

About 3,000 Tibetans flee Tibet through Nepal annually, and approximately 20,000 reside in settlements scattered throughout Nepal. **Tibet's Stateless Nationals: Tibetan Refugees in Nepal** appraises the current status and circumstances of Tibetan refugees in Nepal. Tibetans residing in Nepal and their descendants live in legal limbo; they are not recognized as refugees or given any definable legal status. Their future is increasingly insecure in a country that reluctantly acknowledges, but refuses to accept, their presence. They and their children, born in Nepal and entitled under international law to acquire a nationality, remain stateless. Newly arriving refugees face increased harassment and risks of being returned to Tibet. By providing detailed information on these topics, Tibet Justice Center hopes to clarify the circumstances for Tibetan refugees in Nepal and to suggest politically feasible means to improve them. The circumstances highlighted by this report reveal a pressing need for governments, UNHCR, and the international community to reexamine the current informal arrangement regarding the status and treatment of Tibetan refugees in host countries, and to work to provide them with a more durable solution.

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Cover photo: Three children begin the long journey to the Tibet-Nepal border.  
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# Tibet's Stateless Nationals: Tibetan Refugees in Nepal

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Tibet Justice Center advocates self-determination for the Tibetan people. Through legal action and education, Tibet Justice Center promotes human rights, environmental protection and peaceful resolution of the situation in Tibet. A non-profit membership group, Tibet Justice Center is supported by attorneys, other concerned individuals and organizations. For further information and copies of this report, please contact our office:

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## Executive Summary

This report appraises the current status and circumstances of Tibetan refugees in Nepal.<sup>1</sup> It focuses on two groups: (1) those who arrived in or before 1989, when Nepal ceased to permit newly arriving Tibetans to remain in Nepal; and (2) those who arrived, and continue to arrive, after 1989. The former group enjoys an unwritten right to remain in Nepal, but little else. They and their children live in an uneasy state of subsistence characterized by limited political and economic rights and an undefined legal status. The latter group cannot remain in Nepal; technically, Nepalese law deems them to be illegal aliens, and they may be deported. Because of an informal arrangement or “gentleman’s agreement” between the U.N. High Commissioner for Refugees (UNHCR) and the Nepalese government, however, these refugees should be able to transit safely *through* Nepal and seek refuge and assistance from the Tibetan government-in-exile in India. But the operation of this informal arrangement appears to be breaking down in practice.

By providing detailed information on these topics, Tibet Justice Center hopes to clarify the circumstances for Tibetan refugees in Nepal and to suggest politically feasible means to improve them. While Tibet Justice Center’s research did not focus expressly on the situation in India, all available reports indicate that the circumstances for Tibetan refugees in India are similar in relevant respects. Above all, then, this report underscores the urgent need for a more durable solution to the problem of statelessness that confronts Tibetan refugees. Tibet Justice Center also documented the conditions for Tibetan refugees in Nepal to resolve a discrete legal hurdle that Tibetan asylum seekers in the United States often face: whether they have been “firmly resettled” in Nepal, which means that prior

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<sup>1</sup> For the purposes of this report, “Tibetan refugee” generally means a Tibetan residing in Nepal without Nepalese citizenship or transiting through Nepal without documentation.

to their arrival, they received “an offer of permanent resident status, citizenship, or some other type of permanent resettlement.”<sup>2</sup> Under the law of the United States, firm resettlement is a mandatory bar to asylum; and under the laws of certain other states in which Tibetans seek refuge, comparable third-country resettlement or legal status also precludes a grant of asylum. This report establishes that Nepal does not offer firm resettlement to Tibetan asylum seekers.

Above all, the circumstances highlighted by this report reveal a pressing need for governments, UNHCR, and the international community to reexamine the current informal arrangement regarding the status and treatment of Tibetan refugees in host countries, and to work to provide them with a more durable solution. For both pre- and post-1989 arrivals, the alternative of third-country resettlement should be explored seriously. Under its mandate to prevent and reduce statelessness, UNHCR can and should play a greater role in addressing the long-term problem of statelessness faced by Tibetan refugees. For as long as China occupies Tibet and commits human rights abuses against the Tibetan people, refugees will continue to flee persecution by the thousands annually; and the more than 20,000 Tibetans residing in Nepal (and more than 100,000 residing in India), as well as their growing number of children, will have no viable alternative to the insecure state of subsistence in which they currently live. While Tibetans aspire to return to a free Tibet, the reality is that most have become, and remain, stateless—Tibetan nationals in a world that acknowledges neither the existence of their nation nor their right under international law to seek a more secure legal status.

A summary of the report’s principal findings follows:

## **The Status of Tibetans Residing In Nepal**

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*Legal Status and Access to Citizenship.* Tibetans residing in Nepal have no defined legal status. They lack meaningful access to naturaliza-

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<sup>2</sup> 8 C.F.R. § 208.15 (2002); *see also* 8 U.S.C. § 1158(b)(2)(A)(vi) (1994 & Supp. 2001).

tion, and Nepalese law does not recognize the rights of refugees under the principal treaties that govern their status under international law. Provided they have a Nepalese “refugee identity certificate” (RC), Tibetans who arrived before 1989 can remain in Nepal with certain limited rights. Most live in a uneasy state of subsistence, principally in a small number of isolated settlements in the Kathmandu valley and Pokhara. Tibetan refugees do not enjoy the rights guaranteed to Nepalese citizens. The law in theory permits naturalization under certain limited circumstances, but in practice the government does not view citizenship as a viable option for Tibetans—even though most have resided in Nepal for decades or were born and raised there. Tibetans residing in Nepal are essentially stateless. They are neither citizens nor refugees under the law, and they possess neither the legal status nor the rights with which to improve their welfare.

*Identity Cards.* In theory, Tibetans residing legally in Nepal as a result of their arrival before 1989, and their children, should be issued RCs. Possession of an RC provides the bearer with proof of his or her right to remain in Nepal, a limited ability to travel within the country, and a modicum of security against harassment. But many legally resident Tibetans lack RCs. The Nepalese government issued RCs to Tibetans residing in the settlements in 1995 and, on a smaller scale, in 1999. But the issuance of RCs remains incomplete and has left many Tibetans, particularly those residing outside of the settlements, without one. The government also has not distributed RCs to many young adults who have reached the age of 18, at which time they are entitled to an RC. RCs also must be renewed annually. This can be a burdensome and often inefficient process, and it leaves many resident Tibetans—for example, those not present at the settlements on the date on which they are renewed in a given year—temporarily without proof of their right to remain in Nepal. Without RCs, Tibetans also cannot exercise the limited rights they possess; for example, to apply for a refugee travel document, to purchase a motorbike, to

work in certain fields, or to apply for a driver's license. Children without RCs may find themselves excluded from Nepalese primary schools and higher education. Tibetans without RCs also at times suffer official harassment and in some cases threats of deportation.

*Freedom of Movement.* Legally resident Tibetans cannot travel to certain "restricted" regions of Nepal, typically those near the border with China. Seldom can they travel internationally. Those who travel to restricted areas without an RC risk arrest and even deportation. To travel internationally, Tibetan residents must apply for a refugee travel document, a complex, expensive, and frequently inefficient procedure that makes foreign travel prohibitive for most. Furthermore, most countries do not in any event recognize or issue visas to the bearers of such documents. Recent political pressure from China also appears to have caused Nepal's Ministry of Foreign Affairs to tighten its control over the domestic and international travel of legally resident Tibetans, whom China perceives to be dissidents or "splittists." For some Tibetans, purchasing forged documents is the only viable way to travel abroad. At the same time, the United States, for example, one of the nations that does recognize Nepalese refugee travel documents, sometimes considers their *possession* as conclusive evidence of firm resettlement, a mandatory bar to asylum in the United States. Because few Tibetan asylum seekers can escape from Nepal to a country in which they have a right to seek asylum without acquiring documentation that permits them to exit Nepal, this contributes to serious confusion about the true legal rights and status of Tibetan refugees.

*Property and Employment Rights.* Tibetan residents have no right to own property or businesses. Legal and social discrimination severely curtail their ability to secure employment. Tibetans cannot own houses, cars, land, or other real property. The Nepal Red Cross owns the vast majority of the settlement lands, which it holds in trust for their use. As the Tibetan community in Nepal grows, however, settlement residents find themselves crowded together in homes built years earli-

er, intended for one to four residents but now often housing as many as twelve. Settlement residents must share existing space because they have no right to expand the settlements or to purchase new lands on which to construct additional housing. Because they cannot own or incorporate a business, Tibetan entrepreneurs usually must hire Nepalese citizens to act as nominal owners of their businesses or attempt to secure citizenship by purchasing forged citizenship papers on the black market. Most Tibetan residents struggle to subsist. They support themselves by selling souvenirs, operating small restaurants, engaging in minor trade or industry, and some subsistence agriculture.

*Freedom of Expression.* Nepal permits Tibetans religious freedom for the most part. But the authorities have in recent years increasingly



During the March 10th commemoration in Kathmandu in 2002, no major confrontations took place until after public events concluded when a group of young Tibetans wearing "Free Tibet" banners on their foreheads and carrying Tibetan flags managed to evade Nepalese police and travel to Thamel to demonstrate and shout slogans. The demonstrators were apprehended while marching toward the Chinese Embassy and beaten by Nepalese police. Several of the demonstrators sustained bruises and other injuries.

restricted the right of Tibetans to hold cultural events or to stage peaceful political demonstrations. Public displays of Tibetan cultural and religious activities are sometimes deemed to be “anti-Chinese,” and Nepal faces heightened political pressure from China to restrict such activities. Tibetans therefore cannot organize peaceful political demonstrations in public places or freely celebrate Tibetan national holidays. On several recent occasions, the annual commemoration of the March 10th Lhasa Uprising has erupted into violence after Nepalese police resorted to force to prevent Tibetans from demonstrating outside their local communities. The Nepalese government does not formally recognize the Tibetan government-in-exile or its representative in Kathmandu. But the authorities often tacitly request the assistance of the Tibetan Welfare Office to prevent Tibetans from engaging in activities that may be perceived by China as political and thus a threat to Nepal’s diplomatic relationship with China.

*The Relationship Between the Tibetan and Nepalese Peoples.* With the exception of some Tibeto-Burmese ethnic groups residing in the northern regions of Nepal, with whom Tibetans share cultural and religious affinities, Tibetans remain largely alienated from Nepalese society. While most have spent the majority of their lives in Nepal, in the main they reside in isolated settlements or segregated neighborhoods on the outskirts of Kathmandu. Their children generally attend separate schools. Economic and political instability in Nepal, and the continuing Maoist insurgency, also have generated some resentment among Nepalese citizens toward the Tibetan community in Nepal, particularly toward the few Tibetans who have achieved financial success (often by virtue of their involvement in the once-thriving carpet industry). Disaffected political groups sometimes scapegoat Tibetans, blaming them for the socioeconomic and political problems Nepal faces. At times, this resentment manifests itself in dangerous ways. In recent years Tibetans residents have been the victims of burglaries and ethnically motivated violence.

## **The Gentleman’s Agreement: Transit of Tibetan Refugees Through Nepal**

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*The Terms of the Gentleman’s Agreement.* In recent years, between 2500 and more than 3000 Tibetans have escaped from Tibet via Nepal annually. In 1989, Nepal ceased to permit newly arriving Tibetans to remain or seek refuge in Nepal. By informal arrangement with the Office of the U.N. High Commissioner for Refugees (UNHCR), however, Nepal has acceded to an agreement whereby it facilitates the transit of new arrivals through Nepal, typically to Tibetan exile communities in India. This should operate as follows: Newly arriving Tibetans apprehended at the Sino-Nepalese border by Nepalese authorities will be denied entry to Nepal. Those apprehended within Nepal, however, will be turned over to the Nepalese Department of Immigration, which ordinarily then transfers them to UNHCR’s custody. UNHCR cooperates with the Tibetan Welfare Office to make a preliminary determination that these Tibetans are “of concern to the High Commissioner,” a broad, non-specific designation used by UNHCR to refer generally to asylum seekers, refugees, internally displaced persons, and others. UNHCR does not conduct refugee status determinations for Tibetans. Newly arriving Tibetans remain temporarily at the Kathmandu Tibetan Refugee Reception Centre, which provides them with food, shelter, and medical attention. By tacit agreement, they generally must depart for India within two weeks. After UNHCR processes new arrivals and determines them to be “of concern,” it ordinarily recommends to the Department of Immigration that they be issued an “exit permit,” which solely provides Tibetans with the right to travel from the Reception Centre to the Indo-Nepalese border. It provides no right of reentry, legal status, or protection of any kind. Indian border authorities typically take these permits, together with a small “fee,” when Tibetan refugees cross into India.



*Operation of the Gentleman's Agreement in Practice.* The “terms” of the gentleman's agreement are rarely followed. In practice, most Tibetans arrive at the Reception Centre in Kathmandu independently, usually by one of two routes: via the Friendship Highway, which extends from Lhasa to Kathmandu, or via the Nangpa-la pass in the Solu Khumbu region of the Himalayas in northern Nepal. Tibetans often employ freelance guides to assist them in journeying safely to Kathmandu. Both the Friendship Highway and Nangpa-la routes are fraught with danger, including natural perils such as a lack of adequate food and shelter, particularly in the winter months, and the risk of apprehension by Chinese or Nepalese authorities. Contrary to the gentleman's agreement, Nepalese police increasingly appear to be forcing Tibetans apprehended within several days walking distance of the border to return to Tibet, often at great risk to their lives and safety. China treats these Tibetans as political dissidents. Reports of detention, torture, and other maltreatment by Chinese authorities are commonplace. Even without reference to the gentleman's agreement, the act of returning refugees to a state where their lives or freedom may be threatened violates the bedrock principle of international refugee law prohibiting *refoulement*.

*The “Parties” to the Gentleman's Agreement.* The gentleman's agreement requires the active cooperation of UNHCR, the Nepalese government, the Tibetan government-in-exile, and the United States Embassy in Kathmandu. UNHCR plays several vital roles. It provides a modicum of legitimacy that the Nepalese government deems crucial to its cooperation in implementing the agreement. UNHCR channels funds received from donor governments, particularly the United States, to support the day-to-day operation of the agreement. And until recently, it conducted missions to the border regions of Nepal in order to inform the Nepalese police of the terms of the agreement and international human rights law, and to monitor compliance. For reasons that remain somewhat unclear, the Nepalese government ceased to permit these missions as early as 1998, and

Tibet Justice Center's research suggests that the consequences have included: an increase in instances of *refoulement* and other abuses, and an increasing lack of knowledge on the part of the police about their obligations under the agreement. The government of Nepal has acceded to the gentleman's agreement for two principal reasons: It requires UNHCR's assistance with its Bhutanese refugee crisis, and cooperation in the gentleman's agreement appears to be something of a *quid pro quo* for that assistance. It also remains under pressure from the United States, the European Union, and other foreign-aid donors to assist Tibetan refugees in need. Countervailing pressure from the Chinese government to repatriate Tibetans and tighten border control, however, has led to increasing incidents of non-compliance. The Tibetan government-in-exile, operating through the Tibetan Welfare Office in Kathmandu performs most of the practical work required to maintain the gentleman's agreement, including providing food, shelter, and medical care to new arrivals, assisting in their processing, cooperating with UNHCR to ensure that Tibetans reach the Reception Centre, and arranging for their departure to India. While the Nepalese government does not officially recognize the Tibetan Welfare Office because this would be perceived by China as an intolerable political statement, it relies on the assistance of the Tibetan Welfare Office to implement the gentleman's agreement. The United States Embassy in Kathmandu, finally, cooperates with UNHCR and the Nepalese government to ensure compliance with the gentleman's agreement. It participates in meetings with the Ministry of Home Affairs and works actively to advance the interest of the United States in ensuring the safe transit of Tibetan refugees through Nepal. The United States also provides much of the funding, channeled through UNHCR and the Tibetan Welfare Office, that supports the operation of the gentleman's agreement.

*Allegations of Abuse and Refoulement by Nepalese Police.* The gentleman's agreement cannot operate effectively unless the Nepalese police understand and comply with it. Tibet Justice Center's research sug-



In November 2000, this woman, one of twenty-two Tibetan refugees apprehended and detained by the Nepalese police at the town of Jiri following their escape from Tibet, was shot in the leg by the police when the refugees sought to escape fearing that they would be repatriated by the police. At the time of Tibet Justice Center's research, she was still recovering from her injuries.

days. Because Nepalese police face dangers from the Maoist insurgency, and because, according to Tibet Justice Center's interviews, they have not been receiving the stipends to which they are entitled for their cooperation, the police are reluctant to accompany Tibetans to the Kathmandu Reception Centre as required by the agreement. In some cases police reportedly resort to theft or extortion of money from new arrivals to supplement their salaries. In rarer instances there have been reported incidents of more severe abuses, including detentions, shootings, and rape. Resumption of UNHCR's border missions and greater efforts by the government to educate the police about the gentleman's agreement are vital steps to prevent such abuses in the future.

gests that because UNHCR no longer carries out border missions, and because pressure from China appears to have caused the Nepalese government to cease to comply conscientiously with the gentleman's agreement, Tibetans arriving in Nepal increasingly face dangers of *refoulement* and, at times, police abuses. The police in Solu Khumbu reported receiving a directive from the Ministry of Home Affairs in Kathmandu instructing them to return apprehended Tibetans to the border, in violation of the fundamental principle of *non-refoulement*. In practice, this appears to have translated into a trend whereby the police will "encourage" Tibetans to return to China—at times, at gunpoint—and follow them back toward the border for several hours or even

## The "Firm Resettlement" Bar to Asylum Under U.S. Law

Declassified documents from the U.S. Department of State make clear that the State Department, the Immigration and Naturalization Service (INS), and the U.S. Embassy in Kathmandu are misinformed in certain respects about the circumstances for Tibetan refugees in Nepal. As a consequence, the INS at times deems Tibetan asylum seekers, both those who arrived before 1989 and those transiting through Nepal incident to their flight from Tibet, to be "firmly resettled" in Nepal. In fact, Tibet Justice Center's research establishes that as a matter of law, few, if any, Tibetan asylum seekers can acquire firm resettlement in Nepal. This mandatory bar to asylum should seldom preclude consideration of Tibetan asylum applications on the merits. Because virtually all Tibetans fleeing persecution must travel through Nepal and India, where conditions are reportedly similar, *en route* to a country in which they have a right to seek refuge, clarification of the conditions for Tibetan refugees in Nepal and India would facilitate the proper assessment of Tibetan asylum applications.

This report concludes by noting that while the "gentleman's agreement" provides a minimal arrangement that facilitates the ability of some Tibetans to escape persecution, and while the settlements in Nepal provide Tibetan residents with a temporary subsistence existence, in the long term, governments, UNHCR, and the international community must begin to take steps to establish a more durable solution to the fundamental problem underscored by this report: Tibetan refugees remain in legal limbo, one of the largest communities of stateless persons in the world. The report presents a series of recommendations for beginning to address the problems highlighted in a constructive and politically feasible way. In particular, Tibet Justice Center recommends that third-country resettlement, which already has been undertaken successfully on a small scale in Switzerland, Canada, and the United States, be given serious

consideration. This resolution would be in the interest of Nepal, which fears that the growth of its Tibetan community is beginning to threaten the integrity of the Nepalese cultural identity. It also would provide Tibetans, currently suspended in a legal limbo that affords them neither citizenship nor refugee status, to begin to establish a more stable existence and to build a more secure future for themselves and their children.

## Recommendations

### To the Nepalese Government:

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The Nepalese government should be acknowledged and commended for its reception and accommodation of Tibetan refugees over the years. The government can and should take additional steps to protect Tibetan refugees in Nepal, particularly as the situation of Tibetan residents becomes increasingly precarious and incidents of *refoulement* and ill-treatment of Tibetans transiting through the border regions continue.

#### Generally:

- Ratify the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (Refugee Conventions). Adopt implementing legislation immediately after ratification.
- Enact legislation to establish a formal process for refugees to seek asylum. Define and guarantee the rights and status of refugees and asylum seekers by law in accordance with internationally recognized human rights standards.
- Cooperate fully with the Office of the United Nations High Commissioner for Refugees (UNHCR) to facilitate its mandate to protect refugees, asylum seekers, and stateless persons. In particular, ensure that the Ministry of Home Affairs and the Department of Immigration consult regularly with the UNHCR Country Representative for Nepal to establish and maintain a strong and effective working relationship.

### **Regarding Tibetan Residents of Nepal:**

- Immediately provide all eligible Tibetans, those who arrived in or before 1989 and their children, with refugee identification certificates (RCs).
- Implement Nepal's obligation under the CRC to provide children with the means to acquire a nationality.
- To reduce unnecessary administrative burdens on the Ministry of Home Affairs and on Tibetan residents, extend the term of validity of RCs significantly beyond the current term of one year.
- Repeal the present restrictions on the rights of Tibetan residents to own property, work, establish and incorporate businesses, and travel freely.
- Permit the Tibetan settlements to purchase and develop more land for their populations.
- Establish a fluid and less burdensome procedure to enable long-term Tibetan residents eventually to acquire Nepalese citizenship.
- Respect Tibetans' rights freely and peacefully to express their political views and to celebrate cultural and religious holidays. Ensure that police protect these rights and do not instigate violence against Tibetans conducting peaceful celebrations.

### **Regarding Tibetans in Transit through Nepal:**

- Immediately cease the practice of *refoulement* of Tibetan asylum seekers. Repeal the order issued by the Ministry of Home Affairs instructing immigration and border police to return undocumented Tibetans, found at or within several days walking distance of the

border, to China. All Tibetans entering Nepal from Tibet without documentation should be presumed to be asylum seekers and, until their status has been determined, afforded the protection due to refugees under international law. At a minimum, all Tibetans should be ensured safe passage to the Tibetan Refugee Reception Centre in Kathmandu for an assessment by UNHCR.

- Swiftly investigate reports of *refoulement* and take disciplinary measures, which may include prosecution, against perpetrators.
- Permit UNHCR to resume sending staff to border regions in order to educate immigration and police officers about the terms of the gentleman's agreement and international human rights standards.
- Inform all border police of the terms of the gentleman's agreement. Ensure that when patrol rotations occur, new officers understand their obligations under the gentleman's agreement.
- Seek to provide immigration and police officers stationed in the border regions with communication equipment, either telephones or radios, to enable them to maintain contact with the Ministry of Home Affairs, the Department of Immigration, and UNHCR staff.
- Instruct border police that if they cannot accompany Tibetan refugees to the Tibetan Refugee Reception Centre in Kathmandu, the refugees should be permitted to make their way to Kathmandu independently and without delay. Tibetans seeking to reach the Reception Centre should not be detained for lack of police accompaniment.
- Because the absence of interpreters often makes it difficult for border police to carry out their obligations under the gentleman's agreement, provide border police with a letter in Tibetan explain-

ing the gentlemen's agreement and clarifying the police's obligations to assist them.

- Permit local Nepalese citizens in the border regions to assist Tibetan refugees in need of food, shelter, medical attention, or other assistance, without interference by the police.
- For Tibetans seeking voluntarily to return to Tibet through Nepal, work with UNHCR to establish a procedure for their safe and orderly repatriation, without the risk of fines or imprisonment by Nepalese authorities.
- Release all Tibetans currently imprisoned for attempting voluntarily to return to Tibet through Nepal.

### **To the Office of the United Nations High Commissioner for Refugees in Nepal (UNHCR):**

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The Office of the United Nations High Commissioner for Refugees in Nepal should be acknowledged and commended for its efforts to establish and implement creative solutions to issues concerning Tibetan refugees in Nepal. Still, there is more that UNHCR should be doing pursuant to its mandate to protect both Tibetan refugees in transit through, and those residing in, Nepal—and to seek a durable solution to their plight.

#### **Generally:**

- Urge the Nepalese government to ratify the Refugee Conventions, the 1954 Convention Relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness, and immediately to adopt relevant implementing legislation.

- Implement UNHCR's mandate to prevent statelessness for Tibetan refugees.
- Provide technical assistance and advice to the Nepalese government in drafting domestic legislation intended to ensure refugee protection and to avoid and reduce statelessness.
- Provide greater authority and support to a local, Nepalese-speaking UNHCR staff officer responsible for Tibetan refugees. The officer should be provided with a designated vehicle and driver to enable UNHCR staff to respond promptly to reports of detention or other endangerment of Tibetan refugees in the border regions of Nepal.
- Actively work with foreign governments to promote and facilitate the third-country resettlement of Tibetan refugees—as an instrument of refugee protection, a means to reduce the threat of statelessness, and a feasible and durable solution to the plight of Tibetan refugees.

#### **Regarding Tibetan Residents of Nepal:**

- Assist the Nepalese government to formalize a procedure for the issuance of fraud-proof RCs and travel documents for all resident Tibetans.
- Urge the Nepalese government to permit the Tibetan settlements to purchase and develop more land for their populations, and to repeal existing restrictions on the rights of Tibetan residents to own property, work, establish and incorporate businesses, and travel freely.

#### **Regarding Tibetans in Transit through Nepal:**

- Encourage and provide assistance to the Nepalese government to create an information sheet for distribution to all border police and

immigration patrols explaining their obligations under the gentleman's agreement. In addition, all such officers should receive a letter in Tibetan for the purpose of communicating to newly arriving Tibetan refugees the terms of the gentlemen's agreement and the obligations of the police to assist them.

- Work with the Nepalese government to establish a series of low-profile workshops for UNHCR, the Ministry of Home Affairs, the Department of Immigration, and representatives of concerned governments to agree upon arrangements to ensure the smooth functioning of the gentleman's agreement.
- Provide earmarked funds for the Department of Immigration to compensate Nepalese police who comply with their obligation to accompany newly arriving refugees to the Tibetan Refugee Reception Centre in Kathmandu. Monitor the disbursal of these funds strictly.
- Work with the Nepalese government to ensure that, for police unwilling or unable to accompany Tibetan refugees, a policy is implemented whereby officers who provide bus fare, directions, and food to newly arriving Tibetans sufficient to allow them to journey safely to the Reception Centre are reimbursed and compensated upon proof of their compliance.
- Renew and emphasize UNHCR's request to the Nepalese government to permit its staff, and qualified non-governmental organizations willing to lend assistance, to resume border missions to educate the border police in the terms of the gentleman's agreement and relevant international human rights standards. Take steps to reassure the Nepalese government that such missions will be carried out in a low-profile manner that will not interfere with its diplomatic relationship with China.

- Increase funding to the Reception Centre during the winter months, when its needs become particularly great.
- Issue documentation to all Tibetans found to be "of concern" such that, should they subsequently seek asylum in third countries, they possess proof of UNHCR's finding that they are "of concern to the High Commissioner," their date of arrival in and departure from Nepal, and their birthplace.

### **To All Donor Governments:**

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- Condition military and economic aid to Nepal on the government's compliance with the gentlemen's agreement and respect for the fundamental human rights of Tibetans, both those who reside in Nepal and those seeking refuge in India or elsewhere.
- Allocate funds to UNHCR specifically earmarked for assisting Tibetan refugees.
- Urge Nepal immediately to issue RCs to all Tibetan residents eligible for them.
- In the spirit of international cooperation and burden-sharing, provide for the resettlement of Tibetan refugees from Nepal and India, as did Canada, the United States, and Switzerland in past years.

*In particular, the government of the United States should be acknowledged and commended for its support of UNHCR's work with Tibetan refugees in Nepal and further called upon to:*

- Insist that the Nepalese government immediately carry out its promise to the former Special Coordinator for Tibet to issue RCs to all resident Tibetans. Earmark funds specifically for this purpose.

- Ensure that the Nepalese government understands the strong interest of the United States in ensuring the welfare and safety of Tibetans residing in or transiting through Nepal.
- Make clear that Nepal’s official position that Tibet is an integral part of China is not inconsistent with its recognition that Tibetans may face persecution there, making them eligible for refugee status or asylum under international law.
- Until Nepal ratifies the Refugee Conventions, ensure that, at a minimum, it abides by the paramount customary international law obligation of *non-refoulement* and does not interfere with the efforts of UNHCR and concerned governments to protect the rights of Tibetan refugees.

