

# GROUNDNS FOR NEPALESE ASYLEES IN THE US

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## Abbreviations

CPNM .....	Communist Party of Nepal (Maoist)
NC .....	Nepal Congress Party
UML .....	United Marxist Leninist
CPN .....	Communist Party of Nepal
YCL .....	Young Communist League
NDP .....	National Democratic Party
JT'TM .....	People's Terai Liberation Front
KLMM .....	Kirat Limbuwan Liberation Front
NLF .....	Newar Liberation Front
NSU .....	Nepal Student Union
NWA .....	Nepal Women Association
USCIS .....	United States Citizenship and Immigration Services
USC .....	United States Code
INA .....	Immigration and Nationality Act
IIRIRA .....	Illegal Immigration Reform and Immigrant Responsibility Act
CAT .....	Convention against Torture
CFR .....	Code of Federal Regulations
BIA .....	Bureau of Immigration Appeals
LLM .....	Master of Laws
GGU .....	Golden Gate University
US .....	United States of America
UK .....	United Kingdom
EU .....	European Union
v. ....	Versus

## Landmark Decisions

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## Chapter I

### Introduction

The research explains the situation of Nepalese asylum seekers in the US and their eligibility based on various grounds. Persecution, torture and discrimination on various grounds is also briefly explained to provide better understanding of the problem.

#### 1. Background

Each year thousands of Nepalese flee from Nepal to avoid persecution, death and extortion from the terrorists, extremists and armed groups. Most are displaced from their original habitat and are recognized as Internally Displaced People as long as they are in Nepal. Once they leave Nepal they attain the status of either asylees or refugee. Nepalese refugees are not yet accepted by international community. However, Nepalese asylees are recognized globally and especially in nations such as US, UK, EU and Australia. Few hundred of them make it to the United States.

<b>Nepalese Asylee approved since 1997 till 2007</b>			
Year	Defensive	Affirmative	Total
1997	-	3	3
1998	9	17	26
1999	40	13	53
2000	39	18	57
2001	31	19	50
2002	37	69	106
2003	57	143	200
2004	93	162	225
2005	85	231	316
2006	163	210	373
2007	130	n/a	n/a

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a. **Meaning and Definition:** Section 208 of the Immigration and Nationality Act (INA) provisions that, Asylum may be granted to a person who is determined to be a “refugee” within the meaning of Sec. 101(a)(42) of the INA. The Act defines "refugee," in part, as any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion..

**b. Statement of Problem:**

- i. Nepalese Asylees lack adequate knowledge of procedural aspects of Asylum.
- ii. Asylum should not be denied based on the one-year filing deadline because of the exceptional nature of changed circumstances and extraordinary situation applicable to Nepalese.
- iii. Asylum Officers lack adequate knowledge on Nepalese Asylees and their persecution.

- c. **Hypothesis:** Proper dissemination about Nepalese Asylees and their qualification based on various grounds shall result in accurate decision on asylum cases

## 2. Research Methodology

- a. **Scope and Limitation of the Study:** The study is limited to Nepalese asylees applying in the US. The study also covers future asylum seekers and their eligibility based on various grounds.
- b. **Technique and Tools of Research:** The study is a doctrinal research. However, some aspects of the study is based on the researcher's acquaintance with individual asylees in the US and their situation; knowledge gained through filing of asylum application; interviews with approved-denied-pending asylees in the US and information received from sources such as newspapers, internet and media.
- c. **Time and Budget:** The research was completed in two month from the month of March 2008 till May 2008. The researcher managed all costs incurred during the research i.e. roughly \$5000.
- d. **Dissemination:** The research and its outcome shall be disseminated to the general public and interested stakeholders using internet through the researcher's own website [www.santosgere.wordpress.com](http://www.santosgere.wordpress.com).

