

**WRITTEN STATEMENT OF THE GOVERNMENT OF NEPAL ON
OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE
(REQUEST FOR ADVISORY OPINION)**

I. TERMS OF THE REQUEST

1. By resolution 77/276 of 29 March 2023, the General Assembly of the United Nations decided, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice to render its advisory opinion on the following questions:

“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”

**II. COMPETENCE OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS TO
REQUEST THE QUESTIONS PRESENTED AND THE COMPETENCE OF THE
COURT TO RENDER AN ADVISORY OPINION ON THOSE QUESTIONS**

2. Article 96 paragraph 1 of the Charter of the United Nations empowers the General Assembly to seek advisory opinions from the International Court of Justice on legal questions.¹ Similarly, Article 65 of the Statute of this Court authorises the Court to provide such opinions.² The issues of whether the UNGA has the competence to request the questions presented and whether the court has the competence to render an advisory opinion on those questions is based on whether the questions presented are *legal questions*.”

3. The Government of Nepal submits that the questions before this court are legal questions within the meaning of the above-mentioned provisions. *Firstly*, Questions (a) and (b) presented before this Court call on the Court to expound on the obligations of States and the primary, classical and well-settled legal personality of International Law. Further, these questions call on the Court to expound the obligations “under International Law”. *Secondly*, the treaties and recognised international customs and principles, mentioned in the preambular paragraphs of Resolution 77/276 and the paragraph that provides chapeau to the two questions presented before this Court demonstrates that the Court is called on to expound on legal questions.

¹ Charter of the United Nations (24 October 1945) 1 UNTS XVI, art. 96(1).

² Statute of the International Court of Justice, (26 June 1945) 33 UNTS 993, art. 65.

4. The Court tends to check the relationship between the questions presented before it to render its advisory opinion and the activities of the General Assembly³. The Government of Nepal submits that the subject matters of questions presented before the Court are well within the competence of the General Assembly.⁴ According to commentary on the Charter of the United Nations edited by *Judge Bruno Simma*, the General Assembly of the United Nations has the power to discuss matters which are related to the function of any organ provided for in the Charter of the United Nations.⁵ It is submitted that the General Assembly of the United Nations has the powers to discuss issues relating to climate change and international legal obligations of States in respect of climate change because *firstly*, its subsidiary body, the Governing Council of the United Nations Environment Programme has the powers and functions to discuss and deal with issues of climate change and *secondly*, its subsidiary body, the International Law Commission has the powers to discuss and deal with issues pertaining to international law. Therefore, the General Assembly of the United Nations has the competence to discuss issues pertaining to climate change and the obligations of States pertaining to it.

III. THE COURT OUGHT TO RENDER ITS ADVISORY OPINION IN THE QUESTIONS PRESENT

5. The Court has the discretionary power to decline to give an advisory opinion even if it possesses the competence to give it⁶, this discretionary power has been affirmed by the court through its advisory opinions⁷. Nevertheless, as per the long-standing legal jurisprudence of the Court, it, in principle, should refuse to give an advisory opinion only if there is a compelling reason for it⁸.

6. The Government of Nepal submits that there are no compelling reasons for the Court to refuse its opinion in this advisory opinion. While the Nepal Government reserves its right to reply to other Written Submissions that contend the presence of compelling reason(s) for the Court to refuse its opinion in this matter, in this Written Submission, it pre-emptively submits that the following considerations cannot form a basis for refusal of the Court to give its advisory opinion.

7. The fact that negotiations between States and reaching of agreements between them, particularly under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC) cannot form a compelling basis for refusal of the Court to give its advisory opinion. The Court stated that the opinion given by the Court would not adversely affect the negotiations, but would rather have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter.⁹

8. Therefore, if the Court wishes to abide by its longstanding jurisprudence on this matter and to portray a degree of consistency in its practice to its member States and the international community, there is no

³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 ¶21; *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 ¶¶16-17.

⁴ *Charter of the United Nations* (24 October 1945) 1 UNTS XVI, art. 10.

⁵ Bruno Simma et al (eds) *The Charter of the United Nations: A Commentary* (vol 1, 3rd edition, Oxford University Press 2012) Ch. IV ¶19.

⁶ *Statute of the International Court of Justice*, (26 June 1945) 33 UNTS 993, art. 65(1);

⁷ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 2019 ¶63; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 ¶29.

⁸ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* [1950] (Advisory Opinion) ICJ Rep 65, 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 ¶29.

⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 ¶17.

compelling reason for the Court to refuse its opinion in response to the questions forwarded to it in Resolution 77/276.