### **To the U.S. Immigration and Naturalization Service:**

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- Inform all asylum officers and immigration judges of the factual and legal circumstances in Nepal for Tibetan refugees fleeing persecution via Nepal.
- Ensure that all asylum officers and immigration judges understand the restrictions on the rights of Tibetan residents in Nepal and the crucial distinction between Tibetans who arrived in Nepal in or before 1989 and those who arrived thereafter—and who continue to arrive annually in flight from persecution. Further inform asylum officers and immigration judges of the situation regarding the issuance of RCs to pre-1989 arrivals, in particular, that many Tibetans residing in urban areas (mainly in Kathmandu) outside of the formal settlements, as well as the children of settlement residents who reached the age of eighteen subsequent to 1995, have not been issued RCs.

- Based upon the information documented in this report, make clear that Tibetan asylum seekers residing in or transiting through Nepal cannot, as a matter of law, acquire the rights necessary to be deemed “firmly resettled” in Nepal. INS asylum officers and trial attorneys should cease to adopt this position in asylum proceedings unless extenuating circumstances (such as the rare case of a Tibetan who has acquired Nepalese citizenship in Nepal) exist.

### **To the Tibetan Government-in-Exile:**

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The Tibetan government-in-exile should be acknowledged and commended for its efforts to provide for the security and welfare of the Tibetan community in exile, to preserve the Tibetan identity and cultural heritage of its people, and for its continuing work to ensure the safety of Tibetans fleeing persecution.

- Concerning newly arriving Tibetans, emphasize to the Nepalese government that it is the Tibetan government-in-exile’s policy to facilitate the transit of Tibetan refugees through Nepal, not to facilitate their illegal resettlement in Nepal.
- Clarify to the Tibetan community in exile that the Tibetan government-in-exile does not seek to discourage Tibetans in exile from obtaining citizenship in other countries.
- Encourage collaboration between Tibetan organizations and Nepalese non-governmental organizations to address issues of mutual concern and to promote closer relations between the Tibetan and Nepalese peoples.

### **To Non-Governmental Organizations (NGOs):**

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- Urge the Nepalese government immediately to cease the practice of *refoulement* of Tibetan refugees; to halt the imprisonment of Tibetans

seeking voluntarily to return to Tibet through Nepal; to ratify the Refugee Conventions; and to guarantee Tibetan residents their civil and political rights, including meaningful access to citizenship.

- Collaborate with the Tibetan Welfare Office and Tibetan NGOs to address issues of mutual concern.
- Offer technical assistance and personnel resources to UNHCR, the Nepalese government, and the Tibetan Welfare Office to assist them to, *inter alia*, register resident Tibetans, assist with border missions, and monitor compliance with the gentleman's agreement.
- Work with foreign governments to promote and facilitate the resettlement of Tibetan refugees in third countries.

## Methodology

This report documents the conclusions of a fact-finding mission carried out by Tibet Justice Center in cooperation with Yale Law School's Allard K. Lowenstein International Human Rights Law Clinic. Following preparatory legal and factual research in Spring 2001, Tibet Justice Center conducted field research in Nepal from May 18 to June 14, 2001.

The mission had two principal objectives: *first*, to ascertain the legal status, rights, and treatment of Tibetans residing—whether permanently or temporarily—in Nepal; and *second*, to investigate Nepal's compliance with the "gentleman's agreement," an informal arrangement in place since 1990 that permits newly arriving Tibetan refugees to transit through Nepal. In the course of this research, Tibet Justice Center also documented and gathered information about related issues including freedom of cultural expression for Tibetans in Nepal; the issuance of refugee identity cards and international travel documents to Tibetans residing legally in Nepal; allegations of Nepalese police abuses against newly arriving Tibetan refugees; the effect of the Maoist insurgency on Nepal's ability to comply with the gentleman's agreement; and the relationship between the Nepalese people and the substantial Tibetan refugee population—estimated at roughly 20,000—that resides in Nepal.

To gather information on these issues, Tibet Justice Center conducted interviews with Nepalese government officials, the Nepal country representative of the United Nations High Commissioner for Refugees (UNHCR) in Kathmandu and other UNHCR staff, representatives of non-governmental organizations (NGOs), both within and outside of the Tibetan community, journalists, police, Nepalese citizens, Tibetans residing (with and without formal legal status) in Nepal, and newly arrived Tibetan refugees in transit to Tibetan exile settlements, monasteries, and schools in India. Tibet Justice Center's research included thirty-four interviews with newly



arrived refugees at the Tibetan Refugee Reception Centre in Swayambunath, Kathmandu;<sup>3</sup> thirty-eight interviews with residents at the Tibetan settlements of Jawalakhel, Tashi Ling, Paljorling, and Tashi Palkhiel; interviews with Sherpas and Nepalese police in Thame and Khunde, villages in northeastern Nepal situated along the route traversed by many Tibetans after crossing the Tibeto-Nepalese border at the Nangpa-la pass; interviews with Nepalese government officials including (a) Shree Kant Regmi, Secretary, Ministry of Home Affairs; (b) Chakra Prasad Bastola, Minister, Ministry of Foreign Affairs; (c) Udaya Nepali Shrestha, Secretary, Ministry of Law and Justice; (d) Ganesh Dhakal, Undersecretary, Ministry of Home Affairs; (e) Umesh Prasad Mainali, Director-General, Department of Immigration; and (f) Kapil Shrestha, Secretary, Nepal Human Rights Commission.<sup>4</sup>

As this report goes to press, some of the individuals interviewed by Tibet Justice Center no longer hold the official positions that they occupied during the period of research. But news reports and evidence gathered subsequent to the mission suggest that the findings presented in this report continue accurately to reflect Nepal's policies and practices toward Tibetan refugees.

Tibet Justice Center worked principally in Kathmandu and surrounding areas, but also conducted research at Tibetan settlements in Pokhara and in Solu Khumbu, the northeastern region of Nepal through which many newly arriving Tibetan refugees pass in the course of their escape from Tibet. At the Reception Centre, Tibet Justice Center elicited information about the flight of refugees from Tibet; the difficulties they encountered on their journey; and their interactions with Chinese and Nepalese authorities, local Nepalese

citizens, and UNHCR staff. The interviews did not inquire into the reasons for Tibetan refugees' flight except insofar as this clarified questions concerning the border control and flight issues central to the objectives of Tibet Justice Center's research. At the settlements, interviews focused primarily on the rights and status of Tibetans resettled permanently in Nepal as a result of their arrival before 1989. Many of these individuals have resided in Nepal since the 1960s and 70s, at which time the Nepalese government resettled the first wave of Tibetan refugees, most of whom arrived in the aftermath of the 1959 Lhasa Uprising. The vast majority of the other permanent residents at the settlements are their children.

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<sup>3</sup> A few of these interviews were conducted with two—and, in one case, three—refugees who fled Tibet together and therefore related substantially the same events.

<sup>4</sup> Secretaries occupy the highest bureaucratic posts in the Nepalese ministries and therefore most often maintain their official position despite changes in the ruling party or coalition. Ministers, by contrast, are political appointees. Informally, Tibet Justice Center also spoke with Surya Nath Upadhyay, Chief Commissioner, Commission for the Investigation of Abuse of Authority.

## Background

### I. Historical and Cultural Ties Between Tibet and Nepal

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Tibet's historical relationship with the Kingdom of Nepal dates back millennia. In the Seventh Century, King Songtsen Gampo of Tibet married the Nepalese princess Bhrikuti who, together with the imperial Chinese princess Wen Cheng, shares the credit for introducing Buddhism to Tibet.<sup>5</sup> By the Ninth Century, the Tibetan Empire of King Trison Detsen encompassed the entire territory of present day Nepal.<sup>6</sup> With the decline of Tibet's military empire, Nepal regained its political independence, and in later years, it was the militaristic Nepalese Kingdom of the Gorkhas that on several occasions threatened Tibet.<sup>7</sup> But despite the sometimes tense political relationship between Nepal and Tibet, social and economic exchanges between these nations flourished because of their geographic proximity and cultural ties.

Many of the peoples of northern Nepal, such as the Sherpas, Tamangs, Melangis, and Yolmu, share strong religious and cultural bonds, as well as common Tibeto-Burmese racial origins, with Tibetans. Indeed, Foreign Minister Bastola remarked that “we [the Nepalese people] have our own ‘Tibetan’ population.”<sup>8</sup> To this day,

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<sup>5</sup> MICHAEL C. VAN WALT VAN PRAAG, *THE STATUS OF TIBET: HISTORY, RIGHTS, AND PROSPECTS IN INTERNATIONAL LAW* 2 (1987); *see also* LEE FEIGON, *DEMISTIFYING TIBET* 26 (1996).

<sup>6</sup> FEIGON, *supra* note 5, at 43.

<sup>7</sup> The Gorkhas invaded Tibet in 1788 and again in 1854. *See* VAN WALT VAN PRAAG, *supra* note 5, at 19, 23. Under the terms of the Nepal-Tibet Treaty of 1856, which ended the latter war, Nepalese traders gained unique trading privileges in Tibet, and the Nepalese government enjoyed special rights related to the settlement of Nepalese disputes and affairs with Tibet. *See id.* at 24; *see also* MELVYN C. GOLDSTEIN, *A HISTORY OF MODERN TIBET, 1913-1951*, at 382 (1989). After solidifying its control of Tibet in 1959, China revoked most of these privileges. *See* FEIGON, *supra* note 5, at 148.

<sup>8</sup> Tibet Justice Center interview with Chakra Prasad Bastola, Minister, Ministry of

many of these ethnic groups, which populate the Himalayan regions of Nepal, rely on cross-border trade with Tibetans and Chinese settlers living in Tibet for their economic livelihood.<sup>9</sup> Moreover, “[f]or centuries Tibetans had traveled to Buddhist temples in India and Nepal, and the Indians and Nepalese, in turn, had gone on pilgrimages to Mount Kailash, the holy mountain of Tibet.”<sup>10</sup> Economic interdependence and cultural and religious ties between Nepal and Tibet persist today, although Nepal now must negotiate its political relationship with Tibet through the Chinese government.

### II. Nepal's Recent Political History

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For virtually all of its history, various dynasties ruled Nepal absolutely. In 1854, the “Ranas,” who coopted their name from a well-known Indian family, overthrew the ruling Shah dynasty. For the next century, a succession of Rana prime ministers ruled Nepal.<sup>11</sup> In 1951, however, Nepal instituted a cabinet system of government.<sup>12</sup> During the same year, the government opened Nepal's doors to foreigners for the first time.<sup>13</sup> On December 14, 1955, the United Nations approved Nepal's membership application.<sup>14</sup> Four years later, the United States

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Foreign Affairs, in Kathmandu (May 25, 2001).

<sup>9</sup> Tibet Justice Center interview with Kapil Shrestha, Secretary, Nepal Human Rights Commission, in Kathmandu (June 12, 2001).

<sup>10</sup> ANN AMBRECHT FORBES, *SETTLEMENTS OF HOPE: AN ACCOUNT OF TIBETAN REFUGEES IN NEPAL* 19 (1989).

<sup>11</sup> Isabel Hilton, *Royal Blood*, *NEW YORKER*, July 30, 2001, at 45-46.

<sup>12</sup> Central Intelligence Agency, *The World Factbook 2000 – Nepal*, at <<http://www.cia.gov/cia/publications.factbook.geos/np.html>> (visited Sept. 15, 2001).

<sup>13</sup> FORBES, *supra* note 10, at 17.

<sup>14</sup> To establish its statehood, Nepal relied upon, *inter alia*, treaties it had concluded with Tibet. It also “listed Tibet among the six countries with which it had ‘established diplomatic relations’ and in which it maintained legations”; and “whereas Nepal maintained full diplomatic relations with Tibet during this period, it never established diplomatic relations with the Republic of China.” VAN WALT VAN PRAAG, *supra* note 5, at 139-40.

and France opened embassies in Kathmandu.<sup>15</sup>

In 1990, the ruling Shah, King Birenda, acceded to popular pressure for democracy, and Nepal became a constitutional monarchy.<sup>16</sup> The 1990 Constitution allocates power between the royal family and a parliamentary government.<sup>17</sup> In recent years, however, Nepal's fledgling democracy has faced severe strains. A Maoist insurgency that began in 1994 poses a constant threat to the elected regime. More recently, the tragic massacre of King Birenda and the royal family caused political upheaval, the aftereffects of which continue to test the resilience of Nepal's democracy. But at present, the constitutional monarchy established in 1990 survives and continues to provide the operative framework for Nepal's political and legal systems.

### III. Sino-Nepalese Relations

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The Nepalese monarchs traditionally maintained close relations with China.<sup>18</sup> Nepal's change of regime and contemporaneous decision to begin modernization in 1951 coincided roughly with China's annexation of Tibet. From its inception, the modern Nepalese government therefore has been sensitive to the danger of antagonizing China with overt support for Tibet. In general, Nepal's foreign policy has "emphasized the 'theme of friendship and peaceful coexistence with all countries—within the framework of nonalignment and neutrality.'"<sup>19</sup> In 1966, Nepal and China concluded a treaty that reflects this theme.

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<sup>15</sup> FORBES, *supra* note 10, at 18.

<sup>16</sup> See generally T. LOUISE BROWN, *THE CHALLENGE TO DEMOCRACY IN NEPAL: A POLITICAL HISTORY* (1996); PREM RAMAN UPRETY, *POLITICAL AWAKENING IN NEPAL—THE SEARCH FOR A NEW IDENTITY* (1992); see also U.S. DEP'T OF STATE, 2001 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NEPAL (2002).

<sup>17</sup> See NEPAL CONST., Pt. V.

<sup>18</sup> Tibet Justice Center interview with Tapan K. Bose, Secretary-General, South Asia Forum for Human Rights, in Kathmandu (June 7, 2001).

<sup>19</sup> FORBES, *supra* note 10, at 18-19 (quoting G.L. HARRIS, *AREA HANDBOOK FOR NEPAL, BHUTAN, AND SIKKIM* 319 (1973)).

Both governments reaffirmed the "five principles of friendly relations":

1. Mutual respect for each other's territorial integrity and sovereignty;
2. Mutual non-aggression;
3. Non-interference in each other's internal affairs for any reasons of an economic, political or ideological character;
4. Equality and mutual benefit; and
5. Peaceful coexistence.<sup>20</sup>

Tibet Justice Center's interviews with Nepalese government officials suggest that these five principles, and the concerns that animate them, continue to influence Nepal's approach to the often politically sensitive questions concerning Tibet and Tibetan refugees. Foreign Minister Bastola, for example, remarked that "[b]ecause we are so near [to China], we cannot do without a stand on Tibet. It is an autonomous region of China. That has been our stand ever since [China annexed Tibet]."<sup>21</sup> But the government's approach to Tibetan refugees is not as clear, because it faces countervailing pressures from the international community—particularly from large foreign-aid donors such as the United States and the European Union—to recognize the special status and plight of Tibetans fleeing from Tibet via Nepal.<sup>22</sup>

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<sup>20</sup> Agreement on Trade, Intercourse, and Related Questions Between the Tibet Autonomous Region of China and Nepal, P.R.C.-Nepal, May 2, 1966, *reprinted in* NEPAL'S RELATIONS WITH INDIA AND CHINA: DOCUMENTS, 1947-1992, at 1349 (Avtar Singh Bhasin ed., 1994).

<sup>21</sup> Tibet Justice Center interview with Chakra Prasad Bastola, Minister, Ministry of Foreign Affairs, in Kathmandu (May 25, 2001).

<sup>22</sup> The United States actively monitors Nepal's treatment of Tibetan refugees. Tibet Justice Center interview with Julia Taft, former Assistant Secretary of State for Population, Migration, and Refugees, and Special Coordinator for Tibet, in Washington, D.C. (April 17, 2001). The European Union also conditions aid to Nepal in part on its agreement not to expel Tibetan refugees. Angela Dietrich, *Tibetan Refugees in Nepal: Balancing Humanitarian and Security Concerns, in STATES, CITIZENS, AND OUTSIDERS: THE UPROOTED PEOPLES OF SOUTH ASIA* 288 (Tapan K. Bose & Rita Machanda eds., 1997).

## **IV. Origins: Tibetan Refugees Residing in Nepal**

Today, approximately 20,000 Tibetans reside in Nepal. The vast majority of this population arrived before 1989 and particularly during the period between 1959, when the People's Liberation Army's (PLA) assault on Lhasa sent thousands of Tibetans into exile, and 1974, when the Nepalese government forcibly shut down the Tibetan guerilla base that had been operating for more than fifteen years in the western Kingdom of Mustang.<sup>23</sup> The remainder of the Tibetan refugee population in Nepal is comprised largely of the children of this first caseload and, to a much lesser extent, Tibetans who have fled since the late 1980s. The latter group, the second caseload, almost invariably proceeds to India because the Nepalese government no longer provides sanctuary to newly arriving Tibetan refugees.

### **A. In Flight from the 1959 Uprising**

While some Tibetan refugees arrived in Nepal in the early 1950s, the first major influx crossed the border in 1959, following the Lhasa Uprising. At that time most did not expect to remain in Nepal for more than a few months. They established camps primarily in the Himalayan border regions of Nepal such as Mustang, a small, largely autonomous, and ethnically Tibetan kingdom in western Nepal, as well as in Nubri, and Solu Khumbu. The climate in these regions resembles that of Tibet. The refugees also felt that the proximity of the camps to the border would enable them to return home easily when the appropriate time came.<sup>24</sup> Shortly, however, it became apparent to many that

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<sup>23</sup> See TAPAN K. BOSE, PROTECTION OF REFUGEES IN SOUTH ASIA: NEED FOR A LEGAL FRAMEWORK 38 (2000).

<sup>24</sup> See FORBES, *supra* note 10, at 14. Virtually all of the Tibetans interviewed by Tibet Justice Center at the settlements in Pokhara moved there from the Himalayan regions to which they had initially fled. The Nepalese government permitted them to construct permanent settlements in Pokhara and elsewhere in the late 1960s and early 1970s.

this time would not arrive in the near future. But few possessed the means to establish settlements with long-term economic viability. By 1961, many of the refugees faced serious food shortages and suffered from a lack of adequate shelter and healthcare.<sup>25</sup>

In May 1960, Nepal requested assistance from the International Committee of the Red Cross (ICRC) and other aid organizations. Funded primarily by the United States Agency for International Development (USAID), the ICRC established emergency relief programs for the refugees. With airplanes provided by the Swiss Red Cross, the ICRC parachuted supplies to refugee encampments in the remote Himalayan regions.<sup>26</sup> At about the same time, Tibetan officials of the government-in-exile returned to Dharamsala, India, from a fact-finding mission to Nepal, and reported to the Dalai Lama on the dire conditions facing the refugees there. In response, the Tibetan government established the Kathmandu Tibetan Welfare Office, a branch of the Tibetan Ministry of Home Affairs. The Tibetan Welfare Office functioned as a liaison between the refugees, various aid organizations, and the Nepalese government.<sup>27</sup> Also known as the Office of Tibet, it continues to serve this vital role today.<sup>28</sup>

### **B. The Guerilla Operation at Mustang**

The guerilla operation in Mustang created a second major source of Nepal's original Tibetan refugee population. From about 1959 to 1974, the Nepalese government turned a blind eye to a Tibetan military base

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<sup>25</sup> LOUISE HOLBORN, REFUGEES, A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-1971, at 745-46 (1975); see also FORBES, *supra* note 10, at 37.

<sup>26</sup> OFFICE OF HIS HOLINESS THE DALAI LAMA, TIBETANS IN EXILE, 1959-1969, A REPORT ON TEN YEARS OF REHABILITATION IN INDIA 137-38 (1969); see also ICRC, ANNUAL REPORT 28 (1963) (describing the ICRC's activity in the early 1960s in response to the arrival of "several thousand Tibetan refugees at the Indo-Nepalese frontier").

<sup>27</sup> FORBES, *supra* note 10, at 37.

<sup>28</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).



A former member of the Khampa guerilla force in Tibet, the Chinese government imprisoned this man for more than twenty years during and after the Cultural Revolution. After his release, he worked as a primary school teacher for many years in an effort to teach Tibetan children about Tibet's true history, and in 1998, fled Tibet with the intention of informing the United Nations about its plight.

located in the remote northwestern Kingdom of Mustang, which received covert support from the United States Central Intelligence Agency (CIA).<sup>29</sup> From this base, Tibetans, primarily former residents of the province of Kham, carried out guerilla strikes against the PLA. For about ten years, the CIA funded military training for Tibetan guerillas, including in “camouflage, spy photography, guns, and radio operation,”<sup>30</sup> and provided them with weapons and other equipment to sustain the Mustang base. By the late 1960s, however, the U.S. government’s support for this covert operation dwindled, and the CIA gradually discontinued aid to the guerillas.<sup>31</sup> At about the same time, Nepal began to seek a closer relationship with China because “[n]o longer fearful, as it had been in the early 1960s, of a Chinese attack, Nepal now wished to counter New

Delhi’s influence in the region by furthering ties with [Beijing].”<sup>32</sup>

In 1974, the Nepalese government ordered the remaining Tibetan guerillas (about 1800 men) to shut down the operation. To avoid violent conflict with the Nepalese and the endangerment of the Tibetan refugee community in Nepal, the Tibetan administration in Dharamsala agreed. The Dalai Lama then conveyed a personal, tape-recorded message to the guerilla forces requesting them to lay down their arms.<sup>33</sup> The disbandment of the Mustang guerilla forces created a second population of Tibetan refugees that required resettlement. Trained for war, however, this group, like those who fled in the aftermath of the 1959 Uprising, did not possess the knowledge or means to establish new settlements with long-term economic viability.<sup>34</sup> These two groups comprised the first caseload of Tibetan refugees in Nepal and established the twelve major Tibetan refugee settlements.

## V. Establishment and Development of the Settlements

In the early 1960s, the Nepalese government arranged to provide the first caseload of Tibetan refugees with land. It established four “temporary” settlements: (1) Chialsa, in the Solu Khumbu mountain range east of Kathmandu; (2) Tashi Palkhiel, on the outskirts of Pokhara; (3) Dhorpatan, in western Nepal; and (4) Jawalakhel, on the southern edge of Kathmandu. The Nepal Red Cross (NRC), founded in 1963, purchased the land for these settlements with funds donated by UNHCR.<sup>35</sup> Apart from their inability to afford

<sup>29</sup> See generally JOHN KENNETH KNAUS, ORPHANS OF THE COLD WAR: AMERICA AND THE TIBETAN STRUGGLE FOR SURVIVAL (1999); Ramananda Sengupta, *The CIA Circus, Tibet’s Forgotten Army: How the CIA Sponsored and Betrayed Tibetans in a War the World Never Knew About*, OUTLOOK, Feb. 15, 1999; Paul Salopek, *How the CIA Helped Tibet Fight Their Chinese Invaders*, CHI. TRIBUNE, Jan. 25, 1997. Mustang, while theoretically a part of Nepal, remained a *de facto* independent kingdom at this time. Its remote location and traditional independence made Mustang essentially ungovernable from Kathmandu. See FORBES, *supra* note 10, at 149.

<sup>30</sup> Salopek, *supra* note 29, at 2.

<sup>31</sup> KNAUS, *supra* note 29, at 308. United States support for the Tibetan government-in-exile ceased altogether by 1974, when the government cut off all subsidies to the Dalai Lama’s government. *Id.* at 310.

<sup>32</sup> JOHN F. AVEDON, IN EXILE FROM THE LAND OF SNOWS 125 (1979).

<sup>33</sup> See KNAUS, *supra* note 29, at 300-302; AVEDON, *supra* note 32, at 126-28.

<sup>34</sup> See FORBES, *supra* note 10, at 151-52.

<sup>35</sup> Tibet Justice Center interview with T.R. Onta, Executive Director, Nepal Red Cross, in Kathmandu (June 11, 2001). The ICRC closed its office in Nepal in about 1963. The Swiss Red Cross, however, remained for many years and continued to assist the refugees. Before its formal legal establishment in 1964, made possible by Nepal’s ratification of the Geneva Conventions of 1949, the Nepal Red Cross contributed to these operations on an *ad hoc* basis. *Id.*

the land at that time, Tibetan refugees did not enjoy the legal right to purchase it. They required an intermediary to hold the land in trust for their use. The NRC served this critical function. It also enabled the Nepalese government to disavow any direct support for the refugees in order to avoid jeopardizing its tenuous relationship with China. The result, as the NRC's present executive director remarked, was that the NRC aided the refugees "with the [tacit] *support* of the government," but "not exactly *for* the government."<sup>36</sup> By 1969, seven Tibetan settlements had been established in Nepal.<sup>37</sup>

As it became clear the their exile would not be short-term, the Tibetan government sought to bring the refugees scattered throughout Nepal together in the newly established settlements. Shanmo Palchung, an elder Tibetan at the Tashi Ling Settlement in Pokhara, recalled that in 1964 Tibetan officials asked him to gather the refugees temporarily settled at encampments near the border and bring them to Pokhara. He arrived in Pokhara that year with 377 Tibetan refugees from throughout Nepal and then petitioned the NRC to purchase land for them from the Nepalese government. The Nepal Red Cross "gave [us] land for living and agriculture," he said, "but it was bad [and undeveloped] land"; and in the first year, sixty refugees, living without shelter, died from exposure to the heat and monsoon rains.<sup>38</sup> The Nepalese government soon recognized that it must take steps to make the refugee settlements self-sufficient.

In 1964, Nepal asked the Swiss government—acting through the Swiss Red Cross and the Swiss Association for Technical Assistance—to help to resettle the refugees and administer the settlements. On November 22, 1964, the two governments entered into an agreement stipulating the main goals of the settlements: long-term economic self-sufficiency and gradual integration into

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<sup>36</sup> Tibet Justice Center interview with T.R. Onta, Executive Director, Nepal Red Cross, in Kathmandu (June 11, 2001).

<sup>37</sup> TIBETANS IN EXILE, 1959-69, *supra* note 26, at 140.

<sup>38</sup> Tibet Justice Center interview with Shanmo Palchung, Tashi Ling Settlement, in Pokhara (May 28, 2001).

Nepalese society.<sup>39</sup> Thereafter, the Swiss groups provided the residents of the settlements with basic humanitarian aid, technical assistance, and vocational training. Other organizations, including USAID, the Protestant United Mission, the Nepal International Tibetan Refugee Relief Committee, the Norwegian Refugee Council, and United Nations affiliates, such as the U.N. Children's Fund (UNICEF) and the World Health Organization (WHO), contributed additional aid in the form of medical care, primary school education, construction of housing, and food rations.<sup>40</sup> At about the same time, the Tibetan government-in-exile recognized a need to establish its own permanent representatives to administer the settlements. For each settlement, it appointed a "Welfare Officer." These individuals cooperated with the Tibetan government's principal representative in Kathmandu to administer the settlements and look after the needs of their residents.<sup>41</sup>

UNHCR offered financial assistance to the ICRC and other aid organizations from the outset. Its role expanded significantly, however, in 1964. At that time, the High Commissioner, at the request of the Nepalese government, sent an envoy, J.D.R. Kelly, to appraise the situation. Kelly reported that Tibetan refugees remained in dire need of humanitarian assistance. In August 1964, the Nepalese government authorized UNHCR to open an office in Kathmandu to serve as a liaison between the Tibetan community and the government.<sup>42</sup> In 1965, the government asked UNHCR to begin to assist with the resettlement of those Tibetans not already residing in one of the initial camps.<sup>43</sup> UNHCR remained actively involved throughout the 1960s and the early 1970s. Its role shifted over time.

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<sup>39</sup> FORBES, *supra* note 10, at 51.

<sup>40</sup> See HOLBORN, *supra* note 25, at 744-46; YEFIME ZARJEVSI, A FUTURE PRESERVED: INTERNATIONAL ASSISTANCE TO REFUGEES 198-99 (1988); TIBETANS IN EXILE, 1959-1969, *supra* note 26, at 138; FORBES, *supra* note 10, at 50-51.

<sup>41</sup> TIBETANS IN EXILE, 1959-1969, *supra* note 26, at 139.

<sup>42</sup> See HOLBORN, *supra* note 25, at 746.

<sup>43</sup> FORBES, *supra* note 10, at 51.

