

NEPAL'S CONSTITUTIONAL PROCESS

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NEPAL'S CONSTITUTIONAL PROCESS

EXECUTIVE SUMMARY AND RECOMMENDATIONS

With the formation of an interim legislature incorporating mainstream parties and Maoists, Nepal's peace process hinges on writing a constitution that permanently ends the conflict, addresses the widespread grievances that fuelled it and guards against the eruption of new violence. Most political actors have accepted the Maoist demand for a constituent assembly (CA) tasked with framing a new dispensation, although royalists are worried over the future of the monarchy, which has in effect been suspended. The major challenge is to maintain leadership-level consensus while building a broad-based and inclusive process that limits room for spoilers and ensures long-term popular legitimacy. Recent unrest in the Tarai plains illustrates the dangers of ignoring popular discontent. Key political actors need to prepare more seriously for the CA. Led by the newly established United Nations mission in Nepal (UNMIN), the international community should pressure all sides to abide by their stated commitments and global norms and provide technical assistance to the electoral process.

The interim constitution promulgated on 15 January 2007 established a framework for constitutional change and enshrined the guiding principles agreed in earlier negotiations. The new constitution's drafting process has to address the twin objectives of peacebuilding and longer-term political reform. It offers an opportunity to cement the Maoists' integration into mainstream democratic politics, to determine the monarchy's fate and to tackle long-standing ethnic, regional and caste fissures. But successful constitutional processes require a delicate balance of elite accommodations and broad public participation. If the joint mainstream party/Maoist leadership fails to balance these sometimes competing demands, or the process stalls, violent conflict may emerge once more.

There is also a tension over timescales – a speedy process would maintain momentum but could cut too many corners. The elections and assembly will not be perfect but they have to be good enough: the polls must be plausible, and the assembly must be seen to work adequately. The initial arbiters of the election's fairness will be a small number of critical domestic

and international constituencies, primarily the major party leaderships and India. If their judgement is out of step with the national mood – as it often has been in the past – it will produce new problems.

The constitutional process has to build a complex equilibrium among elites. It must provide political space for the Maoists while limiting their options to use violence or coercion against political opponents. The consolidation of a competitive multiparty system naturally bolsters the mainstream political parties but in the short term will heighten their differences with each other and may encourage a return to the less than edifying tactics of earlier parliamentary politics. Managing the transition in the palace's role may also present difficulties: political leaders have skillfully stripped royal powers comprehensively but gradually, with no single step sufficient to prompt a backlash. But a decisive alteration of traditional power structures will still encounter resistance from conservative institutions – not just the palace but also elements of the army, judiciary and bureaucracy.

So far the process has concentrated on building elite consensus at the expense of intense political debate or extensive public consultation. A handful of SPA and Maoist leaders have controlled closed-door negotiations; limited parliamentary scrutiny has not even extended to recognising the concept of an opposition. The interim constitution has granted the prime minister and cabinet sweeping authority, subject to minimal checks and balances; the compromised independence of institutions such as the judiciary has weakened the principle of separation of powers. The inclusion of provisions such as the unrestricted authority to grant pardons suggests that interim arrangements may enable the political elite to sweep past misdeeds under the carpet.

Warnings of a "new dictatorship" are exaggerated but the peace process has so far delivered an oligarchy of party leaders rather than a popular democracy. Party leaders have shown little appetite for pluralism: the interim legislature will have no official opposition, royalist parties may be excluded from the CA, new

parties will find it very hard to register for elections, and in any case, “consensus” decisions will leave most power in the hands of party leaders. Ad-hoc pre-negotiation of important issues threatens to undermine the constitutional process. For example, the SPA-Maoist response to Tarai discontent was to push forward proposals for federalism, thus preempting any meaningful discussion of one of the CA’s central concerns.

The demise of the 1990 Constitution illustrates that no new constitutional order will gain legitimacy unless it visibly incorporates public input. Diverse education efforts, including both local initiatives and internationally-funded projects, have already begun; expectations of significant changes have been aroused. However, there are no institutional structures to channel, process and consider the results of consultation. The Interim Constitution Drafting Commission invited public input but lacked a clear mandate or adequate mechanisms to deal with submissions. The result was public frustration and dissatisfaction with the end product. The CA process will need to do better if it is to deliver greater legitimacy.

Mainstream parties have devoted scant consideration to the difficult questions of procedure involved in constitutional reform. Few have embarked on internal changes to tackle their own problems of corruption, patronage and exclusion that fuelled support for the Maoists. Strengthening parties’ internal democracy and accountability would directly benefit the constitution-making process.

The Maoists first agreed to join multiparty politics in November 2005. They need to use the transitional period and the CA elections, scheduled for June 2007, to justify this strategy to their cadres. This could encourage them to democratise and make the most of open political campaigning on their populist agenda but it will also tempt them to retain their tried and tested tactics of intimidation and coercion. To date, the picture is mixed: while they have not given up all illegitimate means, they are working to present a moderate, compromising image.

