certainly in those areas that matter most to the country.

It should be borne in mind that concluding a treaty with another States is a more serious task and commitment than simply writing a new constitution or enacting a new piece of legislation for one’s own state only. This is because a law enacted by one’s parliament can be amended anytime by the same parliament or a future parliament. Even a constitution for a country written today can be amended tomorrow. On the other hand, once a treaty is concluded with another State no parliament or government can amend the treaty without the consent of another State; and that State is unlikely to consent to any amendments to the treaty if its original provisions are more beneficial to that State than the newly proposed ones.

The country that concludes treaties with other countries without fully grasping the pros and cons of the treaty at hand do so at their peril as treaties are usually binding for a considerable amount of time, sometimes for 50, 70 or even 99 years.

When highlighting the significance of international law for a developing country such as Nepal, I am not implying that every rule of international law is fair for developing countries. The developed and Western countries have dominated international law-making thus far and consequently the laws made by them tend to favour Western and developed countries rather than developing countries. Most of the developing countries have been the receivers of laws made by developed countries, they are usually not the creators of laws. That is why some of the rules of international law are not fair for developing countries. Therefore, developing countries like Nepal could act in concert with other like-minded states to make vital contributions to international law-making.

Nepal can aspire to do so in the areas of its primary concern such as the protection of the Himalayan ecology, the trade and transit rights of land-locked countries, differential and preferential treatment for low-income countries and sharing, management and conservation of the shared watercourses in an equitable, fair, and mutually beneficial manner. For instance, the world is already experiencing unusual weather patterns and climatic extremes in several parts of the world. Snow is reported to be receding fast in the Himalayas due to climate change and global warming.

If the Himalayan ecology continues to deteriorate due to global warming, hundreds of millions of people whose survival depends on the water supply from the water tanks fed by Himalayan streams, will be faced with a life-threatening situation.<sup>12</sup> It is in such areas that Nepal should aspire to provide leadership at the

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<sup>12</sup> See Ananda Mohan Bhattarai, *Protection of Himalayan Biodiversity* (Sage Publications, New Delhi), 2010.

international level, and I hope that the idea of the *Sagarmatha Sambaad* initiated by the Ministry of Foreign Affairs some time ago will be revived. Initiatives of this nature can enable Nepal to play a leadership role regionally and internationally.

As Nepal looks to the future, the role of international law in nation building will gain in significance. Law is an instrument to achieve desired objectives and international law serves this purpose, too. The challenge for developing countries such as Nepal is to build capacity in how to use international law effectively. Therefore, there is a need for a proper think-tank devoted to the study of and research in international law in Nepal and I hope the Government will take the decision to establish such an organisation.

International law is not only about governing external relations of a country but is also about regulating its economic activities. For instance, the role of international economic law has changed; international economic law has become a champion of liberal economy and free trade designed to empower and benefit the person, whether natural or juridical. Much of the World Trade Organisation law and the international law of foreign investment are designed to protect and enhance individual entrepreneurship and protect and promote individual innovation through intellectual property protection. The ultimate objective is to create a borderless world or a global village where a free flow of goods, capital, and services can take place. The centre that I have proposed could assist the Government to maximise the benefits offered by international law.

The proposed centre could also be entrusted with the task of exploring the possibility of developing Nepal as a regional arbitration centre. Legal services have been a major source of income not only for countries with a well-established reputation for the independence of the judiciary and robust rule of law such as the UK, but also for other countries such as Singapore which has an ambitious

scheme to develop itself as a regional hub for international arbitration. Given Nepal's traditional reputation as a non-aligned country with temperate weather and a touristic destination, Nepal is well placed to serve as an attractive venue for resolutions of international commercial disputes, including international arbitration.

Some of the reasons why the UK in general and London in particular has been successful in attracting international legal business, including international commercial arbitration, are that it has a trusted legal system, an independent judiciary, and reputable institutions that offer first class arbitration services. It also has stable and relatively clean politics, a reliable, relatively honest, professional, and politically neutral civil service, a generally liberal, global outlook among both politicians and the general public, and relatively low crime rate. The UK also affords a lot of importance to international law, more so than many other countries.