Initially, UNHCR focused on providing urgently needed emergency relief; in later years it began to search for more permanent solutions. In 1973, however, UNHCR discontinued its assistance program for Tibetan refugees and closed its Kathmandu office. It concluded that Nepal was well on its way to achieving a durable solution to the problem through local integration.<sup>44</sup>

In the early years, Tibetans worked to ensure the long-term availability of basic necessities for the settlements. With the assistance of non-governmental organizations, they built roads, homes, schools, and medical facilities.<sup>45</sup> Thereafter, each settlement began to establish industries with which to sustain itself. These included, for example, agriculture, handicraft production, and carpentry. But the refugees achieved their greatest financial success in the carpet industry. Swiss aid workers first encouraged the development of this trade at the Jawalakhel, Chialsa, and Tashi Palkhiel settlements. In 1966, the factories were converted into private companies managed, though not owned, by the Tibetan refugees themselves.<sup>46</sup> By the early 1980s, the Tibetan carpet industry had “evolved into the primary source of income for the entire Tibetan community in Nepal.”<sup>47</sup> By the late 1980s, it had become the largest handicraft industry and the second-largest earner of foreign currency in Nepal.<sup>48</sup>

Some Tibetans also established private shops, hotels, and restaurants, particularly during the first two decades of their exile. Until the late 1970s, Tibetans in Nepal, by contrast to those in India, “did not need any legal document or down payment to open their stores.”<sup>49</sup> The mass exodus of Tibetans in the late 1960s and early 1970s also coincided with Nepal’s economic expansion and the development of

its tourist industry. This, too, created some opportunities for Tibetan entrepreneurs. Restrictions on their rights to own property, travel, register businesses, and work, however, prevented them from securing a strong foothold in the tourist industry.

Today, more than one dozen Tibetan settlements exist in Nepal, including Jawalakhel, Boudha, Swayambunath, and Jorpatia, in the vicinity of Kathmandu; Jampaling, Paljorling, Tashi Ling, and Tashi Palkhiel, in the Pokhara region; and Dhorpatan, Chialsa, Chairok, Shabrus, and Lumbini, in the northern regions of Nepal. The majority of these were established either in the early to mid-1960s or in 1974, when the Nepalese government terminated the Mustang guerilla operation. Six of the settlements rely on handicraft industries, four sustain themselves by agriculture, and the remainder are “self-reliant,” meaning their residents work individually in various jobs.<sup>50</sup>

Nepal, with the aid of foreign governments and private donors, thus succeeded in resolving the immediate humanitarian crisis provoked by the mass exodus of Tibetans in the aftermath of China’s annexation of Tibet and the 1959 Lhasa Uprising. But the prospect of a long-term and durable solution that led UNHCR to close its Kathmandu office in 1973 has proven elusive. Because of the isolation of the settlements and their residents from mainstream Nepalese society, local integration of the Tibetan refugee population has been minimal. Tibetans who were resettled in the 1960s and 1970s are permitted to remain in Nepal, but their legal status is ambiguous and their financial situation precarious. Without the rights to own property and businesses, to travel, and to work freely in industries and vocations outside the settlements, Tibetans residing in the settlements remain economically and socially alienated from Nepalese society. With the notable exception of some Tibetans in the carpet industry, which has been in decline in recent years, relatively few of the refugees in the settlements have been able to

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<sup>44</sup> HOLBORN, *supra* note 25, at 753.

<sup>45</sup> FORBES, *supra* note 10, at 62.

<sup>46</sup> TIBETANS IN EXILE, 1959-1969, *supra* note 26, at 141.

<sup>47</sup> FORBES, *supra* note 10, at 65.

<sup>48</sup> Tibet Justice Center interview with T.R. Onta, Executive Director, Nepal Red Cross, in Kathmandu (June 11, 2001); *see also* FORBES, *supra* note 10, at 50.

<sup>49</sup> FORBES, *supra* note 10, at 71.

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<sup>50</sup> TIBETAN WELFARE OFFICE, KATHMANDU, THE STATE OF TIBETAN REFUGEES IN NEPAL (1999).

improve their standard of living far beyond subsistence. The precarious status of the settlement residents highlights the need for a more durable solution that either permits the refugees to acquire Nepalese citizenship or affords them a more expansive set of rights consistent with those ordinarily afforded to permanent resident aliens under international law.

## VI. Nepal's Shifting Approach to Tibetan Refugees: The Treatment of New Arrivals

From 1959 to 1986, but particularly in the years before 1974, Nepal generally facilitated the work of foreign governments and humanitarian aid organizations involved in helping to resettle the first wave of Tibetan refugees. The Nepalese government viewed the settlements as an efficient long-term solution to a potentially serious refugee crisis. It therefore maintained a largely laissez-faire approach toward them. In 1975, UNHCR historian Louise Holborn lauded Nepal for “provid[ing] for the survival of thousands of Tibetan refugees” and giving them “the possibility of becoming contributing members of the societies of their host countr[y] while at the same time preserving their own identity.”<sup>51</sup>

Before 1986, the Nepalese government also tended to tolerate the arrival of new refugees for several reasons: It lacked the practical ability to enforce a strict border-control policy; fewer new refugees arrived during China's Cultural Revolution (approximately 1966-1979) because the Chinese government then maintained strict control over the movement of the Tibetan population; and in any event the Nepalese government did not perceive the number of newly arriving Tibetan refugees as a threat or a diplomatic liability during these years. The 1966 Agreement on Trade, Intercourse, and Related Questions Between the Tibet Autonomous Region (TAR) of China and Nepal permitted Tibetans living in the border regions of the

TAR and “religious pilgrims” to cross the Tibeto-Nepalese border without a passport or visa, provided they registered at the border.<sup>52</sup> Nepal renewed this Agreement for another ten years in 1976.

The Nepalese government's laissez-faire approach toward Tibetan refugees began to change and tighten in 1986. In that year Nepal and China executed a new treaty that significantly restricted the ability of Tibetans to travel through or into Nepal.<sup>53</sup> Soon after, in 1987 and 1989, the Chinese government suppressed a series of pro-Tibetan independence demonstrations in Lhasa. This led to a resurgence in the number of Tibetans fleeing into exile.

In 1989, pressure from the Chinese government and the growing number of new arrivals led Nepal to initiate a strict border-control policy.<sup>54</sup> The Nepalese government made clear that it would henceforth refuse to accept or recognize new Tibetan refugees.<sup>55</sup> At about the same time, however, UNHCR reestablished an office in

<sup>52</sup> Agreement on Trade, Intercourse, and Related Questions Between the Tibet Autonomous Region of China and Nepal, *supra* note 20, arts. 1(3)-(4).

<sup>53</sup> Agreement on Trade, Intercourse, and Related Questions Between the Tibet Autonomous Region of China and Nepal, P.R.C.-Nepal, Aug. 1, 1986, arts. 1(3)-(5), *reprinted in* NEPAL'S RELATIONS WITH INDIA AND CHINA: DOCUMENTS, 1947-1992, *supra* note 20, at 1381-86.

<sup>54</sup> In 1989, a U.S. congressional delegation visited Nepal to assess the situation for Tibetan refugees. Its report to Congress noted that:

The influence of N[e]pal's powerful neighbor, China, was pervasive. (Nepal receives substantial development assistance from China, and, indeed coinciding with our stay in Nepal, a visiting Chinese delegation was meeting to reevaluate the China-Nepal border agreements.) The [Nepalese Foreign] Secretary concluded that the “refugee question is not a legal question and not a humanitarian operation; it is a political question.”

*Congressional Staff Delegation Report on Current Status of Tibetan Political, Refugee, and Human Rights Problems*, 135 CONG. REC. E1913-01, at \*E1915 (May 25, 1989).

<sup>55</sup> Tibet Justice Center interviews with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001); and John Dyson, Political and Economic Officer, United States Embassy, in Kathmandu (May 23, 2001); *see also* U.S. COMM. FOR REFUGEES, COUNTRY REPORT: NEPAL (2001), at <<http://www.refugees.org/world/countryrpt/scasia/nepal.html>> (visited Sept. 17, 2001); Barbara Crosette, *Tibetans Fear Loss of Safe Haven in Nepal*, N.Y. TIMES, May 7, 1989, at 14.

<sup>51</sup> HOLBORN, *supra* note 25, at 753.



Kathmandu to assist Nepal with its Bhutanese refugee crisis. With the tacit approval of Nepal's Ministry of Home Affairs, UNHCR also began to facilitate the transit of newly arriving Tibetan refugees through Nepal to India. The funds for this informal and low-profile operation initially came from the United States, which provided an "infusion of \$100,000 in 1991" to support the "refugee protection and processing program."<sup>56</sup>

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The circumstances and legal status of Tibetans residing in Nepal, and the current operation of this informal "protection and processing program," are the twin subjects of this report.

## Legal Overview

### I. International Law

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All persons in need, regardless of their immigration status, share certain basic human rights under international law. The Universal Declaration of Human Rights (UDHR), which proclaims "a common standard of achievement for all peoples and all nations,"<sup>57</sup> prohibits discrimination on the grounds of national origin and provides that all persons shall enjoy the right "to seek and enjoy in other countries asylum from persecution."<sup>58</sup> Nepal is also a party to three treaties that guarantee certain rights and protections to all persons, including refugees, within its borders: the International Covenant on Civil and Political Rights (ICCPR),<sup>59</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>60</sup> and the Convention on the Rights of the Child (CRC).<sup>61</sup>

In general, the ICCPR's provisions protect not only citizens of the state party, but "all individuals within [the state party's] territory and subject to its jurisdiction."<sup>62</sup> The ICCPR guarantees freedom of thought, conscience, religion, expression, and peaceful assembly.<sup>63</sup> Article 24 also extends to every child the right to acquire a nationality.<sup>64</sup> The ICESCR

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<sup>57</sup> Universal Declaration of Human Rights, pmb., G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. I, at 71, U.N. Doc. A/810 (1948).

<sup>58</sup> *Id.*, art. 14; *see also id.*, art. 2 (prohibiting discrimination of any kind with respect to all rights recognized in the UDHR).

<sup>59</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>60</sup> International Covenant on Economic, Social, and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3.

<sup>61</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 44.

<sup>62</sup> ICCPR, art. 2.

<sup>63</sup> *Id.*, arts. 18, 19, 21.

<sup>64</sup> *Id.*, art. 24(3) ("Every child has the right to acquire a nationality."). The application of this principle to the children of refugees is not altogether clear from the

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<sup>56</sup> *Congressional Staff Trip Report on Tibetans in Exile*, 138 CONG. REC. S12732-02, at \*S12734 (Aug. 12, 1992).

guarantees the rights to work, an adequate standard of living, education, and the highest attainable standard of health.<sup>65</sup> But the ICESCR recognizes state resource constraints and therefore provides that “[d]eveloping countries... may determine to what extent they w[ill] guarantee the economic rights recognized in the present Covenant to non-nationals.”<sup>66</sup> The CRC extends a similar catalogue of rights to “each child within [a state party’s] jurisdiction without discrimination of any kind.”<sup>67</sup> The CRC recognizes the right of each child both to “preserve his or her identity, including nationality” and to acquire a nationality.<sup>68</sup> This right, according to UNICEF, “renders questionable legislation that does not allow children to acquire full nationality from significant periods of residence.”<sup>69</sup>

*Refugees and Asylum Seekers.* Beyond the rights guaranteed to all persons by human rights treaties of general application, refugees and asylum seekers enjoy special protections under international law by virtue of two treaties: the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (collectively, the Refugee Conventions).<sup>70</sup> The 1951 Convention defines a refugee as any person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-

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ICCPR’s language. But at a minimum, it seems clear that children born to refugee parents who enjoy no right to the nationality of the state of their parent’s origin nor to that of their host state are effectively deprived of the right to acquire a nationality in violation of article 24(3).

<sup>65</sup> ICESCR, arts. 6, 11, 12, 13.

<sup>66</sup> *Id.*, art. 2.

<sup>67</sup> CRC, art. 2.

<sup>68</sup> *Id.*, arts. 8, 7.

<sup>69</sup> UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 112 (1998).

<sup>70</sup> Convention Relating to the Status of Refugees, July 28, 1951, 1989 U.N.T.S. 150 (1951 Convention); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (1967 Protocol).

side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence... is unable, or owing to such fear, is unwilling to return to it.<sup>71</sup>

An asylum seeker is a person who seeks refugee status. Asylum seekers should enjoy the same rights as refugees until their status has been fairly determined.<sup>72</sup>

The Refugee Conventions guarantee refugees a number of rights, including freedom of conscience, movement, and religion, protection from discrimination, and the right to acquire identity papers.<sup>73</sup> Most critically, Article 33 of the 1951 Convention forbids the “return (*refouler*) [of] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>74</sup> The principle of *non-refoulement* codified in Article 33 is the touchstone of the modern regime for the international protection of refugees. Many scholars argue that it has become a rule of customary international law, binding on all states regardless of their express treaty obligations.<sup>75</sup> While

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<sup>71</sup> 1951 Convention, art. 1(A)(2).

<sup>72</sup> See UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶ 28, U.N. Doc. HCR/IP/4/Eng. (1979).

<sup>73</sup> 1951 Convention, arts. 3, 4, 26, 27.

<sup>74</sup> *Id.*, art. 33.

<sup>75</sup> See L. SOHN AND THOMAS BUERGENTHAL, THE MOVEMENT OF PERSONS ACROSS BORDERS 123 (1996) (stating that *non-refoulement* “has become a rule of customary international law”); see also Elizabeth E. Ruddick, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U.L. REV. 429, 448 n.94 (1997) (citing GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 167 (2d ed. 1996) and Paul Weiss, *The International Protection of Refugees*, 48 AM. J. INT’L L. 193, 198-99 (1954)); Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 251 (1996); Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 Va. J. Int’l L. 899, 902 (1986);

Nepal has not ratified the Refugee Conventions, it serves as an observer state on UNHCR's Executive Committee and, as such, should respect UNHCR Executive Committee Conclusions.<sup>76</sup> Moreover, the CRC obliges Nepal "to ensure that a child who is seeking refugee status...receive[s] appropriate humanitarian assistance," and to this end, to work proactively with UNHCR and other intergovernmental and non-governmental organizations cooperating with the United Nations.<sup>77</sup>

Nepal is also a party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).<sup>78</sup> Article 3 of the CAT prohibits the *refoulement* of any person to a "State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>79</sup> Because reports consistently show that Chinese authorities use torture against Tibetans perceived to be dissidents,<sup>80</sup> including those who attempt

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*see, e.g.,* H. Knox Thames, *India's Failure to Adequately Protect Refugees*, 7 HUM. RTS. BR. 20, 21 (1999). Customary international law requires a consistent and largely uniform practice pursued by states because of a perceived legal obligation (*opinio juris*). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103 (1987). If *non-refoulement* is a rule of customary international law, then no nation, including Nepal, may forcibly repatriate Tibetan refugees to China if there exists a reason to believe that their lives or freedoms would be threatened. The so-called "persistent objector" rule permits states that vigorously object to the formation of a rule of customary international law to exempt themselves from its otherwise universally binding status. The level of protest by a state, however, must be highly visible and express during the evolution of the rule. *See generally* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985). Nepal's actions and statements during the latter half of the Twentieth Century do not amount to a persistent objection to a customary norm against the *refoulement* of refugees.

<sup>76</sup> The Executive Committee, UNHCR's governing body, passes resolutions annually "intended to guide states in their treatment of refugees and asylum seekers"; and its resolutions, while "not legally binding, do constitute a body of soft international refugee law." HUMAN RIGHTS WATCH, *LIVING IN LIMBO: BURMESE ROHINGYAS IN MALAYSIA* n.73 (2000).

<sup>77</sup> CRC, art. 22.

<sup>78</sup> Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113.

<sup>79</sup> *Id.*, art. 3(1).

<sup>80</sup> *See, e.g.,* U.S. DEP'T OF STATE: 2001 COUNTRY REPORTS ON HUMAN RIGHTS

to flee into exile, the CAT forbids Nepal from repatriating Tibetans who may be subjected to torture. Moreover, scholars argue that Article 3 should be interpreted broadly to protect persons apprehended close to the border, not only those who have already crossed into foreign territory.<sup>81</sup> Any systematic, government-sanctioned policy of *refoulement* of Tibetan refugees therefore raises serious concerns about Nepal's compliance with its obligations under the CAT.

The extent to which any of the foregoing treaty obligations—and the fundamental principle of *non-refoulement*—translate into practical guarantees in Nepal is unclear. Nepal's government, according to the U.S. State Department, has "no official refugee policy."<sup>82</sup> Nepal is not a party to the Refugee Conventions, and Tibet Justice Center's interviews with Nepalese government officials suggest strongly that Nepal does not intend to subscribe to these treaties in the near future.<sup>83</sup> On the other hand, Director-General of Immigration Mainali remarked that, as a

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PRACTICES: CHINA (Tibet Addendum) (2002); INTERNATIONAL COMMISSION OF JURISTS (ICJ), *TIBET: HUMAN RIGHTS AND THE RULE OF LAW* 244-54 (1997); PHYSICIANS FOR HUMAN RIGHTS, *STRIKING HARD: TORTURE IN TIBET* (1997). *See also* Tibet Information Network (TIN), News Update, *New Increase in Deportations of Tibetans from Nepal*, Dec. 24, 2001 (reporting that Tibetans returned to Chinese border authorities are routinely detained for weeks or months, during which time they are commonly subjected to beatings, interrogation, and other forms of maltreatment).

<sup>81</sup> *See, e.g.,* Christine Tomuschat, *A Right to Asylum in Europe*, 13 HUM. RTS. L.J. 257, 259 (1992) ("Article 3 [of the CAT] proceeds from the assumption that governmental authorities surrendering a person to the authorities of another State that habitually practices torture would themselves become accomplices of the crime of torture. In that perspective, the subtle legal distinction between returning someone who has already put his foot on the territory of the desired host State, and preventing another person from performing that symbolic act becomes immaterial.")

<sup>82</sup> U.S. DEP'T OF STATE, 2000 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NEPAL § 2(d) (2001).

<sup>83</sup> Foreign Minister Bastola remarked candidly: "If we sign the [Refugee Conventions], we are under certain international obligations that will have to be fulfilled—and that may not be practical given the situation on both the north and south of our border [respectively, China and India]...South Asia is an area where you have a lot of ethnic conflict, cross-border migration, and other refugee-related issues. So when you are in this situation, maybe you [i.e., Nepal] cannot have such an open and liberal refugee policy." Tibet Justice Center interview with Chakra Prasad Bastola, Minister, Ministry of Foreign Affairs, in Kathmandu (May 25, 2001).

member of the United Nations, the government ordinarily will “respect UNHCR policy” on “humanitarian grounds.”<sup>84</sup> For Tibetans, this approach to refugee issues translates in practice into the informal arrangement or “gentleman’s agreement” discussed in detail below.

Kapil Shrestha, Secretary of Nepal’s Human Rights Commission, told Tibet Justice Center that despite Nepal’s accession to more than one dozen multilateral human rights treaties, “at the level of implementation, it is lagging far behind. Practically, it leaves much to be desired.”<sup>85</sup> The ICCPR, ICESCR, and CRC guarantee concrete rights that, in theory if not yet in practice, extend to all Tibetan refugees entering or residing in Nepal.

## II. Nepalese Law

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Nepal’s Constitution, promulgated in 1990 after King Birenda legalized the formation of political parties, for the most part protects only citizens. They enjoy rights to equality before the law, non-discrimination, expression and assembly, freedom of movement, freedom to engage in trade, and to own and transfer property.<sup>86</sup> Non-citizens—all “persons”—enjoy a more limited set of rights. These include the rights to equal protection, religious freedom, and protection from expropriation of property.<sup>87</sup> But they do not include freedom of expression, freedom of movement, and the right to acquire or own property. During the drafting of the 1990 Constitution, international NGOs urged Nepal to avoid distinctions between citizens and non-citizens for purposes of fundamental guarantees such as speech, association, and movement.<sup>88</sup> But the government insisted on these

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<sup>84</sup> Tibet Justice Center interview with Umesh Prasad Mainali, Director-General, Department of Immigration, in Kathmandu (May 21, 2001).

<sup>85</sup> Tibet Justice Center interview with Kapil Shrestha, Secretary, Nepal Human Rights Commission, in Kathmandu (June 12, 2001).

<sup>86</sup> NEPAL CONST. arts. 11(1)-(2), 12(2)(d), 12(e), 17(1).

<sup>87</sup> *Id.*, arts. 11(1), 12(1), 17(2).

<sup>88</sup> INTERNATIONAL HUMAN RIGHTS LAW GROUP, TOWARD A NEW CONSTITUTION FOR NEPAL ix (1990).

distinctions, and consequently, the constitutional guarantees available to refugees remain minimal.

No statute or regulation of Nepal defines or even refers to “refugees.” The government has no official policy toward them.<sup>89</sup> Tapan K. Bose, Director of the South Asia Forum for Human Rights, noted that “there is no formal process for accepting refugees... [Refugees] have no legal status.”<sup>90</sup> Nepalese law classifies refugees simply as aliens. The Immigration Act of 1992 prescribes their treatment.<sup>91</sup> The Act defines “foreigners” as all persons not citizens of Nepal.<sup>92</sup> It states that “[n]o foreigners shall be allowed to enter into and stay in the Kingdom of Nepal without obtaining a passport and visa,” and it limits the entry of foreigners to “prescribed” routes.<sup>93</sup> The Act also empowers immigration officers within the Ministry of Home Affairs to investigate infractions of these regulations and to detain, fine, and deport persons charged with their violation.<sup>94</sup> UNHCR said that in recent years Nepal has been increasingly enforcing these provisions against Tibetans seeking to return to Tibet via Nepal after briefly visiting India—typically for the purposes of a pilgrimage or to visit relatives residing there.

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<sup>89</sup> U.S. DEP’T OF STATE, 2000 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NEPAL § 2(d) (2001).

<sup>90</sup> Tibet Justice Center interview with Tapan K. Bose, Director, South Asia Forum for Human Rights, in Kathmandu (June 7, 2001).

<sup>91</sup> Nepal Immigration Act, 2049 (1992) (amended by Immigration (First Amendment) Act 2050 (1994)). This statute replaced the Foreigners Act of 1958, which the government promulgated in order to create “arrangements for restraining, prohibiting, and regularising the entry, presence, or departure of foreigners within the Kingdom of Nepal.” Foreigners Act § 1 (1958). This Act gave the government broad latitude to arrest, detain or intern foreigners; to restrict their movements and activities; and to confiscate their property. *See id.* §§ 3-4. The Immigration Act is slightly less restrictive, but it still grants the government broad administrative authority over aliens. *See* SURYA DHUNGEL ET AL., COMMENTARY ON THE NEPALESE CONSTITUTION 86 (1998) (describing the government’s broad discretion to regulate aliens’ entry into Nepal and to prescribe rules for their conduct within its borders).

<sup>92</sup> Immigration Act § 2(b).

<sup>93</sup> *Id.* §§ 3(1), 3(5).

<sup>94</sup> *Id.* § 9.

“[T]hose returning from India are often arrested and fined under the [Immigration Act]. But they can’t pay their fine.”

The domestic legal framework for the protection and processing of refugees in Nepal is therefore minimal. Nepalese law does not recognize refugees or provide them with rights to seek protection, asylum or legal residence. Tibet Justice Center’s interviews with officials at the Ministry of Home Affairs confirmed that the absence of a formal legal framework is not an oversight; it reflects a deliberate policy decision perceived to be in Nepal’s geostrategic interest. At the same time, the Nepalese government does cooperate with UNHCR to handle its two major refugee populations: Tibetans and ethnic Nepalese refugees from Bhutan. The informal “gentleman’s agreement” between Nepal and UNHCR for the transit of Tibetan refugees through Nepal allows UNHCR to continue to assist Tibetan refugees without requiring the Nepalese government to incur unwanted obligations toward Tibetans. Because of Nepal’s strong national interest in maintaining UNHCR’s overt assistance with its Bhutanese refugee population, estimated at more than 100,000, the Nepalese government also has much to gain by permitting UNHCR tacitly to continue to assist Tibetan refugees, an objective supported by UNHCR and many foreign aid donors.

## The Status of Tibetans Residing in Nepal

### I. Introduction

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By 1989, the Nepalese government ceased entirely to permit newly arriving Tibetan refugees to remain in Nepal. This created two classes of Tibetans in Nepal: (1) residents who entered Nepal before 1989 and their children, the subject of this section of the report; and (2) new arrivals with no right to remain in Nepal, the subject of the following section.

Nepal’s new policy reflected in part the heightened pressure placed on Nepal by the Chinese government in the late 1980s. China’s economic development of Tibet during the 1980s brought a massive influx of Chinese settlers, including cadres, engineers, traders, and small-business owners. By 1987, Chinese migration and reinvigorated political repression in Tibet caused political tensions to rise. Expressions of support for the Dalai Lama and his “Five-Point Peace Plan” precipitated large demonstrations, which China crushed with military force. These culminated in the Tibetan protest of March 4, 1989, just three months before the Tiananmen Square Massacre of June 4, 1989. Shortly thereafter, Beijing declared martial law in Lhasa.<sup>95</sup> The heightened repression in Tibet during this period caused a dramatic increase in the number of Tibetans fleeing persecution. Because China perceived these Tibetans as dissidents and traitors, it sought to prevent their flight to India via Nepal as part of its campaign to “quell the counter-revolutionary rebellion.”<sup>96</sup> China asked Nepal to cooperate.<sup>97</sup>

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<sup>95</sup> See generally ICJ, *supra* note 80, at 77-80.

<sup>96</sup> Statement by NPC Standing Committee Vice Chairman Ngapoi Ngawang Jigme in a Meeting with Ran Bahadur Thapa, *Consulate-General of Nepal*, BBC NEWS, Sept. 6, 1989.

<sup>97</sup> See, e.g., *Tibetan Nationality Official on Relations Between China and Nepal*, BBC NEWS, Sept. 8, 1989.

In the late 1980s, Nepal maintained a delicate political relationship with China. To promote its economy and solidify domestic political stability, it sought to improve that relationship. At about the same time, Nepal's relationship with India began to deteriorate. In 1988, Nepal purchased weapons from China without informing India, an action perceived by India as a deliberate diplomatic slight. On March 23, 1989, in retaliation for this breach of etiquette—and for Nepal's refusal to allow resident Indians to work there without a permit—India imposed a trade embargo on Nepal. It permitted only essential supplies to enter the country.<sup>98</sup> Nepal responded by strengthening its ties to China.

This drift toward a pro-China foreign policy caused Nepal to heighten its border security with Tibet and to cease to permit Tibetans to enter and settle in Nepal. It also led the Nepalese government to increase restrictions on the political and cultural activities of Tibetans already residing in Nepal. In November 1989, the Chinese Premier visited Nepal. Then-Prime Minister Marich Man Singh emphasized that Nepal has “always recognized that Tibet is an integral part of China, and Nepal has always believed in the principle of non-interference in the internal affairs of another country.”<sup>99</sup> The following month, the Nepalese government cancelled a Tibetan cultural festival and refused to permit Tibetans in Kathmandu to celebrate the Dalai Lama's receipt of the Nobel Peace Prize.<sup>100</sup>

Today, according to official estimates, about 20,000 Tibetans reside in Nepal.<sup>101</sup> While the government does not permit new

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<sup>98</sup> Dhruba Adhikary, *Nepal: Weathering the Storm, Widening the Horizon*, INTER-PRESS SERV., Sept. 8, 1989.

<sup>99</sup> *Nepalese Prime Minister Praises Chinese Premier's Visit*, XINHUA NEWS SERV., Nov. 18, 1989.

<sup>100</sup> *See Dalai Lama, Accepting Prize, Urges Peaceful Tibet Solution*, N.Y. TIMES, Dec. 11, 1989, at A14.

