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Lawful Limitation or Northern Influence? Restricting the Freedom of Expression of Tibetan Refugees in Nepal

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DECLARATION FORM

The work I have submitted is my own effort. I certify that all the material in the Thesis which is not my own work has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed: Barun Ghimire

Date: May
22, 2013

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ABSTRACT

Any exercise of Right to freedom of expression of Tibetan refugees living in Nepal if deemed as ‘anti-Chinese activity’ is restricted by the Government of Nepal. Nepal, having ratified the ICCPR, has undertaken an international obligation to recognize and protect freedom of expression. In this context, this paper aims to examine the lawfulness of the restriction imposed by Nepal within the framework of Article 19 (3) of ICCPR. This study also seeks to analyze whether Nepal is under any influence of its Northern neighbor, China in restricting the freedom of Tibetan refugees.

This study reveals that restriction imposed by Nepal on freedom of expression of Tibetan refugees does not fall under the domain of lawful restriction permitted within human rights law. Further, it also establishes that Nepal is under influence of China in matter concerning Tibetan refugees, including freedom of expression. The influence of China on Nepal has been established by the analysis of Nepal’s foreign policy commitment towards China as Nepal’s national interest. The study brings to light the paradoxical situation of Nepal in context of its national interest in one hand and its human rights commitments in another.

This study concludes that the restriction on freedom of expression of Tibetan refugees in Nepal amounts to violation of human rights obligation by Nepal. This study recommends that Nepal should adhere to its human rights obligation and respect the freedom of expression of Tibetan refugees living within its jurisdiction.

Key Words

Freedom of Expression, Tibetan Refugees, Nepal, Restriction, anti-Chinese activity, ICCPR

LIST OF ACRONYMS

AI	Amnesty International
ACHPR	African Charter on Human and Peoples' Right
ACHR	American Convention on Human Rights
CAT	Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICT	International Campaign for Tibet
IOM	International Organization for Migration
MoHA	Ministry of Home Affairs
MoLJPA	Ministry of Law, Justice and Parliamentary Affairs
NGO	Non -Governmental Organization
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
TJC	Tibet Justice Centre
U.S.	United States
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
UNGA	United Nations General Assembly
NUCRA	National Unit for Co-ordination of Refugee Affairs

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CHAPTER ONE

1. INTRODUCTION

It has been more than 60 years from the adoption of the Convention relating to refugees, which till this date is the cornerstone for development of refugee law regime (Rehman, 2010). Despite the development of a standard of treatment of refugees there is an absence of clear indication on the extent of political rights that are entitled to refugees in the host country. The UNHCR Consultant and author of Political Rights of Refugees Ruma Mandal (2003) argues that the political rights of refugees rest on a delicate balance between protecting the essential human dignity of such persons and the need for states to respect each other's sovereignty and to protect their own community in general. The issue of political rights of refugees in host State is embedded in controversies, diverse State practice and uncertainties. The entitlement of political rights is often determined by the host state in the context of its relationship with the country of origin.

In the sphere of political rights, there are varieties of rights which are recognized as universal rights indiscriminately applicable to refugees (UNGA: 1996). On the other hand there are treaty laws and domestic laws which allow (obligate) states to limit the political activities of refugees in their territory. For instance, the 1969 Organisation of African Unity (OAU) Convention Governing Specific Aspects of the Refugee Problem in Africa restricts participation of refugees in any subversive activities against an OAU member state and further restricts refugees to engage in activities likely to cause tension between them (OAU Convention 1969, Article 3.2). Similar restriction can be observed in 1966 *India- Pakistan Treaty of Friendship* (1966) as well as in *Nepal-China Friendship Treaty* (1960). These examples indicate existing ambiguity/dichotomy relating to political rights of refugees within legal premise.

The present study concentrates on the particular issue of freedom of expression of Tibetan refugees in Nepal. The study will discuss the restrictions on freedom of expression of Tibetan refugees living in Nepal and seek to determine its lawfulness. Further, this study will examine the influence of Nepal's northern neighbour China in restriction concerning freedom of expression of Tibetan refugees in Nepal, observing that restrictions on rights of refugees often are driven by States political preference and national interest in light of the relationship with the

country of origin of refugees. The study is based on secondary sources, supplemented with interviews and observations in Nepal January to March 2013.

1.1. Tibetan Refugees in Nepal

A recent fact sheet of UNHCR (2012) estimates that Nepal hosts around 60, 000 Bhutanese refugees, 15,000 Tibetan refugees and 260 refugees from various other states. The number of Bhutanese refugees in Nepal is gradually decreasing as they are being resettled to third countries with the assistance from UNHCR (*Republica*, April 26, 2013).

An official record of the Government of Nepal confirms that 12,540 Tibetans living in different parts of Nepal, however the actual number of Tibetan refugees in Nepal at present is estimated to be around 20,000 as the government has not updated the record since 1993. The Tibetan refugees living in Nepal are dispersed in over 21 districts of the country in Tibetan refugee camps. (NUCRA, 2010)

The influx of Tibetan refugees in Nepal commenced when Dalai Lama XIV left Lhasa for asylum in India in 1959 (TJC, 2002). Despite being a host to Bhutanese as well as Tibetan refugees, Nepal does not have a legal framework concerning refugees. Furthermore, Nepal is not a signatory to the 1951 Refugee Convention and its 1967 protocol. As a matter of fact, Nepal does not legally recognize nor accept refugees or asylum seekers. There is also an absence of comprehensive policy relating to treatment of refugees in Nepal.

The Tibetan refugees in Nepal can be classified into two categories i.e. those who arrived in Nepal before 1989 and those who arrived in or are arriving in Nepal after 1989 (new arrivals). This classification is based on the right of residence of Tibetan refugees in Nepal. The Tibetan refugees who arrived in Nepal before 1989 and their descendants are entitled to lawfully reside in Nepal. Those Tibetan refugees who arrived after 1989 and are arriving in Nepal are not entitled to stay in Nepal, however, are entitled safe transit through Nepal to seek refuge in India. (TJC, 2002; interview 11.05.2013)

This difference right entitlement in case of Tibetan refugees is the result of a change in Nepalese law. During the period of 1966-1986, an *Agreement on Trade, Intercourse, and Related*

Questions between the Tibet Autonomous Region of China and Nepal was in force. By virtue of this agreement, Tibetans living in the border area of Tibet Autonomous Region and other religious pilgrims were entitled to enter to Nepal without passport or visa, provided they register their arrival at the border. However, since 1989 travel from the People's Republic of China to Nepal and vice-versa is regulated by valid passport and visa of the respective countries with an exception for those inhabitants staying within the periphery of 30 kilometers of the border area between two countries (TJC, 2002). Hence, Tibetans who arrived in Nepal before 1989 and seek refuge were entitled to stay, where refugees arriving after 1989 are not entitled to the same right.

Despite the change in policy of the Nepal government relating to Tibetan refugees, UNHCR estimates that around 800 Tibetan new arrivals transit to India through Nepal each year (UNHCR, 2012). The right of safe passage of Tibetan new arrivals is governed by an informal agreement commonly known as the Gentlemen's Agreement. The arrangement of safe transit is arranged by the UNHCR and only those Tibetan new arrivals who are apprehended on Nepalese territory are entitled safe passage, i.e. those apprehended on the border are not subject under this agreement (TJC, 2002).

For the purpose of this study, Tibetan new arrivals are not included, the study at times refers to the instances associated with Tibetan new arrivals but remains primarily focused on Tibetan refugees living in Nepal i.e. those who are legally entitled to stay in Nepal. In regards to the Tibetan Refugees who are entitled to reside in Nepal, refugee identification cards are provided. This identification card entitles Tibetan refugees the right to stay in Nepal, rights relating to travelling within Nepal and protection from harassment. These refugees are also provided with travel documents to travel outside Nepal on a case by case basis by the government authority.

However, the government, citing administrative reasons, has halted providing refugee cards to those who are eligible for refugee card since 1995. This has led to situation where children of settlement residents who have reached the age of eighteen subsequent to 1995 are unable to obtain such refugee cards (TJC, 2002). Furthermore, the rights entrusted to Tibetan refugees through refugee cards do not meet with the requirements (requisite) prescribed under the existing refugee law framework.

1.2. Legal Regime Relating to Tibetan Refugees in Nepal

As stated earlier, Nepal does not have any particular legislation relating to refugee or asylum seekers in force. There is no reference to the term ‘refugee’ in Nepalese law and there is no official policy of the government towards treatment of refugees in Nepal. *The Immigration Act* of 1992 is the closest legislation that deals with the entry of non-citizens in Nepal. As per the Act, all persons who are not citizens of Nepal are classified as foreigners. It states that “no foreigner shall be allowed to enter into and stay in Nepal without obtaining a passport and visa,” and it limits the entry of foreigners to prescribed routes. (*Immigration Act* 1992, Section 3) The same Act also empowers immigration officers under the MoHA to investigate infractions of these regulations and to detain, fine, and deport persons charged with the violation (Section 8, 9 & 10). The absence of particular legal framework relating to treatment of refugees in Nepal leaves the fate of refugees in Nepal in ambiguity.

Despite the absence of a particular law dealing with refugees, some of the fundamental rights guaranteed under the *Interim Constitution of Nepal 2007* are applicable to Tibetan refugees living in Nepal. For instance, Article 12 provides that “every person shall have the right to live with dignity...”. Similarly, Right to justice (Article 24) , Right against preventive detention (Article 25) , Right against Torture (Article 26) and Right against exploitation (Article 29) has potential application in case of Tibetan refugees as protection under these rights are not restricted to citizens unlike other rights. Furthermore, Article 17(3) relating to education and cultural rights acknowledge rights of each community residing in Nepal to preserve and promote its language, script, culture, cultural civility and heritage and Article 22 relating to the right of the child recognize certain set of rights of children. Both Article 17(3) and Article 22 along with the aforementioned constitutional provisions are applicable in the case of Tibetan refugees. (*Interim Constitution of Nepal, 2007*)

As a party to various human rights instruments, the legal obligation of Nepal in the matter of Tibetan refugees is to be derived from the international human rights law regime. UDHR in Article 14 specifically recognizes “right to seek and to enjoy in other countries asylum from persecution” (UNGA, 1948). Similarly, as state party to ICCPR, Nepal is under a specific obligation under Art. 2 to respect and to ensure, to all individuals within its territory and subject to its jurisdiction, the rights recognized within the framework of the covenant (UNGA, 1996).