It is to the credit of Nepal’s government and the Maoists that the peace process has largely been internally driven rather than internationally imposed and that the key political players have shown a willingness to recognise and learn from past errors. The international community, nevertheless, has an important, if ancillary, role in supporting the constitution-making process. In addition to funding grassroots education, donors should build on the country’s considerable intellectual capital, for example

by funding publications, radio shows and news articles by local scholars, lawyers and activists. Aid that promotes transplanted models or that pursues donors’ narrowly conceived political goals, however, would likely be counterproductive.

RECOMMENDATIONS

To the Government of Nepal and the Communist Party of Nepal (Maoist):

1. Commit publicly that elected delegates to the constituent assembly will abide by the principles listed in the preamble of the Comprehensive Peace Agreement (CPA) so that the constitution to be drafted reflects those principles.
2. Commit publicly before the constituent assembly convenes to abstain from trading off constitutional goals for short-term legislative purposes.
3. Enact a law, in accordance with Article 79 of the interim constitution, stipulating transparent agenda-setting procedures for the constituent assembly in both plenary and committee sessions.

To the Interim Government of Nepal (once formed):

4. Establish a professionally-staffed commission with a clear mandate to:
 - (a) prepare options for constitutional provisions;
 - (b) manage a process of public submissions, including the preparation of public education materials and the facilitation of public outreach;
 - (c) synthesise and analyse public submissions received and prepare detailed summaries of the issues and demands raised by the general public;
 - (d) issue a public report detailing how the constituent assembly discussed and, to the extent relevant, incorporated public input; and
 - (e) communicate effectively to the public the progress and next steps of the process throughout the lead-up to, and life of, the constituent assembly.
5. Clarify that the mandate of the constituent assembly in its capacity as a legislature will be narrowly construed to cover solely issues that must be resolved before the creation and

convening of an elected, true legislature under the new constitution.

6. Enact rules to maximise the transparency of the constituent assembly's deliberations by, for example, providing for press coverage of, and public access to, all plenary sessions and limiting the number of closed committee sessions.
7. Demonstrate willingness to engage in serious debate with parties not represented in government so as to encourage them to play the role of a constructive opposition.

To the Mainstream Political Parties:

8. Carry out internal reforms in line with Article 142(3)(c) of the interim constitution, including the setting of minimum quotas, to improve the representation and participation of women and minorities such as dalits and ethnic groups in party bodies such as central committees.
9. Establish internal rules to promote transparency and increased debate so as to diminish the importance of patronage as a factor in intra-party decision-making.

To the Communist Party of Nepal (Maoist):

10. Renew the commitment made in the CPA to a constituent process that is "without any kind of fear" by:
 - (a) announcing that all private and government public education efforts related to constitutional reform will be permitted without interference or violence;
 - (b) allowing the police, as agreed in the CPA, to maintain order and investigate criminal activities; and
 - (c) committing publicly to respect freedoms of speech and political association of other political parties and other entities engaged in mobilisation or education in the run-up to the constituent assembly.

To India, the U.S., the European Union and Other Members of the International Community:

11. Maintain coordination and avoid duplicative or conflicting efforts by consulting with each other and, where appropriate (as, for example, in electoral assistance), making use of the coordinating capacity of the United Nations Mission in Nepal (UNMIN).
12. Use the forthcoming Nepal Development Forum to develop a coordinated approach to development aid and peace process support.
13. Facilitate an inclusive and effective process of public consultation in the run-up to the constituent assembly by:
 - (a) supporting ceasefire monitoring and the creation of democratic space politically, practically and financially, for example, by strengthening institutions such as the National Human Rights Commission;
 - (b) maintaining pressure on the Maoists to refrain from politically-motivated violence;
 - (c) encouraging the funding of radio and television content and books and magazine articles by Nepalis that broaden and clarify the debate on constitutional issues; and
 - (d) providing financial and technical assistance if the government creates a commission-like body to mediate public input.
14. Provide funding for an inclusive and effective process of public consultation, while:
 - (a) scrutinising funding directed to "grassroots" public education to ensure that projects benefit their target groups rather than merely their implementers; and
 - (b) avoiding the funding of home-country experts who seek to transplant foreign constitutional models.
15. Provide technical support to intra-party efforts to foster discussion of constitutional issues, without pressing for transplantation of features of donor nations' constitutional arrangements.

Kathmandu/Brussels, 26 February 2007

NEPAL'S CONSTITUTIONAL PROCESS

I. INTRODUCTION

Recognition that constitutional change would be an essential part of a viable peace deal in Nepal grew steadily following failed peace talks in 2001 and 2003.¹ The Maoist demand for a constituent assembly (CA) – a decades-old proposal that has enjoyed the support of many political forces at different times – grew in acceptability subsequent to the February 2005 royal coup.² It was formally endorsed by the mainstream Seven-Party Alliance (SPA)³ in November 2005, when it signed a twelve-point agreement pledging to work with the Maoists towards “full democracy”.⁴ Although the palace resisted fundamental change, King Gyanendra recognised defeat when forced to relinquish power in the aftermath of mass protests in April 2006. He asked the SPA to resolve “the ongoing violent conflict and other problems facing the country according to [its] roadmap”, which by then included the commitment to elect a CA with Maoist participation.⁵

Negotiations after the April 2006 transfer of power were sometimes difficult but neither side reneged on this understanding. The 21 November 2006 Comprehensive Peace Agreement (CPA) placed

constitutional change at the heart of peacebuilding and efforts to tackle deep-seated economic and social inequalities.⁶ It stipulated that elections for a CA should be completed by mid-June 2007. The interim constitution promulgated on 15 January 2007 detailed electoral mechanisms and laid ground rules for the CA's functioning.⁷

Successful constitution making depends on two related, but distinct, processes: building a new consensus among the political elite that incorporates the Maoists into a democratic mainstream, and recognising the Nepali people's right to a say in their constitutional future through structured public consultation that is incorporated into constitutional deliberations. This report considers procedural aspects of the constitutional process and makes recommendations in these areas, while touching only in passing on substantive issues, such as the role of the monarchy, state restructuring and methods for building an inclusive society, which are for the people to decide.