### 3. Legal Instruments

a. **Domestic Instruments prohibiting persecution and their efficacy:** There are various legal instruments related to protection of human rights in Nepal. However, their effectiveness is highly questionable given the rising numbers of human rights violation and the persecution faced by the general public across the nation. Some of the major acts are being discussed in brief.

i. **Interim Constitution of Nepal 2007:** Interim Constitution scrapped the earlier constitution of 1990 which guaranteed fundamental human rights including rights against exploitation and torture. However, armed groups such as CPNM claimed the constitution as discriminating and launched a civil war in 1996 which claimed nearly 15000 lives in 10 years. The interim constitution still remains as a dummy constitution and is rarely implemented.

ii. **National Human Rights Commission Act:** Although enacted to protect, promote and guarantee basic human rights to the Nepalese, the act has not been able to justify the objectives because of Human Rights Commission established without any executing power under this act.

- b. **Applicable International Instruments:** United Nations Universal Declaration of Human Rights, United Nations Commission on Human Rights and United Nations Convention against Torture has been well understood in Nepal but implemented and followed less. Disregard to the International human rights laws and their violation has been seen from both armed groups and the governance time and again.
- c. **Applicable US Laws:** Immigration and Nationality Act, IIRIRA, Patriot Act, Real ID Act etc are known as the primary laws regarding asylum in the US. However, there is a lack of in-depth understanding of Nepalese asylees situation and assessment thereof. Although the laws are defined literally while adjudicating the asylum application and at Immigration Judges, it merely acknowledges the actual persecution Nepalese face resulting in injustice to the asylees. Immigration Officers and Immigration Judges are provided with limited knowledge about Nepal and existing persecution through the US Department of State Country Report which does not cover the actual scenario.

## Chapter II

### Nepalese Asylum Seekers and Persecution

The most common forms of torture in Nepal include beating, electric shocks, use of lit cigarettes, and forcing detainees to assume painful postures. Animals, insects, needles, sharp-edged materials and denial of food and drink are also commonly applied as tools of torture. Similarly, psychological tortures include threats, forced feeding of human excreta, and forced removal of 'sacred thread' of the upper caste detainees, long-term isolation, and confinement in a dark room and exposure to loud noises<sup>1</sup>. Likewise, capture and seizure of property, kidnapping of family members, issuance of blacklist, posting eviction or exile notices, continuous extortion attempts are also common. The state and the armed groups are equally involved in torture and persecution.

**1. Types of Persecution in Nepal:** Persecution of Nepalese is multifold and ranges from religious to political reasons. Fundamental human rights including Economic, Social and Cultural Rights and Political and Civil Rights are infringed in all walks of life.

**a. Persecution based on Religion:** Persecution based on religion<sup>2</sup> towards Nepalese is widespread because of the traditional superstitious Hindu Varna System and Caste Based Persecution.

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<sup>1</sup> <http://www.cvict.org.np/news2006/news2006.html>

<sup>2</sup> [http://en.wikipedia.org/wiki/Freedom\\_of\\_religion\\_in\\_Nepal#Persecution\\_by\\_Terrorist\\_Organizations](http://en.wikipedia.org/wiki/Freedom_of_religion_in_Nepal#Persecution_by_Terrorist_Organizations)

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Likewise, there is also presence of Persecution of Buddhists and Tibetans because of the political non-tolerance towards Tibetan Buddhists unlike Nepali Buddhists. Persecution towards other religions are also widespread specially towards minorities such as Christians and Muslims. Hindu Extremists are specially involved in persecution towards them. In the past few years CPNM accused churches of being agent of American Imperialism. Likewise, Hindu Extremists have been involved in bombing of mosques<sup>3</sup>.

- a. **Persecution based on Political Opinion<sup>4</sup>:** Persecution by Communist Party of Nepal (Maoist) and its associates such as Young Communist League and their Ethnic Sister Organizations such as JTTM, KLMM, NLF etc have been mostly involved in persecution based on political opinion. They attack and persecute democrats mostly from Nepali Congress and its sister organizations such as Nepal Student Union (NSU), Nepal Women Association (NWA), Tarun Dal and also members of other parties such as Nepal Communist Party, Madheshi Rights Forum, National Democratic Party, Nepal Sadbhawana Party and their allies. Likewise Persecution by Terai (Southern Plains) Extremists towards Pahades (people from the hills) and vice versa is also