<sup>101</sup> U.S. DEP'T OF STATE, 2000 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NEPAL § 2(d) (2001); *Dalai Lama's Representative Says Tibetans in Nepal Number 20,000*, BBC WORLDWIDE MONITORING, Mar. 12, 2000. Unofficial estimates, which include both illegal residents who arrived in Nepal

arrivals to settle in Nepal, it allows those who arrived in or before 1989, and their children, to remain. The government does not deem these Tibetans to be “refugees,” even though it has periodically issued some of them RCs that describe their nationality as “Tibetan refugee.” But in response to Tibet Justice Center's question about the number of permanent Tibetan refugees residing in Nepal, Home Secretary Regmi replied: “They are *not* permanent residents; no one [of the Tibetans] is a permanent resident.”<sup>102</sup> UNHCR, by contrast, made clear that it:

still consider[s] [legally resident Tibetans] “refugees,” but they do not need assistance. They are somehow self-sufficient. We look after them in discrete ways; for example, the kids of these refugees, when they reach the age of [eighteen], they need to have an identity document and receive a card like the one that has been issued to their parents.<sup>103</sup>

Most such Tibetans live in the Kathmandu valley, generally in the Boudha and Swayambunath regions on the outskirts of the city or at the Jawalakhel settlement. The majority of the others reside in Tibetan settlements located in or around Pokhara, Nepal's second-largest city. The remainder live in isolated settlements such as Namgyaling, in Mustang, or Chialsa, near Paphlu.

Notwithstanding their long-term residence in Nepal, most Tibetans remain isolated from mainstream Nepalese society. Few can become Nepalese citizens. Their status remains uncertain and insecure

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after 1989 and legal residents who lack an identity card to prove their status, place the actual number of Tibetans in Nepal at least several thousand higher. *See* Suman Pradhan, *Nepal-China: Absence of Tibetan Protests Brings Relief*, INTER-PRESS SERV., May 17, 2001.

<sup>102</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>103</sup> Tibet Justice Center interview with Roland-Francois Weil, Protection Officer, UNHCR, in Kathmandu (May 25, 2001).

because no law or regulation defines it. Home Secretary Regmi described this legal limbo, remarking that the Tibetans “are not permanent residents.... We provide a refugee identity card to them. They are [thus] easily identified. Once the Tibet problems are resolved, we will repatriate them to Tibet.”<sup>104</sup> Many resident Tibetans, however, particularly the children of the original settlers, lack these identity cards or “RCs.” Without them, Tibetans enjoy little security from harassment by officials and possess no proof of their right to remain in Nepal. Even with an RC, Tibetans cannot claim the protection of fundamental rights such as freedom of speech and assembly. Nepal’s Constitution guarantees these rights only to citizens.<sup>105</sup> Nor can legally resident Tibetans own property, incorporate a business, travel freely within the country or internationally, or participate freely in political and cultural activities. Tibetans in Nepal are stateless—residents with no defined legal status and severely limited political and economic rights, and nowhere else to go. In general, no country claims Tibetans in exile as nationals. While China periodically informs them that they may return to “the Motherland,” it conditions this right of return on untenable restrictions on their civil and political rights.

## II. Citizenship

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While Nepal’s Citizenship Act makes many Tibetan residents theoretically eligible for citizenship, the government does not view citizenship as a viable option for Tibetans. Section 6 of the Citizenship Act permits an adult to apply for citizenship if he or she:

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<sup>104</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>105</sup> Home Secretary Regmi implied that it would not be feasible to grant legally resident Tibetans a more robust set of rights, in part because of Nepal’s vulnerable geopolitical position between China and India. “Refugees cannot enjoy the same rights as citizens,” he remarked. “We give them the same kind of rights as you do in the [United] States.... But you do not have big neighbors [i.e., China and India].” Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

- (a) has the ability to speak and write the national language of Nepal
- (b) has renounced citizenship of any other state
- (c) is a member of any profession in Nepal
- (d) has resided in Nepal for at least 15 years
- (e) is a citizen of a country that permits naturalized citizenship to citizens of Nepal
- (f) is of good moral character.<sup>106</sup>

Candidates for citizenship must also demonstrate that they have made or can make a substantial contribution to science, philosophy, art, literature, world peace, the welfare of humanity, Nepalese industry, or economic improvement generally.<sup>107</sup>

Nepalese law therefore does not technically bar Tibetans from acquiring citizenship. But government officials candidly conceded that Nepal does not want Tibetans to become citizens. Home Secretary Regmi and Undersecretary Dhakal said—apparently mistakenly—that the law categorically does not permit refugees to acquire citizenship. Expressing a fear that naturalization would encourage Tibetans to assimilate and thereby threaten the Nepalese cultural identity, Secretary Regmi remarked that repatriation rather than naturalization would be the most desirable solution for Nepal’s Tibetan residents.<sup>108</sup> Other officials argued that Tibetans never relinquished their prior citizenship as required by the Citizenship Act. In any event the bottom line, as former Home Minister Ser Bhadadur Dupa remarked to the Nepalese National Assembly in 1993, is that “there is simply no policy of giving the [Tibetan] refugees Nepalese citizenship.”<sup>109</sup>

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<sup>106</sup> Nepal Citizenship Act, 2048 (1963) (as amended, 1989, 1992); *see also* NEPAL CONST. art. 9(4) (setting forth similarly the conditions for the acquisition of Nepalese citizenship by a foreigner).

<sup>107</sup> Nepal Citizenship Act, 2048 (1963) (as amended, 1989, 1992).

<sup>108</sup> Tibet Justice Center interviews with Shree Kant Regmi, Secretary, and Ganesh Dhakal, Undersecretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>109</sup> *Tibetan Refugees Not to be Given Citizenship Certificate in Nepal*, U.P.I., Aug. 10, 1993.

A few Tibetans manage to obtain citizenship. Tibetan women who marry Nepalese men, for example, automatically become citizens, but the converse is not the case, i.e., Tibetan men cannot obtain citizenship by marrying Nepalese women.<sup>110</sup> While the CRC obliges Nepal to respect the rights of every child “to acquire a nationality” and “to preserve his or her identity, including nationality,”<sup>111</sup> children born to Tibetan refugees in Nepal generally do not have a right to acquire Nepalese citizenship; rather, they inherit the precarious status of their parents. Only children of mixed marriages whose fathers are Nepalese can become Nepalese citizens.<sup>112</sup>

Some Tibetans seek to acquire citizenship papers so that they can purchase a business. But because the naturalization process is cumbersome, most Tibetans who need to own property or incorporate a business find it easier to either purchase false citizenship papers or secure the cooperation of a Nepalese citizen in whose name title will be held.<sup>113</sup> Karma Samten, a refugee who resides at the Paljorling Settlement, said that citizenship papers cost about U.S. \$2000 on the black market.<sup>114</sup> But purchasing citizenship papers illegally is risky. Tsering Yanki, a refugee at Jawalakhel, explained that “[t]hese days it is possible to make citizenship [papers for] Nepal, but it is not real; it is a duplicate, and very risky. If the police catch you, you go to jail.” But to obtain citizenship through the legal process, she continued, is even more difficult.<sup>115</sup> Tsondu Tharchin, for example, a

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<sup>110</sup> Tibet Justice Center interviews with Shree Kant Regmi, Secretary, and Ganesh Dhakal, Undersecretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>111</sup> CRC, arts. 7, 8.

<sup>112</sup> Tibet Justice Center interviews with Shree Kant Regmi, Secretary, and Ganesh Dhakal, Undersecretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>113</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

<sup>114</sup> Tibet Justice Center interview with Karma Samten, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>115</sup> Tibet Justice Center interview with Tsering Yanki, Jawalakhel Settlement, in Kathmandu (June 7, 2001).

resident of Tashi Palkhiel, said that he applied for citizenship in about 1995 by submitting an application to the Pokhara office of the Ministry of Home Affairs, but “[t]hey showed me something in the Constitution and said, ‘You’re a refugee, you can’t get citizenship.’”<sup>116</sup> Tibet Justice Center did not interview any Tibetan who had successfully acquired Nepalese citizenship through the naturalization process established by the Nepal Citizenship Act.

Most Tibetans, however, never attempt to become citizens. The reasons for this are twofold: First, most recognize that few, if any, legal avenues to citizenship exist; and second, some Tibetans feel that to acquire Nepalese citizenship would be to compromise or dilute the integrity of the Tibetan national identity. The latter reason seems to be more of a concern among older Tibetans. By contrast, several Tibetan interviewees under the age of thirty expressed a desire to acquire citizenship. Karma Samten, for example, a resident of the Paljorling Settlement, explained: “If I had Nepali citizenship, I would have more rights...I would be able to buy land, do business, and have better options.”<sup>117</sup> Kunga Gyatso, another resident of Paljorling, similarly remarked that, with citizenship, “you can own a building or buy property or [do] anything.”<sup>118</sup> For some second-generation Tibetans, the benefits of citizenship thus appear to outweigh the concerns expressed by older Tibetans about maintaining the integrity of the Tibetan national identity.

But most Tibetans interviewed by Tibet Justice Center did not desire Nepalese citizenship. Shakya Honnkte Parkeanghuk, a resident of Tashi Palkhiel, captured this sentiment plainly: “I do not want to become a citizen of Nepal. I want to return to a free Tibet.”<sup>119</sup> In part,

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<sup>116</sup> Tibet Justice Center interview with Tsondu Tharchin, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>117</sup> Tibet Justice Center interview with Karma Samten, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>118</sup> Tibet Justice Center interview with Kunga Gyatso, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>119</sup> Tibet Justice Center interview with Shakya Honnkte Parkeanghuk, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).



this widespread view originates in a now-defunct policy of the Tibetan government-in-exile, adopted in the aftermath of the 1959 exodus of the Dalai Lama and the thousands of Tibetans who followed him into exile. At that time, the Tibetan government-in-exile believed that exile would be short-term, and that the purpose of exile should not be to seek a new and better life in foreign lands, but to struggle to regain their country by any means available.<sup>120</sup> The Tibetan government-in-exile thus adopted a policy discouraging naturalization. This policy is no longer in effect. By the early 1990s, the Tibetan government-in-exile had come to recognize that naturalization, far from eroding the Tibetan national identity, provides greater opportunities, particularly to Tibetan children, to achieve higher education, to express their political views freely, and to more effectively advance the Tibetan cause in the international arena.<sup>121</sup> But the bias against naturalization nonetheless remains among many older Tibetans. “Until recently,” Tibetan Youth Congress President Kelsang Phunstok explained, “the perception was that you should remain refugees; citizenship was seen as a betrayal.”<sup>122</sup> Younger Tibetans, too, while more pragmatic in their views, remained concerned that to exchange refugee status for Nepalese citizenship—even were it legally feasible—would be to betray their Tibetan identity. “I don’t want to obtain [Nepalese] citizenship,” insisted Jamyang Dorjee, a thirty-year-old resident of Tashi Ling. “I am Tibetan. How can I become Nepalese?”<sup>123</sup> Most Tibetans interviewed hoped to return to a free Tibet.

In reality, however, remaining stateless and without legal rights leaves Tibetan refugees in a dangerously precarious situation that

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<sup>120</sup> Tibet Justice Center interviews with Phintso Thonden, former representative of the Dalai Lama to North America (1966-73) and India (1973-75) (Mar. 31, 2002); Rinchen Dharlo, President, Tibet Fund (April 3, 2002).

<sup>121</sup> Tibet Justice Center interview with Rinchen Dharlo, President, Tibet Fund (April 3, 2002).

<sup>122</sup> Tibet Justice Center interview with Kelsang Phuntsok, President, Tibetan Youth Congress, in Kathmandu (May 24, 2001).

<sup>123</sup> Tibet Justice Center interview with Jamyang Dorjee, Tashi Ling Settlement, in Pokhara (May 28, 2001).

threatens their long-term survival. Phuntsok, a fifty-seven-year-old refugee at Paljorling, acknowledged that for members of the Tibetan exile community today, seeking citizenship in their host country may be the most viable, perhaps the only, alternative to statelessness. “No Tibetans want to be citizens of another country,” he said, “but circumstances sometimes compel them to do so.”<sup>124</sup> At this stage, the resilience of the Tibetan exile community depends on the willingness of governments, UNHCR, and the international community to begin to take steps to address the precarious status of the Tibetan refugee populations in Nepal and India by, among other things, advocating and supporting meaningful local integration and third-country resettlement.

Third-country resettlement of Tibetan refugees already has proven successful on a small scale. In the early 1960s, the Swiss Red Cross facilitated the resettlement of about 1500 Tibetans to Switzerland. Many achieved higher levels of education and thrived economically, and about 2000 Tibetans now reside permanently in Switzerland.<sup>125</sup> Based on this initial positive experience, the Dalai Lama approached the Canadian and U.S. governments during the last years of Lyndon Johnson’s administration. At that time (approximately 1969 or 1970), Canada agreed to accept about 500 Tibetans. But for reasons that remain unclear, the United States did not then respond to the Dalai Lama’s request. In 1990, however, the U.S. Congress, with the support of Senator Ted Kennedy, and Congressmen Barney Frank, Charlie Rose, Ben Gilman, Tom Lantos, and John Porter, passed the Immigration Act of 1990, section 134 of which authorized the issuance of “1,000 immigrant visas to ‘displaced’ Tibetans living in India and Nepal.”<sup>126</sup> Third-country

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<sup>124</sup> Tibet Justice Center interview with Phuntsok, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>125</sup> See Rinchen Dharlo, *A Brief History of Tibetans in North America*, TIBETAN REV., Oct. 1994, at 12, 13. (“[S]uch settlement projects contributed to the economic well-being of the larger Tibetan community. While Tibetans learned a great deal from living abroad, they were also able to preserve their identity and culture quite well and in doing so, they have become good representatives of the Tibetan people.”).

<sup>126</sup> *Id.* at 13-15.

resettlement has therefore proved to be a viable and historically successful option. Much more could be done in this regard to provide Tibetan refugees with a durable solution, assisting them to achieve greater stability and control over their lives.

### III. Identity Cards (RCs)

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Because Nepal does not grant Tibetans legal status, refugee identity cards (RCs) are critical for Tibetans residing in Nepal. RCs provide a modicum of security from harassment by authorities and, potentially, even expulsion to India. Director-General of Immigration Mainali said that RCs entitle Tibetans to “refugee status,” which allows such Tibetans to remain in Nepal with certain minimal rights, such as the (theoretical) ability to acquire a travel document.<sup>127</sup> “Without an identity card,” Home Undersecretary Dhakal remarked, “they [Tibetans in Nepal] are not refugees.”<sup>128</sup> Again, however, it is important to emphasize that “refugee” is not a term of art in Nepal; it does not define a legal category of persons or provide persons so identified with any status consistent with the Refugee Conventions.

Accounts vary, but it appears that the Nepalese government first provided documentation to Tibetan refugees in the mid-1970s. In 1974, the government registered the former Mustang guerillas for administrative and security purposes.<sup>129</sup> In 1995, UNHCR urged the government to issue RCs to all legally resident Tibetans (those who arrived in or before 1989) above the age of eighteen, and the

government agreed.<sup>130</sup> But later that year it suspended the program, apparently because of a change in government. Subsequently, the central district officers (CDOs), lower-level functionaries in the Ministry of Home Affairs, sought to provide RCs to most Tibetans in the settlements in the Kathmandu valley. But officials evidently did not return to the Pokhara settlements after 1995. For this reason, particularly in Pokhara, Tibetans who had not been present in 1995, or who subsequently reached the age of eighteen, continue to lack RCs.<sup>131</sup> Many legal Tibetan residents in Nepal therefore lack an RC even though the Nepalese government’s policy is to provide RCs to all Tibetans who arrived before 1989 and their adult children.

The Department of Immigration requires that RCs be renewed annually. Nepalese officials generally visit the settlements once each year to extend the validity of RCs already issued, but except as noted above, new RCs have not been issued. Tibetans not present at the time of these visits must go to their local central district office to renew their RCs. Dekyi Wangmo, a resident of Tashi Palkhiel, described the somewhat erratic nature of the renewal process:

It is difficult to renew the Nepali refugee identity cards. Sometimes, officials come here, but sometimes we have to go into town and wait for three to four days. To renew the card, we have to show our existing identity, and the [central district] office also maintains a registration list. It would be much better

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issued in or about 1974, contained numerous restrictions on movement within Nepal, including a general prohibition on travel from the Pokhara settlements to the Kathmandu valley. Tibet Justice Center interview with Phuntsok, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>130</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

<sup>131</sup> Legal residents interviewed at the Pokhara settlements of Paljorling, Tashi Ling, and Tashi Palkhiel said that they obtained RCs in 1995. By contrast, Tibetans residing at the Jawalakhel Settlement in the Kathmandu valley related that the government issued RCs in both 1995 and 1999.

if the RCs were valid for a longer period of time than just one year.<sup>132</sup>

Renewal is particularly difficult for Tibetans not present on the official registration day and for those who reside outside the settlements because it is the settlement officers who generally confirm the status of the refugees and pay the fees on their behalf.<sup>133</sup> Some Tibetans also reported that, outside of the settlements, immigration officials may delay the renewal process and extort bribes in exchange for the required renewal stamp. Dhondup Tsering explained:

When the Nepalese officials come to the settlement, it takes them ten hours to renew everyone's ID. If people miss the opportunity to have their IDs renewed here, then they have to go to an office in town. In town, they have to pay 25 Rs for their renewal, plus usually a bribe on the side...Otherwise, the officials will say to come back the next day.<sup>134</sup>

UNHCR explained that "obtaining an identity card is a cumbersome process," and "the [Nepalese] government makes more of a headache for itself." But UNHCR also emphasized that ensuring the efficient registration of legally resident Tibetans would be in the government's best interests. The registration process could enable the government accurately to distinguish pre-1989 residents from new arrivals.

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<sup>132</sup> Tibet Justice Center interview with Dekyi Wangmo, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001). Dhondup Tsering similarly remarked that his "wish was for the renewal of the RCs to be every five years, not every year." Tibet Justice Center interview with Dhondup Tsering, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>133</sup> Tibet Justice Center interviews with Karma Phuntsok, Paljorling Settlement, in Pokhara (May 29, 2001); Dhondup Tsering, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>134</sup> Tibet Justice Center interview with Dhondup Tsering, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

Without an RC, Tibetans cannot obtain documents to purchase a motorbike, apply for a driver's license, travel freely within Nepal (to non-restricted areas), or acquire a refugee travel document, which permits limited foreign travel. Karma Choezin, a resident of Tashi Palkhiel, complained that "sometimes when we go by tourist bus to Kathmandu, we need the identification card. Otherwise, they [the Nepalese authorities] would take us off the bus."<sup>135</sup> Travel across the border to India may also be difficult. Jigme Wangdu said that "[c]hildren [with no RC] who go across the border are asked, 'Where are you going?' If they don't have an RC, there are problems."<sup>136</sup> This is a serious concern because many children of Tibetans residing in Nepal travel to India to obtain an education in the schools run by the Tibetan government-in-exile. Individuals without an RC may also face obstacles to attending Nepalese schools and securing employment. Additionally, refugees said that Nepalese officials periodically come to the settlements to check whether Tibetans there possess RCs.<sup>137</sup> The police sometimes suspect that Tibetans without RCs are new arrivals remaining at the settlements illegally; at other times, the situation reportedly provides the officials with a means to extract minor bribes.

*The Special Case of Children.* Tibetan community leaders and NGO representatives from the Pokhara area pointed to the lack of documentation for adult children of resident Tibetans as one of the chief problems facing the Tibetan community in Nepal.<sup>138</sup> The vast

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<sup>135</sup> Tibet Justice Center interview with Karma Choezin, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>136</sup> Tibet Justice Center interview with Jigme Wangdu, Settlement Officer, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>137</sup> Tibet Justice Center interview with Karma Phuntsok, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>138</sup> Community and NGO leaders in Pokhara presented Tibet Justice Center with an appeal that listed, among other concerns, that "Tibetans have identity cards issued by his Majesty's Govt. of Nepal, but our children reaching adulthood have not [been] issued the identity cards, which causes difficulties to travel." Tibet Justice Center interviews, roundtable discussion with Tibetan community and NGO representatives, in Pokhara (May 30, 2001).

majority of Tibetans residing legally in Nepal without RCs are young men and women. Without RCs, their futures are bleaker than those of their parents. Unable to seek higher education or employment or to travel freely within Nepal, they are fast becoming the Tibetan community's greatest concern.

The children of Tibetan residents are entitled to receive RCs at the age of eighteen.<sup>139</sup> But in practice, most young adults find themselves unable to obtain RCs. Moreover, children born after 1999 in the Kathmandu settlements (and after 1995 in the Pokhara settlements) are not listed on their parents' RCs. They therefore possess no official evidence of their legal right to remain in Nepal. This creates serious problems because, as one Tibetan remarked, "[t]he children of Tibetans who are legal residents have no status. They can go to school, but need identification at the secondary level. The only way out for them is to purchase false documents and pretend; this is the only way to avoid being stateless." Many interviewees expressed grave concern about their children's lack of legal status. Budharpo Yichung of Tashi Palkhiel said that he frequently worries about his children's future:

My children do not have refugee identification cards. This is the main problem. Children are now above eighteen years old, and they still do not have an ID card. If they don't have an ID card, they have no identity. They just stay here, and they have never been to another place.<sup>140</sup>

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<sup>139</sup> While Nepalese government officials, Samdup Lhatse, and most refugees interviewed at the settlements said that children could apply for RCs at the age of eighteen, UNHCR Protection Officer Weil and Paljorling Settlement Officer Norbu Dorje said that children become eligible for RCs at the age of sixteen. Tibet Justice Center interviews with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001); Roland-Francois Weil, Protection Officer, UNHCR, in Kathmandu (May 25, 2001); Norbu Dorje, Settlement Officer, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>140</sup> Tibet Justice Center interview with Bhudharpo Yichung, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

Some older Tibetans also lack documentation. Settlement Officer Jigme Wangdu estimated that between forty and fifty individuals in the Tashi Palkhiel Settlement never received an RC because they were away from the settlement on the date the government distributed them.<sup>141</sup> At Jawalakhel, where the government reportedly issued RCs again in 1999, Settlement Officer Thinley Gyatso said that about twenty individuals do not possess RCs for the same reason; and between forty and fifty young people, who had been under the age of eighteen at the time of distribution, also lack RCs.<sup>142</sup>

The Tibetan government-in-exile, UNHCR, and the United States government have all made attempts to call the Nepalese government's attention to this problem. Settlement officers informed Tibet Justice Center that despite repeated requests, they have been unable to obtain the RCs for the children of settlement residents.<sup>143</sup> Individual refugees like Karma Sonam Tsering, a legal resident not present at Tashi Palkhiel at the time the Nepalese government last distributed RCs in 1995, said he submitted personal requests to the Department of Immigration on several occasions without success.<sup>144</sup> UNHCR Representative Dupoizat emphasized that UNHCR continually urges the CDOs (branches of the Home Ministry) to issue RCs to Tibetans who come of age, but "we are not very satisfied with how it's going, and some people fall through the cracks."<sup>145</sup> According to former U.S. Assistant Secretary of State Taft, last time she visited Nepal in 2000, the Nepalese government had committed to issuing RCs to all Tibetans

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<sup>141</sup> Tibet Justice Center interview with Jigme Wangdu, Settlement Officer, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>142</sup> Tibet Justice Center interview with Thinley Gyatso, Jawalakhel Settlement, in Kathmandu (June 7, 2001).

<sup>143</sup> Tibet Justice Center interviews with Jigme Wangdu, Settlement Officer, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001); Norbu Dorje, Settlement Officer, Paljorling Settlement, in Pokhara (May 29, 2001)

<sup>144</sup> Tibet Justice Center interview with Karma Sonam Tsering, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>145</sup> Tibet Justice Center interview with Michel Dupoizat, Representative, UNHCR, in Kathmandu (May 25, 2001).

entitled to one.<sup>146</sup> At the time of Tibet Justice Center’s research, the government had yet to follow through on this commitment.

Notwithstanding the foregoing problems, the Nepalese government does not appear to be unwilling to issue RCs. Bureaucratic inefficiencies, rather than any desire to withhold status from Tibetans residing legally in Nepal, appears to be the principal reason for delay. Jawalakhel Settlement Officer Thinley Gyatso said that while he engaged in several promising discussions with the central district officers (CDOs) for Kathmandu about having RCs issued for Tibetans who have reached the age of eighteen, he feared that the upheaval caused by the June 2001 massacre of the Nepalese royal family would delay the process once again.<sup>147</sup> Tibetan representatives of the Pokhara settlements emphasized that the United States, acting through the Kathmandu Embassy or the State Department’s Special Coordinator for Tibet—currently, U.S. Under Secretary for Global Affairs Paula Dobriansky—could remedy this situation by requesting that the Nepalese government implement its own policy: to issue RCs to all legally resident Tibetans and their children.<sup>148</sup>

## **IV. Travel Documents and Freedom of Movement**

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### **A. Restrictions on Movement Within Nepal**

Even with an RC, Tibetan residents in Nepal enjoy only limited freedom of movement. The government prohibits their travel to certain regions, particularly those near the northern border with China

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<sup>146</sup> Tibet Justice Center interview with Julia Taft, former Assistant Secretary of State for Population, Migration, and Refugees, and Special Coordinator for Tibet, in Washington, D.C. (April 17, 2001).

<sup>147</sup> Tibet Justice Center interview with Thinley Gyatso, Settlement Officer, Jawalakhel Settlement, in Kathmandu (June 7, 2001)

<sup>148</sup> Tibet Justice Center interviews, roundtable discussion with Tibetan community and NGO representatives, in Pokhara (May 30, 2001).

(Tibet). Most Tibetans said that the authorities seldom ask for their RCs while traveling in unrestricted areas of Nepal. But in prohibited areas, Tibetans said that they risk arrest and even deportation. For example, the Nepalese police arrested Lanchup, a member of the Tibetan National Ex-Political Prisoners Association, in December 2000 because he traveled to a restricted area without a permit. The authorities held him in custody until he paid a “fine” of 100,000 Rs (approximately \$1,300). He told Tibet Justice Center that he knew of a Tibetan family that had been deported for the same violation.<sup>149</sup> Several other members of the Tibetan National Ex-Political Prisoners Association remarked that some refer to refugee identification cards in jest as “prison identification cards,” because they impose such restraints on freedom of movement in Nepal.<sup>150</sup> Tibetans without RCs face even greater restrictions on their movement and may suffer harassment or the extortion of bribes if apprehended.

### **B. Restrictions on International Travel**

By law, Tibetan residents cannot obtain a Nepalese passport. To travel internationally, Tibetan residents must apply for a refugee travel document. By most accounts, this tends to be an inefficient, laborious process, plagued by systemic delay and bureaucratic corruption at some levels. Ordinarily, refugee travel documents remain valid for one year and are non-renewable. Foreign Minister Bastola explained that the government issues refugee travel documents at its discretion, at times relying on the recommendation of UNHCR. But “[t]here is no policy about issuing [refugee] travel documents. We do so on a case-by-case basis.”<sup>151</sup> To qualify for a travel document, Tibetans must present a valid

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<sup>149</sup> Tibet Justice Center interview with Lanchup, Tibetan National Ex-Political Prisoners Association, in Kathmandu (May 19, 2001).

<sup>150</sup> Tibet Justice Center interview with Lanchup, Choekyi Gyaltzen, and Tsering Losal, Tibetan National Ex-Political Prisoners Association, in Kathmandu (May 19, 2001).

<sup>151</sup> Tibet Justice Center interview with Chakra Prasad Bastola, Minister, Ministry of Foreign Affairs, in Kathmandu (May 25, 2001).

RC and pay a fee.<sup>152</sup> UNHCR Protection Officer Weil added that refugees must provide a valid reason for traveling outside of the country “such as a letter of invitation, medical [problems], family reunification, a conference, and sometimes—but not always—business affairs.” He added that “bureaucratic red tape” often makes international travel for most legally resident Tibetans prohibitively difficult.<sup>153</sup>

Several Tibetan interviewees confirmed these problems. “To get a [travel] permit,” said Dhondup Tsering, “we have to go to many offices. Local Nepalese people can get everything from the [central] district offices. For Tibetan people, we have to go through the settlement office, then the district office, then the Home Ministry, then the Foreign Ministry.”<sup>154</sup> Based on the accounts of Tibetans who successfully acquired refugee travel documents, fees for their issuance generally run to around U.S. \$100 to \$150.<sup>155</sup> Corruption among some civil service officials adds complexity and cost to the process. Karma Palden Tsering, a resident of Jawalakhel, recounted:

I went to Denmark for a human rights and democracy workshop, for one month. We had to bribe officials to get our travel documents. First, we went to the central district office, then to the Home Ministry, then to the Foreign Ministry. I paid around 10,000 Rs [approximately \$130] to get my travel documents, and it took about one month to get them all.<sup>156</sup>

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<sup>152</sup> Tibet Justice Center interview with Umesh Prasad Mainali, Director-General, Department of Immigration, in Kathmandu (May 21, 2001).