The Rights guaranteed under ICCPR which ensures safeguard of personal integrity, liberty, security and political rights have the same significance for Tibetan refugees within jurisdiction of Nepal as for Nepalese citizen.

Similarly, Article 3 of the CAT which reads “No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture” (UNGA, 1984) is of significant importance with regard to Tibetan refugees. Furthermore, Nepal is also under obligation prescribed under the principle of *non-refoulement*¹ as this principle has crystallized into norm of customary international law² (UNHCR, 1994). Hence, it is evident that Nepal is under a plethora of obligations arising out of international human rights instruments and customary international law in relation to Tibetan refugees.

1.3. Restriction of Rights of Tibetan refugees in Nepal

The foreign policy of Nepal is guided by the principles of the United Nations Charter, nonalignment, the *Panchsheel*³, international laws and the norms of world peace as enshrined in the Constitution of Nepal (Interim Constitution of Nepal 2007, Article 35(21)). The *Panchsheel* refers to five basic principle of peaceful coexistence. They are mutual respect for each other’s territorial integrity and sovereignty, mutual non aggression against anyone, mutual non-interference in each other’s internal affairs, equality and mutual benefit and peaceful co-existence (Government of India, 2004). Further, concerning foreign policy orientation of Nepal has affirmed that:

“The state’s foreign policy will be conducted based on the principles of the UN Charter, and Non-alignment keeping national interest on the top. Friendly and cordial relations with neighbouring countries, particularly with India and China will be further

¹ Principle of *non-refoulement*, prescribes that, any State shall not expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture This principle has been included in CAT under Article 3 and is also included in 1951 Refugee convention.

² Customary international law is binding on all states regardless of their express treaty obligations.

strengthened on the basis of mutual respect, equality, co-operation and cordiality. Nepalese territory will not be allowed to be used against any neighbouring and friendly countries.” (Government of Nepal, 2009).

Nepal and China have a long history of cultural and political relationship. Nepal established its formal relationship with northern neighbour China in 1955 and the relationship was based on principles of *panchasheel* (Institute of Foreign Affairs: 2004). China has been maintaining friendly relation with Nepal, being based on its policy of non-intervention in the internal affairs of a friendly country. China has not shown any interest in internal affair of Nepal except those concerning Nepal’s commitment towards the one-China policy. (Nepali, April 18, 2013)As its commitment towards one-China policy, Nepal accepts that Tibet and Taiwan are inalienable parts of China and has expressed commitment not to allow anti-Chinese activities within the territory of Nepal (Institute of Foreign Affairs, 2004).

In line with the commitment of Nepal government under the friendship treaty (1960) and the one- China policy, Nepal has imposed restriction on any anti-Chinese activities within the territory of Nepal. This position of the Nepal government means that certain rights of Tibetan refugees in Nepal that should be guaranteed under international human rights law framework, have been restricted. The restriction of the rights of Tibetan refugees in Nepal has been elaborately discussed in the reports of *Tibet Justice Centre* (TJC, 2002), *Human Rights Watch* (HRW, 2008) and *International Campaign for Tibet* (ICT, 2011). The concern over restriction of rights of Tibetans in Nepal has also been expressed during adoption of Universal Periodic Review of Nepal in Human Rights Council. (UN Human Rights Council, 8 March, 2011) The studies relating to Tibetan refugees living in Nepal contents that Nepal has violated the rights to freedom of expression of Tibetan refugees living in its territory (AI, 2012; HRW, 2008; TJC, 2002; ICT, 2011; Article19, 2008; ifex/Freedom Forum, 2013).

As Nepal is imposing restriction on anti-Chinese activities in Nepal, it is obvious that expressions which are deemed as anti-Chinese activities are restricted as well. However, freedom of expression under international human rights law is not absolute rights and it may be subjected to lawful restriction.(ICCPR Article 19 (3), 1966) Hence, the restriction on freedom of expression of Tibetan refugees in Nepal (*ipso facto*) may not qualify as violation of freedom of expression.

1.4. Formulation of Problem

Despite the absence of domestic law, Nepal is under obligation to protect the basic rights of Tibetan refugees under its international human rights commitments. (ICCPR, 1966; CAT, 1984; CERD, 1979, CRC, 1989) However, the government of Nepal is entitled to impose certain restriction on the rights of Tibetan refugees, including right to freedom of expression as provided under international law. In case of freedom of expression of Tibetan refugees in Nepal, there is no disagreement on the fact that freedom of expression is restricted to a certain extent. However, there are contentions on whether the currently imposed restriction is lawful or not. The government assert that the existing restriction is a lawful (interview 11.02. 2013) restriction whereas human rights organizations consider the restriction as unlawful. (UN Human Rights Council, 2011b, 2011; AI, 2012; HRW, 2008; TJC, 2002; ICT, 2011; Article19, 2008; ifex/Freedom Forum, 2013) Hence, analysis of lawfulness of the existing restriction will determine whether or not Nepal is violating right to freedom of expression of Tibetan refugees living in its territory.

In the analysis of issues of Tibetan refugees in Nepal discussion on the question of Chinese influence in the matter is unavoidable, as China has been alleged to be pressurizing Nepal in Tibetan affairs. However, the government has been denying the allegations stating that its treatment towards Tibetan refugees is based on Nepal's long standing foreign policy. Accordingly, this study aims to analyze two basic questions, i.e.

- Whether the restriction on freedom of expression of Tibetan refugees living in Nepal falls within the lawful restriction of freedom permitted under international law and
- Whether or not Nepal is under the influence of its northern neighbor, China to restrict the freedom of expression of Tibetans living in Nepal.

1.5. Study Overview

The study will follow the following structure to answer the research question. The brief overview of each chapter reflects the organization of study.

Chapter I: The first chapter has introduced the situation of Tibetan refugees in Nepal, rights entitled to them and restriction on their rights. This chapter has also discussed briefly that all restriction of freedom of expression may not necessarily mean violation of freedom of expression.

Chapter II: The second chapter deals with the methodological aspect of the study. It also summarizes the field visits undertaken for the study. Furthermore, this part explains the use of legal analysis, content analysis and interpretative approach in the study.

Chapter III: This chapter will explain the legal regime of freedom of expression including the restrictive regime. This part will present a comprehensive legal understanding of freedom of expression, discussing what rights are guaranteed under freedom of expression and what are the limitations associated with it. Furthermore, the chapter will also discuss the classical realism theory which will be used to discuss the element of influence from China in matter concerning Tibetan refugees.

Chapter IV: Once the legal regime is explained, this chapter will bring together the legal premise and findings and on basis of legal reasoning determine the lawfulness of restriction imposed on Tibetan refugees in Nepal.

Chapter V: This chapter will discuss the potential influence of China over Nepal in the matter of Tibetan refugees, citing a number of activities that demonstrate this connection. This chapter will also use classical realism theory to analyse factors of influence on the foreign policy of Nepal.

Chapter VI: This chapter will sum up the conclusion concerning research questions based on the analysis, and present some recommendations.

CHAPTER TWO

2. METHODOLOGY

As the study aims to determine the lawfulness of restriction on freedom of expression of Tibetan refugees in Nepal and potential influence of China, this study have used qualitative content analysis to answer the research questions.

In qualitative research, content analysis is acknowledged as one of the “the longest established method of text analysis among the set of empirical methods of social investigation” (Titscher *et al.* 2000). Similarly, Bryman (2004: 542) defines qualitative content analysis as,

“An approach to documents that emphasizes the role of the investigator in the construction of the meaning of and in texts. There is an emphasis on allowing categories to emerge out of data and on recognizing the significance for understanding the meaning of the context in which an item being analyzed (and the categories derived from it) appeared”

Further qualitative content analysis is, considered as most relevant approach in qualitative analysis of documents as it comprises of understanding the underlying ideas and themes in the materials being analyzed (Bryman, 2004; 392). “probably the most prevalent approach to the qualitative analysis of documents that comprises a searching-out of underlying themes in the materials being analyzed”.

The determination of lawfulness of the restriction imposed on Tibetan refugees in Nepal needs analysis of legal texts. Further, the content of freedom of expression needs to be discussed and analyzed against the data relating to restriction of freedom of expression of Tibetans, obtained through interview and other sources. In this study fact and laws brought together determines the lawfulness of the restriction, in light of relevant case law and jurisprudence.

In the question of possible Chinese influence, different factual events and incidents are brought to discussion to establish the existence of Chinese influence in matter concerning freedom of expression of Tibetan refugees. Hence, qualitative content analysis is adopted in this study as appropriate approach.

2.1 Field Work

The pre-understanding of issues associated with the study was based on the secondary data available on the subject matter. This reading was supplemented through field work in Kathmandu to observe the impact of the restrictions on the life of the refugees. During the field study which took place from 10th Jan to 15th March 2013, I interviewed 12 Tibetan refugees, 2 officials from the Home Ministry of Home Affairs (MoHA), 3 officials from the Ministry of Law Justice and Parliamentary Affairs (MoLJPA), an academicians from Nepal Law Campus, one journalist and 4 legal professionals. I also approached the Tibetan Refugee Welfare Office in Lazimpat, Kathmandu and the office of the UNHCR-Nepal without any success.

The core questions for the interview were prepared before the field work. (Annex II). The interview was conducted in an informal way with reference to basic questions when conducting interviews other questions were included depending upon the interviewees' response to the basic questions.

I also observed the situation of Boudha, Kathmandu after the self immolation of the *Drupchen Tsering* on 13th Feb 2013. There was a significant presence of security personnel in the area following the days to avoid potential Tibetan demonstrations. The news relating to the event was published in Republica daily under the title Govt ups alert to avert incidents by Tibetans (Koirala, 10 March 2013) which stated:

“Amid heightened concern that Tibetan exiles could unleash ‘untoward’ incidents to mark Tibetan Uprising Day, the government has stepped up security vigilance and increased the presence of police at various ‘sensitive places’ in Kathmandu Valley”.