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<sup>3</sup> [http://news.bbc.co.uk/2/hi/south\\_asia/7321186.stm](http://news.bbc.co.uk/2/hi/south_asia/7321186.stm)

<sup>4</sup> <http://www.satp.org/satporgtp/countries/nepal/timeline/index.html>

rampant. Similarly, Persecution by Pro-Palace Royalists such as Nepal Defense Army and Royal Regime Figures namely *Panchee* or *Mandale* are involved in persecution towards other party followers because of their continued effort on saving the monarchy. It must be noted that on May 01, 2008 World Hindu Federation (Nepal) released a press statement declaring armed revolution for saving the monarchy, which has been almost scrapped by the coalition between the parties and CPNM.

- b. **Persecution based on Race and Special Characteristics:** Nepal is a diversified society comprising of several religion, linguists, cultures, appearance and ethnicity. The traditional conservative society which is illiterate, superstitious and conservative is the primary reason for various types of persecution which are generally targeted towards *Dalit* Community, Women, *Pabades* (People from Hills), *Madhesi* (People from the Plains), HIV Aids Individuals, Disables, Transgender and also Internally Displaced People (IDPs).
- c. **Persecution based on membership in a Social Group:** Members of Non-Profit Organization are also targeted by the armed groups. They have chased away many INGO and NGO development

programs from rural areas<sup>5</sup>. These organizations are generally accused of agents of US Imperialism and Indian Expansionists. Various organizations have been bombed, their members slaughtered, kidnapped, physically and mentally tortured and assaulted, extorted, exiled and forcefully evicted. These vulnerable groups comprise of Social Organizations (SO), Religious Organization (RO), Government Organization (GO), Non Government Organization (NGO), Community Based Organization (CBO) and International Non Government Organization (INGO).

- d. **Persecution based on Nationality or Origin:** This type of persecution is generally targeted towards fellow Nepalese in and outside Nepal. Minority Nepali in India, Burma, Tibet and Bhutan has been openly discriminated in terms of application of economic, social, cultural, civil and political rights.

## 2. The One Deadline to File Asylum INA §208(a)(2)(B), 8 U.S.C. §1158(a)(2)(B) (2002)

- a. **Landmark Decisions:** There have been several decisions regarding the one year deadline to file asylum. Considering the changing

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<sup>5</sup> Mahendra Lawoti, *Towards a Democratic Nepal*, 2005, Sage Publications Inc

dimension of Nepal's politics, the notions envisaged on the following decisions can also be implemented.

*USCIS states, "You must apply for asylum within one year of your last arrival in the United States, but you may apply for asylum later than one year if there are changed circumstances that materially affect your eligibility for asylum or extraordinary circumstances directly related to your failure to file within one year. These may include certain changes in the conditions in your country, certain changes in your own circumstances, and certain other events. For a non-exhaustive list of circumstances that may be considered changed or extraordinary circumstances, see 8 CFR § 208.4. You must apply for asylum within a reasonable time given those circumstances.*

IIRIRA 1996 provisions the requirement that all asylum applicants must apply within one-year of their last entry into the United States and that an asylum applicant must demonstrate "by clear and convincing evidence that the application has been filed within 1 year after the date of the [applicant's] arrival in the United States."<sup>6</sup> An asylum applicant can demonstrate that he is eligible for an exception to this rule if there are changed circumstances or extraordinary circumstances relating to the delay in filing the application.<sup>7</sup> Asylum must be filed within a reasonable period of time after the changed circumstances or extraordinary circumstances occur in order to warrant an exception to

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<sup>6</sup> INA §208(a)(2)(B).

<sup>7</sup> INA §208(a)(2)(D)

the one-year bar. The one-year deadline only applies for asylum applications and not for withholding of removal or relief under CAT.