IV. NEPAL'S INTEREST IN THE QUESTIONS

9. The Government of Nepal submits that it has an interest in the questions presented before this Court. *Firstly*, Nepal co-sponsored Resolution 27/276 of the United Nations and voted for the said Resolution. *Second*, Nepal is an upstanding member of the international community and has been a part of a multitude of fora concerning climate change, human rights, least developed countries, international cooperation arrangements, South-South cooperation, and preservation of mountain ecology, among others. *Third*, Nepal falls within the category of States that are direct beneficiaries of obligations that remain to be explained by the Court in response to Sub-question (i) of Question (b) as it is “specially affected by and particularly vulnerable to the adverse effects of climate change”.

10. This Written Submission will now explain the *third* contention i.e. Nepal falls within the category of States that, due to their geographical circumstances and level of development, are injured or specifically affected by or are particularly vulnerable to the adverse effects of climate change and, as such, are direct beneficiaries of obligations that remain to be explained by this Court in response to Sub-question (i) of Question (b).

The Government of Nepal submits that:

(i) Nepal, due to its geographical circumstances and the level of development is specially affected by and particularly vulnerable to the adverse effects of climate change.

11. The Government of Nepal submits that the terms “specially affected by” and “particularly vulnerable to” the adverse effects of climate change refer to one and the same characteristics, albeit the former connotes the past and present, and the latter connotes the future. “*Particularly vulnerable to*” the adverse effects of climate change, as expressed in the nineteenth preambular paragraph of the UNFCCC includes “Countries with.... *and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change.*”¹⁰ Therefore, both terms refers to countries and people differentially affected by the adverse effects of climate change. The Written Submission will now explain how Nepal is specially affected by and particularly vulnerable to the adverse effects of climate change.

12. Nepal, a landlocked country, primarily consists of mountains, hills and Terai plains. The greatest amount of warming is seen in the mountains¹¹. Due to the elevation-dependent warming (EDW)¹², the warming in Nepal is projected to be higher than the global average.¹³ In most high mountain districts, annual precipitation is decreasing, with a higher rate in the east¹⁴. Snowfall is projected to decrease

¹⁰ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, preamble ¶19.

¹¹ Nepal: Third National Communication to the United Nations Framework Convention on Climate Change (June 2021) 117 <<https://www.mofe.gov.np/uploads/documents/tnc-nepalv21629966891pdf-7343-817-1658827818.pdf>> accessed on 20 January 2023.

¹² Nicholas Pepin et al, ‘Elevation-dependent warming in mountain regions of the world’ [2015] Nature Climate Change 5(5) 242.

¹³ Asian Development Bank ‘Climate Risk Country Profile: Nepal’ (2021) 2.

¹⁴ Nepal: Third National Communication to the United Nations Framework Convention on Climate Change (June 2021) 118 <<https://www.mofe.gov.np/uploads/documents/tnc-nepalv21629966891pdf-7343-817-1658827818.pdf>> accessed on 20 January 2023.

considerably because of temperature increases leading to a reduction of storage of snow, ultimately resulting in a distinct decrease in snowmelt runoff from non-glaciated areas¹⁵. Rising temperatures have caused a surge in meltwater runoff, leading to the inundation of natural dams and glacial lake outburst floods.¹⁶ A World Bank report notes that recent major disasters including Glacial Lake Outburst Floods in the *Bhote Koshi* River in early 2016, the *Barun Khola* River in 2017 as well as the June 2021 flood and landslide in the *Melamchi* River and associated rivers in central Nepal can be attributable to climate change.¹⁷ Climate change has also subsequently increased the risk of erratic monsoons as floods and landslides have become more frequent endangering and displacing entire communities.¹⁸ Detailed climatic trends that describe the effects of climate change in Nepal can be found in the Third National Communication of Nepal to the Secretariat of the UNFCCC.¹⁹

13. Climate change is leading towards increased food insecurity in Nepal with nearly 50% of Nepal's households considered food insecure, and 14% undernourished. Agriculture, heavily reliant on climatic conditions, faces challenges from increasing temperature and erratic rainfall, leading to significant yield declines. Droughts and floods, especially impactful on crops, contribute substantially to agricultural losses. Livestock also suffer from rising temperatures, affecting reproduction and health. The movement of herds and migratory species is also affected²⁰.