¹ Recent Crisis Group analysis on Nepal includes Crisis Group Asia Report N°111, *Electing Chaos*, 31 January 2006; Crisis Group Asia Briefing N°49, *Nepal's Crisis: Mobilising International Influence*, 19 April 2006; Crisis Group Asia Report N°115, *Nepal: From People Power to Peace?*, 10 May 2006; and Crisis Group Asia Report N°126, *Nepal's Peace Agreement: Making it Work*, 15 December 2006. Earlier reporting is available at www.crisisgroup.org.

² Crisis Group Asia Report N°99, *Towards a Lasting Peace in Nepal: The Constitutional Issues*, 15 June 2006, pp. 3-5.

³ The parliamentary parties that make up the SPA are the Nepali Congress (NC); Communist Party of Nepal (Unified Marxist-Leninist, UML); Nepal Sadbhavana Party (Anandidevi, NSP (A)); Nepali Congress (Democratic, NC(D)); Janamorcha Nepal; Nepal Workers and Peasants Party (NWPP); and United Left Front (ULF).

⁴ Crisis Group Asia Report N°106, *Nepal's New Alliance: The Mainstream Parties and the Maoists*, 28 November 2006.

⁵ Royal proclamation, 24 April 2006, reproduced in Crisis Group Report, *From People Power To Peace?*, op. cit., p. 31.

⁶ Crisis Group Report, *Nepal's Peace Agreement*, op. cit. The full text of the CPA is available at <http://www.ekantipur.com>.

⁷ The interim constitution is available at http://www.nepalnews.com/archive/2007/jan/jan15/Constituti_on_2063.doc (in Nepali); no reliable English translation is publicly available. Its provisions may yet be altered; it can be revised by a two-thirds vote in the interim legislature and many politicians have indicated that they will be seeking amendments (see below).

II. THE END OF THE 1990 CONSTITUTION

A. IN WITH A BANG

The 1990 Constitution was widely celebrated by Nepalis as “the best constitution in the world”.⁸ The country’s fifth, it was the first to embody the spirit of a mass movement and to be drafted largely by political parties representing popular aspirations.⁹ However, the nine-member Constitutional Recommendation Commission formed after the movement was only an advisory body, not a drafting commission, and its members were not elected. It was limited by a mandate to create a constitutional monarchy with a parliamentary system and was subject to strong palace pressure;¹⁰ it was King Birendra who promulgated the constitution.¹¹

⁸ This assessment was still widely used in the country until surprisingly recently. Even after its apparent collapse, one journalist asked of a drafter: “As one of the framers of the constitution of the kingdom of Nepal, 1990 – which is considered one of the best constitutions of the world – what do you think is the major reason for its failure?” Pratibedan Vaidya, interview with Justice Laxman Prasad Aryal, nepalnews.com, 21 May 2006. For activists who long opposed its provisions, the claim that it was “the best” was a focus for criticism. In the wake of early 2007 protests, one activist complained that “the 1990 Constitution was even claimed by some quarters as ‘the best constitution in the world’”. Then why do Nepalese people have to fight again and again in the name of same ‘freedom’ and ‘democracy’ even after that?” “Nominal federalism”, madhesh.com, 17 February 2007. Supporters of the 1990 Constitution used the same terms to mourn its passing: “Acclaimed as one of the best constitutions of the world, the Constitution of Kingdom of Nepal 1990 has been sent to dustbin”, Keshab Poudel, “Political turmoil”, *Spotlight*, 19 January 2007.

⁹ Nepal had four earlier constitutions: a January 1948 document issued by the Rana regime; a transitional Interim Government Act of 1951; and King Mahendra’s constitutions of 1959 (multiparty parliamentary) and 1962 (partyless Panchayat). For a more detailed discussion of these, see Crisis Group Report, *Towards a Lasting Peace in Nepal*, op. cit., pp. 3-5.