Nepal may not have all the favourable conditions to attract international legal business, still, it has many more than other countries in Asia. There are plenty of direct and indirect benefits of developing Nepal as a regional hub for international commercial dispute settlement, such as the generation of additional revenue for Nepal, the development of the service sector and the enhancement of Nepal's prestige internationally.

### Moving towards a policy of permanent neutrality

The Hindu Kush Himalayan belt extending from Myanmar to Afghanistan has long endured external interference and internal political upheavals because of its strategic significance to regional and global politics and long-standing territorial and boundary disputes among the states in the area. Given the unfolding new

dynamics of international relations, this region may once again be drawn into the conflict over the expansion of the spheres of influence of different international actors.<sup>13</sup> Therefore, many of the foreign policy challenges for Nepal are as great today as they have been in the past.

Nepal could thus consider moving towards adopting a policy of permanent neutrality similar to that pursued by Switzerland for the benefit of the Nepalese people and those of the wider Hindu Kush Himalayan belt.

### Meaningful representation in international organisations

Despite Nepal's contribution to the UN peacekeeping and to the maintenance of the rules-based international order in an impartial and independent manner over a long period of time, its representation in the UN and other international organisations has not been as strong as it should be. No Nepali national has ever occupied a senior executive level position in the core areas of business of these organisations. Most of the past and present positions occupied by Nepalese nationals have been peripheral to the main powers and functions of these organisations. For instance, Nepal remains one of very few countries that has never been represented in the UN International Law Commission with 34 members, let alone in the International Court of Justice. Some strategic planning should be put in place to identify the right candidates for the right positions and to promote them accordingly so that they can gain the experience and exposure needed to compete successfully for such positions.

Owing to the political upheavals experienced within the country over the past several decades, Nepali political leaders have not paid adequate attention to

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<sup>13</sup> 'A Himalayan rivalry', *The Economist* (of London), 21 August 2010, pp.17-20.

project Nepal internationally and promote Nepali nationals. Since some degree of political stability has now been achieved in the country, the time has come to be assertive in the international arena. There are huge long-term and short-term benefits of doing so for the country.

### Domestic Challenges of Foreign Policy

Professor Yadu Nath Khanal is right in stating that “foreign policy cannot be pursued in isolation from home policy.”<sup>14</sup> The liberal economic policy pursued by international trade and investment organisations and the values embedded in international trade and investment treaties enable the strongest to succeed in this increasingly interdependent and globalised world. To succeed in this tough, competitive global environment, every country has to put in place policies designed to produce first-rate intellectuals and professionals. Unfortunately, Nepalese institutions of higher education and especially those in the public sector have not been able to produce leading intellectuals and professionals up to the level expected. In fact, their ability to do so has diminished over the past several decades due to political interference in the management of these institutions.

Political interference in the civil service has also eroded the professionalism and political neutrality of the civil service and its capacity to deliver the desired outcomes. The institutions free of political interference produce the best students who are ready to take on the world and succeed in the competitive global environment.

Unfortunately, a large number of youths of Nepal are compelled to take up low-income and unskilled or low-skilled jobs in the Gulf countries and elsewhere.

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<sup>14</sup> Y.N. Khanal, *Essays in Nepal's Foreign Affairs* (Murari Prasad Upadhyay, Kathmandu, 1988), p.4 (Introduction).

This is an ongoing tragedy which is not conducive to Nepal succeeding in the race to the top in an increasingly competitive world. Economic diplomacy and domestic policy are intertwined and for the former to succeed a paradigm shift is needed in the latter. We know that in democracy everybody is a politician, but not every youth needs to be indoctrinated into party politics from early on in life. It can be counterproductive for the development of the individual as well as the country. A youth should be encouraged to spend time learning and developing skills to be able to compete in a fiercely competitive world and should not be called upon to carry party political flags to serve the interests of political leaders. The educational establishments in Nepal, the temples of knowledge, should be free of party-politics so that they can focus on producing first-rate intellectuals and professionals, generating knowledge, and developing specialisms. The youth of today are the future in any country and if this foundation is weak the prospects for a country's tomorrow are not compelling.