14. Economic losses are one of the major adverse impacts of climate change in Nepal. The Per Capita Income of Nepali is 1399 United States Dollars.²¹ The percentage of Nepali living in poverty currently stands at 15.1 per cent.²² Economic losses have been defined by the UNFCCC as "loss of resources, goods, and services that are commonly traded in markets."²³ The World Bank estimates that global warming and climate change are already affecting Nepal's gross domestic product as an LDC with a precipitous impact on agriculture, livestock, energy and tourism sectors.²⁴ As an example, post-flood recovery assessments by the Ministry of Home Affairs estimated losses of around USD 584.7 million in 2021—almost 3 per cent of Nepal's Gross Domestic Product²⁵. Mitigation measures have also had a detrimental impact on the annual revenue collection of the Government. On 26 January 2024, the Minister of Finance stated that the Government faced 264 million United States Dollars (35 billion Nepali Rupees) in the loss in revenue due to customs duty concessions provided to electric vehicles.²⁶

¹⁵ Nepal: Third National Communication to the United Nations Framework Convention on Climate Change (June 2021) 122 <<https://www.mofe.gov.np/uploads/documents/tnc-nepalv21629966891pdf-7343-817-1658827818.pdf>> accessed on 20 January 2023.

¹⁶ Government of Nepal, Ministry of Population and Environment 'Nationally Determined Contributions' (2016) 1 <<https://unfccc.int/sites/default/files/NDC/2022-06/Nepal%20First%20NDC.pdf>> accessed on 1 February 2024.

¹⁷ World Bank 'In Nepal, 2 Major Climate Disasters in a Single Year Highlight the Need to Build Resilience' (31 March 2022).

¹⁸ Government of Nepal, Ministry of Home Affairs 'National Position Paper on Disaster Risk Reduction and Management Nepal' (2017) 13, 15 <<http://drrportal.gov.np/uploads/document/1321.pdf>> accessed on 1 February 2024.

¹⁹ Nepal: Third National Communication to the United Nations Framework Convention on Climate Change (June 2021) 11 <<https://www.mofe.gov.np/uploads/documents/tnc-nepalv21629966891pdf-7343-817-1658827818.pdf>> accessed on 20 January 2023.

²⁰ Nepal: Third National Communication to the United Nations Framework Convention on Climate Change (June 2021) 121-126 <<https://www.mofe.gov.np/uploads/documents/tnc-nepalv21629966891pdf-7343-817-1658827818.pdf>> accessed on 20 January 2023.

²¹ Government of Nepal, Ministry of Finance 'National Economy Survey 2022/23' 192.

²² Government of Nepal, Ministry of Finance 'National Economy Survey 2022/23' 88.

²³ United Nations Framework Convention on Climate Change 'Non-economic losses in the context of the work programme on loss and damage' (9 October 2013) UN Doc FCCC/TP/2013/2 3.

²⁴ World Bank 'Country Climate and Development Report: Nepal' (2022) 11 <<https://www.worldbank.org/en/country/nepal/brief/key-highlights-country-climate-and-development-report-for-nepal>> accessed on 15 February 2024.

²⁵ Asian Development Bank 'Nepal: Flood Sector Risk Assessment' (11 November 2019) 7.

²⁶ Republica 'FinMin Mahat acknowledges govt's failure to meet revenue target' (26 January 2024) <<https://myrepublica.nagariknetwork.com/news/finmin-mahat-acknowledges-govt-s-failure-to-meet-revenue-target/>> accessed on 12 March 2024.

15. Extreme weather events and climate-related disasters, such as floods and landslides, have posed a significant threat to Nepal's developmental ambitions.²⁷ Notably, around 90 per cent of Nepal's electricity generation is sourced from hydropower,²⁸ which currently is 2,666 MW²⁹ produced per year. This represents a potential vulnerability in the context of an uncertain future precipitation regime, glacial melting, and potential increases in the risks of landslides and Glacial Lake Outburst Floods.

16. Nepal is specially affected by the adverse effects of climate change because it is disproportionately differentially affected by the anthropogenic emissions of greenhouse gases. The total anthropogenic emissions of greenhouse gases in Nepal was 0.027 per cent of the total global emission in 2016³⁰. However, having had a negligible contribution to the global emission of greenhouse gases, Nepal is one of the most climate-vulnerable countries and is disproportionately differentially affected by the adverse impacts of climate change.

V. SUBMISSIONS ON QUESTION (a) - OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW TO ENSURE PROTECTION OF CLIMATE SYSTEM AND OTHER PARTS OF ENVIRONMENT FROM ANTHROPOGENIC EMISSIONS OF GHG

17. This question calls upon the Court to determine the obligations owed by the States, in general to other States and for present and future generations. The question simply notes "obligation of States" and does not point to the "differential obligation". However, given the difference in contribution and capacity to mitigate, "differential obligation" of the States serves as an inherent part of this question. Based on that, the Government of Nepal submits:

18. *First*, the States have the obligation of limiting the global average temperature to well below 2 degrees Celsius above the pre-industrial level under Paragraph 1 (a) of Article 2 of the Paris Agreement³¹. The Agreement is binding as it is a treaty with 195 parties,³² and is integral in the realisation of the objective laid out in Article 2 of the UNFCCC i.e. to prevent the dangerous anthropogenic interference with the climate system as it would not be possible without limiting the global average temperature to well below 2 degrees Celsius above the pre-industrial level.

