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## **From the top of the world to the world's top court: an overview of Nepal's submissions**

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# INDIAN BLOG OF INTERNATIONAL LAW

## FROM THE TOP OF THE WORLD TO THE WORLD'S TOP COURT: AN OVERVIEW OF NEPAL'S SUBMISSIONS

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2 COMMENTS

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### INTRODUCTION – THE UNIQUE PERSPECTIVE OF NEPAL

Mount Everest, Earth's highest mountain above sea-level, is located in Nepal. I want the reader to be cognizant of this fact before reading further. The International Court of Justice (hereafter 'ICJ') recently witnessed historic advisory proceedings, with the largest participation ever, of [more than 100 oral statements](#) of States and several international organizations. Many States, including Nepal, appeared before the ICJ for the first time. So, why, among several submissions made before the Court by key players, is it important to highlight Nepal's submission? This post discusses what makes Nepal's submissions unique.

In order to analyze Nepal's unique position before the ICJ, it is first important to discuss the backdrop in which the Advisory Opinion (AO) has been sought from the Court. Of particular importance, is the following excerpt of the [Request](#) for AO sought from the Court:

(b) *What are the legal consequences under these obligations for States [under international law] 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? [Emphasis mine]

The italicised parts in the excerpt above make it evident that the emphasis – for good reason – of these proceedings was on Small Island Developing States (SIDS). This is no surprise, given the fact that these proceedings were initiated as a result of Vanuatu's herculean efforts to secure a unanimous [Resolution](#) from the United Nations General Assembly. Given also, the fact that the International Tribunal for the Law of the Sea, just six months before this hearings at the ICJ, delivered its [Advisory Opinion](#), upon the request of the Commission of Small Island States on Climate Change and International Law (COSIS), the discussion at the ICJ between 2-13 December 2024 (perhaps without intention) focused around States' obligations in relation to marine harms. However, the mandate of the question before the ICJ is broader, and concerns [Least Developed Countries](#) (LDCs) and those having hilly terrains, such as Nepal which is home to the highest mountain range in the world—the Himalayas. These regions of the world are as susceptible, if not more, to the ramifications of climate change. In fact, the well-being of these regions is also key for the sustenance of the global ecosystems of SIDS as well.

From a South-Asian and Central-Asian perspective, Nepal's submissions are representative of the voices of several such states having similar geographical terrains and common development indices and issues as Nepal (such as Bhutan, which did not participate in the written or oral phase of these proceedings). In this vein, some of the submissions made by Nepal are noteworthy and I discuss them below.

## NEPAL'S POSITION

### *THE OPTICS*

Last year, Nepal won its [first-ever investment related arbitration](#), and this year, for the first time ever, Nepal participated in an [oral](#) or [written](#) phase of an ICJ hearing. What is more noteworthy is the fact that Nepal chose to participate in the oral proceedings with an all Nepalese delegation, ably led by its Foreign Minister, HE Dr. [Arzu Rana Deuba](#).

This shows Nepal's increasing participation in international law issues, such as climate change. This can be evinced from Nepal's internal efforts as well to address the issue. In 2018, the Supreme Court of Nepal in [Shrestha v. Office of the Prime Minister et al.](#) called upon the government to enact facilitating legislations in line with Nepal's international obligations and the protection guaranteed under Article 51(g) of the new [2015 Constitution of Nepal](#) to protect the environment. Accordingly, Nepal enacted the [Environment Protection Act of 2019](#) and the [Forests Act of 2019](#).

### *SELECT HIGHLIGHTS OF THE SUBMISSION*

Nepal began by arguing that *it is not responsible for the Climate Change menace*. As also reported by the [Kathmandu Post](#), the Foreign Minister emphatically opened the oral proceedings by arguing that Nepal is [bearing](#)

**disproportionate cost of climate change** “for the crimes [it] never committed.”

Next, most crucially, Nepal noted that it **is specifically affected by and particularly vulnerable to Climate Change due to its mountainous system**. In its [Written Statement](#) (p. 3-5), Nepal relies upon the UNFCCC’s preambulatory text (“**Countries with ... and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change.**”) to assert its special circumstances. As noted further, this poses special challenges such as decrease of snowfall due to temperature increases leading to reduction of storage of snow, ultimately resulting in snowmelt runoff from non-glaciated areas. Rising temperatures have caused a surge in meltwater runoff leading to inundation of natural dams and glacial lake outbursts (recalling certain events of 2016, 2017 and 2021). In this context, some of the statistics below as of 2016 (as retrieved from [Nepal’s First Nationally Determined Contribution](#)) are telling:

- “In Nepal’s Himalayas, total estimated ice reserve between 1977 and 2010 has decreased by 29 percent (129 km<sup>3</sup>).”
- “The number of glacier lakes has increased by 11 percent and glaciers recede on an average by 38 km<sup>2</sup> per year.”
- “Climate change has visible and pronounced impacts on snows and glaciers that are likely to increase the Glacier Lakes Outburst Floods (GLOFs).”