## Conclusions

To conclude, as a country located between the two giants of Asia, Nepal has traditionally strategically followed a sensible policy to preserve its sovereignty and independence and retain much of its ancient cultural heritage. A British scholar has observed that “of all the states of the world, there is probably a no more fiercely patriotic country than Nepal.”<sup>15</sup> However, this country would do well by taking a step up in its foreign policy to project itself internationally and I for one am ready to assist. I am confident that we can assemble a group of prominent international lawyers from within and outside of the region to assist

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<sup>15</sup> Perceval Landon, *Nepal* (first published in London in 1928 and AES Reprint 1993 (New Delhi, Asian Educational Services), vol.2, p.2.

Nepal. Nepal has to grow out of the ‘a yam between two stones’ mind-set and the self-defeating notions of an insignificant, impoverished, and peripheral state tucked away in the southern flanks of the Himalayas.

The foreign policy of Nepal must have a global outlook, it must go beyond its preoccupation with the management of relations with its two immediate neighbours. If some of the ideas I have outlined this afternoon were implemented, Nepal would be poised to gain power and influence in regional politics and make inroads into global politics.

The country is a cradle of Hindu-Buddhist civilisations and has served as a bridge between the Indian and Chinese civilisations for millennia, spreading the message of peace, universalism, multi-culturalism, and tolerance. Therefore, there is every prospect of more prosperity for Nepal, provided that the country is able to put in place sensible policies designed to exploit its comparative advantage and its geostrategic status. As the economic power shifts gradually to the East any of the initiatives that I have outlined today are bound to pay off tomorrow.

Nepal may be perceived to be a small country, but the dreams of the Nepali people are not small. I hope the Nepalese foreign policy will rise to the challenge to realise some of the dreams of the Nepalese people.

May this nation live long as a beacon of peace and freedom in this part of the world!

I thank you for your kind attention.

I will try to answer any questions that you may have.

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### Appendix 1

The following are the publications of Professor Surya P. Subedi that are directly or indirectly related to the international legal aspects of Nepal’s external relations:

## Books:

Subedi, S.P., *Dynamics of Foreign Policy and Law: A study of Indo-Nepal Relations* (Oxford University Press, 2005).

Subedi, S.P., *International Watercourses Law for the 21st Century: The Case of the River Ganges Basin* (Ashgate Publishing, Aldershot, 2005) (editor and lead author)

Subedi, S.P., *The Workings of Human Rights, Law and Justice: A Journey from Nepal to Nobel Nominee* (Routledge, London/New York, 2022)

Subedi, S.P., *Human Rights in Eastern Civilisations: Some Reflections of a Former UN Special Rapporteur* (Edward Elgar Publishing, Cheltenham, 2021)

Subedi, S.P., *Land and Maritime Zones of Peace in International Law* (Clarendon, Oxford University Press, Oxford, 1996)

Subedi, S.P., *Land-Locked Nepal in International Law* (K Gautam, Kathmandu, 1989)

## Articles and book chapters:

Subedi, S.P., 'When is a Treaty a Treaty in Law? An Analysis of the views of the Supreme Court of Nepal on a Bilateral Agreement between Nepal and India', in Ko Swan Sik et al (eds.) *5 Asian Yearbook of International Law* (1996) (Kluwer Law International, The Hague), pp.201-210

Subedi, S.P., 'India's New Bilateral Investment Promotion and Protection Treaty with Nepal: A New Trend in State Practice', 28(2) *ICSID Review: Foreign*

*Investment Law Journal* (Oxford University Press, Oxford, Fall 2013), pp.384–404

Subedi, S.P., ‘The Himalayan Frontier Policy of British-India and the Significance of the 1923 Treaty of Friendship between Great Britain and Nepal’, *27 Journal of the Britain-Nepal Society* (December 2003), pp.35–39

Subedi, S.P., ‘Regulation of Shared Water Resources in International Law: The Challenge of Balancing Competing Demands’, *15(1 & 2) Nepal Law Review* (Kathmandu, July 2002), pp.1–14