19. *Second*, the Government of Nepal submits that the States have an obligation under human rights laws to take urgent steps to limit the rise in global average temperature as far as possible and at least within 1.5 degrees Celsius above pre-industrial levels. Human Rights law obliges states to respect³³, protect³⁴,

²⁷ Government of Nepal, Ministry of Forests and Environment 'Vulnerability and Risk Assessment and Identifying Adaptation Options: Summary for Policymakers' (2021) xii, 56.

²⁸ Government of Nepal, Ministry of Finance 'National Economy Survey 2022/23' 88.

²⁹ Government of Nepal, Ministry of Finance 'National Economy Survey 2022/23' 220.

³⁰ Government of Nepal, Ministry of Population and Environment 'Nationally Determined Contributions' (2016) 2 <<https://unfccc.int/sites/default/files/NDC/2022-06/Nepal%20First%20NDC.pdf>> accessed on 1 February 2024.

³¹ Conference of the Parties, Adoption of the Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/L.9/Rev.1 art. 2.1(a).

³² Paris Agreement, Status of Ratification <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>> accessed on 3 March 2024.

³³ UNHRC 'General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add. 13 [6].

³⁴ UNHRC 'General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add. 13 [8].



adopt concrete measures³⁵, refrain from deliberate retrogressive measures³⁶, with immediate effect, basic minimum level of these rights³⁷. This obligation also extends to the extraterritorially³⁸ as recognized by this court³⁹ as well the Inter-American Court of Human Rights⁴⁰. 1.5 degree Celsius is considered as the “defence line” and climate change impacts are expected to be increasingly severe, gravely impacting the human rights of people, States have the obligation to limit the global average rise within 1.5 degrees Celsius above pre-industrial level for the realisation of its human rights obligations.

20. **Third**, States are obliged internationally to cooperate to promote mitigation action. The UNFCCC, along with Marrakesh Accords⁴¹, the Cancún Agreements⁴², and the Bali Action Plan,⁴³ Paris Agreement⁴⁴, and 2030 Agenda for Sustainable Development⁴⁵ obliges states to communicate the measures⁴⁶ and to “cooperate in preparing for adaptation to the impacts of climate change”⁴⁷.

21. **Fourth**, States should provide support to developing States under the “the duty of assistance” recognized in UN Charter⁴⁸ and various international instruments⁴⁹ with mountainous countries in priority. The developed states under the duty of assistance have obligation to support developing countries, least developed countries, mountainous countries like Nepal, small island developing States and Africa in terms of both mitigation and adaptation”⁵⁰

³⁵ CESCR, ‘General Comment 3: The Nature of States Parties’ Obligations’ (14 December 1990) UNDoc. E/1991/23 [2]; UNHRC ‘General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) CCPR/C/21/Rev.1/Add. 13 [7]

³⁶ CESCR, ‘General Comment 3: The Nature of States Parties’ Obligations’ (14 December 1990) UNDoc. E/1991/23 [9].

³⁷ CESCR, ‘General Comment 3: The Nature of States Parties’ Obligations’ (14 December 1990) UNDoc. E/1991/23 [10].

³⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art. 2.1; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 arts. 3, 6, 14.1, 14.2.

³⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [109].

⁴⁰ Inter-American Court of Human Rights *The Environment and Human Rights* [2017] (Advisory Opinion) OC-23/17 [74].

⁴¹ Report of the Conference of the Parties on its Seventh Session, ‘Decision 5/CP.7 - Marrakesh Accords’ (21 January 2002) UN Doc FCCC/CP/2001/13/Add.1 [5].

⁴² Report of the Conference of the Parties on its sixteenth session, ‘The Cancun Agreements’ (15 March 2011) UN Doc FCCC/CP/2010/7/Add.1 [13].

⁴³ Report of the Conference of the Parties on its thirteenth session, ‘Decision 1/ CP.13 - Bali Action Plan’ (14 March 2008) UN Doc FCCC/CP/2007/6/Add.1* [1(c)(v)].

⁴⁴ Conference of the Parties, Adoption of the Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/L.9/Rev/1, art. 7.7.