The article also states that,

“A few days after the self-immolation incident, the Chinese Embassy in Kathmandu had sent a diplomatic note to the Ministry of Foreign Affairs (MoFA), asking the government of Nepal to effectively curb such ‘anti-China’ activities. The diplomatic note also reminded the Nepal government of its commitment to a ‘One-China’ policy”. (Koirala, 10 March 2013)

The news relating to Tibetans are commonly reported by national as well as international news papers. For instance, The Kantipur on March 12 published news relating to Tibetans in Nepal entitled *Nepal Tibetans 'suffocated' by Chinese influence*, it reflected the view of Tibetan living in Nepal (Ekantipur, 12 March, 2012). There has also been news articles relating to influence of

China in matter of concerning Tibet, Ekantipur reported arrest of Tibetans during protests stated that,

“Nepal, which is home to around 20,000 Tibetans, is under intense pressure from Beijing over the exiles, and has repeatedly said it will not tolerate what it calls ‘anti-China activities’ it also stated that, “Hundreds of Tibetan exiles gathered in solidarity around a monastery on the outskirts of Kathmandu, but Nepalese police barred hundreds more from getting in”. (Ekantipur, 1 November, 2011).

A study by Ujjwal Prajapati entitled *Influence of Foreign Policy on Nepalese Press: A Case Study on Coverage of Tibetan Protest in Nepal* concludes that importance have been given by Nepali media to the stories in covering the Tibetan protest and China affairs issues (Prajapati, 2011). He further concludes that, “the influence of the foreign policy of the country on Nepalese news media is high when the issue of Tibet is reported” (2011:79).

Most of the findings during the field work were congruent with available secondary data indicating the restricting based on government’s stand on one-China policy. During the field work, sensitivity of the issue concerning freedom of expression of Tibetan refugees was clearly reflected as most of the interviewee stated that it was a politically sensitive issue; even some of the Tibetans were reluctant for the interview initially. Further, Political sensitivity of the issue was the reason why officials of UNHCR-Nepal did not want to participate in the research.

The interviewees during field visit were Tibetan refugees living in Boudhanath, Swyambhu and Jawalakhel area of Kathmandu. Interviews were conducted for around 30 minutes in an average, and have been transcribed.

2.3. Sampling

The respondents for interview were selected on certain pre-determined criteria. Tibetans who had taken part in political activities in Kathmandu were selected for the interview as they would be in better position to explain the issues relating to restrictions.

As regard to representatives of government and relevant ministries, officials from the MoHA and MoLJPA were selected for interview. As representative of relevant ministry they would be able to provide with necessary information.

Academicians and legal professionals who had contextual knowledge of the subject matter were selected for interview. A journalist was also interviewed during the field visit as he had concluded a research relating to Tibetan refugees in Nepal.

2.4. Ethical Considerations

Most of the interviewees in my field work were not neutral as they belonged either to the category whose rights were restricted or those who are restricting the rights. Hence, the study relies on the data which is congruent with both primary and secondary source.

During the interview, confidentiality has been maintained and anonymity of interviewee has been assured, considering the sensitivity of the issue. The personal identification of interviewee is not disclosed in the study.

The interviews with Tibetan refugees were conducted individually, except a group interview in Boudha area which comprised of 4 Tibetan refugees. The officials from ministries were interviewed in their respective ministry during office hours. Before an interview everyone was informed about the study through letter issued from university of Tromsø (Annex III) and interviews were conducted upon verbal consent.

CHAPTER THREE

3. LEGAL AND THEORETICAL FRAMEWORK

3.1. Freedom of Expression under International Law

Freedom of Expression is universally acknowledged as a foundational Human Right and an essence of democratic society (Mendel, 2010). Freedom of expression is interlinked with other basic human rights including freedom of information, freedom of assembly, freedom of opinion and freedom of thought, conscience and religion. Because of the fundamental nature of this freedom, it is thus considered as a cornerstone of all democratic rights and freedoms. (Human Rights Review, 2012: 331) Recognizing the pivotal significance of freedom relating to information and expression, the first United Nations General Assembly (UNGA) in its resolution 59(i) on 14 December 1946 stated that, “Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.” (UNGA, 1946)

With the adoption of the UDHR freedom of expression was acknowledged as one of the basic and universal human rights. Article 19 of UDHR entrusted everyone with right to freedom of opinion and expression; including freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.(UNGA, 1948) In a similar line, ICCPR in its Article 19 provides that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (UNGA, 1966)

Beyond ICCPR regional human rights instruments including the European Convention on Human Rights (ECHR), American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples’ Rights (ACHPR) have enshrined the right to freedom of expression, respectively at Article 10, Article 13 and Article 9 (Council of Europe, 1950; Organization of American States, 1969; OAU, 1982). The substantive aspect of freedom of expression in each of these human rights treaties are in resonance with the provision of ICCPR (1966). Furthermore other UN treaties have also expressly or implicitly protected freedom of

expression. Such treaty provision includes Article 5 of ICERD, Article 3 CEDAW and Article 13 of CRC. (UNGA, 1965; UNGA, 1979; UNGA, 1989)

The UN Human Rights Committee in its General Comment No. 34 relating to freedom of opinion and expression has elaborated that, “freedom of opinion and expression are indispensable conditions for the full development of the person and are essential for any society as they constitute the foundation stone for every free and democratic society”(UN HRC, 2011). This notion relating to freedom of expression has also been reaffirmed in various communications brought before the committee. [*Benhadj v. Algeria* (UNHRC, 20 July 2000); *Park v. Republic of Korea* (UNHRC, 5 July 1996)]

The regional human rights courts have univocally acknowledged the importance of freedom of expression. For Instance, the Inter-American Court of Human Rights in case of ‘*Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*’ has recognized Freedom of expression as a cornerstone upon which the existence of a democratic society is founded (Inter-American Court of Human Rights, November 13, 1985). Similarly the European Court of Human Rights in *Handyside v. United Kingdom* 1976, Freedom of expression is considered as one of the basic element for a society (European Court of Human Rights, 7 December 1976) Furthermore, African Commission on Human and Peoples’ Rights in *Media Rights Agenda and Others v. Nigeria* 1998, in relation to freedom of expression under Article 9 of the African Convention viewed freedom of expression as basic human right for overall development of a person(African Commission on Human and Peoples' Rights, 1998).

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information (1966) in its preamble reaffirms the importance of freedom of expression in a democratic society for the progress, welfare and for the enjoyment of other human rights and fundamental freedoms. (Article19, 1995)

The General Comment No. 34 clearly indicated that political discourse, commentary on one’s work and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse as rights protected under freedom of expression as asserted in various communication in HRC (UNHRC, 2011; Paragraph 11). It

further states that freedom of expression under ICCPR protects all forms of expression and the means of their disseminations, in different forms such as spoken, written and sign language, as image and subject of art through different means such as newspapers, pamphlets, posters, banners, dress and legal submissions. (UNHRC, 2011: Paragraph 12)

3.2. Restriction on Freedom of Expression

The possible restriction on the freedom of expression has been stated in Article 19(3) of ICCPR which reads:

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.” (UNGA, 1966: Article 19(3))

This legal text has been further explained by UNHRC (2011) in General Comment No. 34. The test of lawfulness of restriction imposed by a state party to ICCPR cannot be broader than the prescribe regime in Article 19(3) of ICCPR.

Similar scope of lawful restriction on exercise of freedom of expression has been enshrined in Article 10(2) of ECHR, Article 13 (2) of ACHR and Article 9 of ACHPR (Council of Europe, 1950; Organization of American States, 1969; OAU, 1982). The lawful restrictions are reflected as acknowledgements of need to balance individual interest against wider community needs and the special duties and responsibility embedded in right to freedom of expression (Benedek *et al*, 2012).

The determination of lawfulness of restriction imposed in freedom of expression needs to be carried out in case by case basis. Toby Mendel (2010) has made detailed study on the standard and principles related to restriction of freedom of expression. His paper has discussed the ‘three part test’ used assessing restriction on freedom of expression. The ‘three part test’ refers to assessing restriction on freedom of expression in lieu of criterion set in Article 19(3).

This test has also reiterated a Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (UN Human Rights Council, 2011). The report further explains the ‘the part test’ relating it to three principle i.e. principles of predictability and transparency, principle of legitimacy and principles of necessity and proportionality (UNHRC, 2012: Paragraph 24).

The freedom of expression which may be legitimately restricted has previously been examined in the annual report of the Special Rapporteur, on the promotion and protection of the right to freedom of opinion and expression 2010 (UN Human Rights Council, 2010). This report does not refer to term ‘three part test’, however argue in similar line and identifies various relevant principles for determining the conditions that must be satisfied in order for a limitation or restriction to be permissible (UN Human Rights Council, 2011: Paragraph 79). The report does not refer to the term ‘three –part test’ but the principle when generalized forms the same test criterion.

Mandal (2003) has discussed the issues relating to political rights of refugees both in context of legal framework and forms of political activities and has drawn references from the state practices in the subject. Further, it has classified the forms of political activities into three categories:

- a) Activities that host state is obliged to allow;
- b) Activities that the host State may allow; and
- c) Activities that host state are obligated to prevent.

The activities that host state is obliged to allow are basically those activities that are guaranteed by human rights law. For instance, freedom of expression guaranteed under ICCPR would fall under this category unless it falls within with the lawful restriction scope or form of expression which are expressly prohibited by the law. In case of activities that are not expressly protected nor prohibited under international law the host state can at its discretion allow or restrict these activities under specific exceptions. These activities fall within the legal framework of Article 19(3) of ICCPR as it entitles state to restrict freedom of expression under certain exceptions, however this does not impose strict obligation on restriction of such activities.

The third category refers to activities that are expressly prohibited under international law. For instance, Article 20 of ICCPR prohibits all propaganda for war. (UNGA, 1966) Similarly Article 4 of ICERD also imposes prohibition of certain expression (UNGA, 1965). Furthermore, states are under obligation to restrict expression advocating a war of aggression against the notion upheld in the UN charter (UN, 1945). The obligation to prevent certain activities may also derive from customary law or treaty law. However, such obligation should be read in line with the human rights commitments of the state concerned.