¹⁰ Two royal representatives (Pradyumna Lal Rajbhandari and Ramananda Prasad Singh) were included in the commission (alongside three NC, three communists and the neutral chair, Bishwanath Upadhyay). Narahari Acharya, *Sambidhansabha: sambidhanma janatako swamitwa ra apanatwa* (Kathmandu, 2005), p. 17. The Royal Nepalese Army also made strong representations to pressure the interim prime minister to preserve royal powers. Interim Prime Minister K.P. Bhattarai, interviewed in Martin Hoftun,

The 1990 dispensation suffered from two critical weaknesses. First, the drafting process came to be widely criticised for its exclusivity.¹² Apart from the Maoists, activists representing smaller parties and ethnic or regional movements complained it was a private deal made by powerful parties and the palace.¹³ Even the UML, which was represented on the commission, was not happy with the final version and only expressed “critical support”. The commission received submissions from the public, the “vast majority” concerning ethnic, linguistic and religious issues, but it neither publicly acknowledged nor incorporated them.¹⁴

Secondly, the 1990 Constitution failed to stabilise relations between the monarchy and democratic political forces. This failure long preceded King Gyanendra’s encroachments on power following the May 2002 dissolution of the House of Representatives. Immediately after the constitution’s promulgation, King Birendra accredited the ambassador to France, Kalyan Bikram Adhikari, to other countries without the advice and consent of the council of ministers required by Article 35(2). He also nominated members of the upper house of parliament without the required input from the council of ministers. The 1990 Constitution gave the palace no substantive law-making role but Birendra thwarted legislation by declining to sign bills sent to him, referring them instead to the supreme court.¹⁵ Mainstream political parties neither checked these palace gambits nor

William Raeper and John Whelpton, *People, Politics & Ideology* (Kathmandu, 1999), p. 301.

¹¹ Krishna Hachhethu, “Transition to Democracy in Nepal: Negotiations behind Constitution Making, 1990”, *Contributions to Nepalese Studies*, vol. 21, no. 1, January 1994, p. 112.

¹² Crisis Group interview, civil society observer of SPA-Maoist negotiations, Kathmandu, October 2006. See also Krishna P. Khanal, *Nepal’s Discourses in Constituent Assembly: An Analysis* (Kathmandu, 2005), p. 1. This view is not universally shared. See Mukunda Regmi, *Samvaidhanik vikas ra nepal adhirajyako samvidhan 2047* (Kathmandu, 2005).

¹³ Crisis Group interviews, ethnic activists, Kathmandu, October 2006.

¹⁴ Hoftun et al., op. cit., p. 312. The resulting constitution acknowledged Nepal’s ethnic and linguistic diversity, but also endorsed its Hindu status and assigned priority to the Nepali language. Constitution of Nepal 1990, Arts. 4(1) and 6(1), reprinted in Ram Kumar Dahal, *Constitutional and Political Developments in Nepal* (Kathmandu, 2001).

¹⁵ Surendra Bhandari, “Failure of the Constitution and Democracy in Nepal,” in Surendra Bhandari and Budhi Karki, eds., *Future of the Nepalese Constitution* (Kathmandu, 2005), pp. 40-42.

established conclusive authority by delivering stable, clean and effective government.¹⁶

B. SECOND THOUGHTS

Discontent with the 1990 dispensation converged with a five-decade-old popular sense of entitlement to a CA. In September 1950, a Nepali Congress party conference in Bairgania, India, called for a “council or assembly” to “frame the constitution of the democratic state of Nepal”.¹⁷ On 18 February 1951, following the end of the century-long rule by hereditary Rana family prime ministers, King Tribhuvan announced that Nepal would be governed under a democratic constitution to be formulated by an elected CA.¹⁸

After Tribhuvan's death in 1955, the Nepali Congress renewed its call for a CA, and in December 1957, its leadership undertook a nationwide promotional tour.¹⁹ Tribhuvan's son and successor, Mahendra, undercut this campaign by promising an election without specifying whether for a CA or a legislature. In February 1959, Mahendra announced that the vote would be for a new parliament – but that he would grant a new constitution without a CA. In February 1959, six days before national elections, he promulgated a constitution largely drafted by the British international lawyer Ivor Jennings, and 22 months later he used his emergency powers to arrest the prime minister and cabinet and institute full royal rule. His “Panchayat” system of government was formalised in 1962 in yet another constitution.²⁰

During the Panchayat era, Communist activist Mohan Bikram Singh advocated a popular CA.²¹ When a

popular movement culminating in April 1990 brought down the Panchayat system, the Communist Party of Nepal (Masal), led by Singh, renewed this demand and boycotted the 1991 general election. Neither the Nepali Congress nor the UML, both represented in the 1990 constitution drafting body, took up this campaign.²² The Maoists, then known as the CPN (Unity Centre), were also not in favour; they participated in the 1991 election under the 1990 Constitution. Even when they launched their “people's war” in 1996, they did not call for a CA.²³ They raised the issue when they put out feelers for talks with the government from 1999 onwards and first presented it as a formal demand during the 2001 peace talks. Gradually, their calls for a CA found echoes among cadres of other political parties.²⁴ By April 2005, representatives of most major parties endorsed a “consensus...unambiguously in favour of CA”.²⁵

C. OUT WITH A WHIMPER

Popular protests in April 2006 ended with King Gyanendra's surrender of political powers to the mainstream parties.²⁶ On 21 April, he invoked Article 35 of the 1990 Constitution as the legal basis for a carefully limited transfer of authority, which would have established a new government under the old dispensation. The SPA rejected this offer. His second proclamation, on 24 April, recognised popular

Nepal's Maoists: Their Aims, Structure and Strategy, 27 October 2005.

²² Khanal, *Nepal's Discourses in Constituent Assembly*, op. cit., p. 44; Krishna Belbase, “Politics of Constituent Assembly in Nepal,” in Mukti Rijal (ed.), *Readings on Governance and Development*, vol. vii (Kathmandu, 2006), p. 52.