Nepal notes that **Other States have the Duty of Assistance under Article 9(1) of the Paris Agreement** (see [Verbatim Record](#) at pp. 26-27). Nepal has emphasized how other States have the duty to assist States like Nepal, which are heavily reliant on and trying to develop hydropower, which is exposed to uncertain future weather events.

Nepal’s view on the **CBDR-RC principle expands the principle’s reading and its applicability to vulnerable groups**. Nepal notes in its [Written Statement](#) (at para. 32) that: “[i]n 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.**”

Finally, in relation to the last question posed before the Court – **Legal Consequences of State Responsibility – Loss and Damage Fund Not Charity** – Nepal notes (see [Verbatim Record](#) at pp. 28-29) (as do many other States) that the developed States’ view that given the diffused nature of Climate Change, it is not reparable, is not true. According to Nepal, “the question of attribution should look into the legal responsibilities of developed countries that have historically contributed to emissions. This is an example of the composite breach as reflected in Article 15 of [ARSIWA].” According to Nepal, the [UNFCCC’s Fund for responding to Loss and Damage](#) should not be viewed as voluntary charity, but as compensation emanating out of a State’s internationally wrongful act.

## CONCLUSION – A REGIONAL TEMPLATE

According to the [World Bank](#), Nepal’s contribution to climate change is only “0.1 percent of total global greenhouse gas emissions.” However, as Puspa Sharma [notes](#), the World Bank figure of 0.1 percent does not reflect the fact that Nepal’s emissions have increased by more than 80 per cent since 1990. The increase in

emissions is not surprising, given that LDCs like Nepal are undergoing a period of infrastructural development. What is important to note however, is that Nepal is undertaking (notwithstanding how appropriate) steps to reduce its carbon footprint (despite it being negligible). Apart from the fact that Nepal submitted its [first Nationally Determined Contribution](#) (NDC) document in 2016 (under the Paris Agreement) to the UNFCCC (and then in 2020), it has also taken steps towards energy transition. In 2021, per the Kathmandu Declaration, Nepal has endorsed the [Green, Resilient, and Inclusive Development \(GRID\)](#) plan of the IMF (alongside Bangladesh and Pakistan from South Asia).

From a legal *jurisprudence constante* standpoint, as can even be seen from **India's written submissions** (paras 9-18 – [General Obligations of States to Prevent Transboundary Harm](#)), it may be difficult to assert – especially given the [Common But Differentiated Responsibilities and Respective Capabilities](#) (CBDR-DR) principle (see also, in this context, overview analysis of Pakistan's submissions) – that Nepal's actions meet transboundary environmental harm standards. These were discussed in the *Trail Smelter*, *Corfu Channel*, *Gabčíkovo-Nagymaros*, *Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River* cases (including also, the recent *2022 Armed Activities on the Territory of the Congo* (Compensation) case). If Nepal can satisfy the due diligence obligation, precautionary and prevention approaches and that it conducts Environmental Impact Assessments (in accordance with this Court's decision in *Pulp Mills*), it should steer off much (if any) State Responsibility for climate harms. Thus, Nepal's argument of it being a legitimate beneficiary of the Loss and Damage fund through State Responsibility, and not just voluntarily through States' contributions is worth noting, when Nepal states in its oral submissions that: “[w]hat countries like Nepal are calling for is not mere handouts or charity, but compensatory climate justice.”

From a political standpoint and message sending standpoint, Nepal's submission is particularly relevant, and a regional template for the ICJ, given that the Court does not have the benefit of written or oral submissions from many of Nepal's neighbours with similar geographical and/or other realities (such as Bhutan, Kyrgyzstan, Kazakhstan, Turkmenistan, Tajikistan, Afghanistan, Myanmar etc.).

From a scientific standpoint, the Mount Everest – and the Himalayas – have a significant, natural, economic, cultural, security, and biodiversity -related importance for the entire South Asia. The AO which will follow these submissions (vis-à-vis the question highlighted in this post) will benefit from a broad and balanced approach taken towards all vulnerable terrains of the world, rather than the specific emphasis laid in the question. Nepal's submissions crucially highlight that the scope of the question is broader than what appears at first glance. The emphasis on SIDS should not be seen as lessening the importance of terrains such as those found in Nepal. In any case, Nepal's analysis (see [Verbatim Record](#) at pp. 20-21) on – how snow-clad mountains such as the Himalayas help maintain the health of oceans, by serving as a heatsink, sustaining vegetation and the ecosystem of the lives of the people leaving downstream – will help the Court in holistically assessing the Climate Change impacts from the top to the bottom of the world.

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