In context of restriction on freedom of expression of refugees various declarations can be taken into consideration as they have significant political authority. For instance Article 4 of *The Declaration on Territorial Asylum* provides that, “States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations”(UNGA, 1967). In similar lines, *Declaration on the Inadmissibility of Intervention in the Internal Affairs of States*, in Article 2 (b) specifies “the duty of a State to ensure that its territory is not used in any manner which would violate the sovereignty, political independence, territorial integrity and national unity or disrupt the political, economic and social stability of another State...”(UNGA, 1981). furthermore the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, states that, “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State” (UNGA, 1970).The activities are supposed to be restricted by the host state in case of refugees alongside other legally expressed restriction.

The categories identified by Mandal(2003), although being general in nature can be used to determine whether certain forms of expression fall under activities that ought to be allowed, may be allowed, or those which should be restricted.

Hathaway in his book entitled, *The Rights of Refugees under International Law* (2005) has discussed freedom of expression under the heading ‘Rights of refugees lawfully staying’. He argues that States response to political activities of refugees has not been uniform as it depends on host States alignments and preferences. Hathaway refers to examples of treatment of Ugandan refugees in Kenya and Liberian refugees in Ivory Coast to demonstrate that such treatment were

determined by the own political gains of those states. However, such restriction of Kenya and Ivory Coast to limit the activities of refugee populations based simply upon whether the refugees' views corresponded with their host government's prevailing foreign policy preferences has been concluded to be in violation of ICCPR.

This conclusion has been drawn in light of UNHRC affirmation that non-citizens have the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association . . . There shall be no discrimination between aliens and citizens in the application of these rights and Refugees have right to undertake campaigns and to hold rallies intended to raise awareness of conditions in their country of origin (UNHRC, 1986; UNHRC, 1999). Hathaway also argues that that blanket duty on states “ to prohibit refugees...from attacking any member states of the OAU, by any activities likely to cause tension between member States” under the Article 3 of the OAU Refugee Convention as unlawful as it allow states to legitimately constrain refugee activities against the basic international legal and political commitments (2005).

Hathaway (2005) discusses with various examples how States practices in matters concerning political rights of refugees, including freedom of expression is influenced by the political preference and foreign policy commitment of host State. He further argues such restrictions are only lawful if they are within the limitations established by law, and can be objectively assessed as necessary to protect an enumerated interest under article concerned i.e. Article 19, Article 20 and Article 22 of ICCPR in this context.

As there is established parameter of what restrictions can be imposed in freedom of expression of refugees, a well developed assessment test to determine the lawfulness of restriction imposed and supporting case laws and jurisprudence has been developed. In chapter IV the restriction imposed on freedom of expression of Tibetan refugees will be assessed according to this framework.

3.3. Theory of Political Realism

Political realism is a view of international politics that stresses its competitive and conflictual side. Realists theorist consider the principal actors in the international arena to be states, which

are concerned with their own security, act in pursuit of their own national interests, and struggle for power. (Karpowicz, K. and Julian, W, 2013) Using this perspective, it can be argued that the restriction on the rights of freedom of expression for Tibetan refugees in Nepal is based on foreign policy commitment of Nepal derived from its national interest perspective. The classical realism theory developed by Hans J. Morgenthau (1904–1980) provides some arguments in this direction. Among six principles that he includes in the second edition of *Politics among Nations* (1948) the concept of “of interest defined in terms of power” can be significant in understanding the aspects of foreign policy of Nepal which restricts freedom of expression of Tibetan refugees.

The concept of power is at the heart of analysis of international politics. Morgenthau defines power as “a psychological relation between those who exercise it and those over whom it is exercised. It gives the former control over certain actions of the latter through the influence which the former exert over the latter's minds” (1948: 9). That influence derives from three sources i.e. the expectation of benefits, the fear of disadvantages, the respect or love for men or institutions. It may be exerted through orders, threats, persuasion, the authority or charisma of a man or of an office, or a combination of any of these.

In case of Nepal-China relationship this element of power lies with Chinese counterpart. The Chinese government cooperation towards Nepal is increasing in recent years in fields of promotion of trade and tourism, border management, development of hydropower and transport infrastructure, technical advancement and achievement of overall socio-economic growth. Further, Nepal considers friendly relationship with China as important aspect of national interest, as the geo-political situation of Nepal put Nepal in position to largely benefit from China. In Morgenthau’s terms, power through the expectation of benefits,

As stated by Former Prime Minister of Nepal, Madhav Kumar Nepal, “China has only one concern [in Nepal], that is concern of Tibet” (BBC News, January 27, 2010) and Nepal responded well to the concern. As result of Nepal commitment towards Chinese concern, Nepal-China relationship has been seen as ‘trouble free’ relationship and China has hailed Nepal for its commitment (Republica, 11 August, 2012). The concern raised by Chinese officials indicates Tibetan refugee issue in Nepal is closely associated with Nepal-China relationship (Sidner, 2012).

Morgenthau emphasizes the importance of ‘national interest’ and argues that a good foreign policy minimizes risks and maximizes benefits. He further explains good foreign policy “complies both with the moral precept of prudence and the political requirement of success” (Morgenthau, 1948). Yet, Morgenthau clearly recognizes that states may choose not to act in such manner since moral principles do not serve as effective political restraints (Williams, 2005: 187). Hence, foreign policy of Nepal which has acknowledged promotion of national interest and the balance of power as key component signifies Nepal’s alienation towards Chinese concern within its territory. The present day foreign policy of Nepal (Interim Constitution of Nepal, Article 35 (21)) and bilateral peace and friendship treaty with China (1960) indicates Nepal’s position on what constitutes good rational foreign policy for Nepal. The officials of Nepal are clearly convinced that it is not in line with Nepal’s national interest to displease its Chinese counterpart (‘fear of disadvantage’). As Tibetan concern is of primary importance for China, Nepal has pledged to assure that government will not allow Tibetan dissents to operate in its territory. (Krakaur, 2011; BBC News, January 27, 2010; Republica, March 12, 2013; interview 11.02.2013)

Hence, the theory of political realism by Morgenthau can shed light on broader understanding of why Nepal is restricting on freedom of expression of Tibetan refugees living in Nepal. This theory also offers understanding on how China can influence Nepal in matter of Tibetan refugees as it holds the power of ‘expectations from Nepal’ whether it be ‘expectations of benefit’ or ‘fear of disadvantage’. The later part of the study will discuss more on Nepal’s foreign policy commitment as national interest of Nepal, which Nepal seeks to uphold.

CHAPTER FOUR

4. LAWFULESS OF RESTRICTION IMPOSED ON TIBETANS LIVING IN NEPAL

4.1. Freedom of Expression of Tibetan Refugees in Nepal

The Interim constitution of Nepal 2007 recognizes freedom of expression as fundamental right; however the right is limited to citizens. With regard to restriction on freedom of expression it is provided that:

“through law...reasonable restriction may be imposed on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities, or on any act of defamation, contempt of court or incitement to an offence; or on any act which may be contrary to decent public behaviour or morality”. (Interim Constitution of Nepal, Article 12(3))

This clause prescribes that; the restriction on freedom of expression should be imposed through law. The proviso does not expressly impose restriction on acts which are deemed to be contrary to the foreign policy of Nepal.

Although Constitution of Nepal does not expressly entitle freedom of expression to refugees, it is under obligation enshrined in ICCPR relating to freedom of expression, as Nepal ratified ICCPR without any reservation on 14th August 1991. The obligation of Nepal in relation to Article 19 of ICCPR is also reaffirmed by Nepal Treaty Act 1990, Section 9, which provides provisions of treaties ratified by Nepal to be applicable as domestic law despite domestication. (UNGA, 1966; Nepal Treaty Act 1990, Section 9) The same provision also provides that in case of conflict arising between treaties and domestic laws, provisions of treaties would prevail. So it can be argued that Article 19 of ICCPR has full implication for Nepal.

Furthermore, as State party to ICCPR, Nepal has undertaken obligation “...to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” (UNGA, 1966: Article 2)

Tibetan refugees in Nepal are not legally recognized as refugees i.e. *de jure* recognition of Tibetans refugees is absent. As per the legal arrangement Tibetans in Nepal are classified as aliens. However, the non-recognition of *de jure* refugee status of Tibetans in Nepal does not affect the implications of obligation of Nepal under the ICCPR. Since, the freedom of expression under Article 19 of ICCPR is guaranteed to ‘everyone’. Furthermore, it has been affirmed in UNHRC General Comment No. 15 that, “Once aliens are allowed to enter the territory of a state party they are entitled to the rights set out in the Covenant” (UNGA 1966, Article 19; UNHRC, 1986). Hence, Tibetan refugees living in Nepal are entitled to the same protection vis-a-vis freedom of expression as Nepalese citizens are, despite the silence of Nepalese domestic law in the matter.

4.2. Restriction on Freedom of Expression of Tibetan Refugees

In contrary to the obligation to respect and ensure freedom of expression of Tibetan refugees living in Nepal, government is imposing restrictions on freedom of expression of Tibetans. Such restrictions has been reported as violation of freedom of expression of Tibetans by various human rights organizations including OHCHR-Nepal (UN Human Rights Council, 2011b), AI(2012), HRW(2008 & 2011) , Article19(2008), TJC(2002) and ICT(2011). The government of Nepal does not refute the existence of such restriction, but claims that restrictions are limited to anti Chinese activities and is justifiable under international law (interview 11.02.2013).

The interviews with Tibetans living in Kathmandu also revealed that there is restriction on their freedom of expression. Further, respondents revealed that any form of expression relating to issue of Tibet including human rights violations in Tibet, expressions relating to China or Chinese activities in Tibet were under severe scrutiny and were restricted. (interview 08.01.2013) The interviews with Tibetans living in Kathmandu also revealed that there is restriction on their freedom of expression. The respondents revealed that any form of expression relating to issue of Tibet or China indiscriminately were under severe scrutiny and subject to restriction. (interview 08.01.2013) For instance, there have been instances of Tibetans being arrested for carrying a Tibetan flag (Aljazeera, March 10, 2013), peaceful protest against human rights violation in Tibet, staging a hunger strike (Saunders, 22 May 2013), use of sporting headbands and t-shirt reading ‘Free Tibet’(ICT, 2011), carrying banner demanding justice in Tibet, claiming

autonomy in Tibet etc. Further, respondents informed that the restriction on expression is not limited to political expression or expression relating to autonomy in Tibet as they are facing restriction on cultural and religious expression as well (HRW, 2008; HRW, 2011, ICT, 2011 UN Human Rights Council, 2011b; UN News Centre, 25 March 2008). Any activities by Tibetan refugees living in Nepal if construed as anti- Chinese or harmful to Nepal-China foreign relations by the government authorities were indiscriminately subjected to restriction.