⁴⁵ United Nations General Assembly Resolution 70/1 (25 September 2015) UN Doc A/RES/70/1.

⁴⁶ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 arts. 4.1(b), 12.1(b).

⁴⁷ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 art. 4.1(c).

⁴⁸ Charter of the United Nations (24 October 1945) 1 UNTS XVI (“UN Charter”) preambular recital 8.

⁴⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 2.1; United Nations General Assembly Resolution 3201 (S-VI) (1 May 1974) UN Doc A/RES/3201(S-VI); United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art. 4.4; Conference of the Parties, Adoption of the Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/L.9/Rev/1, art 2.2; Rio Declaration on Environment and Development (adopted on 13 June 1993, entered into force 29 December 1993) 31 ILM 874, Principles 6 and 7; Vienna Convention for the Protection of the Ozone Layer (adopted on 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293; Montreal Protocol on Substances that Deplete the Ozone Layer (adopted on 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3; Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79; Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted on 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3.

⁵⁰ Conference of the Parties, Adoption of the Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/L.9/Rev/1, art. 9.1.

22. The mountainous countries, affected by the triple crisis of climate change, biodiversity loss and environmental pollution to being exposed to risks of disasters like⁵¹ glacial outbursts, food insecurity⁵² particularly to local communities and indigenous people of mountain and the extension of the impact to even to lowland areas and ocean,⁵³ with the estimations of 1.5 billion people's source of freshwater running off from mountains by 2050⁵⁴ are environmentally vulnerable areas. Thus, states *must give due care to mountain ecosystems in relation to their obligations related to climate change under the Convention on Biological Diversity*⁵⁵ and UNFCCC.⁵⁶

23. Based on the historical contribution of States (in particular the G8, G20, and OPEC States)⁵⁷ since the Industrial Revolution in 1750s, present contributions with G20 economies with 80% global emission and 70% climate impact⁵⁸, and consequence of 10.6% rise in global temperature by 2030⁵⁹, OPEC Countries with 6.36% of global emissions⁶⁰ and economic and financial capacity⁶¹ as well as scientific and technological capacity of developed States to implement measures to reduce the GHG emissions without jeopardising the basic needs of their population, developed states have legal obligations to make adequate reparations⁶² to share the benefits of their scientific advancements, climate data, modelling tools, and scientific expertise to improve their understanding of climate impacts, vulnerabilities, and mitigation options with the global community, particularly with developing countries like Nepal which lack the resources to conduct their research and development efforts.

VI. SUBMISSIONS ON SUB-QUESTION (i) OF QUESTION (b)- LEGAL CONSEQUENCES WITH RESPECT TO STATES WHICH DUE TO THEIR GEOGRAPHICAL CIRCUMSTANCES AND LEVEL OF DEVELOPMENT ARE INJURED OR SPECIALLY AFFECTED BY OR PARTICULARLY VULNERABLE TO THE ADVERSE EFFECTS OF CLIMATE CHANGE, INCLUDING SMALL ISLAND DEVELOPING STATES.

24. This question calls on the Court to expound the legal consequences that arise concerning injured States. The Court is requested to give an opinion on the legal consequences for violating obligations towards States who are injured or specially affected or are particularly vulnerable to the adverse effects of climate change.

⁵¹ United Nations General Assembly Resolution . 76/129 (16 December 2021) UN DOC A/RES/76/188 preamble.

⁵² FAO & UNEP 'Restoring mountain ecosystems: Challenges, case studies and recommendations for implementing the UN Decade Principles for Mountain Ecosystem Restoration' (2023) 4 <<https://www.fao.org/documents/card/en?details=cc9044en>> accessed on 3 March 2024.

⁵³ United Nations General Assembly Resolution 77/172 (14 December 2022) UN Doc A/RES/77/172[15].

⁵⁴ FAO & UNEP 'Restoring mountain ecosystems: Challenges, case studies and recommendations for implementing the UN Decade Principles for Mountain Ecosystem Restoration' (2023) 4 <<https://www.fao.org/documents/card/en?details=cc9044en>> accessed on 3 March 2024.

⁵⁵ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, art. 20(7).

⁵⁶ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art. 4(8)(g).

⁵⁷ Climate Watch, 'Global Historical Emissions' (2020) <<https://www.climatewatchdata.org/ghg-emissions>> accessed on 3 March 2024.

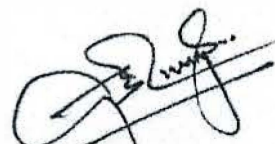
⁵⁸ Y. Habib, E. Xia, S.H. Hashmi, A. Zahoor, 'The Nexus Between Road Transport Intensity And Road-Related CO2 Emissions In G20 Countries : An Advanced Panel Estimation' (2021) 28 Environ. Sci. Pollut. Res.58405, 58425.