²³ One of their original 40 demands submitted to then Prime Minister Deuba in February 1996 was that “a new constitution should be drafted by representatives elected for the establishment of a people's democratic system”. They did not use the phrase “constituent assembly” and their thinking on the topic subsequently developed. For the 40-point demand see Crisis Group Report, *Nepal's Maoists*, op.cit., pp. 40-41. A fuller translation of the point regarding the new constitution is given in Deepak Thapa, *A Kingdom Under Siege* (Kathmandu, 2003), pp. 189-194.

²⁴ Within the major mainstream parties the two most vocal and consistent advocates for a CA were Narahari Acharya (NC) and Shankar Pokhrel (UML).

²⁵ See “Constitutional Crisis in Nepal: The Way Forward”, at <http://insn.org/?p=909>. The conference was held on 23 April 2005; the Nepali political party representatives were Krishna Sitaula (NC), Rajan Bhattarai (UML), Pradip Giri (NC(D)), Rajendra Mahato (NSP(A)); Swanaam (Communist Party of Nepal (Unity Centre-Mashal)) and C.D. Joshi (CPN (United)).

²⁶ See Crisis Group Report, *From People Power To Peace?*, op. cit.

¹⁶ Hoftun et al., op. cit., pp. 187-214; John Whelpton, *A History of Nepal* (Cambridge, 2005), pp. 198-202.

¹⁷ Khanal, *Nepal's Discourses in Constituent Assembly*, op. cit. p. 42.

¹⁸ Bhuwan Lal Joshi and Leo E. Rose, *Democratic Innovations in Nepal: A Case Study of Political Acculturation* (Berkeley, 1966), p. 91. According to the authors, King Tribhuvan hoped to hold elections to CA by April 1953; this proved elusive due to political in-fighting and instability in the new post-Rana order, *ibid*, pp. 174-175.

¹⁹ *Ibid*, pp. 261-62.

²⁰ *Ibid*, pp. 212-13, 281-82; Whelpton, *A History*, op. cit., pp. 98-101.

²¹ Singh first presented the constituent assembly agenda at the Communist Party of Nepal's 1961 plenum in Darbhanga, India, immediately after King Mahendra's December 1960 seizure of power. See Crisis Group Report, *Towards a Lasting Peace in Nepal*, op. cit. and Crisis Group Asia Report N°104,

sovereignty and reinstated the dissolved House of Representatives without invoking the 1990 Constitution.²⁷

This handover, justified by political necessity rather than legal process, left the status of the constitution unclear. Without a “formal declaration of nullity,” a prominent constitutional lawyer argued, the 1990 Constitution remained *de jure* valid.²⁸ Other constitutional experts concluded that it had been overtaken by events and lost *de facto* effectiveness.²⁹ In the words of one political scientist, “the heart of it has been thrown out”.³⁰ The two perspectives reflect a difference of opinion between those who believed that the 1990 Constitution had to be followed carefully in moving to a new system and those who believed that the people’s movement justified acting outside existing constitutional provisions.

In practice, the legislative and executive branches selectively followed the 1990 framework. The restored House of Representatives acted without the upper house or king.³¹ Indeed, it quickly moved to strip the king of power. On 18 May 2006, it promulgated by voice vote a decree establishing itself as “sovereign” and “supreme”, removing the king as supreme commander of the army, asserting control over the royal succession, declaring the country a secular state and dissolving the Rajparishad (royal privy council).³² Nevertheless, the selective revocation of only specific articles strongly suggested that other parts of the 1990 Constitution remained in force.

The SPA, led in effect by the Nepali Congress (NC), the largest parliamentary party, formed the government.³³ The council of ministers, which included the ULF

despite its lack of representation in parliament, reflected a mixture of political expediency and legalism, corresponding only roughly with possible cabinet formulations under the 1990 dispensation.³⁴ Parliamentary committees engaged in some effective debates on new legislation regulating citizenship and the army; plenary sessions were less influential.³⁵

The 1990 Constitution’s uncertain status did not affect the day-to-day functioning of the courts and bureaucracy. “Constitutionalism is not only a written document, but practice and behaviour” observed a member of the 1990 Constitution Recommendation Commission. While much of the framework of written law has lapsed, he noted, unwritten conventions have sustained government.³⁶

²⁷ This sequence of events is recounted in more detail in Crisis Group Report, *Nepal: From People Power To Peace?*, op. cit.

²⁸ Crisis Group interview, Kathmandu, October 2006.

²⁹ Crisis Group interviews, constitutional lawyers, Kathmandu, October 2006.

³⁰ Crisis Group interview, political scientist, Kathmandu, October 2006.

³¹ The 1990 Constitution defined parliament as the House of Representatives, the National Assembly (upper house) and the king. From May 2006 the Speaker of the House, not the king, signed acts to make them law. Crisis Group interview, Nilamber Acharya, former law minister, Kathmandu, 13 October 2006. This was maintained in the interim constitution. See Interim Constitution, Art. 87.

³² Crisis Group Report, *Nepal's Peace Agreement*, op. cit., p. 4.