<sup>153</sup> Tibet Justice Center interview with Roland-Francois Weil, Protection Officer, UNHCR, in Kathmandu (May 25, 2001).

<sup>154</sup> Tibet Justice Center interview with Dhondup Tsering, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>155</sup> Another source, who requested anonymity, confirmed these figures, noting that false documents generally cost about 60,000 Rs, and as much as 100,000 to 200,000 Rs, approximately \$1,300 to \$2,600, for a high-quality document.

<sup>156</sup> Tibet Justice Center interview with Karma Palden Tsering, Jawalakhel Settlement, in Kathmandu (June 7, 2001).

Recently, the government appears to have tightened its control over Tibetans’ foreign travel. One Tibetan resident, who requested anonymity, said that his application had been pending for several months, and that it now appears difficult, if not impossible, for Tibetans in Nepal to obtain a refugee travel document. Both Tibetans and Nepalese officials expressed the belief that heightened Chinese pressure is partially to blame for this state of affairs.<sup>157</sup>

### C. Travel to India

For many years, Nepal permitted Tibetan residents to travel to India without a refugee travel document. But a new law passed in October 2000 now requires Tibetans to obtain documentation if they intend to travel to India by air.<sup>158</sup> This imposes a substantial burden on Tibetans because of the bureaucratic hurdles they face in acquiring a travel document. Recently, for example, the Nepalese government agreed to issue special permits to Tibetans who wanted to attend a teaching of the Dalai Lama in India in January 2002. Some Tibetans welcomed this concession, while others viewed it as a stopgap measure. One Tibetan, who requested anonymity, remarked: “We really need a more permanent solution. Acquiring a permit every time one needs to travel to India would impose so much hardship, including corruption.”

Because of the difficulties in acquiring a travel document, the majority of Tibetans travel to India overland. Tibetans said they face harassment, extortion, and discrimination from Nepalese and Indian border officials who often maintain, contrary to their governments’ policies, that RCs do not permit passage between India and Nepal.<sup>159</sup>

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<sup>157</sup> Tibet Justice Center interviews with Chakra Prasad Bastola, Minister, Ministry of Foreign Affairs, in Kathmandu (May 25, 2001); Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 18, 2001).

<sup>158</sup> Tibet Justice Center interviews, roundtable discussion with Tibetan community and NGO representatives, in Pokhara (May 30, 2001).

<sup>159</sup> Tibet Justice Center interviews with Kunga Gyatso, Paljorling Settlement, in Pokhara (May 29, 2001); Karma Choezin, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

Karma Phuntsok, a resident of Paljorling, explained:

I face many problems when crossing the border from Nepal to India. If I show my Nepali ID card, the police say that it is only for traveling inside Nepal, and it is not valid to go to India. They say I am a Tibetan refugee. They tell me I have to show a passport. Sometimes, I have to pay at every check-point along the border.<sup>160</sup>

Representatives of the Tibetan National Ex-Political Prisoners Association said that undocumented Tibetans generally pay as much as 20,000 to 30,000 Rs (\$260 to \$390) in bribes to authorities at the border.<sup>161</sup>

Frustrated by the cumbersome procedures for obtaining a refugee travel document, some Tibetans make or pay for false documents.<sup>162</sup> One Tibetan businessman emphasized, however, that lower-level government officials have become somewhat less likely than in the past to accept bribes for false papers. Mounting pressure from China has led the Ministry of Foreign Affairs to crack down on this practice. Foreign Minister Bastola remarked that he would like the Ministry to begin to produce refugee travel documents that would be more difficult to forge. But government regulations require him to grant contracts to the lowest bidder, frustrating his efforts to shift to more expensive fraud-proof documents.<sup>163</sup>

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<sup>160</sup> Tibet Justice Center interview with Karma Phuntsok, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>161</sup> Tibet Justice Center interview with Lanchup, Choekyi Gyaltzen, and Tsering Losal, Tibetan National Ex-Political Prisoners Association, in Kathmandu (May 19, 2001).

<sup>162</sup> Tibet Justice Center interview with Umesh Prasad Mainali, Director-General, Department of Immigration, in Kathmandu (May 21, 2001).

<sup>163</sup> Tibet Justice Center interview with Chakra Prasad Bastola, Minister of Foreign Affairs, in Kathmandu (May 25, 2001). Minister Bastola said that he intended to seek a waiver of this rule next year in order to produce more secure travel documents.

Representative Dupoizat said UNHCR has also urged the Nepalese government to change the format of travel documents in order to reduce fraud.<sup>164</sup>

Making or purchasing false documents may be the only option for some Tibetans seeking to travel abroad. But in the long term, this practice appears to threaten greater harm than good to the Tibetan community in Nepal. John Dyson, Political and Economic Officer at the U.S. Embassy in Kathmandu, explained that because consular officers recognize the ability of some to obtain false documents in Nepal, they tend to pay less attention to the validity of these documents, thus weakening the cases of those seeking to travel on *bona fide* travel documents.<sup>165</sup> In any event, with the exception of the United States, Canada, Switzerland, and a few others, most foreign embassies refuse altogether to accept such travel documents, granting visas only upon presentation of a proper passport, thus making travel to most foreign countries by Tibetan residents in Nepal impossible.

## V. Property and Employment Rights

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### A. Property Ownership

Tibetan residents in Nepal have no right to own property. Secretary Shrestha of the Ministry of Law and Justice explained that “Tibetans cannot maintain property here because Nepal is a small country and a poor country,” and the government seeks to preserve Nepal’s scarce resources for Nepalese citizens.<sup>166</sup> The curious exception to this blanket prohibition is that Tibetans may purchase and own motorbikes.

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<sup>164</sup> Tibet Justice Center interview with Michel Dupoizat, Representative, UNHCR, in Kathmandu (May 25, 2001).

<sup>165</sup> Tibet Justice Center interview with John Dyson, Political and Economic Officer, U.S. Embassy, in Kathmandu (May 23, 2001).

<sup>166</sup> Tibet Justice Center interview with Udaya Nepali Shrestha, Secretary, Ministry of Law and Justice, in Kathmandu (May 22, 2001).

But they cannot own houses, automobiles, land, or other forms of personal or real property. Tibetans who live outside of the settlements generally rent their homes from Nepalese citizens.<sup>167</sup> With one exception,<sup>168</sup> today, as at the time of their founding, Tibetan settlement lands are owned by the Nepal Red Cross, which effectively holds them in trust for their residents.<sup>169</sup>

The dearth of adequate living space poses a serious problem for the settlement residents. Most live in houses built or acquired in the 1960s and 1970s. But today, the original residents must find space in these same structures for their children and grandchildren. Increasingly, as many as nine or ten people live together in a two-room house. Pema Choedon, for example, a twenty-nine-year-old resident of Tashi Palkhiel, lives with nine others, including her husband, children, and her husband's parents and brothers.<sup>170</sup> "The biggest problem facing the settlement now," Jawalakhel Settlement Officer Thinley Gyatso emphasized, "is the shortage of land. We are not allowed to buy more land. The population is growing. There are many children. For example, we have four families in one small building."<sup>171</sup> Without ownership of the land or their homes, and

<sup>167</sup> One couple, who lives near Tashi Palkhiel, pays 5,500 Rs (approximately \$71) per month in rent, leaving only 300 Rs from their combined salaries to meet their food and other needs. Tibet Justice Center interview with Sherap Dolma, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>168</sup> The Paljorling Settlement owns its own land because a Tibetan woman who acquired Nepalese citizenship purchased it in 1968, though it is unclear to whom ownership will pass when she passes away. Tibet Justice Center interview with Norbu Dorje, Settlement Officer, in Pokhara (May 29, 2001).

<sup>169</sup> Tibet Justice Center interview with T.R. Onta, Executive Director, Nepal Red Cross, in Kathmandu (June 11, 2001).

<sup>170</sup> Tibet Justice Center interview with Pema Choedon, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>171</sup> Tibet Justice Center interview with Thinley Gyatso, Settlement Officer, Jawalakhel Settlement, in Kathmandu (June 7, 2001). At Paljorling, Norbu Dorjee expressed similar concerns, noting that "there have been many children and not enough land to expand. We have too many people for the amount of space we have. We have two or three families in one room." Tibet Justice Center interview with Norbu Dorje, Settlement Officer, Paljorling Settlement, in Pokhara (May 29, 2001).



Elizabeth Brundige, May 2001

As the Tibetan community in Nepal grows, settlement residents increasingly find themselves crowded together in homes built years earlier, intended for one to four residents but now often housing as many as twelve. Without the right to own or purchase property, the Tibetan community cannot expand the settlements or construct new housing to meet the needs of its growing population.

prohibited by law from purchasing additional property, Tibetan residents cannot expand the settlements to meet the needs of a growing population.

## B. Employment Rights and Taxation

Settlement residents do not pay taxes to the Nepalese government. (Most, however, contribute two percent of their income to the Tibetan government-in-exile as a voluntary tax.) By the same token, residents do not receive benefits or aid of any kind from the government. Former Tibetan Welfare Office Representative Samdup Lhatse explained that the Tibetan government-in-exile provides some limited help to Tibetans in Nepal; for example, educational scholarships for the young and financial support for the elderly. Several Tibetan NGOs also provide refugees with some assistance.



For example, Lodric, a Tibetan NGO active in the Paljorling and Jampaling Settlements, grants monthly pensions of 2000 Rs (approximately U.S. \$26) to elderly settlement residents; and the Norbulingka Social Welfare Organization at Jawalakhel provides training programs for young Tibetans.<sup>172</sup>

Government officials and Tibetan residents confirmed that Tibetans can work in some jobs provided they possess an RC. Only citizens, however, can own and incorporate businesses.<sup>173</sup> Tibetan businessmen and entrepreneurs therefore must either hire a Nepalese citizen to serve as the nominal owner of his or her business or attempt to acquire citizenship, which generally means purchasing false papers on the black market. While some scapegoat Tibetans as “wealthy capitalists” who occupy jobs that would otherwise be available to the Nepalese people, the reverse is often true. A few Tibetans have been financially successful, largely because of the once-flourishing Tibetan carpet industry. But most struggle to subsist. The majority of settlement residents interviewed by Tibet Justice Center support themselves by selling souvenirs to tourists or operating small restaurants.<sup>174</sup> Others work as teachers, nurses, or administrative assistants at the settlements.<sup>175</sup> Still others work in the carpet factories, but most frequently as laborers and salespersons rather than business managers.<sup>176</sup> The carpet industry has also been in decline since the early 1990s,

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<sup>172</sup> Tibet Justice Center interviews with Tashi Thundrup, Paljorling Settlement, in Pokhara (May 29, 2001); Tashi Dawa, Paljorling Settlement, in Pokhara (May 29, 2001); Chime Dhondren, Jawalakhel Settlement, in Kathmandu (June 7, 2001); Karma Palden Tsering, Jawalakhel Settlement, in Kathmandu (June 7, 2001).

<sup>173</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

<sup>174</sup> Shopkeepers said they generally can earn about 1,000 Rs (approximately \$13) monthly selling souvenirs, with business varying by season.

<sup>175</sup> Interviewees said that teachers earn about 5,800 Rs monthly, and cashiers, secretaries, and other staff at the settlements earn about 4,000 Rs monthly.

<sup>176</sup> Salespersons earn about 2,500 Rs monthly, while a carpet designer may earn as much as 4,000 Rs monthly. Tibet Justice Center interviews with Tsondu Tharchin, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001); Tsering Yanki, Jawalakhel Settlement, in Kathmandu (June 7, 2001).

and many such settlement factories have closed.<sup>177</sup> Settlements contain scarce land suited for cultivation, and few jobs for Tibetans exist outside of the settlements.

Young adults living in the settlements expressed discouragement and frustration at their lack of employment opportunities. While all young people in Nepal face this situation to some extent, for Tibetans, it is aggravated by legal and social discrimination. Several interviewees expressed the hope that they might be able to have their own living space and begin new lives outside the settlements; few knew of any feasible means to realize their aspiration. Norbu Dorje remarked:

When parents have money, they try to send their children to college in India. When children return here after their studies, they face problems, because we don't have space or jobs to [offer] them in the Tibetan settlement here. Joblessness is a grave problem.<sup>178</sup>

Sangpo, Youth President at Jampaling, said that “the most urgent thing for the future is to help youngsters find jobs, get training. Otherwise, they go down much worse paths.”<sup>179</sup> Some Tibetans seek to participate in Nepal's trekking industry, but they frequently face insurmountable obstacles because of rigid travel and employment restrictions. “At checkpoints,” one settlement resident explained, “the police ask for your guide license, which is issued only to Nepalese, so I must say that I am a friend of the tourists and that they are taking me with them.”<sup>180</sup> Tsewang Mingde, a refugee at the Tashi Ling Settlement, described her

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<sup>177</sup> Tibet Justice Center interviews with Thinley Gyatso, Settlement Officer, Jawalakhel Settlement, in Kathmandu (June 7, 2001); Norbu Dorje, Settlement Officer, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>178</sup> Tibet Justice Center interview with Norbu Dorje, Settlement Officer, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>179</sup> Tibet Justice Center interview with Sangpo, President, Youth Organization, Jampaling Settlement, in Pokhara (May 29, 2001).

<sup>180</sup> Tibet Justice Center interview with anonymous resident, Tashi Ling Settlement, in Pokhara (May 28, 2001).

mounting frustration as she watched her own children struggle to find employment: “My daughter has a B.A. and wanted a government post. But Tibetans can’t have government jobs. Now they say that hotel guides and trekking guides must be Nepali citizens, and it is hard to get citizenship.”<sup>181</sup> Other private businesses from which Tibetans are not barred by law nonetheless hesitate to hire qualified Tibetans when Nepalese young people also need jobs.<sup>182</sup>

## VI. Freedom of Expression

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Tibetans residing in Nepal today face heightened restrictions on their right (or ability) to hold certain cultural events and to stage peaceful political demonstrations. As Nepal pursues closer ties with China and pressure from Beijing intensifies, the Nepalese government’s toleration of perceived “anti-China” activities decreases. According to some reports, the Karmapa’s escape in January 2000 exacerbated the situation for Tibetans. Representative Samdup Lhatse noted that “both the Chinese government and Nepalese opposition parties have been blaming the Nepalese government for the escape of the Karmapa, and using this as an excuse to tighten security and crack down on Tibetan social and political activities.”<sup>183</sup> Moreover, the political instability in Nepal caused by the Maoist insurgency contributes to a growing intolerance for any public display of Tibetan cultural or political activities. Because the line between cultural and political activities is often blurred, the Nepalese government at times perceives cultural and religious events to be political in nature.

Nepalese government officials made clear that they would not

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<sup>181</sup> Tibet Justice Center interview with Tsewang Mingde, Tashi Ling Settlement, in Pokhara (May 28, 2001).

<sup>182</sup> Tibet Justice Center interviews, roundtable discussion with Tibetan community and NGO representatives, in Pokhara (May 30, 2001).

<sup>183</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

tolerate “anti-China” activities in Nepal. Home Secretary Regmi explained that “Nepal will not serve as a base for anti-China activities against our neighbor. . . . It is the established policy of the government not to let any anti-Chinese activities [take place] on our soil. If there are anti-China activities in Nepal, they [the Chinese authorities] will not be pleased.”<sup>184</sup> Foreign Minister Bastola emphasized the same position and remarked that “[i]f [the Tibetans] are refugees, we say they should remain refugees, not political activists.”<sup>185</sup>

### A. Pokhara

Tibetans living in the Pokhara settlements said March 10, 1999, marked the beginning of a period of heightened intolerance of Tibetan political and cultural activities. On March 10th, the anniversary of the 1959 Lhasa Uprising, Tibetans in the exile community typically organize peaceful marches and demonstrations. In Pokhara in 1999, these events, organized largely by the Tibetan Youth Congress (TYC) and the Tibetan Women’s Association (TWA), erupted into violence after Nepalese police ordered Tibetan demonstrators to return to their settlements. Some refused, and the police responded with tear gas and by beating some demonstrators with sticks.<sup>186</sup> Karma Choezin, then TWA President at Tashi Palkhiel, recalled: “On March 10th, I was beaten with a stick. They were beating our backsides, and I put my hands behind to protect myself. My right hand was broken. Now we are not free to do a peace march. The

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<sup>184</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>185</sup> Tibet Justice Center interview with Chakra Prasad Bastola, Minister, Ministry of Foreign Affairs, in Kathmandu (May 25, 2001).

<sup>186</sup> Tibet Justice Center interviews with Dekyi Wangmo, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001); Tashi Thundrup, Paljorling Settlement, in Pokhara (May 29, 2001); Thubten Tsering, Paljorling Settlement, in Pokhara (May 29, 2001); Shakya Honnkte Parkeangthuk, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001); Karma Sampten, Paljorling Settlement, in Pokhara (May 29, 2001); Pema Tenzin, Tashi Ling Settlement, in Pokhara (May 28, 2001); Keylo Tsearpaysang, Paljorling Settlement, in Pokhara (May 29, 2001).

Nepali government will never allow it.”<sup>187</sup>

Paljorling Settlement Officer Norbu Dorje described how this event and its aftermath prompted a heightened crackdown on political and cultural expression among the Tibetans residing at the Pokhara Settlements:

In 1999, we marched from one end of [the lake in Pokhara] to the other. The march was stopped by the police. The police said: “We let you go this far, but we have to obey the orders of our authorities, but also China, because we’re small and poor.” The younger Tibetans didn’t listen. They had so much love for their country that they couldn’t control themselves. About 160 people were imprisoned for a few days. After this, officials came to the settlements to warn us. The police asked the settlement officers to go to City Hall on March 12th, and [they] had to put it in writing that they would not participate in political activities. Since then, the police have been very strict. When March 10th or other holidays near, the police come to the settlements to find out what we are planning. We celebrate days here in the camp, but we are not allowed to go out.<sup>188</sup>

The settlement officers in Pokhara thereafter reluctantly agreed to ask the TYC, TWA, and other organizations to cease demonstrating outside of the settlement boundaries.<sup>189</sup>

Since 1999, Tibetan political and cultural activities in Pokhara

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<sup>187</sup> Tibet Justice Center interview with Karma Choezin, Tashi Palkhiel TWA President, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>188</sup> Tibet Justice Center interview with Norbu Dorje, Settlement Officer, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>189</sup> Tibet Justice Center interview with Jigme Wandu, Settlement Officer, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

have taken place within the settlements, although a few Tibetans have quietly distributed leaflets to tourists. Tibetans also said they can no longer display the Tibetan flag outside of the settlements. Some, however, manage to remain politically involved in a low-profile manner. Dhondup Tsering, Pokhara Regional President of the National Democratic Party of Tibet, said that while the newly formed political party mainly staged events in India, “we have some activities in our home here, and the government does not disturb us when we are in the settlement.”<sup>190</sup> Pokhara Regional TYC President Thutop Yuthok and TWA President Pema Dolkar both said that because of heightened restrictions on Tibetans’ political activity, their organizations had been forced to shift their focus from political to social-welfare work.<sup>191</sup>

## **B. Kathmandu**

In Kathmandu, too, the Nepalese government limits Tibetan cultural events. The Tibet Information Network (TIN), a London-based organization that provides independent monitoring of matters concerning Tibet, reported that on December 4, 2000:

Nepalese police baton-charged a crowd of thousands of Tibetans, including monks, nuns and schoolchildren, in order to break up an event organized to commemorate the 50th anniversary of the Dalai Lama’s leadership. Tibetans were allowed to hold a peaceful gathering to commemorate Human Rights Day and the anniversary of the presentation of the Nobel Peace Prize to the Dalai Lama on 10 December at the Boudhanath Stupa in the city, but there was a

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<sup>190</sup> Tibet Justice Center interview with Dhondup Tsering, Pokhara Regional President, National Democratic Party of Tibet, in Pokhara (May 30, 2001).

<sup>191</sup> Tibet Justice Center interviews with Thutop Yuthok, Pokhara Regional President, TYC, in Pokhara (May 30, 2001); Pema Dolkar, Pokhara Regional President, TWA, in Pokhara (May 30, 2001).

heavy police presence at the event, including some officers in riot gear with batons.<sup>192</sup>

Interviews with TYC President Kelsang Phuntsok, TWA President Purbu Dolma, and residents of Jawalakhel confirmed reports of heightened restrictions on Tibetans' freedom of assembly and expression. Jawalakhel Settlement Officer Thinley Gyatso said that during the December 10, 2000 celebration, the Nepalese authorities prohibited Tibetans from holding a ceremony at a public school:

There have been some changes from the [Nepalese] government. Sometimes, when we organized events like for the Dalai Lama's birthday, we don't get sanction [a permit] from the [central] district office....[I]n December 2000, we were celebrating the fifty-years enthronement of the Dalai Lama. The event was going to be at Namgyal Middle School, but they did not allow us to do the ceremony. Authorities said [it] was a public space, and we could not have our celebrations in public places.<sup>193</sup>

Tibetans' March 10th celebrations at the Boudhanath Stupa have always been potentially volatile. In 2000, the celebrations led to a violent exchange of bricks and stones after Nepalese authorities refused to allow Tibetans to leave through the Boudha gate entrance. A small child was killed, dozens of people injured, and a young boy arrested for throwing stones. In 2001, TYC members, cooperating with the Tibetan Welfare Office, worked to prevent further confrontations between Tibetans and the police.<sup>194</sup> TYC members dis-

<sup>192</sup> TIN, News Update, *Tibetans Sent Back Across the Border as Pressure Increases on Nepal*, Dec. 20, 2000.

<sup>193</sup> Tibet Justice Center interview with Thinley Gyatso, Settlement Officer, Jawalakhel Settlement, in Kathmandu (June 7, 2001).

<sup>194</sup> Tibet Justice Center interviews with Samdup Lhatse, former representative,

couraged Tibetans from waving the Tibetan flag or engaging in other more overt political activities. One Tibetan and one American hoisted the Tibetan flag, but the police did not respond with force, and the celebrations proceeded without a major incident.<sup>195</sup>

In 2002, at least three Tibetan national flags were displayed during the March 10th commemoration in Boudha. While Nepalese police in riot gear remained present throughout the day, no major confrontations took place until after the public events concluded. At that time, a group of young Tibetans wearing "Free Tibet" banners on their foreheads and carrying Tibetan flags managed to evade the Nepalese police at Boudha and travel to Thamel, where they demonstrated and shouted slogans. They then marched toward the Chinese Embassy, but the Nepalese police apprehended them within a few yards of the Embassy grounds. The youths reportedly sat immobile in a show of civil disobedience, and the police responded by beating them with batons and kicking them. Several of the demonstrators sustained bruises and other injuries. They were detained briefly but released shortly after the incident. The following day, the Tibetan Welfare Office issued a public notice imploring Tibetans not to engage in such high-profile demonstrations on March 10th.<sup>196</sup>

### C. Religious Freedom

Tibetans in Nepal generally enjoy freedom of religion. After Hinduism, Buddhism is the most widely practiced religion in Nepal, particularly among the Tibeto-Burmese ethnic groups that populate Nepal's north-

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Tibetan Welfare Office, in Kathmandu (May 20, 2001); Kelsang Phuntsok, TYC President, in Kathmandu (May 24, 2001); see, e.g., *Tibetans in Nepal Mark Anniversary of Failed Uprising*, AGENCE FRANCE-PRESSE, Mar. 10, 2001.

<sup>195</sup> Tibet Justice Center interviews with John Dyson, Political and Economic Officer, U.S. Embassy, in Kathmandu (May 23, 2001); Kelsang Phuntsok, TYC President, in Kathmandu (May 24, 2001).

<sup>196</sup> Email from Dorjee Damdul, Researcher, Tibetan Centre for Human Rights and Democracy (TCHRD), Kathmandu, to Robert D. Sloane, Tibet Justice Center, New York (Mar. 22, 2002) (on file with Tibet Justice Center).

ern Himalayan regions. Nepalese Hindus also consider the historical Buddha to be an incarnation of the Hindu god Vishnu. Buddhism is therefore deeply ingrained in Nepalese society and culture, and for this reason, generally respected. But at times, Nepalese officials perceive Tibetan religious activities as political and therefore prohibit them. “Sometimes, Tibetans want to celebrate the birthday of the Dalai Lama,” Home Secretary Regmi said, “and if they want to observe this in a public place, we fear they will celebrate not only the birth of the Dalai Lama, but promote the independence of Tibet. In that case, we decide to intervene.”<sup>197</sup> Reports indicate that in February 2001, the authorities attempted to stop Tibetans in Kathmandu from celebrating *Losar*, the Tibetan Buddhist new year, which Nepalese Buddhists as well as Tibetans celebrate.<sup>198</sup> The police eventually permitted Tibetans briefly to display a photo of the Dalai Lama and to throw barley flour in the air. But Tibetans were prevented from setting up a traditional shrine with the Dalai Lama’s picture and from assembling an audio system for projecting public prayers and speeches.<sup>199</sup> The restrictions on *Losar* celebrations during 2001 may have been a product of the recent visit of top Chinese military officials to Nepal, and of the then-upcoming visit of former Nepalese King Birenda to China.<sup>200</sup>

TYC President Kelsang Phuntsok said that since the end of the year 2000, the Nepalese government has instituted a general prohibition against Tibetan religious and cultural programs, even those unrelated to the Dalai Lama and other perceived “political” issues. Purbu Dolma noted that in Fall 2000, the Nepalese authorities prevented TWA from holding a celebration of the birthday of a deity. “We were going to pray in the morning, and in the afternoon, we

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<sup>197</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>198</sup> See World Tibet News, *PM Nepalese Attempt to Stop Tibetan Festivities*, Feb. 27, 2001, at <<http://www.tibet.ca.wtnarchive/2001/2/27.html>>.

<sup>199</sup> See *id.*

<sup>200</sup> See *Nepalese Officials Meet with Chinese Defense Minister*, AGENCE FRANCE-PRESSE, Feb. 23 2001.

dance. But we were told by the Nepalese authorities that we couldn’t have it.” Mr. Phuntsok expressed cautious optimism, however, that in light of the peaceful March 10th celebration in 2001, the government might agree to permit cultural shows again soon.<sup>201</sup>

#### **D. Coordination Between the Nepalese Government and the Tibetan Welfare Office**

The Nepalese government does not formally recognize the Tibetan Welfare Office. But Home Secretary Regmi said that the “so-called ambassador of Tibet” acts as a useful intermediary between the Nepalese government and the Tibetan community.<sup>202</sup> Home Undersecretary Dhakal, by contrast, insisted that he had never heard of Samdup Lhatse, the Tibetan government’s representative at the time of Tibet Justice Center’s research.<sup>203</sup> Representative Lhatse expressed frustration about the constraints of working with a government that does not recognize the Tibetan Welfare Office. He said he mainly communicates with the central district officer responsible for security in Kathmandu.<sup>204</sup>

Notwithstanding the government’s reluctance to recognize the Tibetan government-in-exile formally, the Nepalese authorities often request the assistance of Tibetan government officials in preventing Tibetans in Nepal from engaging in activities that China may perceive to be political. These Tibetan officials therefore find themselves in the unenviable position of asking those they represent to accept limitations on their basic human right to freedom of expression. For example, in May 2001, immediately prior to the visit to Kathmandu of

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<sup>201</sup> Tibet Justice Center interviews with Kelsang Phuntsok, TYC President, in Kathmandu (May 24, 2001); Purbu Dolma, TWA President, in Kathmandu (June 2001).