⁵⁹ OXFAM, 'Are G20 Countries Doing Their Fair Share Of Global Climate Mitigation?' (2023) Discussion Papers September, 9 <<https://policy-practice.oxfam.org/resources/are-g20-countries-doing-their-fair-share-of-global-climate-mitigation-comparing-621540/#:~:text=Despite%20some%20differences%20between%20these,which%20assessment%20methodology%20is%20a%20pplied>> accessed on 4 March 2024.

⁶⁰ Global Carbon Atlas, Country Emissions (2022) <<https://www.globalcarbonatlas.org/en/CO2-emissions>> accessed on 4 March 2024.

⁶¹ Benoit Mayer *The International Law on Climate Change* (Cambridge University Press, 2018) 97 .

⁶² See generally Lukas H. Meyer and Pranay Sanklecha(eds.), *Climate Justice and Historical Emissions* (Cambridge University Press, 2017).



7



(i) States have obligations

25. Nepal submits that the heaviest burdens of climate change are on the shoulders of the countries like Nepal that have historically contributed the least to climate change and have the least capacity for implementing adaptation measures.⁶³ Conventions such as the UNFCCC principally recognize that developing countries tend to have specific needs and circumstances that warrant them leniency on climate change goals, all the while emphasizing that these are the states tending to be particularly vulnerable to the adverse effects of climate change.⁶⁴

26. The principles of “no significant harm”⁶⁵ to address trans-boundary environmental challenges constitute customary international law⁶⁶. In order to establish that significant harm has occurred, the physical link between the cause (activity) and the effect (harm), and even the several intermediate links in the chain of causation, must be established.⁶⁷ The States are obligated to conduct EIA not only as a part of this principle but conducting EIA has been established as a customary international law itself due to nearly universal acceptance of this provision in various instruments⁶⁸ and as decided by the Pulp Mills case. Aligning with this, the duty to notify and consult in cases with the potential for adverse environmental impact is widely acknowledged under customary international law. Failure to adhere to this obligation may constitute a violation of the principles of good faith as enshrined in international law⁶⁹. All these constitute the procedural obligation of the States.

27. On the other hand, the substantive obligation relates to the actual harm that has been inflicted upon other States and thus requires an objective determination as to whether significant harm has actually been incurred. The Court has pursued such an approach and has determined that the breach of a substantive obligation not to cause trans-boundary harm entails the assessment as to whether the harm in question has been done and whether there is a causal link between the harm and the concerned State Party’s actions.⁷⁰

(ii) Legal consequences for acts or omissions

28. Carbon offsetting, also known as carbon compensation, was established in the Kyoto Protocol to pay for CO2 emissions based on the global climate balancing concept. The polluter-pay principle amplified the existence of a legal obligation to pay for environmental damages, specifically arising out of pollution.

⁶³ René Lefeber, ‘Climate change and state responsibility’ in Rosemary Rayfuse and Shirley v. Scott (eds), *International Law in the Era of Climate Change* (EE 2012).

⁶⁴ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art. 3.

⁶⁵ Stockholm Declaration, (adopted on 16 June 1972, UNGA Res 2994/XXVII), principle 21; Rio Declaration on Environment and Development (adopted on 13 June 1992, entered into force 29 December 1992) 31 ILM 874, principle 2; UNEP, *Environmental Law: Guidelines and Principles*, No. 2, Shared Natural Resources (Nairobi, 1978), principle 3.

⁶⁶ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)/Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* 2015 ICJ Rep 665 ¶104.

⁶⁷ *Massachusetts v. EPA* 2008, There must be a “truly adversarial relationship” proven by four factors: they have suffered concrete and particular injury; The injury must be actual or imminent; The injury must be traceable to the defendant’s misconduct; The injury is likely to be redressed by a favorable decision by the Court.

⁶⁸ UNEP Goals and Principles of Environmental Impact Assessment, 1987, principle 1; Convention on Environmental Impact Assessment in a Transboundary Context, 1991, art 1 (vii); UNEP Goals and Principles of Environmental Impact Assessment, 1987, principle 1; Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, art. 14. ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, UN Doc A/56/10, II.2 YILC 148 (2001) arts 1, 2(a), 7.

⁶⁹ This perspective finds support in the decision rendered in the *Lake Lanoux arbitration*, which was subsequently expounded upon by the ICJ in the *Fisheries Jurisdiction case* and echoed in the order issued by ITLOS in the MOX case.