³³ The NWPP did not quit the SPA but declined to join government. See Crisis Group Report, *Nepal's Peace Agreement*, op. cit. The composition of the House of Representatives (elected in May 1999) is: NC 71 seats, UML 68, NC(D) 40, RPP eleven, NSP three, NSP(A) two, Janamorcha Nepal three, Samyukta Janamorcha Nepal three and NWPP one.

³⁴ Articles 35 and 36 of the 1990 Constitution vested executive power in a cabinet of ministers appointed by the king from the majority party in the House of Representatives.

³⁵ Crisis Group Report, *Nepal's Peace Agreement*, op. cit., p.3; Crisis Group interview, senior journalist, Patan, October 2006.

³⁶ Crisis Group interview, Nilamber Acharya, Kathmandu, October 2006. Other lawyers agree that the constitution is now more a matter of conventional practice than formal legal rules. Crisis Group interview, law professor, Kathmandu, October 2006. An “unwritten constitution” is not a contradiction in terms; both the UK and New Zealand are described as having unwritten constitutions.

III. THE INTERIM CONSTITUTION

A. THE INTERIM CONSTITUTION DRAFTING COMMITTEE

1. Process

On 16 June 2006 the SPA and the Maoists reached an eight-point agreement, committing to “draft an interim constitution based on the twelve-point understanding and the ceasefire Code of Conduct” and “announce the dates for CA elections”.³⁷ The following week, they formed an Interim Constitution Drafting Committee (ICDC) tasked with producing a draft within fifteen days.³⁸ In the event, the ICDC submitted its draft to the SPA and Maoist negotiating teams only on 25 August. It had gaps, or lists of options, for key issues such as the fate of the monarchy and the electoral mechanism for the CA³⁹ but its 172 articles went into more detail about government institutions than is generally needed for a short transition.⁴⁰ It received a frosty welcome. Constitutional lawyers described it as at best “incomplete”;⁴¹ one international expert described it as “a maximalist constitution without even minimal political agreement”.⁴²

From its inception, the ICDC was embroiled in confusion and controversy. Former supreme court judge and member of the 1990 Constitution Drafting Committee Laxman Prasad Aryal was asked to chair it. SPA and Maoist negotiating teams approached six other Kathmandu-based lawyers to make up the committee. One, Kathmandu Law School Dean

Yubaraj Sangroula, declined, citing concerns about the secretive manner of appointment.⁴³

None of the members interviewed by Crisis Group had seen written terms of reference.⁴⁴ They also offered conflicting accounts of the initial mandate. Its chair suggested that the mandate was from the outset limited to technical drafting matters and did not extend to substantive issues.⁴⁵ One member, however, insisted there was no such limitation.⁴⁶

The ICDC's composition – six men, no women, no dalits⁴⁷ and no ethnic members – sparked public protest. A cross-party caucus of women politicians picketed the committee, and there were calls to include ethnic groups and dalits.⁴⁸ Ten further members were appointed between late June and mid-July.⁴⁹ The process was slow because SPA and Maoist negotiators selected lawyers not only of the requisite social groups but also with party links reflecting the balance of power. Aryal expressed frustration at delays, warning that “an interim constitution might not be framed at all”.⁵⁰ Advocates for ethnic and dalit groups remained dissatisfied.⁵¹ Enlarged membership

³⁷ The text of the eight-point agreement is available at <http://www.kantipuronline.com/kolnews.php?&nid=76803>.

³⁸ Crisis Group interview, ICDC Chair Laxman Prasad Aryal, Kathmandu, 9 October 2006.

³⁹ Jeannie Shawl, “Nepal interim constitutional panel submits draft”, *Jurist.com*, 25 August 2006, at <http://jurist.law.pitt.edu/paperchase/2006/08/nepal-interim-constitution-panel.php>.

⁴⁰ In contrast, the proposed interim constitution drafted by the Maoists was extremely concise, only one-tenth the length of the ICDC document. “Interim Constitution of Federal Democratic Republic of Nepal”, CPN(M) draft.

⁴¹ Crisis Group interviews, constitutional lawyers, Kathmandu, October 2006. One member described it as an essay rather than a draft constitution. See Crisis Group Report, *Nepal's Peace Agreement*, op. cit., p. 7.

⁴² Crisis Group interview, Kathmandu, September 2006.

⁴³ Sangroula suggested that asking lawyers to reach the political compromises necessary for a constitution was “like getting seven vets to do heart surgery.” Crisis Group interview, Yubaraj Sangroula, dean of Kathmandu University School of Law, Kathmandu, 11 October 2006.

⁴⁴ According to a source close to the Peace Secretariat, written terms of reference for the ICDC did exist. Crisis Group interview, Kathmandu, October 2006. Another close observer of the process suggests that members received letters of appointment but these did not specify terms of reference. Email communication with Crisis Group, February 2007.

⁴⁵ Crisis Group interview, Laxman Prasad Aryal, 9 October 2006. The initial Maoist representative on the ICDC agreed. Crisis Group interview, Khimlal Devkota, Kathmandu, 15 October 2006.

⁴⁶ Crisis Group interview, Shambhu Thapa, ICDC member, Kathmandu, October 2006.

⁴⁷ “Dalit” is the term preferred by “untouchables” at the bottom of the traditional caste hierarchy to describe themselves.