Among the Tibetans interviewed some of the interviewees had at some point been arrested for participating in peaceful demonstration, carrying a Tibetan flag or flyer, chanting slogan against Chinese rule in Tibet etc. The interviewees informed that they were promptly arrest by officials if they stage a demonstration/protest or attempt to do so. (interview 08.02. 2013) Interestingly, Tibetans who are arrested during participation in restriction activities are released in the same day without any charges. However in some cases, there has been a legal charge against some refugees under Some Public (Crime and Punishment) Act, 1970. (ICT, 2011; HRW, 2008; Interview 08.01. 2013)

Tibetan refugees also highlighted that restrictions imposed on their activities were gradually increasing. Interviewees presented instances where police interrupted their religious and cultural activities accusing them of being political in nature. Tibetans are warned by local authorities to refrain from participating in any political activities at all times within the territory of Nepal. During interviews Tibetans also indicated that police uses excessive force to disperse and the Tibetan protesters. One of the interviewee stated that, “government of Nepal wants us to be silent; they don’t want us to speak things they don’t want to hear”. (interviews 8 - 20.01. 2013) Relying on the interview and reading relating to Tibetan refugees in Nepal, it is apparent that, the restriction imposed by the government of Nepal is very general restriction on freedom of expression, which is executed on the basis of administrative discretion i.e. it is entirely up to enforcement authorities to determine if the activities falls under restricted activities or not.

Officials from MoHA and MoLJPA did not deny existing restriction on freedom of expression of Tibetan refugees but attempted to clarify that, restrictions were imposed only on expressions relating to anti-Chinese activities or if it is of political nature that would negatively affect friendly relation between Nepal and China. One high ranking official from the MoLJPA emphasized that restriction on freedom of expression in relation to anti-Chinese activity (in

particular Free Tibet movement) is not limited to Tibetan refugees only. He explained that this restriction is applicable to everyone within the territorial jurisdiction of Nepal. (Interviews 11.02. 2013) It means that even Nepalese nationals were under restriction to participate in any activities that would be deemed as anti-Chinese activity by government. This information makes scope of restriction imposed by government much larger, as very often the issue is not seen in isolation of Tibetan refugees living in Nepal.

In contrary to information obtained from government officials, a report of OHCHR-Nepal states that, "...the police, under clear direction from the Ministry of Home Affairs" restricts the "rights to freedom of movement, assembly and association" of Tibetan refugees, "on key ceremonial occasions, including religious festivals and the birthday of the Dalai Lama" through "arbitrary arrest and other inappropriate methods". (UN Human Rights Council, 2011b)

On the basis of findings from the interviews in Kathmandu and existing reports of situation of human rights of Tibetans in Nepal it can be concluded that there is blanket restriction on political activities of Tibetans in Nepal. The findings also showed that restriction were not limited to political expression, as religious and cultural expression was under scrutiny too.

4.3. Lawfulness of Restriction Imposed on Tibetan Refugees in Nepal

The government of Nepal has stood by its argument that it will not allow protests and demonstrations against any friendly nation (HRW, 2008:53). This position of Nepal has been broadly incorporated in the 1960 Nepal-China friendship Treaty, prescribed in its foreign policy and has been reaffirmed by the executive head of the state on numerous instances. The authority of Nepal has shown full compliance with this commitment in case of Tibetan refugees in Nepal. The findings relating to freedom of expression of Tibetan refugees in Nepal clearly indicate existing restrictions particularly in China related protests and demonstrations, dissemination of pamphlets, political discourse, dress etc.

It is evident from earlier discussion that Nepal is under obligation to protect and promote freedom of Tibetan refugees living in Nepal. However analysis of Article 19 of ICCPR indicates that, there might be lawful restriction on freedom of expression i.e. Restriction on freedom of expression may not *ipso facto* amount to violation of right to freedom of expression and some

restrictions may be justified as lawful restrictions (UNGA, 1966). Hence to determine the lawfulness of restriction of freedom of expression of Tibetan Refugees, this study would rely on ‘three-part test’ of the restriction.

Before moving to ‘three part test’ we must keep in mind that there are certain expressions that state are under obligation to restrict. For instance Article 20 of ICCPR requires State parties to prohibit any propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. (UNGA, 1966: Article 20) Similarly, ICERD requires states to prohibit organizations that promote racial discrimination (UNGA, 1965: Article 3). The findings of the study clearly indicate that the restriction on Tibetan refugees does not fall under the positive requirements to restrict expression under international law. The contention of positive obligation to restrict certain expression particularly is argued by government officials in Nepal too. However, in case of Tibetan refugees the notion of positive obligation to restrict expression is not applicable⁴, if *et al* such obligation exist even in that context the imposed restriction must be justifiable under the Article 19(3) of ICCPR. (UNHRC, 2011)

4.3.1. ‘Three-part Test’ of Restriction Imposed on freedom of Tibetan Refugees

The Three-part cumulative test refers to an approach adapted to assess the restriction of freedom of expression. This test has been elaborated in numerous judgments by human rights court tasked with adjudicatory function of international human rights treaties (Mandel, 2010). This test has also been endorsed on a Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (UN Human Rights Council, 2011:19). This test is based on the three part of the restriction clause in Article 19(3) of ICCPR and can comprehensively examine the lawfulness of restriction imposed on freedom of expression.

This test accommodates that the principles used to determine the lawfulness of restriction on freedom. For instance, The Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (UN Human Rights Council,2010:12) sets out

⁴ The application of positive obligation to restrict freedom of expression is considered irrelevant in the study due to two basic reasons i.e. firstly finding clearly shows that the activities of expression of Tibetan refugees in Nepal does not encompass the restricted activity, Secondly, even in case of the restriction on Tibetan refugees in Nepal are derived as result of obligation to restrict under international law that should qualify the ‘three part test’ too.

conditions that must be satisfied in order for a limitation or restriction on freedom of expression to be permissible, which significantly reflects the principles endorsed in the three-part test. This test basically allocates appropriate principles to each clause of lawful restriction under ICCPR.

As set out in article 19, paragraph 3, of the Covenant, there are certain conditions where freedom of expression may be legitimately restricted under international human rights law (UNGA, 1966). However, the restriction imposed on freedom of expression must pass three qualifications, i.e.

- (a) Such restriction must be provided by law, which is clear and accessible to everyone (Principles of Predictability and Transparency); and
- (b) Such restriction must pursue one of the purposes set out in article 19, paragraph 3, of the Covenant, namely (i) to protect the rights or reputations of others, or (ii) to protect national security or of public order, or of public health or morals (Principle of Legitimacy); and
- (c) It must be proven as necessary and the least restrictive means required to achieve the purported aim (Principles of Necessity and Proportionality)

The lawfulness of restrictions imposed by government of Nepal on Tibetan Refugees can be examined on the basis of these three qualifications.

(a) Principles of Predictability and Transparency

The first part of the three part test for restriction on freedom of expression is also known by term ‘provided by law’. It requires that the restriction imposed on freedom of expression must be provided by law. In the case of Nepal, constitutional provisions have prescribed potential restrictions on freedom of expression (Interim Constitution of Nepal 2007, Article 12 (3)). However, in the case of restriction on freedom of Tibetan refugees there is no specific legislation governing the issue. The legality of such restriction is often drawn from foreign policy enshrined in the Constitution (Article 35(21)), exclusive entitlement of freedom of expression to citizens (Article 12(3)), bilateral treaty between Nepal and China i.e. Nepal-China Friendship Treaty(1960).

However, none of these legislation and arrangement is justifiable as these do not deal in general or in particular, relating to restriction on freedom of expression of refugees. In case of commitment under foreign policy in Constitution (Article 35(21) and Nepal- China Friendship Treaty (1960), Nepal is under obligation to respect sovereignty of China and non interference in its internal affairs, maintaining and developing friendly relationship with China. However, restriction of freedom of expression of Tibetan refugees under the derivative of this obligation seems too remote and unreasonable.

In this context the norm restricting freedom of expression, to be characterized as ‘law’ it must entail sufficient precision to enable an individual to regulate his or her conduct and must be made accessible to the public as expressed in *de Groot v. The Netherlands* (UNHRC, 14 July 1995). Further such law restricting freedom of expression may not confer unfettered discretion on those charged with its execution. (UNHRC,1999). In case of restriction of freedom of expression of Tibetan Refugees there is an absence of a specific law and officials execute the restriction in discretionary manner. The Tibetan refugees found in violation of imposed restrictions are generally not pressed charges and are released shortly (same day) after arrest (interview 08.01. 2013). However, there are instances where Tibetans are pressed charges under Some Public (Crime and Punishment) Act 1970. This Act provides, “No person shall ...commit any act or express anything, which causes intimidation or terror in general public and breaks public peace, by entering or not entering in any public gathering, assembly or demonstration; or to show weapon”(Some Public Crime and Punishment Act 1970, Section 3 (k)).

As Nepal does not have any law relating to refugees, law relating to freedom of expression of refugees is out of question. The existing legal provision limiting freedom of expression to citizens only in itself is in contradiction with treaty obligation of Nepal⁵. Further it does not provide for restriction on acts deemed harmful for Nepal’s foreign policy. Even if the practice often cited by Nepal, restriction on anti Chinese activities, is considered as legal norm, its vagueness and susceptibility to wide administrative discretion and possibility of misuse would raise concern relating to predictability and transparency.

⁵ The Interim constitution limits freedom of expression to citizens only despite government of Nepal is under treaty obligation to entitle freedom of expression to everyone within its jurisdiction. Further, the existing set of possible restriction on right of expression is broader in Nepalese context that that prescribed in ICCPR.