⁷⁰ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)/Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* 2015 ICJ Rep 665 ¶104.

In COP28, delegates agreed to establish a loss and damage fund to support vulnerable developing countries in efforts to deal with the effects of climate change.⁷¹

29. UNFCCC obliges parties to formulate and implement measures to facilitate adequate adaptation to climate change⁷². This appears as a substantive obligation on all parties; however, the term "adequate" has not been defined yet. Additionally, Annex II countries also bear a general obligation to assist developing countries in meeting adaptation costs with special reference to parties particularly vulnerable to adverse effects of climate change.

VII. SUBMISSIONS ON SUB-QUESTION (ii) OF QUESTION (b) - LEGAL CONSEQUENCES WITH RESPECT TO PEOPLES AND INDIVIDUALS OF THE PRESENT AND FUTURE GENERATIONS AFFECTED BY THE ADVERSE EFFECTS OF CLIMATE CHANGE FOR STATES THAT HAVE CAUSED SIGNIFICANT HARM

30. This question calls on the Court to expound the legal consequences that arise concerning peoples and individuals of present and future generations.

(i) States have obligation towards individuals with all their diversities to protect the degradation of enjoyment of their human rights from the adverse effects of climate change:

31. Under international human rights law, obligations of States owed to individuals who fall within their territory or jurisdiction are threefold: *First*, States are obliged to respect human rights by refraining from violating them⁷³; *Second*, states must take positive measures to protect human rights being violated,⁷⁴ and; *Third*, adopt legislative, judicial, administrative, educative and other measures to fulfill human rights.⁷⁵ States are also obliged to take deliberate, concrete and targeted steps progressively towards full realization of these⁷⁶ rights and are required to refrain from deliberate retrogressive measures.⁷⁷ Further rights and obligations are enshrined in several international human rights instruments, including the right

⁷¹ Cristen Hemingway, 'COP28 agrees to establish loss and damage fund for vulnerable countries' (EcoWatch, 1 December 2023) <<https://www.weforum.org/agenda/2023/12/cop28-loss-and-damage-fund-climate-change/>> accessed 28 February 2023.

⁷² United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art. 4.2 (b).

⁷³ International Covenant of Civil and Political Rights, 'General Comment No. 31' in 'The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' adopted by the Human Rights Committee (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add/13 ¶6.

⁷⁴ International Covenant of Civil and Political Rights, 'General Comment No. 31' in 'The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' adopted by the Human Rights Committee (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add/13 ¶8.

⁷⁵ International Covenant of Civil and Political Rights, 'General Comment No. 31' in 'The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' adopted by the Human Rights Committee (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add/13 ¶7.

⁷⁶ Economic and Social Council, 'General Comment No. 3' in 'The Nature of State Parties' Obligation' adopted by the Fifth Session of the Committee on Economic Social and Cultural Rights (14 December 1990) UN Doc CESCR/E/1991/23, ¶2.

⁷⁷ Economic and Social Council, 'General Comment No. 3' in 'The Nature of State Parties' Obligation' adopted by the Fifth Session of the Committee on Economic Social and Cultural Rights (14 December 1990) UN Doc CESCR/E/1991/23, ¶9.

to life,⁷⁸ to health,⁷⁹ to adequate food,⁸⁰ adequate housing,⁸¹ water⁸² and sanitation.⁸³ States are also required to fulfill, with immediate effect, the basic minimum level of these rights.⁸⁴ Therefore, Nepal implores the ICJ to ensure that states are held responsible not just for the actions and omissions inside their territory but also actions and omissions outside their territory having adverse effects on the right to clean and healthy environment of the citizens of other States.

32. In adhering to established principles of common but differentiated responsibility and intragenerational equity, States must additionally give specific consideration to the groups who are at most risk to climate change such as women, persons with disabilities, minorities and indigenous peoples.

a) States' obligation towards women:

33. Nepal submits that States' must give particular consideration to the rights of women as they are particularly vulnerable to climate change. Pursuant to Article 12 of CEDAW, women's health must be given particular regard as climate change disproportionately affects women's health systems.⁸⁵ Similarly, Article 14 underscores special consideration to be afforded for rural women with equal access to productive resources to mitigate and adapt to climate change.⁸⁶ Therefore, gender must not be sidelined while planning for financial mechanisms to tackle climate change and environment damage.

b) States' obligations towards persons with disabilities:

34. Nepal submits that States' must, in line with Convention on Rights of Persons with Disabilities, give particular protections to the rights of persons with disabilities as they are disproportionately affected by climate change. States are obliged to implement disability-inclusive climate policies that empower persons with disabilities by ensuring their full and effective participation in climate action at all levels.⁸⁷ Pursuant to article 9, information related to climate change, warning information during extreme weather events and access to facilities must be made easily accessible for persons with disabilities. Article 21 of this Convention also requires communication of information in accessible formats such as Braille, sign languages, augmentative and alternative communication along with other modes and formats of communication.