The one-year filing deadline is calculated from the date of the applicant's last arrival in the United States.<sup>8</sup> Asylum is considered to have been filed on the date it is received by Citizenship and Immigration Services. If the application was mailed within the one-year period but was not received by CIS within that period, the mailing date is considered the filing date if the applicant provides clear and convincing documentary evidence that the application was mailed within the required time period<sup>9</sup>. Although the asylum regulations list specific situations that fall within the exceptions to the one-year deadline, BIA holds that an individualized analysis as to the facts of the case is still required even when the facts fit into one of the enumerated situations<sup>10</sup>. Until Real ID Act became law, federal courts did not have jurisdiction to review BIA decisions about whether an asylum applicant had met the changed or extraordinary circumstances exceptions for an untimely filing<sup>11</sup>. A few circuit courts had remanded some cases to the BIA when it was unclear

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<sup>8</sup> 8 C.F.R. § 208.4(a)(2)(ii).

<sup>9</sup> 8 C.F.R. § 208.4(a)(2)(ii).

<sup>10</sup> *Matter of In re Y.-C.-*, 23 I. & N. Dec. 286, 287-88 (B.I.A. 2002)

<sup>11</sup> INA § 208(a)(3);, 8 U.S.C § 1158(a)(3) (2000). *See also Tarrawally v. Ashcroft*, 338 F.3d 180, 185 (3d Cir. 2003); *Tsevegmid v. Ashcroft*, 318 F.3d 1226, 1230 (10th Cir. 2003); *Fabim v. United States AG*, 278 F.3d 1216, 1217 (11th Cir. 2002); *Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001).

on what grounds a denial of asylum was affirmed<sup>12</sup> or when the BIA had failed to make a determination regarding an exception to the one-year deadline when the issue had been raised by the applicant<sup>13</sup>. The only other means available for directly challenging one-year filing issues prior to the Real ID Act was through *habeas corpus* review under 28 U.S.C. §2241. The Supreme Court held in *INS v. St. Cyr* that although judicial review may be restricted by statutory provisions, matters of law through the habeas process are not similarly restricted unless there is an express statement of Congressional intent to preclude judicial review on *habeas*<sup>14</sup>. One district court found that the changed circumstances exception was reviewable on writ of habeas corpus on the basis of the Supreme Court's ruling in *St. Cyr*<sup>15</sup>. The applicant must demonstrate "either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the [first year of entry].<sup>16</sup>" Additionally, the applicant must prove that the application was filed within a "reasonable period of time" after the changed or

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<sup>12</sup> *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004); *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003).

<sup>13</sup> *Sagaydak v. Gonzales*, 405 F.3d 1035, 1039-40 (9th Cir. 2005). See *Sharari v. Gonzales*, 407 F.3d 467, 473 (1st Cir. 2005)

<sup>14</sup> *INS v. St. Cyr*, 533 U.S. 289, 314 (2001).

<sup>15</sup> *Kanivets v. Riley*, 320 F. Supp. 2d 297, 300-01 (E.D. Pa. 2004).

<sup>16</sup> INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D) (2000).

extraordinary circumstance<sup>17</sup>. An applicant may be granted asylum after missing the one-year deadline if she can demonstrate “the existence of changed circumstances which materially affect the applicant’s eligibility for asylum<sup>18</sup>.” When determining what constitutes a reasonable period of time, an adjudicator must take into account whether the applicant had a delayed awareness of the occurrence of the changed circumstances<sup>19</sup>.

- b. **Changed Situation-Rapid Political Changes in Nepal:** The dimension of Nepal’s politic has been changing since the democracy achieved through the great revolution of 1957 in which the underground political parties such as NC and CPN were successful in overpowering the tyrannical oligarchy of the Prime-minister rule of the Rana Clan for 104 years which returned the power to the exiled King Tribhuwan. Unfortunately the Coup D’état of 1967 established the Shah Kings as absolute autocratic rulers. The political parties were banned and armed revolution was launched against the successor King Mahendra. In 1979 an assassination attempt on the King failed. The Referendum of 1980 which tried to demonstrate the international community that the rule was based on popular will was purely biased and partial. After 10 years the power

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<sup>17</sup> 8 CFR §§ 208.4(a)(4)(ii), and 208.4(a)(5) (2005).

<sup>18</sup> INA § 208(a)(2)(D), 8 U.S.C § 1158(a)(2)(D) (2000).