⁴⁸ Crisis Group interview, international political analyst, Kathmandu, 10 October 2006.

⁴⁹ A list of ICDC members provided by the Peace Secretariat to Crisis Group included: Laxman Prasad Aryal (Chair), Harihar Dahal, Sindhunath Pyakurel, Shambhu Thapa, Mahadev Yadav, Khimlal Devkota, Agni Kharel, Pushpa Bhusal, Sushila Karki, Chhatra Kumari Gurung, Shanta Rai, Sunil Prajapati, Parshuram Jha, Chandeshwor Shrestha and Kumar Yonjan Tamang. Perhaps revealingly, it omitted the last appointed member, the dalit lawyer.

⁵⁰ “Suspicion aroused as constitution draft committee still incomplete,” BBC Monitoring International Reports, 5 July 2006.

⁵¹ Crisis Group interview, Kathmandu, 16 October 2006.

did not alter the fact that the ICDC was dominated by the SPA and Maoists.⁵²

2. Public participation

ICDC efforts to secure public participation compounded the impression of elite control. The committee used announcements in daily newspapers to solicit comments but imposed a limited timeframe. Members attended NGO presentations in Kathmandu, and the public was permitted to make representations directly to the ICDC. More than 1,400 written submissions and “easily 2,000 to 3,000” verbal submissions were received.⁵³ All political parties made recommendations, as did various international and domestic organisations, with ethnic and dalit groups tendering substantial submissions. Even the army gave views.⁵⁴

Meaningful public participation faced two problems. First, ambiguity about the mandate meant the public had no clear sense of what the draft would deal with. Many submissions related to features of a permanent constitution: a new legislature, reservations within government institutions and restructuring of the state into federal or provincial units.⁵⁵ By failing to communicate the limited role of transitional institutions, the ICDC opened the floodgate on pent-up desires for substantive changes, creating expectations that were inevitably disappointed.

Secondly, the ICDC lacked administrative machinery to process and analyse comments. Without this, it could not fulfil its implicit promise to take public opinion into account. It conducted an “initial analysis” of submissions to “pick out themes”⁵⁶ but had only limited support staff, principally drawn from the Peace Secretariat, a body not staffed with constitutional

lawyers.⁵⁷ The ICDC made no public statement about how it had decided which submissions to focus on, or about how submissions were incorporated in the interim draft. The public could not determine to what extent, if any, its ideas were used, or whether submissions from powerful institutional actors such as the army received preferential review. In the absence of transparency, civil society leaders asserted that the ICDC had not even considered public comments.⁵⁸ The government was secretive about submissions, refusing international experts permission to view them in order to prepare suggestions for analysing public views.⁵⁹

3. Substance

The ICDC draft⁶⁰ drew heavily on the 1990 Constitution.⁶¹ As noted, it did not resolve key questions such as the fate of the monarchy and the electoral mechanisms for the constitutional assembly but it described in great detail governance principles and institutions. Part four, for example, listed six “directive principles of the state” (including transformation of “the national economy into an independent and self-reliant system”) and nineteen “state policies”.⁶² Where the 1990 Constitution contained thirteen detailed provisions on rights, the ICDC draft listed nineteen, including new rights to a clean environment, free basic health care, free education up to secondary level and an entitlement to employment or unemployment allowances.⁶³

The ICDC draft also provided considerable detail about the legislative branch (including fifteen

⁵² Parliamentary parties such as the Rastriya Prajatantra Party and the Rastriya Janashakti Party were not represented in the ICDC although they did submit suggestions.

⁵³ Crisis Group interview, Kathmandu, October 2006.

⁵⁴ Crisis Group interview, Peace Secretariat source, Kathmandu, October 2006.

⁵⁵ Crisis Group interviews, Tek Tamrakar, Pro Public, and Om Gurung, Nepal Federation of Indigenous Minorities (NEFIN), Kathmandu, October 2006; “International Day of the World’s Indigenous Peoples: Indigenous Nationalities Kathmandu Declaration 2006”, NEFIN, 9 August 2006. Internationally, the New York-based Center for Reproductive Rights submitted recommendations on women’s right to reproductive health care. Letter from Melissa Upreti to ICDC, 28 July 2006, at http://www.crlp.org/pdf/ww_Letter_to_ICDC.pdf.

⁵⁶ Crisis Group interview, Kathmandu, October 2006.

⁵⁷ Crisis Group interview, former Peace Secretariat official, Kathmandu, October 2006.

⁵⁸ Crisis Group interviews, Kathmandu and Lalitpur, October 2006.

⁵⁹ International constitutional experts, email communication with Crisis Group, February 2007.

⁶⁰ “ICDC draft” refers to the ICDC’s final draft of 25 August 2006 as submitted to the negotiating parties and published, and does not refer to earlier, internal ICDC drafts or subsequent, revised versions prepared by the negotiating parties.

⁶¹ Crisis Group interview, former Peace Secretariat official, Kathmandu, October 2006.

⁶² Part 4 of the 1990 Constitution, by contrast, listed five directive principles and sixteen state policies.