Subedi, S.P., ‘Incorporation of the Principle of Sustainable Development into the Development Policies of the Asian Countries’, *32 (2) Environmental Policy and Law* (International Council of Environmental Law, Bonn, April 2002), pp.85-90

Subedi, S.P., ‘Hydro-diplomacy in South Asia: The Conclusion of the Ganges and the Mahakali River Treaties’, *93(4) American Journal of International Law* (October 1999), pp.631–640

Subedi, S.P., ‘International Law and Land-Locked States: Development of the Freedom of Transit Prior to the Establishment of the United Nations,’ serialized in *Nyayadoot* (Nepal Bar Association, Kathmandu), Vol 29, No 1, Issue 103 (pp.1–6), Vol 29, No 2, Issue 104 (pp.12–26) and Vol 29, No 3, Issue 105 (pp.16–24), 1998–99

Subedi, S.P., ‘Transit Arrangements between Nepal and India: A Study in International Law’, *2(1) Geopolitics and International Boundaries* (Frank Cass, London, 1997), pp.175–196

Subedi, S.P., 'India-Nepal Security Relations and the 1950 Peace and Friendship Treaty: Time for New Perspectives', 34(3) *Asian Survey* (University of California Press, 1994), pp.273–284

Subedi, S.P., 'The Legal Regime Concerning the Utilization of the Water Resources of the River Ganges Basin', 46 *German Yearbook of International Law* (2004), pp.452-493

Subedi, S.P., 'The Marine Fishery Rights of Land-locked States with Particular Reference to the EEZ', 2(4) *International Journal of Marine and Coastal Law* (1987), pp.227–239

Subedi, S.P., 'Nepal', in Rudiger Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (Oxford University Press, Oxford, 2012), Vol VII, pp.606–612

Subedi, S.P., 'Post-conflict Constitutional Settlement in Nepal and the Role of the United Nations', in Morly Frishman and Sam Muller (eds), *The Dynamics of Constitutionalism in the Age of Globalisation* (Hague Academic Press, The Hague, 2010), pp.71–87

Subedi, S.P., 'The Challenges to the National Security of Nepal and the Role of International Law and Foreign Policy', in Rajan Bhattarai and Geja S Wagle (eds), *Emerging Security Challenges of Nepal* (Nepal Institute for Policy Studies, Kathmandu, 2010), pp.65–110

Subedi, S.P., 'The Status of International Humanitarian Law in Nepal' (with Hari Phuyal), in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (Oxford University Press, New Delhi, 2007), pp.86–91

Subedi, S.P., 'Access to Environmental Justice in a Politically Unstable Environment: A Case Study of Nepal', in Andrew Harding (ed.), *Access to Environmental Justice: A Comparative Study* (Brill/Martinus Nijhoff, 2007), pp.157-176

Subedi, S.P., 'The Problems and Prospects of Offshore Banking in Nepal', 34 (141) *Nyaydoot* (a bi-monthly publication of Nepal Bar Association) (English Special Issue, 2004), pp.1-8

Subedi, S.P., 'The Concept in Hinduism of "Just War"', 8 (2) *Journal of Conflict and Security Law* (Oxford University Press, 2003), pp.339-361

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*Conflict in South Asia* (New Delhi Branch of Heidelberg University & Manohar, New Delhi/Heidelberg, 1997), pp220–245.

Subedi, S.P., ‘The Art of Negotiating Investment Treaties and Investment Contracts in a Changing World of International Investment Law’, in Americo B. Zampetti (ed.), *Legal Assistance to Make Foreign Investment work better for Sustainable Development in the Least Developed Countries* (Occasional Policy Paper Series of the United Nations on the Least Developed Countries (No. 2, 2017, United Nations, New York), pp.11-14

Subedi, S.P., ‘Nepal’, in Simon Chesterman, Hisashi Owada and Ben Saul (eds) *The Oxford Handbook of International Law in Asia and the Pacific* (with P.N. Upreti), Oxford University Press, 2019.

(For a full list of Professor Subedi’s publication please refer to S.P. Subedi, *The Workings of Human Rights, Law and Justice: A Journey from Nepal to Nobel Nominee* (Routledge, London/New York, 2022), Appendix, pp.161-173).

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