<sup>202</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>203</sup> Tibet Justice Center interview with Ganesh Dhakal, Undersecretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>204</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

Chinese Premier Zhu Rongji, Secretary Regmi summoned Samdup Lhatse to his office and requested that the Tibetan community “stay away from the streets” during the visit.<sup>205</sup> He asked Representative Lhatse to inform his constituents that demonstrators would be arrested and deported to Tibet. Nepalese officials also visited Pokhara to instruct the settlement officers to ensure that no one traveled to Kathmandu during Zhu Rongji’s visit.<sup>206</sup> Representative Lhatse communicated the Home Secretary’s instructions to the Tibetan community, which reluctantly complied.<sup>207</sup> Some Tibetans felt, however, that Representative Lhatse had buckled too easily. This highlights a growing division within the Tibetan community in Nepal—between those who believe that quiet diplomacy will ensure their survival in Nepal and those who favor a more assertive approach.<sup>208</sup>

During Zhu Rongji’s visit, Nepalese Prime Minister Girija Prasad Koirala reassured his Chinese counterpart that Nepal would not permit resident Tibetans to engage in “anti-Chinese” political activities.<sup>209</sup> To their credit—in what has been generally viewed as an unspoken exchange of concessions—Nepalese authorities did not interfere with the Tibetan government-in-exile’s primary for the election of its first prime minister, which took place shortly thereafter.<sup>210</sup> The elections, however, took place largely within the confines of the settlements and not in any public forum.

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<sup>205</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>206</sup> Tibet Justice Center interview with Tsondu Tharchin, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>207</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001). See *Nepal Warns Tibetans Against Anti-China Protests*, AGENCE FRANCE-PRESSE, May 15, 2001; *Nepal: Don’t Rile Big Neighbor*, N.Y. TIMES, May 16, 2001, at A8.

<sup>208</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

<sup>209</sup> *Nepal Reportedly Clamped Down After Karmapa Lama Fleed*, BBC NEWS, May 15, 2001.

<sup>210</sup> Nearly every Tibetan resident in Nepal interviewed by Tibet Justice Center reported voting in this election.

## VII. The Relationship Between the Tibetan and Nepalese Peoples

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Notwithstanding the cultural and religious affinities between Tibetans and some of the Tibeto-Burmese peoples of northern and western Nepal, Tibetans remain in many respects socially alienated from Nepalese society. Most reside either in the refugee settlements or in the Boudha or Swayambunath regions bordering Kathmandu. Inter-marriage occurs infrequently, and Tibetan and Nepalese children generally attend separate schools, at least until the secondary level. While most of these Tibetans have spent the better part of their lives in Nepal—and many second-generation Tibetans know no other home—Tibetans in Nepal live largely as a community apart.

To most Nepalese, Tibetans remain foreigners. Local peoples in Solu Khumbu, such as the Sherpas, expressed their support for the refugees, and some provide assistance to new arrivals fleeing from Tibet. But while Nepalese Buddhists and Tibeto-Burmese peoples feel a kinship with Tibetans, these groups remain largely marginalized in Nepalese government and civil society.<sup>211</sup> In Kathmandu and Pokhara, popular sentiment tends to be more xenophobic. Nepalese NGOs, with the possible exception of HURON, do not assist Tibetans or cooperate with Tibetan NGOs. Binod Bhattarai, correspondent for the *Nepali Times*, emphasized that some cultural stereotypes about Tibetans are deeply rooted and unlikely to change without increased communication and better education. He recalled his own childhood fears of “the Tibetans”:

I grew up in a village, and Tibetans were seen as guys with different clothes. If you cried too much, they would come and take you. Those Tibetans come

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<sup>211</sup> Tibet Justice Center interview with Kapil Shrestha, Secretary, Nepal Human Rights Commission, in Kathmandu (June 12, 2001).

from other countries with different cultures very different from us. They have always been perceived as “others,” even after so many years.<sup>212</sup>

Relations between Nepalese citizens and Tibetan residents have been relatively peaceful for most of the past four decades. But Mr. Bhattarai added that the lack of interaction and understanding between their communities has led to heightened tension in recent years.<sup>213</sup>

Tibetans described few instances of direct harassment or discrimination, in part because most have minimal contact with their Nepalese neighbors. “If we behave nicely,” said Bhudharpo Yichung of Tashi Palkhiel, “they support us. So we are doing our best.”<sup>214</sup> Tibetan students sometimes become friends with their Nepalese peers at school, some of whom occasionally pay visits to the settlements.<sup>215</sup> Some interviewees, however, reported that local Nepalese use ethnic slurs against Tibetans and discriminate against them in the marketplace. Sherap Dolma of Tashi Palkhiel said that “sometimes Nepali children come [to the settlement] in a group. They get into fights with our children. They use bad words because we are refugees.”<sup>216</sup> Kunga Gyatso added that some local Nepalese discriminate against Tibetans because they do not view them as fellow residents of Nepal: “Nepalese people say, ‘You are Tibetan. This is not your country.’”<sup>217</sup>

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<sup>212</sup> Tibet Justice Center interview with Binod Bhattarai, Correspondent, *Nepali Times*, in Kathmandu (June 12, 2001).

<sup>213</sup> Tibet Justice Center interview with Binod Bhattarai, Correspondent, *Nepali Times*, in Kathmandu (June 12, 2001).

<sup>214</sup> Tibet Justice Center interview with Budharpo Yichung, Tashi Palkhiel Settlement, in Pokhara (May 30, 2001).

<sup>215</sup> Tibet Justice Center interview with Tashi Dawa, Paljorling Settlement, in Pokhara (May 29, 2001).

<sup>216</sup> Tibet Justice Center interview with Sherap Dolma, Tashi Palkhiel Settlement, in Pokhara (May 29, 2001).

<sup>217</sup> Tibet Justice Center interview with Kunga Gyatso, Paljorling Settlement, in Pokhara (May 29, 2001).

Nepalese government officials repeatedly emphasized that Nepal is a “small, poor, developing, and landlocked country,” and this perception influences political attitudes and policies toward Tibetans. According to the United Nations Development Program’s human development index, which measures a country’s status based on educational attainment, life expectancy, and adjusted real income, Nepal ranks 144th out of 177 countries, just behind war-torn Sudan.<sup>218</sup> More than 40% of the population lives below the national poverty line; 90% lack access to healthcare; and more than 20% cannot expect to live past their 40th birthday.<sup>219</sup> While a relatively high percentage of Nepalese citizens (approximately 60%) are literate, limited economic opportunities and endemic political instability—brought into sharp relief by the massacre of Nepal’s royal family in June 2001 and the continuing Maoist insurgency—contribute to a deep sense of disaffection and unease among many Nepalese.

In this context, Tibetans, a few of whom have achieved economic success despite their disadvantaged status, sometimes become scapegoats for the socioeconomic problems facing Nepal. Foreign Minister Bastola remarked that because of Nepal’s economic problems, “many Nepalese have started reacting to the refugees. There are a lot of problems, such as the oversupply of labor and prostitution. Also, there is a feeling that the refugees are taking away our jobs.”<sup>220</sup> While Nepal’s economy depends on the Tibetan community for its contribution to the carpet and tourism industries, this also generates resentment. One Tibetan businessman noted that many Nepalese citizens resent the fact that Tibetans occupy some of the top positions in the carpet industry. Some also fear losing their national identity as tourists increasingly visit Nepal to experience Tibetan religion and culture. TYC President Kelsang Phuntsok blamed the

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<sup>218</sup> UNITED NATIONS DEVELOPMENT PROGRAM, 2000 HUMAN DEVELOPMENT REPORT: HUMAN DEVELOPMENT AND HUMAN RIGHTS 1 (2000).

<sup>219</sup> *Id.* at 70.

<sup>220</sup> Tibet Justice Center interview with Chakra Prasad Bastola, Minister, Ministry of Foreign Affairs, in Kathmandu (May 25, 2001).

Maoists and other opposition parties for mobilizing popular resentment against Tibetans. He suggested, in fact, that the situation for Tibetans in Nepal has some parallels to the situation facing Jews in Germany in the 1930s. Disaffected political groups scapegoat Tibetans in much the same way as Hitler scapegoated the Jews, blaming them for Germany's socioeconomic difficulties in the aftermath of World War I.<sup>221</sup>

This resentment occasionally manifests itself in dangerous ways. Tibetans have sometimes found themselves at the center of the violence and crime that plague Pokhara, Kathmandu, and other Nepalese cities. Some wealthier Tibetans have also become the targets of burglary. In February 2001, the murder of a taxi driver outside of the Paljorling Settlement sparked waves of violence against the Tibetan community in Pokhara. Nepalese police arrested four boys from the settlement, along with a Tibetan youth visiting from Dharamsala. Paljorling Settlement Officer Norbu Dorje and HURON Representative Tamdin Dorje explained that after the incident, local Nepalese gathered outside of Paljorling, where they shouted, threw rocks, and accused the boys of committing the murder.<sup>222</sup> Tibetans remained inside the settlements for two weeks, fearing further violence. Representative Lhatse noted that the Tibetan government-in-exile suspects that the Maoists may have been involved in orchestrating the incident in order to incite violence against the Tibetan community.<sup>223</sup> At the time of Tibet Justice Center's research, four Tibetan boys remained in prison. They had not been charged formally.

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Tibetan residents in Nepal—those who arrived before 1989 and their children—thus live in an uneasy state of subsistence. They can-

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<sup>221</sup> Tibet Justice Center interview with Kelsang Phuntsok, President, TYC, in Kathmandu (May 24, 2001).

<sup>222</sup> Tibet Justice Center interviews with Norbu Dorje, Settlement Officer, Paljorling Settlement, in Pokhara (May 29, 2001); Tamdin Dorje, Representative, HURON, in Kathmandu (June 1, 2001).

<sup>223</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

not work, own property, or travel freely, and remain confined largely within the literal and figurative walls of the settlements. Their right to engage freely in cultural and political activities is curtailed, and most have little contact with their Nepalese neighbors. Notwithstanding their long-term residence in Nepal, their legal status remains undefined and insecure. Unable to return to Tibet but also unable to acquire Nepalese citizenship, Tibetan residents of Nepal remain stateless.



## The Gentleman's Agreement: Transit of Tibetan Refugees Through Nepal

According to different estimates, between 2500 and more than 3000 Tibetans cross the border into Nepal each year, typically in transit to Tibetan exile communities in India.<sup>224</sup> Because of pressure from China, Nepal no longer recognizes newly arriving Tibetans as refugees or permits them to remain in Nepal. Shree Kant Regmi, Secretary of the Ministry of Home Affairs, emphasized that to “recognize” Tibetan refugees or extend them political asylum would implicitly validate the claim that China commits human rights violations in Tibet:

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.<sup>225</sup>

Michel Dupoizat, UNHCR Representative in Kathmandu, similarly remarked that for Nepal to acknowledge Tibetans as “refugees”

<sup>224</sup> See, e.g., U.S. Committee for Refugees, Country Report: Nepal, at <<http://www.refugees.org/world/countryrpt/scasia/nepal.html>> (visited Sept. 19, 2001) (reporting the transit of 2,637 Tibetans through Nepal in the year 2000). In recent years, as many as one-third of these refugees have been children between the ages of six and thirteen traveling to schools operated by the Tibetan government-in-exile in India. Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

<sup>225</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

would be an intolerable “political” statement in the view of the Chinese government.<sup>226</sup> For this reason, Tibetans entering Nepal without legal documentation after 1989 are in theory deemed illegal aliens subject to detention and deportation under section nine of the Immigration Act.<sup>227</sup>

### I. Overview

Despite the formal state of Nepalese law, since about 1990 the Nepalese government has acceded to an informal arrangement or “gentleman's agreement” with UNHCR—and, even more tacitly, with the Tibetan government-in-exile's office in Kathmandu.<sup>228</sup> This agreement remains “in force” to date. In theory, it governs the procedures for the transit *through* Nepal of newly arriving Nepalese refugees;



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Children as young as six years old are frequently sent by parents on the long journey into exile to attend schools run by the Tibetan Government-in-exile in India, often only accompanied by a friend, relative or traveling companion.

<sup>226</sup> Tibet Justice Center interview with Michel Dupoizat, Representative, UNHCR, in Kathmandu (May 25, 2001).

<sup>227</sup> Nepal Immigration Act 2049, § 9(1) (empowering the Director-General of Immigration to deport illegal foreign nationals).

<sup>228</sup> Home Secretary Regmi remarked: “Formally, we do not allow it [the Tibetan Welfare Office]. If we allow a Tibetan Welfare Office, that means we recognize Tibet as a free country.” Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001). According to UNHCR, the gentleman's agreement “took effect” after December 31, 1989. See TIN, News Update, *New Increase in Deportations of Tibetans from Nepal*, Dec. 24, 2001 (quoting Roland-Francois Weil, Protection Officer, UNHCR, Kathmandu).

it does not contemplate or permit the resettlement of Tibetan refugees in Nepal.<sup>229</sup> “There is no formal arrangement,” said Director-General of Immigration Mainali, “but only an explicit policy with an understanding with the [Nepalese] government and UNHCR.”<sup>230</sup>

### A. The “Terms” of the Gentleman’s Agreement

Based on interviews with UNHCR staff, officials at the Ministry of Home Affairs, the Director-General of Immigration, officials of the Tibetan government-in-exile, and officials at the U.S. Embassy in Kathmandu,<sup>231</sup> Tibet Justice Center formed the following general picture of the manner in which the gentleman’s agreement should operate:

Newly arriving Tibetans apprehended by the Nepalese authorities at the border will be denied entry and turned over to the Chinese authorities. Home Secretary Regmi emphasized that the Nepalese border with Tibet (China) is impermeable. The “Tibetan people,” he said, “need to have legal travel documents to enter, and they want to cross illegally. When you travel from Canada to the United States and have no document, you’re also arrested.”<sup>232</sup> Nepal’s practices in this regard, he therefore suggested, conform to those of most every nation. (This is

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<sup>229</sup> See BOSE, *supra* note 23, at 38 (“The Nepal government does not recognise the new arrivals from Tibet as refugees and does not allow them to remain in Nepal...[But] [a]pparently there is an unofficial arrangement between the Nepalese government and the office of the Dalai Lama in India that they will take the new arrivals away from Nepal.”).

<sup>230</sup> Tibet Justice Center interview with Umesh Prasad Mainali, Director-General, Department of Immigration, in Kathmandu (May 21, 2001).

<sup>231</sup> Tibet Justice Center interviews with Umesh Prasad Mainali, Director-General, Department of Immigration, in Kathmandu (May 21, 2001); Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001); Ganesh Dhakal, Undersecretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001); Michel Dupoizat, Representative, UNHCR, in Kathmandu (May 25, 2001); John Dyson, Political and Economic Officer, U.S. Embassy, in Kathmandu (May 23, 2001); and Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

<sup>232</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

not altogether true because many nations, particularly those that have ratified the Refugee Conventions, generally abide by the bedrock principle of *non-refoulement*, and China’s persecution of Tibetans, including those who seek to flee, has been widely documented.)

Tibetans apprehended by the police *within* Nepal’s borders, however, will be detained and then turned over to the Department of Immigration. In theory, Nepalese police will accompany them to the Department, which pays the police a stipend that, according to different accounts, compensates them for their expenses only, provides them with a *per diem* for their services, or both.<sup>233</sup> At this stage, the Department of Immigration contacts UNHCR, which will conduct a brief interview with the refugees to determine whether they are “of concern to the High Commissioner.” According to UNHCR, this interview is emphatically not a refugee status determination.<sup>234</sup>

“Of concern” is a broad designation used worldwide by UNHCR to refer to asylum seekers, refugees, internally displaced persons, and others. For Tibetans present illegally in Nepal, “of concern” generally means “in transit to India.” Country Representative Dupoizat remarked that UNHCR “first meet[s] [the refugees] and make[s] sure they are going to India. We are not going to help people going to Dharamsala if that is not their intent. If that is their intent, we consider them ‘of concern.’”<sup>235</sup> In fact, there appear to be only two situations in which UNHCR ordinarily will not find Tibetans illegally present in Nepal to be “of concern”: (1) where the individual is determined to be a businessman or a legal visitor to Nepal with a valid Chinese passport and Nepalese visa; and (2) where UNHCR’s interview raises concerns that the individual may not be a Tibetan. The

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<sup>233</sup> According to UNHCR, while the police receive this stipend from the Department of Immigration, UNHCR supplies the necessary funds through grants to the Ministry of Home Affairs. Interview with Michel Dupoizat, Representative, UNHCR, in Kathmandu (May 25, 2001).

<sup>234</sup> Representative Dupoizat stated plainly: “We are not doing status determinations for Tibetans.” Tibet Justice Center interview with Michel Dupoizat, Representative, UNHCR, in Kathmandu (May 25, 2001).

<sup>235</sup> *Id.*

“of concern” determinations consist of a brief interview intended to ascertain the reasons for each Tibetan interviewee’s decision to come to Nepal. The overwhelming majority of Tibetans are found to be “of concern”; in only a handful of cases annually does UNHCR determine otherwise, generally for one of the two reasons stated above.

At this stage, though nominally in UNHCR’s custody, Tibetans stay at the Tibetan Refugee Reception Centre located near Swayambunath on the outskirts of Kathmandu. The Tibetan Welfare Office administers and supervises the Reception Centre with funds received from UNHCR and foreign donors. The Reception Centre provides shelter, food, and medical care to Tibetans while they remain in Nepal awaiting authorization to proceed to India. By tacit agreement, Tibetans must depart Nepal within two weeks of their arrival at the Reception Centre. In practice, however, the Nepalese authorities generally do not enforce this time limitation strictly.<sup>236</sup> Instead, a bus leaves the Kathmandu Reception Centre for India whenever enough Tibetans, following processing, are present at the Centre to fill one to or near capacity.

To proceed to India, Tibetans must be (1) registered by the Reception Centre and interviewed by officials of the Tibetan government-in-exile, which (2) categorizes them in terms of their age, reason for leaving Tibet (most frequently, to seek religious freedom, to escape political oppression, or, for children and young adults, to get an education) and intent (e.g., to join a monastery or school, visit relatives, etc.); (3) interviewed by UNHCR officials to ensure that they are “of concern to the High Commissioner,” in which case UNHCR will (4) issue them a “recommendation letter” directed to the Department of Immigration, which ordinarily will then (5) issue them an “exit permit.”

The “exit permit” allows Tibetans solely to travel from the Reception Centre in Kathmandu to the Nepalese border with India at the town of Sonauli. It provides no right of reentry, legal status or

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<sup>236</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

refugee protection of any kind. UNHCR gives Tibetans whom it deems to be “of concern” a small stipend upon their departure. In theory, this money is intended to support them until their arrival in India. In fact, these stipends typically are aggregated and given to the bus driver. Part of the money pays the driver. The remainder typically goes to authorities at the Indian border.<sup>237</sup> Kelsang Chime, Director of the Reception Centre, estimated that the driver receives approximately 1700 Nepalese rupees (Rs) for each Tibetan.<sup>238</sup>

From Sonauli, the buses proceed to New Delhi, India, from where Tibetans typically travel to one of the Tibetan exile communities, schools or monasteries in India. Initially, most visit Dharamsala, the seat of the Tibetan government-in-exile, to meet the Dalai Lama.

## **B. Operation of the Gentleman’s Agreement in Practice**

The gentleman’s agreement appears to operate as described above in rare cases.<sup>239</sup> But this pattern seems to represent the exception rather than the rule. Many aspects of the gentleman’s agreement appear to have broken down in practice. Most of the Tibetans interviewed by Tibet Justice Center arrived at the Reception Centre independently, i.e., without assistance from Nepalese authorities. Often, they reached

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<sup>237</sup> Tibet Justice Center did not investigate the legal status or rights of Tibetan refugees in India. Evidence suggests, however, that despite the tacit arrangement at the border, Tibetans remain in India only as illegal aliens.

<sup>238</sup> Tibet Justice Center interview with Kelsang Chime, Director, Tibetan Refugee Reception Centre, in Kathmandu (May 24, 2001). Dorjee Damdul, a researcher for the Kathmandu branch of TCHRD, estimated that the Indian border police typically demand about 200 Rs for each Tibetan and, in some cases, also a “tariff” on any goods they carry with them. Tibet Justice Center interview with Dorjee Damdul, Researcher, TCHRD, in Kathmandu (May 20, 2001).

<sup>239</sup> For instance, Dekyi Choezem, a Tibetan woman from Lhasa, related that she traveled to Nepal with a group of about twenty others. After two days of walking in the Solu Khumbu region, her group encountered the Nepalese police. The officers transported them by truck to the Department of Immigration. During the journey, the police provided them with food and water purchased, when necessary from local Nepalese citizens. Tibet Justice Center interview with Dekyi Choezem, Tibetan Refugee Reception Centre, in Kathmandu (May 26, 2001).

Kathmandu with the aid of a hired guide to whom they paid a large fee. At times, the Nepalese authorities facilitated their travel by directing them to buses and, in a few cases, by paying their fares. But generally, the journey from the Nepalese border to the Reception Centre appears to be perilous, not only because of natural risks, but also because of the risk of abuses by, among others, the Nepalese police.

Tibetans most frequently travel to the Reception Centre by one of two routes: the Friendship Highway, which extends from Lhasa to Kathmandu, or Nangpa-la pass in the Solu Khumbu region of the Himalayas, northeast of Kathmandu. In general, Tibetans who travel by the former route face greater risks of apprehension because they must cross the border at or near the Kodari Bridge, a formal entry point, evading both the Chinese police at the Tibetan border town of Dram (Chinese: Zhangmu; Nepalese: Khasa) and the Nepalese immigration authorities on the opposite side of the border. Because it is a formal entry point, border management at the Kodari Bridge appears to be consistent year round. By contrast, the Solu Khumbu route poses fewer risks of apprehension. The climate and road conditions deter both Chinese and Nepalese authorities from patrolling this region as vigilantly, especially during the fall and winter months. For the same reason, however, the Solu Khumbu route tends to pose greater risks to Tibetans from natural perils such as inadequate shelter and food.

Tibet Justice Center interviewed several Tibetans who escaped through less well-known routes, but did not gather information sufficient to understand their comparative viability as escape routes. Based on the interviews conducted, Tibet Justice Center formed the following picture of the general patterns of escape along the Friendship Highway and Solu Khumbu routes:

1. *Friendship Highway.* Tibetans who traveled by the Friendship Highway typically traveled to Lhasa first.<sup>240</sup> There, most acquired a Chinese “business travel permit.” This document permits the bearer

<sup>240</sup> Those who did not often resided in towns, such as Tingri, located near the Tibeto-Nepalese border.



© TIN, October 2001

The Chinese border post at the "Friendship Bridge" which links Nepal and Tibet.

to travel legally from Lhasa to Dram at the Chinese side of the Tibeto-Nepalese border. It is difficult, however, to obtain a permit and often requires either connections, bribery or both. But for those Tibetans with adequate resources, a business permit generally allows travel to the border without incident by bus, truck or private car. Without such a permit, by contrast, it appears to be very difficult to traverse this route because of its many police checkpoints—although a few Tibetans interviewed by Tibet Justice Center managed to reach Dram safely without a permit.

In Dram, most then enlisted the aid of a hired guide—sometimes Nepalese, other times Tibetan—and with this help circumvented the main Sino-Nepalese checkpoint at Kodari Bridge by walking or crawling through the surrounding forest and hills at night. After reaching the Nepalese side of the border, they usually walked or hitched a ride to the nearest town with public bus service to

Despite the harsh terrain in the Himalayan regions, many Tibetans fleeing persecution avoid the main trails used by Nepalese and Chinese traders to avoid apprehension by the police. Reports indicate that some Nepalese police have been forcing Tibetans apprehended within a few days walking distance of the border to return to Tibet in violation of the fundamental principle of *non-refoulement*.



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Kathmandu (almost invariably, the village of Barabise). A few also traveled to Kathmandu by private vehicle, truck or motorcycle.

About twenty Tibetans interviewed by Tibet Justice Center traveled by the Friendship Highway. Many encountered the Nepalese police en route, and police conduct, according to their accounts, rarely conformed to the terms of the gentleman's agreement. In general, the police permitted them to continue on to Kathmandu, but in one case, they arrested a Tibetan at Barabise and turned him over to the border authorities; and in several other cases, Tibetans suffered brief detentions or threats of deportation as a means of extortion.

2. *Nangpa-la*. Those Tibetans who crossed the Tibeto-Nepalese border at Nangpa-la pass in Solu Khumbu also typically traveled to Lhasa first. In general, this group tended to be poorer and less well-connected than those who came to Nepal by way of the Friendship Highway. Many therefore spent substantial time in Lhasa—ranging from a few weeks to more than one year—working to save money to pay for a guide, food, bus fares, and other necessities to sustain them during the perilous journey to and through the Himalayas. Often, they joined groups of roughly twenty other fellow travelers accompanied by a guide.<sup>241</sup>

Journeys to Nangpa-la typically, though not always, took the groups from Lhasa to Shigatse by truck or bus; from Shigatse to Lhatse by bus or foot; and from Lhatse to the Sino-Nepalese border by foot. The groups usually walked only at night to minimize the risk of apprehension by Chinese authorities. The walk from Lhatse to the border takes approximately ten days.

Tibetans who escaped by this route frequently encountered the Chinese police. If captured, they were detained—sometimes for sev-

<sup>241</sup> The reliability and precise services offered by guides varied considerably. Some accompanied their groups only as far as the Sino-Nepalese border; others remained with their groups until they had made their way well into Nepalese territory; and still others accompanied their groups the entire way to the Kathmandu Reception Centre. Tibet Justice Center interviewed several Tibetans who related incidents of unreliability, drinking, theft, and even treachery by guides.

eral months—or forcibly returned to Lhasa.<sup>242</sup> Many interviewees therefore made several attempts before managing to reach the border successfully. Once in Nepalese territory, the groups walked for many days to reach the nearest village with transportation to Kathmandu, typically Jiri.

Virtually all of the Tibetans interviewed by Tibet Justice Center who escaped to Nepal by Nangpa-la pass encountered the Nepalese police at some point. Nepalese police abuses appear to be more common in the Solu Khumbu region than along the Friendship Highway route.<sup>243</sup> The police sometimes stole Tibetans' money or belongings and, in some cases, detained or physically mistreated them. Many Tibetans apprehended near—within one or two days walking distance on the Nepalese side of—the border said that the police also ordered them to return to Tibet. Interviewees related that the police forced them, sometimes at gunpoint, to walk back toward the Sino-Nepalese border for from several hours to as long as one day; however, the police rarely followed them the entire way (and, at times, not at all). Instead, the police typically ceased to follow the



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Namche Bazaar, two to three days walking distance from the Nangpa-la pass, is the first major town refugees may reach after traversing the Himalayas.

<sup>242</sup> Border control on the Chinese side of the Sino-Nepalese border has increased in recent years. See, e.g., TIN, News Update, *Tighter Regulations, More Detentions on Tibet Nepal Border*, June 3, 2001.

<sup>243</sup> The reason for this may be that about one month before Tibet Justice Center's research, a delegation from the U.S. State Department visited Nepal to monitor compliance with the gentleman's agreement along the route from Kathmandu to Dram. According to the State Department, the police's knowledge of the gentleman's agreement's tacit procedures is uneven. Despite assurances to the government delegation, some police did not appear to be aware of their duties and others, delegates suspected, knowingly violated them. Tibet Justice Center telephone interview with Susan O'Sullivan, U.S. Department of State (March 2001).

group at some point and simply ordered them to continue. Tibetans would usually wait several hours in hiding and then turn back and travel toward Kathmandu by a less visible route.

Wangdu, for example, said that he traveled with a group of about twenty others from the Sino-Nepalese border. They arrived at a restaurant at midnight and waited there until the morning. They then attempted to sneak past a Nepalese police checkpoint. But they “took the wrong route” and encountered five uniformed police carrying guns. The police brought them to the station, took their knives and other weapons, and searched them for money. After about a half hour of detention, the police released the Tibetans and said, “Go back to Tibet.” According to Wangdu, the officers followed the group for several hours and then threatened: “Go back. And if you come back, we’ll shoot you.”<sup>244</sup>

Tibet Justice Center’s interview with the police in Thame, the site of the final Nepalese police post on the main trail to Nangpa-la, confirmed that this pattern of events may reflect an explicit policy. The Department of Immigration, according to the Thame police, dictated a policy to send Tibetans back to the border by radio announcement about one year earlier. The police insisted that they will not forcibly repatriate Tibetans who refuse to return to Tibet, but said they will encourage the groups to return and explain that it would be in their best interest.<sup>245</sup>

After reaching Jiri or another village with road access to Kathmandu, Tibetans typically took a bus to the capital. By speaking to Tibetan residents there, most then learned how to get to the Reception Centre. Once they arrive at the Centre, Tibetans receive food, shelter, and medical attention if necessary. Most interviewees reported good health, and with few exceptions they suffered only minor injuries from the journey (scratches, bruises, etc.). Those who

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<sup>244</sup> Tibet Justice Center interview with Wangdu, Tibetan Refugee Reception Centre, in Kathmandu (May 23, 2001).