In views adopted by HRC in *Korneenko et al v. Belarus* (UNHRC, 10 November 2006) and *Jaona v. Madagascar* (UNHRC, 1 April 1985), Committee has concluded that, it is obligation of the state party to demonstrate the legal basis for any restrictions imposed on freedom of expression and States should provide details of the law and of actions that fall within the scope of such law. In case of restriction on Tibetan refugees there is neither certainty of scope of restriction nor a particular legislation dealing with it.

(b) Principle of Legitimacy

The second requirement for a restriction on freedom of expression to be lawful is that such restriction must be for the protection of a legitimate and overriding interest. The list of interest mentioned in Article 19(3) (a) and (b) of ICCPR is exhaustive as held in *Mukong v. Cameroon* (UNHRC, 21 July 1994). In the context of Nepal the purpose of restriction on freedom of expression of Tibetan refugees has been “preserving friendly relation with China” (Institute of Foreign Affairs, 2004; Government of Nepal, 2009) which does not fall under the prescribed interests whose protection might justify a restriction on freedom of expression.

Principle 36 of the *Siracusa Principles* is worth a reference, as it states, “When conflicts exist between a right protected in the Covenant (ICCPR) and the one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms (UN Commission on Human Rights, 1984). Since, freedom of expression of Tibetan refugees is protected under the framework of ICCPR and its restriction is to uphold a friendship treaty and maintain friendly relation with China, this does not suffice as legitimate justification for restriction.

The nature of peaceful protest of Tibetan clearly indicates that the restriction has not fall under scope of justification under public order. Findings have shown that the restrictions are increasing and activities which were not restricted before 2008 are being restricted these days (ICT, 2011). The term ‘public order’ as mentioned in Article 19(3), beyond mere maintenance of physical order of society, refers to the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individuals. Hence, the exercise of freedom of expression in peaceful manner would not disturb public order.

The restriction imposed on freedom of expression of Tibetan refugees in Nepal does not meet the requisite criteria to qualify as legitimate aim under article 19(3). The undisputed aim of the restriction on freedom of expression of Tibetan refugees has been maintenance of friendly relation with China and restricting anti-Chinese activity in Nepal.

(c) Principles of Necessity and Proportionality

The third part of the test shares close nexus with the principle of legitimacy, as this test determine whether the restriction are necessary and proportional to protect the legitimate aim discussed above. Since in case of Tibetan refugees in Nepal, the purported aim does not fall with the domain of legitimacy the test holds less significance. However, assuming the non existing legitimacy of restriction on rights of Tibetan Refugees, we can discuss the third part of the test.

In the concluding observation of *Shin v. Republic of Korea* it has been held that a State upon invoking legitimate ground of restriction of freedom of expression must specifically demonstrate the necessity and proportionality of the action taken, in line with the perceived threat from the freedom of expression (UNHRC, 16 March 2004). Similarly, in *Sohn v. Republic of Korea* HRC has explained that, state must demonstrate in specific fashion and precise nature of the threat to any of the enumerated grounds listed in paragraph 3 of Article 19 of ICCPR that has caused State to restrict freedom of expression (UNHRC, 19 July 1995).

When the restriction on freedom of Tibetan refugees in Nepal is examined and, these requisite are not fulfilled. The nature of blanket restriction on freedom of Tibetan refugee indicates that the restriction is not justifiable under these criteria. The government of Nepal is not in position to justify the necessity of such restriction in manner discussed by HRC in above discussed communications.

Finally the restriction must be proportional, whereby the benefit in terms of restriction must be higher than harm caused to freedom of expression. This principle aims to justify the restriction being based on the overall public interest. In case of Tibetan interest this test holds less significance as the restriction is not imposed to uphold overall public interest.

The ‘three-part test’ clearly indicates that the restriction imposed on freedom of expression of Tibetan refugees in Nepal is unlawful. The restriction imposed on freedom of expression of

Tibetan refugees does not fall within the purview of restriction explained under Article 19(3). Further, Human Rights Council resolution 12/16, provides that, restrictions on freedom of expression are not permissible in case of “...Discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups”(UN Human Rights Council, 2009). Hence it can be concluded that restriction on freedom of expression of Tibetan refugees fails to pass the test of lawfulness.

The inference from domestic case law also hints that unlawful nature of restriction of freedom of expression of Tibetan refugees. In a case concerning detention of Tibetan refugees for displaying Tibetan flag, Supreme Court of Nepal has held detention was unlawful. The Tibetans were charged under the Public Offence Act and were in custody for nearly three weeks. (UN Human Rights Council, 2011b). There have been other similar cases where the detention of Tibetans under Public Offence Act and Public Security Act were deemed unlawful (ICT, 2011) The Supreme Court decisions in case of this nature strengthen the argument that freedom of expression of Tibetan refugees in Nepal has been unlawfully restricted.

CHAPTER V

5. NORTHERN INFLUENCE ON THE RESTRICTION ON FREEDOM OF EXPRESSION OF TIBETANS IN NEPAL

5.1. Tibetan Refugees in Nepal and the Existing ‘China Factor’

The earlier discussion has established that the restriction imposed by government of Nepal in matter concerning the freedom of expression of Tibetan refugees in Nepal is unlawful under the existing international and domestic legal framework. This chapter will seek to analyze the influence of China over government of Nepal in matter concerning freedom of expression of Tibetan refugees in Nepal. On account of allegations regarding Chinese influence in the matter, the geo-political positioning of Nepal, existing Nepal-China relationship and Nepal’s commitment towards ‘one-China policy’ it is indispensable to analyze the Chinese influence in matter concerning Tibetan refugees in Nepal.

The issue of influence of China in the freedom of expression for Tibetan refugees is not a new discourse. International human rights organizations including HRW (2008) and AI (2012) have explicitly affirmed the influence of Chinese authority in matter concerning Tibetan refugees in Nepal. These findings of are congruent with the findings in the study report of TJC (2002) and ICT (2011), both of which are international organizations working in Tibetan issue.

An allegation of Chinese influence over Nepal in the matter of Tibetan refugees is not limited to findings of human rights organizations. The influence of Chinese government in matter of Tibetans in Nepal has been surfacing time and again. (Wong, 2013; Sindner, 2012; Mandhana, 2012; Krakauer, 2011) For instance, former president of the United States, Jimmy Carter upon his recent visit to Nepal on April 1, 2013 commented that, “China is putting pressure on Nepal to interrupt the flow of Tibetan refugees into the Himalayan nation”(Sharma, 2013). Similarly, Brad Adams, Asia Director at Human Rights Watch clearly spelled out Chinese influence in matter of Tibetan refugees in Nepal when he said, “The Chinese government has in the past put strong pressure on Nepal not to allow Tibetans to protest.”(HRW, 2011) These instances indicate surfacing concern and allegations of Chinese influence in Tibetan matter in Nepal.

During interviews conducted in Kathmandu, Tibetan activists also alleged that China is luring Nepal to restrict freedom of expression of Tibetans refugees in Nepal. They argued that the increasing restriction on freedom of Tibetans in recent years is an outcome of China's increasing influence over Nepal in Tibetan matter (interview 02.02. 2013) In an interview, a high level official from MoLJPA denied the existence of influence/pressure from Chinese counterpart, although he acknowledged that 'it was obvious for China to have keen interest in Tibetan refugees in Nepal'. Similarly, officials from the Home Ministry acknowledged that there is an apparent concern from Chinese counterpart in matters concerning Tibetan refugees (interview 11.02.2013).

In similar lines with the findings from the interview of Tibetan activists in Kathmandu, HRW report entitled, *Appeasing China Restricting the Rights of Tibetans in Nepal* has discussed the role of Chinese authority in restricting freedom of Tibetans in Nepal. The report even alleges that the Chinese officials are intervening in the Nepalese judicial system. The report states, "the impact of the pressure from the Chinese government on the government of Nepal can be directly and indirectly seen in Nepal's justice system, in policing and in relation to freedom of movement within Nepal" (HRW, 2008: 55). Similarly, a report by the ICT entitled, *Dangerous Crossing: Conditions Impacting the Flight of Tibetan Refugees* (2011) has inferred to Chinese influence over issue of Tibetans in Nepal." (ICT, 2011: 103). Besides the allegations made by Tibetan during the interview and its corroboration with the human rights organizations reports, there are a number of particular factual events that highlight existing Chinese influence in Tibetan issues in Nepal.

5.1.1 Deportation and Attempted Deportation of Tibetan Refugees

As a state party to CAT, Nepal is under an obligation not to deport anyone to a country where they may face torture. Similarly, the principle of *non refoulement* which has been crystallized as customary international law also prohibits Nepal to deport refugees to place where they might face threat of persecution. There is reasonable ground to believe that Tibetan refugees deported back to China might get subjected to torture or be persecuted. The report of the United Nations Special Rapporteur on Torture, Manfred Nowak, states, that, "the practice of torture, though on

the decline – particularly in urban areas – remains widespread in China” (UN Human Rights Council, 2009b). At the present instance there is substantive ground to believe that Tibetans who fled Tibet are in high risk to be subjected to torture. (Randeep 2007, Central Tibetan Administration 2008) Hence, it is unlawful for Nepal to deport Tibetans refugees back to China as refugees may potentially face persecution or may be subjected to torture. Furthermore, Nepal also has an obligation under the Gentlemen's Agreement of 1990 to allow safe passage to India, for those Tibetan refugees who are apprehended in Nepalese territory.

Despite the obligations, there have been instances where Nepal has deported Tibetan refugees upon request from China. On 31st May 2003, Nepal deported 18 Tibetan refugees to Chinese authority (UNHCR, 31 May 2003). Furthermore, the government of Nepal attempted to deport 23 refugees back to China in September 2011 which was halted by an order from Supreme Court of Nepal (Times of India, 23 September 2011; ICT, 23 September 2011). These reported instances of deportation clearly indicate that upon request from Chinese government, Nepal will not hesitate to deport Tibetan refugees despite such deportation being unlawful under international law.