<sup>19</sup> *Kanivets v. Riley*, 320 F. Supp. 2d at 297, 300 (E.D. Pa. 2004)

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was given back to the people through the Revolution of 1990 in which the successor King Birendra agreed to remain as a ceremonial crown and separate from state affairs. During his reign, there was an emergence of Maoist Insurgence in 1996, which claimed the new constitution unequal and discriminatory towards the general people. The Royal Palace Massacre 2001 in which King Birendra's clan was wiped still remains as a mystery. Many believe the Crown Prince as the maser mind while the general public blames the current widely unpopular King Gyanendra behind the plot. Dissolution of Parliament 2002 gave rise to the King's open participation in politics and state affairs. Due to lack of elected parliament and constitutional loopholes the political parties fell in their own trap. Many experiments of coalition of government were done but none were successful. On the other hand the CPNM's armed revolution was gaining success and had already captured almost 75% of the geography. A parallel government and people's court were functioning across the nation. The miscalculation of King Gyanendra urged him to opt for Coup D'état of 2005, in which he banned the political parties and initiating a direct rule just like his father. Arrests, kidnapping, killing, abduction and exile seemed to be regular terminology. The political parties (Seven Party Alliance) formed an alliance with CPNM and agreed to strip off the King of all privileges and immunities and declare Nepal as

a republic from a kingdom. The SPA-M intensified their agitation and the third great revolution cracked leading to hundreds of killing, arrests and disappearances. Pressurized by the international community and fearing the fate and future of the royal institution, King Gyanendra decided to reinstate the Parliament in April 2006. The reinstated parliament decided to strip the King of all his powers making it impossible for him to be involved in politics again. The parliament also declared that the King shall be formally dethroned through a Constituent Assembly, for which election date was set in April 2007. The Maoists declared that they wanted to give up arms and formed alliance with the SPA in November 2006 through an agreement. The Maoists entered the parliament for the first time in December 2006 accepting ballet powerful than bullet which had claimed 15000 lives in 10 years. The elections set for April was however postponed, after the Maoists were involved in the government as Ministers in April 2007. New date for the elections was set for December 2007. Meanwhile there were several instances of power scuffle between the SPA and Maoists. The Maoists walked out of the government in September 2007 citing huge political differences and also threatened to walk out of the parliament. A later compromise with the political parties brought them back to the government in 3 conditions: (i) hold elections in April 2008 instead of December 2008, (ii) declare Nepal a Republic,

and (iii) end Monarchy through the first meeting of the Constituent Assembly. The short rule of the Maoists demonstrated media curtail, cruelty of CPNM and its allies, increased extortion and disregard to established human rights notions. The Constituent Assembly Elections was held in April 2008 and the results came as a huge surprise to the national and international community. The Maoists bagged 120 seats out of 240 seats and established itself as the single largest party. They were also successful in getting 30% of the proportional representative seats, thereby enabling them to rewrite the constitution per their vision if smaller parties support. The fate of the King remains as a mystery until the Constituent Assembly meets for the first time on May 20, 2008.

3. **Extraordinary Circumstances INA §208(a)(2)(D), 8 U.S.C. §1158(a)(2)(D)** : Several standards have been set by courts in determining extraordinary circumstances which have been briefly discussed earlier. Extraordinary circumstances with regards to a Nepali asylees should be duly considered on valid grounds such as Recent Atrocities on the Asylee or her family; Killings and Life Threats to their family members who are in Nepal; instances of Forced Exile or eviction by the terrorist group and their so-called People's Courts; Property Seizure; Forced Recruitment by armed groups; Disappearance, Kidnapping and Extortion. Victim of Rapid Political Change should also be considered under this notion given

that the governments merely last for 6 months to 9 months as proven in the history where the opposition is always vulnerable. Members of Minority Parties, Members of Past Government, Pro-Palace and Royalists, Constituent Assembly Elections Candidates and Leaders should all be considered under this target group and their family members living in the US be considered vulnerable per se. A Possibility of a Coup cannot be ruled out under current circumstances and considering political changes in Nepal and also in some south and east nations such as Pakistan, Bangladesh and Thailand. The major forces who may stage a coup could be The Monarchy, The Military or The Maoists