<sup>245</sup> Tibet Justice Center interview with Nepalese police officers, in Thame (June 5, 2001).

escape during the fall and winter months, however, often suffer from frostbite and other ailments caused by the cold. Mingma Tempa Sherpa, a healthcare worker at Khunde Hospital located north of Namche Bazaar in Solu Khumbu, remarked: “Every year we have seen a lot of Tibetans, those who come in bad weather and have frostbite and pneumonia, those who do not eat or drink very well on the journey...[T]hose who get in trouble usually come through in the winter when it snows.”<sup>246</sup>

## **II. The “Parties” to the Gentleman’s Agreement**

To function smoothly, the informal arrangement established by the gentleman’s agreement requires the participation of UNHCR, the Nepalese government, the Tibetan government-in-exile, and to a certain extent, the U.S. government, acting primarily through its Embassy in Kathmandu.

### **A. The U.N. High Commissioner for Refugees**

Under the “terms” of the gentleman’s agreement, the Nepalese police should inform the Department of Immigration each time they apprehend new arrivals. The Department, in turn, should inform UNHCR of the existence of the refugees and then transfer them to its custody. In fact, most Tibetans arrive at the Reception Centre in Kathmandu independently by one of the two routes described above. Reception Centre staff, officials of the Tibetan government-in-exile, employees, and volunteers then inform UNHCR of their arrival. UNHCR regularly sends its own staff to the Centre to conduct summary interviews. Provided UNHCR determines the refugees to be “of concern,” it will then ask the Department of Immigration to issue them an exit permit.

The Nepalese government formally acknowledges UNHCR’s assistance only with respect to ethnic Nepalese refugees from

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<sup>246</sup> Tibet Justice Center interview with Mingma Tempa Sherpa, Staff Physician, Khunde Hospital, in Khunde (June 4, 2001).

Bhutan. The gentleman's agreement remains uncodified. But since Nepal tightened its border control with China in the late 1980s and then ceased to permit Tibetans to enter its territory altogether in 1989, UNHCR has worked to facilitate the operation of the gentleman's agreement. UNHCR Country Representative Dupoizat and Tibetan Welfare Office Representative Samdup Lhatse both emphasized that this low-profile assistance is a far more effective means to help newly arriving Tibetans than formal involvement and refugee status determinations.<sup>247</sup>

Nepal remains under acute pressure from China—diplomatically, economically, and geopolitically—and it therefore cannot afford to be perceived to recognize the existence of Tibetan “refugees” as defined by the Refugee Conventions.<sup>248</sup> But UNHCR's participation in effect provides a “stamp of legitimacy” to the informal process that renders it more tolerable to the Nepalese government. It may also provide Nepal with a means to deflect the suggestion that it actively aids Tibetans. The government can instead claim that it cooperates with UNHCR, an internationally recognized body, to comply with its obligations as a member of the United Nations. This would be consistent with Foreign Minister Bastola's remark: “Although we're not party to the [Refugee] Conventions, we try to comply with UNHCR's norms.”<sup>249</sup>

By informal arrangement, UNHCR provides funds indirectly to finance the gentleman's agreement. It allocates these funds to ensure the continuing compliance of the Nepalese Department of Immigration, Ministry of Home Affairs, and police; and to enable the Tibetan government-in-exile's refugee-assistance programs for new arrivals. The Tibetan Welfare Office in Kathmandu, working with

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<sup>247</sup> Tibet Justice Center interviews with Michel Dupoizat, Representative UNHCR, in Kathmandu (May 25, 2001); Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

<sup>248</sup> See 1951 Convention, *supra* note 70, art. 1; 1967 Protocol, *supra* note 70, art. 1(2).

<sup>249</sup> Tibet Justice Center interview with Chakra Prasad Bastola, Minister, Ministry of Foreign Affairs, in Kathmandu (May 25, 2001).

UNHCR staff, provides most of the practical assistance to new arrivals. But the funds originate with UNHCR, which in turn receives support from sympathetic foreign governments, most prominently, the United States. The annual U.S. Foreign Appropriations Act earmarks funds specifically for assistance to Tibet. According to the Special Coordinator for Tibet during the Clinton Administration, approximately \$100,000 of the \$2 million annual grant for Tibet serves to support UNHCR's critical assistance to new arrivals.<sup>250</sup> Other foreign governments, principally European, give to UNHCR without specification. According to Representative Dupoizat, the UNHCR Office in Kathmandu must convince Geneva of the need to allocate funds from its general budget to support the low-profile assistance to Tibetans in Nepal. Dupoizat remarked that, at present, adequate funds exist to sustain the process because of the sympathy of foreign donors, particularly the United States, which overtly supports the continuing operation of the gentleman's agreement.<sup>251</sup>

*Border Missions: Monitoring Compliance and Ensuring Non-Refoulement.* Until recently, a crucial exception to this behind-the-scenes approach was UNHCR's policy of carrying out missions to instruct the Nepalese border police in the operation of the gentleman's agreement and to monitor compliance. Until about 1999, UNHCR staff periodically visited the remote regions of Nepal where Tibetans frequently cross the border. These include Solu Khumbu, Humla, Mustang, and other northern Himalayan regions. There, staff spoke with local Nepalese police about the gentleman's agreement and informed them of binding

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<sup>250</sup> Tibet Justice Center interview with Julia Taft, former U.S. Assistant Secretary for Population, Migration, and Refugees, and Special Coordinator for Tibet, in Washington, D.C. (April 17, 2001). The remainder of these funds generally support economic, cultural, and humanitarian aid programs within Tibet, largely by means of the Bridge Fund. *Id.*

<sup>251</sup> Tibet Justice Center interviews with Michel Dupoizat, Representative, UNHCR, in Kathmandu (May 25, 2001); John Dyson, Political and Economic Officers, U.S. Embassy, in Kathmandu (May 23, 2001). See, e.g., *U.S. Backs Nepal to Resolve Refugee Issue*, U.P.I., Dec. 2, 2000.

international human rights norms, including *non-refoulement*.

Sometime in 1998, however, the Nepalese authorities suspended these missions indefinitely. Ganesh Dhakal, Undersecretary of the Ministry of Home Affairs, said he did not know the reason for this apparent policy shift.<sup>252</sup> His immediate superior, Home Secretary Regmi, insisted that UNHCR *does* continue to carry out missions to the border.<sup>253</sup> But Tibet Justice Center's interviews with UNHCR, among others, confirmed that the missions have been disallowed.<sup>254</sup> Foreign Minister Bastola acknowledged candidly that the government ceased to permit the UNHCR border missions because they had "other implications vis-à-vis the Chinese authorities."<sup>255</sup> When Julia Taft, former U.S. Assistant Secretary of State for Population, Migration, and Refugees, and Special Coordinator for Tibet, urged Minister Bastola to reauthorize the missions, he refused remarking that it "is not our policy to facilitate or encourage the escape or smuggling of people across the border. Once they are here, they are facilitated. But if we facilitate them at the border, that would be facilitating their escape....[This is] a very sensitive issue for the Chinese authorities."<sup>256</sup> But "at the border," according to Tibet Justice Center's research, may include regions inside of Nepal as far as one or two days walking distance from the border.

According to most reports, the event that led the Nepalese government to disallow further border missions was the dramatic escape of the 17th Karmapa Lama from Tibet to India, via Nepal, in January 2000. This incident caused the Chinese government con-

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<sup>252</sup> Tibet Justice Center interview with Ganesh Dhakal, Undersecretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>253</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>254</sup> Tibet Justice Center interviews with Michel Dupoizat, Representative, and Roland-Francois Weil, Protection Officer, UNHCR, in Kathmandu (May 25, 2001).

<sup>255</sup> Tibet Justice Center interview with Chakra Prasad Bastola, Minister, Ministry of Foreign Affairs, in Kathmandu (May 25, 2001).

<sup>256</sup> *Id.*

siderable embarrassment. On December 20, 2000, TIN issued a news update explaining:

The UNHCR has until recently sought to ensure that local officials in border areas are aware of [the gentleman's agreement] by making official visits to police posts and local offices in border areas of Nepal where Tibetan refugees arrive from Tibet. Since the escape of the Karmapa, however, these visits have been suspended by the Nepalese government....[A] Nepalese Home Ministry official told TIN that there are no plans at present to allow UNHCR to resume these visits.<sup>257</sup>

UNHCR Country Representative Dupoizat and Protection Officer Weil confirmed this report. Despite repeated requests, they said, the Nepalese government now rejects or ignores their proposals to send staff to the border regions.<sup>258</sup> Secretary Regmi suggested that some Nepalese citizens suspect UNHCR of complicity in the dramatic escape from Tibet of the 17th Karmapa Lama in January 2000.

Other sources, however, who requested anonymity, suggested that the Karmapa's escape alone does not account for the suspension of the border missions. The Nepalese government halted these missions as early as 1998, while the Karmapa did not escape until January 2000. The Nepalese authorities rather suspended the missions in large part because of deteriorating relations between the Ministry of Home Affairs and UNHCR. According to these accounts, this friction results from a change in the manner in which UNHCR broaches the issues with the Nepalese government. While former UNHCR administra-

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<sup>257</sup> TIN, News Update, *Tibetans Sent Back Across the Border as Pressure Increases on Nepal*, Dec. 20, 2000.

<sup>258</sup> Tibet Justice Center interviews with Michel Dupoizat, Representative, and Roland-Francois Weil, Protection Officer, UNHCR, in Kathmandu (May 25, 2001).



tions in Kathmandu sought to maintain a low profile, the present one reportedly takes a more forceful approach. This manner of interaction offends the government's sense of sovereign integrity. It also makes some officials in the Ministry of Home Affairs nervous that UNHCR will raise the "Tibet issue" in a way that may threaten to disrupt the Nepalese government's generally positive relationship with China. Another source explained that while UNHCR has requested resumption of the missions directly, it has not adequately pursued alternative avenues for achieving the same goal. The same source contended that the resumption of these missions is not a high priority at UNHCR because the missions require substantial time, effort, and resources that its staff would prefer not to expend.

UNHCR did not appear to be aware of these criticisms, and it expressed less concern about the cessation of the missions than others:

The fact that we went to the border—I'm not sure that it diminished the problem [of *refoulement*]...When disallowed [to travel to the border], we were very concerned. We have been pleasantly surprised that the numbers [of refugees arriving at the Reception Centre in Kathmandu] have remained the same in comparison to previous years...We have not been able to see in any way instructions from the center [i.e., Ministry of Home Affairs] to the border police to say to turn people back rather than to bring them down. Yes, we would like to have access to the border...But we have no information that border officials receive any different instructions.<sup>259</sup>

But another source said that there is "no question" that "after the missions stopped, the number of deportations increased." Tibet Justice Center also learned that contrary to UNHCR's belief, the

<sup>259</sup> Tibet Justice Center interview with Roland-Francois Weil, Protection Officer, UNHCR, in Kathmandu (May 25, 2001).

Ministry of Home Affairs has issued explicit instructions to border police that represent an apparent shift in policy. In June 2000, Thame Police Chief Padim Adihairim received a radio directive informing him that there are "too many Tibetans in Kathmandu" and that police should seek to send newly arriving Tibetans back to the border.<sup>260</sup> According to a confidential document obtained by Tibet Justice Center, the police deported as many as fifty Tibetans in October and November 2000. In late December 2000, TIN likewise reported (on what may or may not be the same incident) that "at least 60 Tibetan refugees who reached border areas of Nepal...have [recently] been returned to police on the Chinese side of the border."<sup>261</sup> Tibet Justice Center's research therefore suggests that *refoulement* of Tibetans may be occurring with increasing frequency at least in part because UNHCR no longer carries out border missions.

## B. The Government of Nepal

*It is a pity on our part that neither can we deport them so easily nor can we accept them.* —Udaya Nepali Shrestha<sup>262</sup>

Tibet Justice Center's interviews with the Nepalese government suggest that it lacks a clear policy or consistent approach to compliance with the gentleman's agreement. Recent developments—including, for example, an increase in political pressure from the Chinese government, growing domestic concern about the number of Tibetans in Nepal, and related concerns about the integrity of the Nepalese cultural identity and economy—appear to have had some influence on the government's compliance with the gentleman's

<sup>260</sup> Tibet Justice Center interview with Padim Adihairim, Thame Chief of Police, in Thame (June 5, 2001).

<sup>261</sup> TIN, News Update, *Tibetans Sent Back Across the Border as Pressure Increases on Nepal*, Dec. 20, 2000.

<sup>262</sup> Tibet Justice Center interview with Udaya Nepali Shrestha, Secretary, Ministry of Law and Justice (May 22, 2001).

agreement.<sup>263</sup> In December 2000, a spokesperson for the Ministry of Home affairs denied any “change in policy.”<sup>264</sup> But Tibet Justice Center found evidence to suggest that the government’s attitude toward the gentleman’s agreement has changed, at least since the Karmapa’s escape from Tibet in January 2000.

The precise nature of this change remains unclear because Nepalese officials did not themselves present internally consistent accounts of Nepal’s understanding of the agreement. Secretary Shrestha at the Ministry of Law and Justice said that “as a diplomatic and legal matter, we do not accept [Tibetan refugees]. Sometimes, we deport them....It is our discretion that they can stay [and, if so, they will be] escorted to the UNHCR....It is a pity on our part that neither can we deport them so easily nor can we accept them.”<sup>265</sup> This remark captures the government’s uneasy tolerance of, but certainly not enthusiasm for, the gentleman’s agreement.

The Ministry of Home Affairs and the Department of Immigration, which falls with the former’s jurisdiction, bear the principal responsibility for implementing the gentleman’s agreement. Home Secretary Regmi emphasized that Nepal’s “established policy” is that “Tibet is an integral part of China,” and “[i]t is not the policy of this government to believe there are gross human rights violations in Tibet.” Echoing a sentiment that Tibet Justice Center heard repeatedly in interviews with government officials, he also remarked that Nepal is “a small and developing country,” which cannot care for its own people adequately at present, still less for a growing permanent refugee population. Secretary Regmi linked this concern to an anxiety about Nepal’s cultural integrity: “There is a danger,” he said, “that [Tibetans] will assimilate to Nepali culture....[If] we have a liberal refugee poli-

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<sup>263</sup> See, e.g., TIN, News Update, *Decline in Refugee Numbers as China and Nepal Tighten Security on Tibetan Border*, Jan. 22, 2002.

<sup>264</sup> TIN, News Update, *Tibetans Sent Back Across the Border as Pressure Increases on Nepal*, Dec. 20, 2000.

<sup>265</sup> Tibet Justice Center interview with Udaya Nepali Shrestha, Secretary, Ministry of Law and Justice, in Kathmandu (May 22, 2001).

cy, our identity as Nepalese will be lost.” He therefore expressed the hope that other countries, particularly the United States, would begin to accept Tibetan refugees; in that case, he said, “we would be happy to give them one-way transportation to the United States.”<sup>266</sup>

Umesh Prasad Mainali, the Director-General of Immigration, may be the most vital of the Nepalese government officials responsible for implementing the gentleman’s agreement. Like Secretary Regmi, he expressed a begrudging recognition of Nepal’s obligations under the agreement, but also some misperceptions—conscious or not—about his office’s compliance. He denied, for example, that police receive any stipend for accompanying Tibetans safely to the Department of Immigration. And while he insisted that “[p]olice in the border regions are aware of our policies,” he acknowledged that “sometimes” they may nonetheless behave “differently.” But Mainali was also more forthright in his assessment of the impact of China’s pressure on the current operation of the agreement. He said that because Beijing believes the Tibetan refugees to be dissidents engaged in anti-Chinese activities, it urges Nepal to increase its border security: “Conventionally, we have to talk with the Chinese authorities. It’s difficult for us when Tibetans are found on the borderline. When found inside the borderline, almost all are handed over to UNHCR....Just at the border, they are handed over to the Chinese.”<sup>267</sup> The problem, however, is that the border appears to mean “within several days walking distance from” the literal border.

Notwithstanding these concerns, the Nepalese government’s cooperation with UNHCR appears to be motivated by two princi-

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<sup>266</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>267</sup> Tibet Justice Center interview with Umesh Prasad Mainali, Director-General, Department of Immigration, in Kathmandu (May 21, 2001). Foreign Minister Bastola expressed similar frustrations although in the opposite direction. China, he said, no longer “wants the Tibetans. Previously, they wanted Nepal to push them back. Now they’re not very enthusiastic about it.” In a similar vein, he added, referring to the Karmapa’s escape from Tibet: “If the Chinese cannot prevent him from leaving Tibet, how can they expect us to help here?” Tibet Justice Center interview with Charka Prasad Bastola, Minister, Ministry of Foreign Affairs, in Kathmandu (May 25, 2001).

pal factors: pressure from foreign-aid donors, and the need for UNHCR's technical assistance in handling Nepal's Bhutanese refugee crisis.<sup>268</sup> Secretary Regmi explained: "We have more than 100,000 Bhutanese refugees, and we need support from the global community. Without it, we will not be able to repatriate the Bhutanese. In order to gain support of friendly countries to resettle Bhutanese refugees, we are liberal [toward Tibetans in transit to India]." But he also stated candidly that should the Bhutanese refugee situation be resolved, he expects that Nepal would require UNHCR to close its Kathmandu office and cease assisting Tibetans under the present arrangement.<sup>269</sup>

Tibet Justice Center's interviews with other Nepalese officials, however, and with non-governmental organizations and Tibetan officials, suggested that the government would be unlikely to discontinue its low-profile cooperation with UNHCR unless the United States, the European Union, and others cease to insist upon its cooperation as a condition of foreign aid—or unless it becomes a serious obstacle to Nepal's relations with China. Ganesh Dhakal, Undersecretary at the Ministry of Home Affairs, also remarked that the "Tibetan refugees belong to Lama orders [i.e., religious denominations] and worship Lord Buddha, and are peacemaking peoples. Their number is few. They can come and go; no problem."<sup>270</sup> While perhaps less representative of official Nepalese policy, Dhakal's remarks underscore the persistence of a cultural and religious affinity between the Nepalese and Tibetan peoples. This affinity appears to contribute in at least some small way to the

<sup>268</sup> The U.S. Committee for Refugees estimates that 109,200 Bhutanese refugees reside in the seven camps administered by UNHCR in the Jhapa and Morang regions of eastern Nepal. U.S. Committee for Refugees, Country Reports: Nepal, at <<http://www.refugees.org/world/countryrpt/scasia/nepal.html>> (visited Sept. 17, 2001).

<sup>269</sup> Tibet Justice Center interview with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

<sup>270</sup> Tibet Justice Center interview with Ganesh Dhakal, Undersecretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).

Nepalese government's willingness to cooperate informally to assist Tibetan refugees.

Finally, it should be noted that Nepalese officials emphasized that, today, the government's largest concern about Tibetan refugees is not necessarily those in transit *to* India; it is rather the growing number of Tibetans who *return* to Tibet through Nepal after visiting India and thus reenter Nepal from India. The government apparently fears that these Tibetans will remain in Nepal. Director-General Mainali said that Tibetans caught reentering Nepal from India, while eventually returned to UNHCR custody, at times will be arrested, fined, and jailed.<sup>271</sup> Imprisonment for inability to pay a fine or debt, "debtor's prison," has been abolished in the Anglo-American legal tradition,<sup>272</sup> and it is highly questionable under contemporary international law.<sup>273</sup> Nepal nonetheless appears to have adopted this practice toward Tibetans seeking voluntarily to return to Tibet from India. In late 2000, the government detained nineteen Tibetans for this reason, charging them with high fines and imprisoning them for inability to pay. On the basis of this "precedent," in August 2001, the government detained several other Tibetans seek-

<sup>271</sup> Tibet Justice Center interview with Umesh Prasad Mainali, Director-General, Department of Immigration, in Kathmandu (May 21, 2001).

<sup>272</sup> See Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 33 n.109 (1986) (discussing the developments leading to the abolition of debtor's prisons in Britain); see also *In re Martin-Trigona*, 732 F.2d 170, 175 (2d Cir. 1984); *Fid. & Deposit Co. v. Browder*, 291 F.2d 34, 41 (5th Cir. 1961); *State ex rel Moss v. Couch*, 841 P.2d 1154, 1154 (Okla. Crim. App. 1992); cf. *United States v. Reynolds*, 235 U.S. 133 (1914) (striking down laws permitting peonage).

<sup>273</sup> See ICCPR, art. 11 (prohibiting imprisonment for failure to fulfil a contractual obligation); American Convention on Human Rights, Nov. 22, 1969, art. 22(7), 1144 U.N.T.S. 123 ("No one shall be detained for debt."); cf. U.N. Standard Minimum Rules for the Treatment of Prisoners, ¶ 94, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I. E.S.C. Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) (prescribing rules governing the treatment of prisoners "in countries where the law permits imprisonment for debt").

ing to return to Tibet after visiting India and assessed fines—totaling several thousand dollars, comprised of visa fees, late visa fees, and fines for each day of alleged illegal residence—on the presumption that these Tibetans had been resident in Nepal illegally for the duration of their visit to India. Because none of the Tibetans could afford to pay, the Nepalese Department of Immigration imprisoned them. UNHCR is reportedly negotiating with the Ministry of Home Affairs to ensure that this practice does not continue and to develop a means for “Tibetans coming from India [to] safely cross Nepal on their way to Tibet in [the] future.”<sup>274</sup>

On the whole, Tibet Justice Center’s research indicates that the 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. The Nepalese government will also continue to cooperate with UNHCR at least until the Bhutanese refugee crisis is resolved, and so long as it must rely upon foreign aid for development and other assistance.

### C. The Kathmandu Tibetan Welfare Office

The Tibetan Welfare Office in Kathmandu works with UNHCR to provide most of the practical assistance required by newly arriving Tibetans. In the early 1990s, the Tibetan government-in-exile purchased a five-acre parcel on the outskirts of Kathmandu. In consultation with UNHCR, it constructed what is now the Refugee Reception Centre.<sup>275</sup> The Tibetan Welfare Office supervises the Centre’s administration, and UNHCR channels funds to the Office

<sup>274</sup> TIN News Update, *Tibetan Prisoners in Nepal Seek Royal Pardon*, Feb. 15, 2002.

<sup>275</sup> Senate Foreign Relations Committee, Congressional Staff Trip Report on Tibetans in Exile, 138 CONG. REC. S12732-02, at \*S12734 (Aug. 12, 1992).

for this purpose.<sup>276</sup> The Office’s representative, appointed directly by the Dalai Lama, also works with officials at the Ministry of Home Affairs to handle any problems that arise concerning Tibetans in Nepal, whether related to new arrivals or to those residing permanently in the settlements as a result of their arrival before 1989.

The Nepalese government’s reluctance formally to recognize the Tibetan government-in-exile sometimes makes it difficult for the Tibetan Welfare Office to work effectively with the Ministry of Home Affairs to carry out the gentleman’s agreement.<sup>277</sup> But the Nepalese government benefits significantly from the existence of this unrecognized Tibetan government office. The Tibetan Welfare Office provides a centralized authority with which the Nepalese government can negotiate to resolve any matters concerning Nepal’s Tibetan community; and the Home Ministry relies on the Tibetan representative for assistance in this regard.

The Tibetan Welfare Office supervises the Refugee Reception Centre’s day-to-day operations. The Office channels funds to the Centre, which generally receives the first word of new arrivals, and the Centre ensures that the refugees receive food, shelter, and medical treatment until their departure from Nepal. The Centre also generally contacts UNHCR and the Department of Immigration to inform them of the arrival of refugee groups in order to coordinate

<sup>276</sup> Tibet Justice Center interview with Samdup Lhatse, former representative, Tibetan Welfare Office, in Kathmandu (May 20, 2001).

<sup>277</sup> *Id.*



The Refugee Reception Centre in Kathmandu was refurbished in the 1990s after an infusion of funds from foreign aid donors, particularly the United States government.

a time for their summary interviews and processing. Kelsang Chime, the Centre's current director, remarked that the funds it now receives from UNHCR via the Tibetan Welfare Office generally suffice to sustain its day-to-day operations. But at times—particularly during the winter months, when as many as 800 new arrivals may require temporary shelter—the Centre's resources become strained to capacity. The Centre employs thirteen staff members, including cooks, nurses, and administrative assistants.

Except on sensitive occasions such as Tibetan political anniversaries, Nepalese officials generally do not frequent the Reception Centre or interfere with its operations. After the Karmapa's escape from Tibet, however, Director Chime related that the Nepalese police sought to enter the Centre and to demand documents from the refugees then present. He refused to allow this without express authorization from UNHCR.<sup>278</sup> While operated by the Tibetan government-in-exile, it therefore appears that the Nepalese government treats the Reception Centre in practice as an instrumentality of UNHCR.

#### D. The United States Embassy in Kathmandu

The U.S. Embassy in Kathmandu has no formal role in the gentleman's agreement. But its role as the voice of U.S. foreign policy interests in Nepal, which include a commitment to ensuring the continuing viability of the gentleman's agreement, makes the Embassy's participation vital. "The United States agenda here," said Political and Economic Officer John Dyson, "is to keep the quick flow of refugees out of Tibet without problems, and to keep the Tibetan refugee community here intact."<sup>279</sup> To this end, the Embassy participates in meet-

<sup>278</sup> Tibet Justice Center interview with Kelsang Chime, Director, Tibetan Refugee Reception Centre, in Kathmandu (May 24, 2001).

<sup>279</sup> Tibet Justice Center interview with John Dyson, Political and Economic Officer, U.S. Embassy, in Kathmandu (May 23, 2001); see *U.S. Backs Nepal to Resolve Refugee Issue*, U.P.I., Dec. 2, 2000 (noting that "the U.S. government has called on the Nepal[ese] government to instruct its border guards to give protection to Tibetan refugees going to India, crossing the Himalayan kingdom").



Elizabeth Brundige, May 2001

During the winter months, as many as 800 new arrivals may require temporary shelter, straining the Reception Centre's resources to capacity.

ings with the Ministry of Home Affairs and UNHCR. It also maintains a strong working relationship with the Tibetan Welfare Office.

In the Embassy's view, the paramount objective of its policies in Nepal is to ensure that Tibetans can continue to escape persecution in China through Nepal, even if this sometimes means restricting the rights of Tibetan refugees who reside more permanently in Nepal. "It is really not a country of first asylum, especially because Nepal is not a signatory to the Refugee Conventions," Dyson remarked. "But it is more important morally to have the open border than to have every form of cultural freedom of expression." The tradeoff, in other words, is that Nepal will continue to permit the gentleman's agreement to operate provided the political expression of Tibetans *within* Nepal does not jeopardize Nepal's relationship with China. The gentleman's agreement therefore must remain low-profile. "Protesting in Nepal," Dyson emphasized, is "counterproductive."<sup>280</sup> The Embassy exercises substantial influence in Nepal because the United States continues to

<sup>280</sup> Tibet Justice Center interview with John Dyson, Political and Economic Officer, U.S. Embassy, in Kathmandu (May 23, 2001).

provide the lion's share of the funds that enable UNHCR to help to implement the gentleman's agreement.<sup>281</sup> As one Tibetan observed, UNHCR in effect channels U.S. funds in order to confer "international legitimacy" on the gentleman's agreement.<sup>282</sup>

### III. Allegations of Abuse and Refoulement by Nepalese Police

Whatever policies the "official" parties to the gentleman's agreement work out, it is the Nepalese police that implement them. For this reason, their knowledge and compliance is vital to its effective operation. Tibet Justice Center's research suggests that the conduct of the Nepalese police is erratic and sometimes abusive. Some interviewees related that the police stole their belongings or money. In a few cases, officers extorted bribes from Tibetans by threatening them with deportation. Tibet Justice Center also interviewed a number of Tibetans who described brief detentions ranging from several hours to as long as a few days, at times accompanied by police abuse.<sup>283</sup>

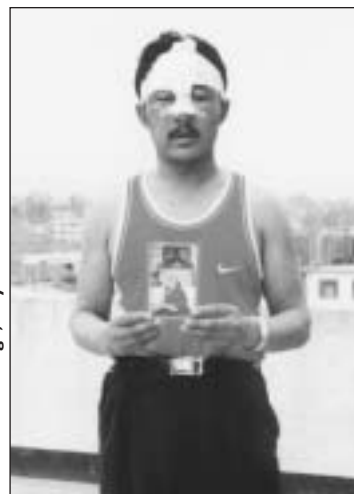
Based on interviews with new arrivals and police in Solu Khumbu, it appears to be the standard practice, if not policy, of the police to order Tibetans apprehended within a few days walking distance of the Tibeto-Nepalese border to return to Tibet. Refugees generally related that the police ordered them to return and followed them back toward the border for several hours. TIN, the International Campaign for Tibet, and TCHRD report cases of *refoulement*.<sup>284</sup> Very

<sup>281</sup> Tibet Justice Center interview with Michel Dupoizat, Representative, UNHCR, in Kathmandu (May 25, 2001).