5.1.2 Chinese Concern over Tibetans in Nepal

The Chinese authority has always been alarmed by anti Chinese activity being carried out in Nepal. The HRW in its report cites Chinese Ambassadors dissatisfaction over ‘anti China’ protest being carried out in Nepal and urged the government to adopt strict measures to pacify such activities. (HRW, 2008) Similarly, upon request from the Chinese government, Nepal imposed restriction of movement around areas Mount Everest to avoid potential Tibetan protest during ascent of the Olympic torch to the peak.(BBC News, 14 March 2008)

The government of China very frequently expresses concern over Tibetan activities in Nepal and Nepal has always been vocal about its one-China policy and commitment to not allow any anti Chinese activity in its soil. The Chinese authorities have applauded Nepal’s action that weakens Tibetans living in Nepal. For instance, the Chinese government welcomed Nepal’s closure of the Office of the Representative of His Holiness the Dalai Lama. (People’s Daily Online, Feb 2,

2005 as cited in HRW, 2008) The HRW claims that there are evidences of direct attempts by Chinese officials to intervene in the Nepalese justice system, pressure from Chinese embassy to charge Tibetans under the Offences against the State and Punishment Act, 1989. (HRW, 2008)

These instances indicate that, China has a keen eye on Tibetan activities in Nepal and wants Nepal to stick to the one-China policy and continue curbing ‘anti-Chinese’ activities in its territory. (Mandhana, 2012; Krakauer, 2011) China’s expectation from Nepal concerning its commitments is acknowledged by high ranking government officials. (interview 11.02.2013)

5.1.3 Nepal’s Unresponsiveness towards Third Country Settlement of Tibetan Refugees

The Tibetan refugees living in Nepal are not entitled rights that are guaranteed to refugees under international regime. Government of Nepal does not even have a proper record of the number of Tibetan refugees currently living in Nepal⁶. There has not been any program of action of the government in relation to welfare or management of Tibetans living in Nepal. Acknowledging the condition of Tibetan refugees in Nepal, the US government has offered a commitment to resettle Tibetan refugees from Nepal to the US.

The offer from the US to resettle Tibetan refugees was first proposed by former US President George W. Bush in 2005. The US has been keen to offer a hand to resettle Tibetan refugees and the offer of resettlement is still open (Giri, 2012). On December 2011, three members of the U.S. House of Representatives wrote a letter pushing for the implementation of a stalled Tibetan refugee resettlement programme to the US to which Nepal was yet to respond.⁷

Despite such concern of the US regarding the matter of Tibetan refugees, Nepal has not responded to a proposed resettlement program. In contrast, in the case of the Bhutanese refugees in Nepal, with assistance from UNHCR and International Organization for Migration (IOM)

⁶ Government’s official record relating to number of Tibetans in Nepal is outdated as it has not been updated since 1993.

⁷ In separate letters addressed to President Ram Baran Yadav and Prime Minister Baburam Bhattarai on December 9 2011, three US Congressmen James P Mc Govern, Frank R Wolf and Joseph R Pitts have requested Nepal "to work with the US government to implement a program that would allow the resettlement of the Tibetan refugees in the United States".

about 100,000 refugees have been resettled to third country since 2007. (*Republica* April 26, 2013).

The resettlement of Tibetan refugees to United States would require Nepal to lawfully recognize Tibetans as refugees which Nepal is not willing to accept. As emphasized (in interview with TJC) by Shree Kant Regmi, former Secretary of the MoHA, to “recognize” Tibetan refugees or extend them political asylum would implicitly validate the claim that China commits human rights violations in Tibet (TJC, 2002). Secondly, government officials are concerned about the possible flow of Tibetan new arrivals in case of third country settlement (interview 11.02.2013). Further, Nepal’s acknowledgement of Tibetans as ‘refugees’ would be an intolerable political statement in the view of Chinese government (TJC, 2002). The indifference of government of Nepal towards the resettlement program infers that Nepal is not in position to displease China by acknowledging any formal recognition of Tibetan as refugees.

5.1.4 Limited Role of UNHCR

The office of the UNHCR in Nepal is assisting Nepal since 1992 in matters concerning refugees. The UNHCR is involved primarily in the issue of Bhutanese refugees in Nepal and its scope concerning Tibetan refugees is very limited as demonstrated in its fact sheet. (UNHCR, 2012).

UNHCR facilitates the safe transit of Tibetan new arrivals (those arriving in Nepal after 1989) through Nepal to India and ensures that their protection and material needs are addressed while in Nepal. UNHCR continues to advocate with the authorities at all levels for the issuance of refugee documents for the group of long-staying Tibetans in Nepal (UNHCR, 2012). The mandate of UNHCR in matter of safe transit of Tibetans is drawn from the informal ‘Gentlemen’s Agreement’. This Agreement reflects a compromise resulting from pressure from international community to assist Tibetan refugees without defeating the commitment towards Chinese government. The agreement entitles mere safe passage of refugee to India, within two weeks of apprehension, provided they were apprehended within Nepalese territory (TJC, 2002).

The role of UNHCR has been limited in Nepal in matter concerning Tibetan Refugees. For instance UNHCR used to carry out border mission to ensure and instruct border police in compliance of ‘Gentlemen’s Agreement’. However, the mission have been discontinued since 1998/99 reason for which has been stated as, “other implications vis-à-vis the Chinese authorities” by former Foreign Minister Chakra Prasad Bastola. (TJC , 2002)

The role of UNHCR has more of less remained the same in the last decade. The TJC in its finding in 2002 stated that:

“Nepalese government will likely continue to comply with the gentleman’s agreement provided it;

1. remains low-profile,
2. does not interfere drastically with Nepal’s diplomatic relations with China,
3. does not promote an increase in the number of Tibetans illegally *remaining* in Nepal, and therefore
4. does not “threaten” the cultural and national integrity of Nepal, which the government perceives—correctly or not—to be in danger from illegal immigration”. (TJC, 2002: 110)

The role of UNHCR is strictly limited to this mandate and is accordingly very low profile. Hence, the limited role of UNHCR in context of Tibetan refugees can also be attributed to an extent towards Nepal-China relationship.

5.1.5 Treatment of Tibetan refugees involved in Peaceful Assembly

Freedom of expression is often associated with rights to assembly and movement. The reports from human rights institutions indicate that there is violation of freedom of peaceful assembly and freedom of movement in case of Tibetan refugees living in Nepal. Moreover, the force used by authorities upon Tibetan refugees is unnecessary and excessive. (HRW, 2008) Principally, even if any restriction is deemed lawful, the use of force from authority to enforce such restriction must be minimal. The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* gives authoritative guidelines in this concern which is overtly disregarded in the context of Tibetan refugees in Nepal. The use of force by authorities of Nepal seems to aim at inflicting deterrence among Tibetan refugees likely to participate in such activities.

Use of excessive force by government authorities to pacify Tibetan protests in Kathmandu indicates Nepal's intolerance towards Tibetan activities. The intent behind such government actions has been the preservation of friendly relations between Nepal and China. So it is evident that Nepal is committed towards restricting Tibetan activities to an unlawful extent, when examined under international human rights law framework. The kind of treatment Tibetan refugees' are subjected to during peaceful protest exercising freedom of expression in Nepal indicates that Nepal's commitment towards maintaining smooth relation with China outweighs its human rights commitments.

5.1.6. Increasing Restriction on Tibetans in Nepal

During interviews with Tibetan refugees in Kathmandu interviewees informed that restriction imposed on them is gradually accelerating in recent years (interview 17.01.2013). In recent years there has been significant increase in economic assistance from China to Nepal, as China has moved up to top five development partner of Nepal. (Saferworld, 2012) So, increased restriction on Tibetans living in Nepal is often seen as *quid pro quo* from Nepal towards its northern neighbor (ICT, 2011; Wong, 2013).

The restrictions on religious freedom and cultural activities of Tibetans by authorities in Nepal have also been reported in recent years (UNHRC, 2010; HRW, 2008; ICT, 2011). The increase in restrictions in matter concerning protest, assembly and carrying out religious ceremonies freely has been marked since 2008. The protest of Tibetan refugees in Nepal significantly increased in 2008 in response of Olympic torch relay and Beijing Olympics. Following increased protests, Nepal gradually imposed stricter restrictions on movement of Tibetan refugees in Tibet border areas and in March 2009, it declared the areas surrounding the Chinese Consulate in Kathmandu as restricted zone for Tibetan protest. Since 2008, Nepal police has been carrying out preemptive arrests of Tibetans whenever they suspect that Tibetans might protest. (ICT, 2011) Such arrests were made for instance during the birthday of Dalai Lama, uprising day, visits of Chinese envoy in Nepal etc (HRW, 2011, Aljazeera, 2013, ifex, 2013).

5.1.7 Other Instances

Other than those mentioned above, there are grounds to argue for interplay of commitment of Nepal towards Chinese government and its treatment of Tibetan refugees. As an instance, a former secretary of MoHA in an interview with TJC stated that,

“It is the established policy of the [Nepalese] government that Tibet is the integral part of China, and [China] is our good neighbor. We have very good neighboring relations with China. We don’t think there are human rights violations [in Tibet]....If we allow asylum to Tibetan refugees, that is another way to say that [the Chinese government] is violating human rights in Tibet; and I say that there [are] no human rights violations in Tibet. (TJC, 2002)

This explains why Nepal does not recognize *de jure* refugee status of Tibetan refugees and has been denying asylum to Tibetan new arrivals.

The institutions working for Tibetans in Nepal have also been targeted by government of Nepal. For instance in January 2005, Nepal’s then King Gyanendra, closed the Office of the Representative of the Dalai Lama in Katmandu which was in existence since 1960s (HRW, 2008) Similarly, In 2007, the Supreme Court took the step of de-registering the Bhota Welfare Office, a local NGO set up to provide community and humanitarian services to Tibetan refugees in Nepal (HRW, 2008) At the court hearing, the Chinese Embassy in Nepal voiced its opposition to the registration accusing the organisation of being an operation of the “Dalai clique.”(Harvey, 2008)

The cases above add to the conclusion that Nepal has placed its commitment towards China above its human rights commitment. Nepal has violated human rights obligations in matter concerning Tibetan refugees in Nepal in an attempt to express its loyalty towards the one-China policy. Furthermore, no significant changes in the situation of Tibetan refugees in Nepal can be expected without green light from Chinese counterpart in relation to their legal status, resettlement and international involvement in the matter. As the existence of influence from China has been derived from the above discussion this leads to the question of why Nepal is upholding the interest of China even when it is not in line with its human rights obligation.