⁷⁸ UN Committee on Civil and Political Rights (CCPR), 'General Comment No. 36 (2018) on art 6 of the International Covenant on Civil and Political Rights, on the right to life,' 3 September 2019, UN Doc. CCPR/C/GC/36

⁷⁹ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant),' 11 August 2000, UNDoc E/C.12/2000/4,

⁸⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 12: The Right to Adequate Food,' 12 May 1999, UNDoc E/C.12/1999/5

⁸¹ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 4: The Right to Adequate Housing,' 13 December 1991, UNDoc E/1992/23

⁸² Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, enforced 3 September 1981) 1249 UNTS 13, (CEDAW) art 3; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, (CRC) art 14 (2) (h)

⁸³ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 UNTS 135, 12 August 1949, arts 20, 26, 29 and 46; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287, 12 August 1949, of 1949, arts 85, 89 and 127

⁸⁴ Economic and Social Council, 'General Comment No. 3' in 'The Nature of State Parties' Obligations' adopted by the Fifth Session of the Committee on Economic Social and Cultural Rights (14 December 1990) UN Doc CESCR/E/1991/23, ¶10

⁸⁵ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, enforced 3 September 1981) 1249 UNTS 13, (CEDAW) art 12.

⁸⁶ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, enforced 3 September 1981) 1249 UNTS 13, (CEDAW) art 14.

⁸⁷ OHCHR, 'Analytical study on the promotion and protection of the rights of persons with disabilities in the context of climate change,' 22 April 2020, UNDoc A/HRC/44/30, 24

ii) States have obligations towards "peoples" i.e., inter alia, indigenous peoples as regards to the adverse impacts of climate change

35. Indigenous people have special relationships with the land and environment they reside in. Therefore, ILO 169 and UN Declaration on the Rights of Indigenous Peoples have recognised the State's obligation to protect and preserve the environment of the territories where they reside.⁸⁸ Adhering to Article 4 of ILO 169, States are obliged to adopt special measures to safeguard the environment of indigenous peoples. In doing so, they must ensure the full participation of indigenous people in policy development and implementation. Furthermore, States must make sure its internal laws, plans and policies must not adversely affect the indigenous people and their environment. It is submitted that States are obliged to respect the rights⁸⁹ of indigenous people even outside the jurisdiction of their territory, when their actions or omissions have effects on people outside their territory.⁹⁰

iii) States have obligations towards people of future generations in respect to the adverse impacts of climate change.

36. States have an obligation to protect the future generation from the adverse effects of climate change. **Firstly**, States are obliged to respect, protect and fulfill the human rights of the future generation as well because human rights obligations of States are not temporal in nature⁹¹ and apply vis-a-vis the future generation as well. As a corollary, States have the obligation to act so as to protect from degradation of enjoyment of human rights of the future generation that are attributable to the adverse effects of climate change; **Secondly**, the UNFCCC obliges State parties to protect the climate system of future generation⁹²; **Thirdly**, the principle of intergenerational equity, as already established under international law, warrants that States ensure that the use of natural resources is distributed sustainably and equitably across generations.⁹³

⁸⁸ ILO Convention no. 169, Indigenous and Tribal Peoples Convention, (adopted on 7 June 1989, entered into force 5 September 1991) by the 76th Session of the ILO Conference, art. 9; UNGA, UN Declaration on the Rights of Indigenous Peoples, (adopted 13 September 2007, entered into force 2 October 2007), UNDoc A/RES/61/295, art 29.

⁸⁹ *Barcelona Traction, Light and Power Co., Ltd. (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3 [33]

⁹⁰ UNGA "Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities" UNDoc A/61/10, adopted on fifty eighth session; *Trail Smelter case (United States of America v. Canada)* [1941] 3, Reports of International Arbitral Awards, 1965; *Corfu Channel Case (UK v Albania) (Merits)* [1949] ICJ Rep 4, 22; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports* (8 July 1996), [29].

⁹¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Preamble; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Preamble

⁹² United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art. 3(1) & (4).

⁹³ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art. 3(1); UN Committee on the Rights of the Child (CRC), 'General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)', 17 April 2013, UNDoc CRC/C/GC/15; Stockholm Declaration, (adopted on 16 June 1972, UNGA Res 2994/XXVII), principles 1 and 2.