<sup>282</sup> Tibet Justice Center interview with Dorjee Damdul, Researcher, TCHRD, in Kathmandu (May 20, 2001).

<sup>283</sup> The Tibet Information Network (TIN) also has reported isolated instances of more severe abuses in the past. See TIN, News Update, *Tibetan Monk Dies After Nepalese Police Shooting*, Nov. 2, 2000; TIN, News Update, *Tibetan Girls Raped by Police*, Feb. 16, 1999; TIN, News Update, *Tibetan Boy Shot by Border Police*, Feb. 1, 1999.

<sup>284</sup> See, e.g., TIN, News Update, *New Increase in Deportations of Tibetans From Nepal*, Dec. 24, 2001; TIN, News Update, *Tibetans Sent Back Across the Border as Pressure Increases on Nepal*, Dec. 20, 2000.



Elizabeth Brundige, May 2001

This monk was injured when he fell into a ravine while running from the Chinese police on the Nepalese side of the Sino-Nepalese border. The injuries he sustained required fifteen stitches.

Tibet Justice Center's interviews with local residents in Solu Khumbu confirmed this pattern. Mingma Temba Sherpa, for example, said that "[n]ow, they [the police] just take their names and details and take them to the police stations in Namche. They tell [the Tibetans] to go back to Tibet and take them up the hill a little way—and the Tibetans just turn around and come back."<sup>285</sup>

In Solu Khumbu, this pattern of (apparently) lax enforcement may reflect the difficulty of the terrain and the police's reluctance to walk all the way to the border (several days' journey). But it may also reflect some ambiguity in the officers' knowledge and understanding of their orders. Thame Police Chief Adhairim said that he tries to "convince" newly arriving Tibetans to return to Tibet. "Now," he said, "there are too many people in Kathmandu, so there's no place for the refugees to sleep." For this reason:

<sup>285</sup> Tibet Justice Center interview with Mingma Temba Sherpa, Staff, Khunde Hospital, in Khunde (June 4, 2001).

few Tibetans interviewed by Tibet Justice Center, however, reported being forcibly repatriated. (Of course, the most likely reason for this is that refugees who have reached the Reception Centre safely obviously managed to avoid repatriation; but a few interviewees reached Kathmandu only after two or three attempts, in at least one case after being previously repatriated by the Nepalese police.)

Most interviewees said that the police ceased to follow them after between several hours and one day. At this point, the Tibetans frequently would remain in hiding briefly and then turn back toward Kathmandu, following a less conspicuous route.

[t]he government decided that it's better to send them back to the border. So now we talk to them and explain: "Do not go to Kathmandu or India because it will not be so good for you there." But some don't want to go back, so they take another route. We haven't seen any [refugees] in three or more months, so I think they take another route....[If] they come back, then we will let them go on. But mostly, we try to get them to go back to Tibet.<sup>286</sup>

Police Chief Adihairim also explained that for one year, his police station has not had a radio. This means he cannot receive direct instructions from the Department of Immigration or the Home Ministry in Kathmandu. The police may therefore be uncertain or misinformed of their orders. This is particularly true because the Home Ministry frequently rotates individual officers to different posts. Those who assume a new post in one of the areas frequented by Tibetans may not receive proper instructions in the government's tacit policy (i.e., the gentleman's agreement).<sup>287</sup> Director-General Mainali denied this, contending that "police in the border regions are aware of [our] policies."<sup>288</sup> Be this as it may, it seems clear that nonconformance with government policy is not uncommon.

In part, logistical problems impede the ability of the Nepalese police to perform their duties. Chief Adihairim complained that the government gives his officers very little money with which to carry out their obligations. He estimated that they received about 50 to 60 Rs (less than U.S. \$1) per refugee per diem.<sup>289</sup> Chief Adihairim said that:

<sup>286</sup> Tibet Justice Center interview with Padim Adihairim, Thame Chief of Police, in Thame (June 5, 2001).

<sup>287</sup> Tibet Justice Center interview with John Dyson, Political and Economic Officer, U.S. Embassy, in Kathmandu (May 23, 2001).

<sup>288</sup> Tibet Justice Center interview with Umesh Prasad Mainali, Director-General, Department of Immigration, in Kathmandu (May 21, 2001).

<sup>289</sup> Another source, however, who requested anonymity, said that the police receive 225 Rs per diem for their assistance to Tibetan refugees, and this stipend

[The Tibetan refugees] are very hungry and eat...maybe 200 or 500 rupees in one meal; and the policemen have to pay for all of their expenses. So that's another reason why we don't take them to Kathmandu....One time I took a group of refugees to Jiri and received sixty rupees per diem. We stopped at a lodge for dinner, and the refugees ate very big [i.e., a lot]. They cost very much money. If there is this problem, we cannot do this. This is why I do not care very much anymore.<sup>290</sup>

Apparently, some local Sherpas contribute food, shelter, and other aid to Tibetans. By some accounts, the police reject this assistance. Darpa Sherpa Lhakpa, a seventy-two-year-old resident of Thame, said that he "bring[s] food and things to the police stations for the Tibetans; otherwise they have nothing to eat. I have always lived here and want to help. I live very close to the police station. Others want to help, but the police do not allow it."<sup>291</sup>

Chief Adihairim also said that many of the refugees, fearing repatriation, resist arrest; and without an interpreter, the police often cannot explain: "We just want to talk to you."<sup>292</sup> It is not clear to what extent language barriers genuinely account for police misconduct. In at least some cases, it appears to be a legitimate complaint. Some refugees interviewed by Tibet Justice Center were detained by the police—and the police did, in fact, intend to take them to Kathmandu. But the police could not communicate their intention. Fearing for their free-

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is sufficient to encourage some officers to "take a break" and accompany the refugees to Kathmandu as they should. The discrepancy between the police's account of the amount of money they received and that of this source remains unexplained.

<sup>290</sup> Tibet Justice Center interview with Padim Adihairim, Thame Chief of Police, in Thame (June 5, 2001).

<sup>291</sup> Tibet Justice Center interview with Darpa Sherpa Lhakpa, in Thame (June 5, 2001).

<sup>292</sup> Tibet Justice Center interview with Padim Adihairim, Thame Chief of Police, in Thame (June 5, 2001).

dom, the refugees resisted arrest. Chief Adihairim emphasized that in his view the absence of an interpreter is the foremost obstacle to carrying out the Home Ministry's orders regarding new arrivals.

Nepalese police, particularly in Solu Khumbu and other remote regions, also must confront the Maoist rebellion. This creates additional obstacles to their compliance with the gentleman's agreement. Police fear that if they accompany Tibetans toward Kathmandu on foot, they will be attacked by the Maoist rebels. Chief Adihairim explained that "[t]he Maoist problem is really bad. When I did guiding for the refugees, I didn't wear a uniform because the Maoists would shoot at me."<sup>293</sup> UNHCR noted that in recent years many police have abandoned their posts because of Maoist attacks. Representative Dupoizat said that UNHCR "offered to double the money [and hence the size of the police escort] to bring down the refugees," but the government refused. For this reason, UNHCR once resorted to sending a helicopter to rescue a group of refugees in police custody in a remote region. Representative Dupoizat felt that this solution, while not always practical, worked well. He claimed that it did not cost much more than increasing the police stipend, and it "had a considerable psychological impact, showing that we [UNHCR] are serious."<sup>294</sup>

But in general this solution is not available, and the Maoist insurgency hinders police compliance with the gentleman's agreement significantly. A necessary, though probably not sufficient, solution to the problem of ensuring police compliance must address the personal safety risks that police face in carrying out their duties. At a minimum, however, police unwilling to make the journey themselves should permit Tibetans to travel onwards independently to the Reception Centre, without delay, rather than force them to return toward the Tibeto-Nepalese border or detain them.

Finally, while Tibet Justice Center was unable to gather sufficient information on the extent to which the Chinese government

<sup>293</sup> *Id.*

<sup>294</sup> Tibet Justice Center interview with Michel Dupoizat, Representative, UNHCR, in Kathmandu (May 24, 2001).

seeks to influence Nepalese police practices, several sources suggested that police misconduct, and particularly *refoulement*, reflects Chinese efforts to crack down on the illegal transit of Tibetans into Nepal. In Kodari, one anonymous source said, the Nepalese police will sometimes accept small bribes in exchange for returning Tibetans to Chinese authorities on the opposite side of the border. Tamdin Dorjee explained that the Chinese government engages in covert anti-Tibetan activity in three principal ways: (1) by paying "hooligans and gangsters" in the border regions to return Tibetans to China; (2) by bribing the—often poorly paid—Nepalese police to do the same; and (3) by bribing Nepalese businessmen with trading privileges in exchange for their service as informants for the Chinese police.<sup>295</sup> Kelsang Chime, Director of the Reception Centre, likewise remarked that at Tatopani, a village location, Tibetans may be repatriated because the Chinese police will pay "ransom" for their return.<sup>296</sup>

As a general matter, government officials tended to deny the existence of police abuses. Foreign Minister Bastola acknowledged occasional incidents of abuse but insisted that they remain the rare exception, the product of the "flourishing trade of smuggling Tibetans into Nepal." In this context, he said, refugees "may be ill-treated by the local police. Maybe the police demand money from the smugglers and, if they cannot pay, they mistreat them.... When the police find out about this smuggling, they want part of the prize money."<sup>297</sup> Home Undersecretary Dhakal added that "sometimes there are certain incidents where the police have sent the [Tibetans] back over the border, but the incidents are few."<sup>298</sup> But both Home

<sup>295</sup> Tibet Justice Center interview with Tamdin Dorjee, Representative, HURON, in Kathmandu (June 1, 2001).

<sup>296</sup> Tibet Justice Center interview with Kelsang Chime, Director, Tibetan Refugee Reception Centre, in Kathmandu (May 24, 2001).

<sup>297</sup> Tibet Justice Center interview with Chakra Prasad Bastola, Minister, Ministry of Foreign Affairs, in Kathmandu (May 25, 2001).

<sup>298</sup> Tibet Justice Center interview with Ganesh Dhakal, Undersecretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001).



Secretary Regmi and Director-General of Immigration Mainali, the two officials with the greatest responsibility for the behavior of police and immigration authorities, categorically denied knowledge of any such incidents.<sup>299</sup>

To ensure compliance with the gentleman's agreement, then, Tibet Justice Center's research suggests that changes must be made at the levels of both policy and practice. Nepalese officials should clarify the government's commitment to the gentleman's agreement, acknowledge the difficulties encountered by the police, and ensure that they receive the resources required to carry out their duties, including adequate stipends for the care of refugees and translation assistance. Resumption of UNHCR's border missions and an increase in police training also are critically important steps. Because the gentleman's agreement remains, for the time being, the only practicable solution to the politically sensitive issue of Tibetan refugees transiting through Nepal, making these changes would be in the interest of all parties—the Nepalese government's interest in facilitating the transit of Tibetans into India, UNHCR's interest in ensuring their protection, and, of course, the interest of the newly arriving Tibetans seeking to escape safely to India.

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<sup>299</sup> Tibet Justice Center interviews with Shree Kant Regmi, Secretary, Ministry of Home Affairs, in Kathmandu (May 23, 2001); Umesh Prasad Mainali, Director-General, Department of Immigration, in Kathmandu (May 21, 2001).

## The “Firm Resettlement Bar” to Asylum Under U.S. Law

### I. Introduction

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Declassified documents from the U.S. Department of State indicate that, in February 1998, the Department faxed the U.S. Embassy in Kathmandu to request its views on “ethnic Tibetans traveling to the United States on non-immigrant visas.” The fax notes that the U.S. Immigration and Naturalization Service (INS) “has expressed concern about several recent cases of Tibetans making asylum claims upon entry to the United States,” as well as the “integrity of the [Nepalese government's] refugee travel document,” because “it appears that a lack of security features makes this document particularly susceptible to fraud.”<sup>300</sup> The Embassy's response, also dated February 1998, makes the following points, several of which—as the foregoing discussion makes clear—are not accurate and may well cause problems for the significant number of Tibetans with genuine claims to political asylum:

- Tibetans resident in Nepal, many “with almost forty years of presence” and “economically [and] socially well-established,” have relatives or friends in the United States and may qualify for U.S. visas, issued upon presentation of Nepalese RCs and travel documents. Consequently, “Embassy Kathmandu...regards recent requests for political asylum by Tibetans in the United States with skepticism.”
- “All Tibetans living in camps have been issued refugee identity cards. However, only about half of those not in

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<sup>300</sup> Fax from the U.S. Department of State to the U.S. Embassy in Kathmandu (February 12, 1998) (on file with Tibet Justice Center).

camps have been issued refugee cards....Consequently, many of these have illicitly purchased Nepalese identification cards and passports from document vendors and corrupt government officials.”

- “Tibetans in Nepal are afforded many of the same rights enjoyed by Nepalese citizens. They live and travel freely throughout the Kingdom. They own land and property, maintain bank accounts, and conduct business. They participate openly in religious and cultural activities.”
- The Tibetan non-immigrant application pool is comprised largely of Tibetans with American friends and relatives established in the United States—often, “Buddhist ‘Dharma Students’”—and willing to sponsor their visit. The remainder are “Tibetan carpet manufacturers and antique dealers [who] seek entry to the United States to promote export of their products,” and monks and nuns invited to give religious teachings. “As is the case with our Nepalese applicant pool, many applicants are undoubtedly intending...to work illegally in child care, hotel house-keeping, and food service jobs.”
- Travel documents may be obtained by Tibetans “who hold [Nepalese] refugee identity cards,” and some [ethnic] Tibetans possess legitimate Nepalese passports. The consular division is concerned, however, that Tibetans will try to “pass [themselves] off as a Sherpa, a Tamang, or a member of another of Nepal’s many Tibeto-Burmese ethnic groups.”
- The “recent spate” of asylum applications by Tibetans “suggest[s] that [these] claims are driven more by immigration than political concerns.”<sup>301</sup>

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<sup>301</sup> Fax from the U.S. Embassy in Kathmandu to the U.S. Department of State (February 1998) (on file with Tibet Justice Center).

Under U.S. law, Tibetans deemed “firmly resettled” in Nepal do not qualify for asylum in the United States. The extent to which the firm-resettlement bar poses problems for genuine Tibetan asylum seekers remains unclear, but Tibet Justice Center’s research suggests that it frequently does come up in asylum hearings. The principal reason for this is that asylum officers and immigration judges suspect—as the above consular communication implies—that many Tibetans arriving from Nepal in fact possess Nepalese citizenship or permanent residency; and that they come to the United States seeking economic betterment rather than as genuine victims of persecution *from* Tibet.<sup>302</sup> In some cases, this is true. But it presents problems for genuine Tibetan asylum seekers.

We choose to highlight this issue in the United States because the largest Tibetan community in exile outside of Nepal and India resides in the United States. We hope that the following analysis will be instructive not only to the U.S. government, but to governments around the world and those assisting Tibetans in their right to seek asylum.

## II. The Present State of the “Firm Resettlement” Doctrine

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The bar to asylees “firmly resettled” in a third state dates to the early 1960s,<sup>303</sup> before the date on which the United States ratified the 1967 Protocol Relating to the Status of Refugees,<sup>304</sup> and well before

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<sup>302</sup> This problem is one of two main “hurdles” that face Tibetan asylum seekers—the other being the one-year filing deadline. “Mark Beckett, a lawyer at Latham & Watkins,...said that [firm resettlement] trips up Tibetans because they usually come [to the United States] through other countries on forged papers.” Edward Lewine, *Language, Fear & Illegal Status Bars to Asylum*, DAILY NEWS, Feb. 15, 2001.

<sup>303</sup> See *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 (1971) (holding that, under then current legislation giving immigration preference to aliens fleeing persecution from communist states, a Chinese refugee’s application for asylum was barred because Congress could not “have intended to make refugees in flight from persecution compete with all of the world’s resettled refugees”).

<sup>304</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 150, 606

Congress enacted the Refugee Act of 1980, which implements U.S. treaty obligations under the 1967 Protocol.<sup>305</sup> Since that time, the firm-resettlement doctrine has developed considerably, most importantly, by becoming a *mandatory* bar to asylum rather than a discretionary factor that the INS may consider. In 1990, federal regulations recategorized firm resettlement as an absolute bar to asylum—along with, for example, a finding that the applicant committed a serious non-political crime; and in 1996, Congress codified this regulation.<sup>306</sup> The present definition, promulgated in 1990, defines an alien as firmly resettled:

if, prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement, unless he or she establishes:

(a) That his or her entry into that nation was a *necessary consequence* of his or her flight from persecution [and] that he or she remained in that nation *only as long as was necessary to arrange onward travel* .

. . ; or

(b) That the conditions of his or her residence in that nation were so *substantially and consciously restricted* by the authority of the country of refuge that he or she was not in fact resettled.<sup>307</sup>

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U.N.T.S. 267. The Protocol incorporates by reference the relevant provisions of the 1951 Convention Relating to the Status of Refugees.

<sup>305</sup> See 8 U.S.C. § 1158 (setting forth the processes for aliens to seek asylum in the United States).

<sup>306</sup> 8 U.S.C. § 1158(b)(2)(A)(vi); see *Andriasian v. INS*, 180 F.3d 1033, 1044 n.16 (9th Cir. 1999).

<sup>307</sup> 8 C.F.R. § 208.15 (2001) (emphasis added).

The theoretical underpinning of this domestic regulation is Article 1(E) of the 1951 Convention relating to the Status of Refugees, which excludes from the *definition* of a refugee persons resident in a third nation enjoying the “rights and obligations...of nationality” in that nation; and persons who, though once refugees, have “acquired a new nationality” and “enjoy the protection of the country of [their] new nationality.”<sup>308</sup>

In the United States, federal regulations and case law set forth a non-exhaustive list of factors that immigration judges and asylum officers “shall consider” to determine whether a refugee has been firmly resettled. These include the rights to housing, employment, travel, public assistance, education, potential for naturalization, and property.<sup>309</sup> In addition, the case law affirms that where presence in a third nation is not “reasonably proximate” to the applicant’s initial flight from persecution, where the applicant is not “*en route* to refuge in the United States,” a *presumption* of firm resettlement arises.<sup>310</sup> This presumption may be overcome, however, by a showing that the “totality of the circumstances” in the relevant third nation do not amount to firm resettlement under the federal regulatory definition.<sup>311</sup>

### III. Application to Tibetan Refugees in Nepal

#### A. New Arrivals

Tibet Justice Center’s research establishes that with the exception of the very few Tibetans naturalized in Nepal, *no* Tibetan refugee in Nepal *otherwise qualified for asylum* (i.e., in flight from persecution)

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<sup>308</sup> Convention Relating to the Status of Refugees, July 28, 1951, art. 1(E), 189 U.N.T.S. 150.

<sup>309</sup> 8 C.F.R. § 208.15 (2001); see *Matter of Soleimani*, 20 I. & N. Dec. 99, 106 (BIA 1989).

<sup>310</sup> *Cheo v. INS*, 162 F.3d 1227, 1229-30 (9th Cir. 1998); see also *Abdalla v. INS*, 43 F.3d 1397, 1399 (10<sup>th</sup> Cir. 1994).

<sup>311</sup> *Cheo*, 162 F.3d at 1229-30. *But see* *Abdille v. Ashcroft*, 242 F.3d 477, 486 (3d Cir. 2001) (declining to adopt the “totality of the circumstances” test).

should be deemed firmly resettled. Tibetans arriving after 1989 enjoy no legal status and few rights. Under the gentleman's agreement, they generally must depart Nepal within two weeks of their arrival at the Reception Centre unless extenuating circumstances such as medical conditions justify a longer stay. For the vast majority of current asylum applicants, then, the issue of firm resettlement should not arise. These refugees remain "in flight" from persecution, and their residence in a third nation, Nepal, is "reasonably proximate" to their flight. The principal reason that firm resettlement does arise, notwithstanding the law and its implications vis-à-vis Nepal's unofficial policy toward Tibetans, is that, to get to the United States in the first place, most Tibetans must acquire false documentation of one sort or another, showing that they are Nepalese citizens or residents. United States asylum officers and immigration judges at times suspect, for substantially the reasons indicated in the February 1998 consular communication, that many such Tibetans possess Nepalese citizenship or reside there permanently with appreciable, albeit limited, legal rights and status. The reality is that Tibetans who arrive or have arrived in Nepal after 1989 have few, if any, legal rights and no legal status in Nepal.

## **B. Residents at the Settlements**

Tibetans otherwise eligible for asylum who arrived before 1989 and who possess an RC issued by the Nepalese government also should not be deemed firmly resettled under U.S. law. They cannot own businesses in Nepal, work or travel freely within the country, own property, receive public assistance, or—with extremely rare exceptions—become naturalized citizens. The "totality of the circumstances" in Nepal, both legal and practical, should belie any notion that Tibetans residing in one of the "permanent" settlements in Nepal are firmly resettled within the meaning of the federal regulatory definition and pertinent case law. Based on Tibet Justice Center's research, the 1998 consular communication is thus mistaken on sev-

eral points: Tibetans cannot maintain bank accounts, own property, travel freely, or conduct business—save for minor trade and shops that do not require incorporation. Nor is it correct that "[a]ll Tibetans living in camps have been issued refugee identity cards."<sup>312</sup> To the contrary, a large proportion of those in the camps, particularly children, do not possess refugee identity cards (RCs). In short, it is not the case that "Tibetans in Nepal are afforded many of the same rights enjoyed by Nepalese citizens."<sup>313</sup> Canada's Immigration and Refugee Board recognized this state of affairs, noting in one case that "[u]nder Nepali law, the [Tibetan] female claimant was not a citizen of Nepal by virtue of being born there. Since the claimants did not have the right to return to Nepal and were not entitled to any status there, they were not excluded [from asylum in Canada] under Article 1(E) of the [1951 Refugee] Convention."<sup>314</sup>

Finally, it is worth emphasizing that while Tibet Justice Center's research did not focus on the status of Tibetan refugees in India—an equally, if not more, problematic issue for Tibetans who face the firm-resettlement bar—all available evidence indicates that Tibetans (with the possible exception of high-profile political refugees such as the Karmapa Lama) cannot obtain legal status and rights in India that qualify as firm resettlement. Tibetan asylum seekers who arrived in India before 1980, principally in the aftermath of the 1959 Lhasa Uprising, and who also possess Indian refugee identity certificates, enjoy a limited range of rights comparable in many respects to those of Tibetans residing in Nepal with RCs. These Tibetans can reside in India, conduct business, travel internally subject to limitations, and, with some difficulty, obtain documentation enabling them to travel abroad. But they, too, lack formal status as "refugees" under Indian law and, in practice, have no meaningful access to citizenship. Moreover, since 1994 at the latest, the Indian government has ceased

<sup>312</sup> Fax from the U.S. Embassy in Kathmandu to the U.S. Department of State (February 1998) (on file with Tibet Justice Center).

<sup>313</sup> *Id.*

<sup>314</sup> CRDD, T98-08850, at <<http://www.irb.gc.ca>> (visited Mar. 18, 2001).

altogether to issue refugee identity certificates to Tibetans. It also has been exerting pressure on the Tibetan government-in-exile, based in Dharamsala, Himachal Pradesh, to encourage the repatriation of new arrivals.<sup>315</sup> Tibetans apprehended in India without documentation therefore may be subject to imprisonment and deportation under Section 14 of India's Foreigners Act; and indeed, in February 1998, the Indian government arrested twenty-one Tibetans on this basis. In short, while India often turns a blind eye to newly arriving Tibetan refugees, the fact remains that "India is not a signatory of the UN Refugee Convention and those Tibetans technically are stateless persons who have not been explicitly awarded refugee status."<sup>316</sup>

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<sup>315</sup> See Robert Joseph Barnett, Adjunct Research Scholar, Columbia University, *Note on Claims That India and Nepal Do Not Offer Firm Resettlement to Tibetan Asylum Seekers* (1999) (unpublished paper) (on file with Tibet Justice Center); see generally Tapan K. Bose, *India's Policies and Laws Toward Refugees*, 10 HUMAN RTS. SOLIDARITY No. 10 (Oct. 2000).

<sup>316</sup> TIN, News Update, *Refugees Charged by Indian Police for Lack of Papers*, Feb. 4, 1998.

## Conclusion

This report documents the precarious situation of Tibetan refugees transiting through or residing in Nepal. Tibetans residing in Nepal and their descendants live in legal limbo; they are not recognized as refugees or given any definable legal status, either by their host state or by UNHCR. Tibetans who entered Nepal before 1989 receive a modicum of temporary protection through the government's issuance of annually renewable RCs. But these provide little more than the right to remain in Nepal, typically in isolated and increasingly overcrowded settlements. Tibetans cannot own property, incorporate a business, or work or travel freely within Nepal. Those without RCs risk harassment by police. Even though many have resided in Nepal for decades, few, if any, can acquire Nepalese citizenship because of legal and bureaucratic hurdles. Their future is increasingly insecure in a country that reluctantly acknowledges, but refuses to accept, their presence. They and their children, born in Nepal and entitled under international law to acquire a nationality, remain stateless.

Tibetans arriving or who have arrived in Nepal after 1989 have no legal status and no right to remain in Nepal. Within a few weeks of their arrival, they must leave for Tibetan exile communities in India. The informal gentlemen's agreement between the Nepalese government and UNHCR, while preferable to nothing, appears to be breaking down in practice. Some Tibetans reported being detained by Nepalese border authorities, forced to pay bribes in order to continue their journey to Kathmandu, and even compelled to march back to Tibet in violation of the fundamental principle of *non-refoulement*. Because the Nepalese government no longer permits UNHCR to carry out border missions, monitoring of border activity is minimal. The results of this lack of oversight are alarming. In the one-month period between November 25 and December 24, 2001, for example, a reliable report indicates that the Nepalese police returned at least fifteen Tibetans, including several children,

to Chinese border guards.<sup>317</sup> Tibetans returned to Chinese authorities face serious risks of detention, interrogation, and torture.

Notwithstanding UNHCR's recognition of newly arriving Tibetans as persons "of concern," UNHCR has not sought to provide Tibetan refugees with a durable solution. Tibetans cannot present asylum claims or seek a formal determination of their refugee status, resulting once again in an undefined and highly precarious lack of legal status. While Tibet Justice Center's research did not focus on the status of Tibetans residing in India, conditions for Tibetans in India are reportedly analogous to those for Tibetans in Nepal. Tibetans in Nepal and India, where the vast majority end up, thus subsist in legal limbo. At a minimum, the Nepalese government should educate border authorities to ensure that *refoulement* of newly arriving Tibetans crossing onto Nepalese soil ceases. Newly arriving Tibetans should be given the opportunity to seek asylum and to receive a fair refugee status determination with the assistance of UNCHR. And at a minimum, Tibetans residing in Nepal and their children should be issued RCs and afforded greater rights to own property, to work, to travel freely—and, should they wish, to seek to acquire Nepalese citizenship.

But above all, as noted at the outset of this report, the circumstances for Tibetans in Nepal reveal a pressing need for governments, UNHCR, and the international community to reexamine the current informal arrangement regarding the status and treatment of Tibetan refugees in host countries, and to work to provide them with a more durable solution. While Tibetans aspire to return to a free Tibet, the reality is that most have become, and remain, stateless—Tibetan nationals in a world that acknowledges neither the existence of their nation nor their right under international law to seek a more secure legal status.

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<sup>317</sup> TIN, News Update, *New Increase in Deportations of Tibetans from Nepal*, Dec. 24, 2001.

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