5.2. Nepal's Foreign Policy Commitment towards China as Nepal's National Interest

As argued by a 'realist' perspective the States are motivated by national interests, thus restrictions on Tibetan refugees in Nepal are grounded on the firm belief that is in Nepal's national interest to do so. Nepal has benefited in various sectors of development with co-operation from China and hopes for its continuity (Saferworld, 2012; ICT, 2011). Nepal seeks to maintain friendly relationship with its northern neighbour China and as allegiance towards Chinese concern in Nepal rights of Tibetan refugees are restricted as China does not want Tibetans being politically active in Nepal (BBC News, January 27, 2010). Hence, Nepal's imposition of restriction on freedom of expression of Tibetan refugees living in Nepal is rooted in its underlying interest to please China.

The previous discussion has shown that Nepal has been influenced by China in matters concerning Tibetan refugees. Nepal is constantly undermining its human rights obligations by imposing restrictions on freedom of expression on Tibetan refugees living in its territory. The underlying intent of Nepal in the matter can be understood upon closer analysis of Nepalese perspective of Nepal-China relationship. As stated before, the underlying belief of Nepalese foreign policy has been balancing its national interest without offending its neighbouring countries (Pradhan 2003). Nepal's former Ambassador and foreign policy analyst Mohan Lohani (2011) argues that Nepal is located in a crucial geo-strategic region and should remain sensitive to the national interests of both India and China in politics, economy and security without in any way compromising Nepal's sovereign political space.

The Political activities of Tibetan refugees being one of the important concern, former Minister and eminent economist Dr. Prakash Chandra Lohani emphasizes that interest of northern neighbor in matters concerning Tibetans must be taken seriously by the government in Nepal (Lohani P C 2011), In the same line Simkhada (2011) argues that it is in the best interest of Nepal to nurture relation of confidence with China so as to benefit from its economic growth. He further cites Prof. Yadu Nath Khanal, a respected Nepali diplomat scholar stating that, "our foreign policy will breakdown at the point where either India or China loses faith in us and concludes that her vital national interests and sensitivities do not receive proper recognition in

our conduct of relations” to emphasize the importance of foreign policy of Nepal in relation to surrounding neighbours. Further, foreign policy analyst Mohan Lohani argues that, it is in national interest of Nepal to become sensitive to the security concerns of its big neighbors and take appropriate measures to prevent and curb all kinds of hostile operations against them (Lohani M.,2011).

In the light of a foreign policy perspective of Nepal, it is not hard to understand why Nepal has opted to restrict expression of Tibetans under the generic ban on ‘anti-Chinese Activity’. This discussion indicates that Nepal has both ‘expectations of benefits’ and ‘fear of disadvantage’ from the northern neighbour China. Hence, Nepal undermining its obligation arising from human rights has inclined towards its foreign policy prescription.

The unlawful restriction on freedom of expression of Tibetan refugees reflects a typical case where the State has sidelined its human rights obligation in to uphold its foreign policy commitments. There are other instances where States have resorted to curtailment of rights of refugees based on its political gain and preferences (Mandal, 2003). For instance, in India Tibetan refugees are only allowed on the condition that they abstain from political protests against China. An article entitled ‘*Tibetan Refugees' Rights and Services in India*’ by Claudia Artiles infers Indian government’s restriction on political expression of Tibetan refugees was during the 1991 visit of the then Chinese Prime Minister Li Peng. During which Tibetan refugee leaders were arrested and placed under police surveillance to curtail protests. A similar occurrence was also witnessed during Prime Minister Wen Jiabao’s 2010 visit. There are similar restrictions on political expression of refugees in Algeria, Cuba, Tanzania, Cambodia, Burma and other countries which are discussed in series of reports by Article19.

States are entitled to restrict freedom of expression under certain circumstances but the state practice indicates that States are imposing blanket restriction on expression of refugees. As argued by Mandel (2003) often the aim of such restriction appears to be the preservation of good relations with the country of origin of refugees. Hathaway (2005) also argues that states response to political activities including political expression depends on the host states inclination and political preferences. Similarly, restriction of freedom of expression in refugees Convention

under OAU signifies the emphasis given to relations between states than to basic rights guaranteed under human rights law.

The State practice of restricting rights of refugees in different countries illustrates that States with an objective of promoting its national interest are involved in unlawfully restricting the rights of refugees. The study focuses on restriction on freedom of Tibetan refugees in Nepal; however the treatment of refugees by of host states in line with its national interest can be relevant in broader context. Despite this being in conflict with human rights obligations States practice unlawful restriction on rights of refugees as it suits them.

CHAPTER 6

6. CONCLUSION AND RECOMMENDATIONS

The freedom of expression is a basic human rights right with universal implication. The right to freedom of expression shall offer the same entitlement to refugees as it does to citizens of this host country. Despite the absence of specific legal text in the refugee convention, right to freedom of expression of refugees is guaranteed under Article 19 of ICCPR. As State party to ICCPR, Nepal has obligation to protect and promote freedom of expression of Tibetan Refugees living in Nepal.

The restriction on freedom of expression imposed by the government of Nepal on ‘anti-Chinese activities’ is not in line with Nepal’s obligation under human rights law. The restriction on freedom of expression of Tibetan refugee’s amounts to violation of freedom of expression as it does not pass the lawfulness test prescribed under Article 19(3) of ICCPR. The restriction imposed on freedom of expression activities deemed ‘anti-Chinese’ and ‘harmful in Nepal-China Friendly relation’ does not adhere to principles of predictability and transparency, principle of legitimacy and principles of necessity and proportionality. The claim of legality of restriction by the government being based on foreign policy commitment does not stand as such restriction is in conflict with human rights obligations.

Furthermore, Nepal is under influence of its northern neighbour China in matters concerning Tibetan refugees including right to freedom of expression. The study indicates Nepal’s foreign policy commitment towards China is embedded as national interest of Nepal which does not seem to change any time soon. Hence, the fate of Tibetans living in Nepal is irreversibly entangled with Nepal-China relationship unless Nepal stands up to its human rights commitments.

In the current context, the possibility of *de jure* recognition of Tibetans Refugee is very slim. The government is clear in its instance relating to non allowance of any ‘anti-Chinese activity’ within territory of Nepal. However, Nepal’s inherent interest from China should in no way be deemed as justifiable ground for violating basic right to freedom of Tibetan Refugees. On the basis of

the study following recommendations are made in matter concerning freedom of expression of Tibetan refugees living in Nepal.

- i. Nepal should define what are ‘anti Chinese activities’, this would mark the restriction regime on freedom of expression and avoid imposition of blanket restriction. If Nepal seeks to restrict the freedom of expression it should be done in accordance to established principles within international law.
- ii. Nepal should adopt legislation relating to refugees and prescribe the rights and duties of refugees with the territory.
- iii. Nepal should respect its obligation under human rights Convention and should avoid influences in its domestic matters.
- iv. Nepal should seek long term and durable solution for Tibetans living in Nepal.
- v. Nepal should respect Tibetans’ rights freely and peacefully to express their political views and to celebrate cultural and religious ceremonies.

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Annex I

Map of Nepal's Geographic Location. (Source: www.artsmia.org)



Annex II

Interview Guide

Core interview questions for Tibetan refugee:

- i) Do you perceive/had faced threat from public officials aiming at restricting on day-to-day life?
- ii) Is restriction general in nature or imposed during particular day or during some event?
- iii) Do you feel free to talk about Tibetan issue? Celebrate your cultural practices?
- iv) Have you been part of any form of protest activity on Tibetan issue?
 - i) What were you protesting for/or advocating for?
 - ii) Were you subjected to arrest upon your protest? What was the reason for your arrest if you were provided any?
 - iii) When and how were you released once you were arrested?
 - iv) Which area were you protesting on? Do you know if it was a 'prohibited area'?
 - v) Can you provide some information about nature of protest, approximate number of participants, and treatment towards protestor?
 - vi) Why do you think Nepal is restricting rights of expression of Tibetan refugees?

Core Interview Questions for Legal Professionals

- i) What are the underlying laws relating to Refugees in Nepal?
- ii) Does government of Nepal have any particular policy or guidelines relating to treatment of any particular group of Refugees?
- iii) Is there any particular difference in context of restriction of Freedom of expression in citizen of Nepal and a refugee within jurisdiction of Nepal?
- iv) Are such restrictions general in nature or particular to some circumstances or situation?
- v) What are the rationales of such restriction?

Core Interview Questions for Governmental Officials

- i) Is there any restriction on freedom of expression of Tibetan refugees in Nepal?
- ii) What is the nature of such restriction?

- iii) What is the rational of such restriction?
- iv) On what basis the restrictions are imposed as Nepal has undertaken human rights obligation under ICCPR to protect and promote freedom of everyone within its territory?
- v) Is there any influence from Chinese counterpart in the issue relating to Tibetans?

Annex III

Letter from the University of Tromsø for interview.

UNIVERSITY OF TROMSØ UiT

FACULTY OF HUMANITIES, SOCIAL SCIENCES AND EDUCATION
DEPARTMENT OF ARCHAEOLOGY AND SOCIAL ANTHROPOLOGY

December 13, 2012

To Whom It May Concern

Re: Request for assistance

I am writing to you to inform you that **Mr. Barun Ghimire** is currently pursuing a masters' degree in Human Rights Practice under Joint Masters Program administered by Roehampton University (United Kingdom), Goteborg University (Sweden) and University of Tromsø (Norway).

As part of academic requirement, Mr. Ghimire is expected to produce a dissertation based on his own research. His research project has been accepted for research related with the *Freedom of expression of Tibetan Refugee living in Nepal*. Mr. Ghimire is currently in Nepal for the purpose of data collection for his dissertation.

On behalf of the Human Rights Practice program, I request your individual/ institutional cooperation in the research undertakings of Mr. Ghimire. Your cooperation will be highly valued by our programme consortium.

I thank you for your positive consideration.

Sincerely,



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