4. **Other Forms of Nepalese Asylum Seekers:** The Case of 100 Nepali H-2B Workers<sup>20</sup>, who were trafficked into the US promising green card and high pay, must be considered asylees given their situation. Most of them have left the nation because of the threats imposed and mostly sold off their property or acquired high-interest loans. Once they return, most them are bound to be persecuted by the local Maoists for foreign currency, for the loans they incurred and for taking refuge in the US during a crucial phase of the People's war. Trafficked Nepali Women and victims of Domestic Violence in Nepal or in the US should be provided protection based on Gender if not U visa or under VAWA. Likewise,

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<sup>20</sup> <http://santosgere.wordpress.com/2008/03/12/foreign-h-2b-workers-being-trafficked-to-us>

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international students who are facing Financial Hardship due to the armed conflict in Nepal and who fell out of status must be considered as primary stakeholders of asylum, where their family and parents have been persecuted or extorted for financial benefits.

## Chapter III

### Issues of Nepalese Asylee in the US

There are various issues related to the Nepali asylees in the US. The problems range from simple filing procedure to the court hearings. Some of them are discussed below:

1. **Defensive Asylum Process:** The asylees Lack of Knowledge of Defensive Asylum while in the port of entry. There have been several instances where the prospective asylees have been deported or sent back to Nepal without giving adequate information about asylum process. The Port of Entry at various airports must have proper and reckonable signs about the asylum process, the alien's rights and adequate information. This could be useful to the asylees from other nations too. The prospective asylees also lack Proper Representation through an attorney or any pro-bono organizations. The other problem relates to Proper Translation and Interpretation for the illiterate and non-English speaking Nepalese and others alike.
2. **Affirmative Asylum Process:** The affirmative asylum process starts when the alien is already in the US territory. There are problems related to Pre-Filing Issues such as Unavailability of Original Documents, Translation of the Statements, In-Status and Out-of-Status Situations and Lack of Adequate Knowledge about the One Year Filing Deadline, Pro-

Bono Lawyers and Organizations and to some extent Proper Filing Procedure. Some claim that they did not have knowledge about the asylum provision at all. In addition, there are some Post-Filing Issues too. These relate to non-availability of Interpreter and Monitor and improper translation/interpretation and Emotional Distress during the interview. While being referred to an Immigration Judge additional problem have also arisen such as Financial Inability to pay and Lack of proper Representation through pro-bono attorneys and organizations. There are some problems related to the Pending Asylum Applications too where we have found that some cases have been pending for over 6 years and yet nothing have been heard from USCIS regarding the matter. Asylees also lack proper knowledge about filing Work Permit (150 days and 180 days) and Travel Documents.

## Chapter IV

### Conclusion and Recommendation

#### Conclusion

Adequate information about Nepal, dynamic politics and exact threat situation towards the vulnerable general public is not being disseminated to the related agencies, therefore justice may not have been serving its purpose towards the Nepalese asylees.

#### Recommendation

Concerned offices and authorities should not solely rely on the US Department of State issued Country report which does not demonstrate the exact situation of Nepal. Expert Opinions and human rights reports presented by Nepali Human Rights Lawyers must be acknowledged in decision making. Analysis of threats and assessment of actual persecution towards the stakeholders and in their habitat must be done through information received from independent sources listed but not limited to:

1. South Asian Terrorism Portal ([www.satp.org](http://www.satp.org)),
2. Informal Sector Service Center ([www.inseconline.org](http://www.inseconline.org))
3. Centre for Victims of Torture, Nepal ([www.cvict.org.np](http://www.cvict.org.np))
4. [www.ekantipur.com](http://www.ekantipur.com),
5. [www.nepalnews.com](http://www.nepalnews.com)
6. [www.thehimalayantimes.com](http://www.thehimalayantimes.com)
7. <http://www.nepalitimes.com/issue/341/Nation/13359>
8. <http://www.nepalresearch.com/politics/maoists.htm>
9. <http://www.achrweb.org/reports/Nepal/Nepal0205.pdf>
10. <http://www.inseconline.org/book/Executive%20Summary.pdf>
11. <http://thereport.amnesty.org/eng/Regions/Asia-Pacific/Nepal>