⁶³ ICDC draft, Arts. 17-19. The draft also contained detailed new provisions on women’s and children’s rights (Arts. 21, 23), a right against caste discrimination and a right to political participation for previously excluded groups (Arts. 15, 22). These goals, however laudable, are the kind of long-term commitments properly reserved to a final constitution determined by democratically selected representatives.

complex provisions on the law-making process) and anti-corruption, public service and human rights commissions.⁶⁴ In addition to provisions on the structure of the judiciary and the judicial council, it stated that the appointments of all judges would be terminated unless renewed within six months.⁶⁵ But the draft could not resolve politically difficult questions. For example, it did not specify the form of an interim legislature and offered alternative ideas for Nepal's division into a federal structure (a topic best not resolved by an interim constitution in any case).⁶⁶

4. Lessons

The ICDC understood that no non-political body can substitute for the political accommodation and compromise that is a necessary part of constitution making. However, it could still have exercised its right to present a complete draft or offered more substantive options for political leaders to select from. The ICDC was also poorly coordinated – the lack of understanding among its members about its mandate was compounded by weak management and limited debate.⁶⁷

The challenge for a technical body is to channel expert and popular views into the negotiation process without derailing closed-door discussions. One observer close to the process suggested the ICDC might have functioned better with an explicit mandate to develop written formulations of alternative solutions identified in the negotiations and to engage in discussion with the negotiating teams.⁶⁸ Its experience suggests that elite interests will trump popular participation if more is not done than merely opening the process to public comment.

Despite its flaws, the nod towards participation granted some additional legitimacy to the constitutional change process. Both SPA and Maoist leaders acknowledge there were imperfections however, suggesting a learning experience. Lessons that can be drawn include:

⁶⁴ Draft interim constitution, Arts. 88-103, 125-32, 136-37.

⁶⁵ Ibid, Art. 168(2). Supreme Court justices had earlier agreed a thirteen-point recommendation for amendments in the interim constitution to protect judicial independence. "Justices submit memo for amendment in interim statute to CJ", nepalnews.com, 9 January 2007.

⁶⁶ Draft interim constitution, Arts. 46, 144.

⁶⁷ In subsequent media interviews, Aryal himself admitted that the ICDC's work suffered from various weaknesses. See, for example, interview with Laxman Prasad Aryal, *Nepal*, 10 September 2006.

⁶⁸ Crisis Group interview, Kathmandu, October 2006.

Clear mandates promote effective transitional arrangements. There should be a sharp distinction between technical drafting bodies and political decision-making bodies. The ICDC appears to have moved back and forth between a substantive and a purely technical conception of its mandate. By inviting public submissions and drafting detailed constitutional language on, for example, human rights and the goals of the state, it asserted responsibility to make substantive commitments beyond its legitimate authority, risking the pre-emption of choices properly left to a democratically selected entity. The CA should allocate drafting responsibility clearly and make copies of draft options available not only to the delegates but also to the broader public.

Meaningful public participation cannot be achieved solely by inviting public submissions. There needs to be a state body with the time and resources to process submissions, analyse them, submit findings to political decision-makers and report back to the public. It will be difficult for the CA to respond in plenary to public comments but a separately staffed commission or secretariat supporting the constitution-making process could do so.

Maintaining effective communication with the public is an essential part of the constitutional drafting process. Miscommunication risks creating false expectations, which when unmet, weaken confidence in the transitional process and the ultimate constitutional framework. Management of expectations is a legitimate and necessary part of constitution making. Resources ought to be devoted to early communication of goals and functions for discrete phases of the constitution-making process.

B. THE FINAL DOCUMENT

1. How it was decided

The SPA and the Maoists completed the interim constitution on 15 December 2006. The finished document was a modified version of the ICDC's work. Despite a Maoist demand that it be promulgated within twelve days, it took a month – partly due to the desire to get the UN-supervised arms management process underway – during which the text was not officially released to the public, although copies were widely circulated. On 15 January 2007 the House of Representatives promulgated the interim constitution, dissolved itself (and the defunct upper house) and

opened the way for the formation of an interim legislature that immediately held its first sitting.⁶⁹

The final version was a product of political negotiation and compromise but it did not represent a true consensus. Provisions reflected competing party priorities – for example, the Maoist commitment to a “scientific land reform program” was included alongside the right to private property and a principle to encourage increased economic investment. Even the name of the interim legislature – the “Legislature-Parliament” – is an awkward hybrid based on the Maoist preference for “legislature” and the SPA preference for “parliament” (which the Maoists feel carries bourgeois connotations). One constitutional expert complained that the document was “more politics, little constitution”.⁷⁰

All players have recognised that the final document is imperfect – even Prime Minister Koirala expressed doubts and called for revisions,⁷¹ while other parties have been more fiercely critical. Some SPA House of Representatives members had registered proposals for amendments before promulgation but withdrew them on the prime minister’s request. Amendments proposed by the opposition RPP, RJP and Janamorcha Nepal⁷² were rejected by the majority of the House. The motivation for including longer-term provisions was partly public pressure for serious reform but more importantly an enduring sense among party leaders that the transitional period will probably be prolonged; if the CA elections are delayed, they want the mandate to pursue changes.⁷³ Koirala’s own call for amendments can be read as a further indication that delays are likely.

⁶⁹ The interim legislature is officially named “Legislature-Parliament”. Its 330 members include 209 from the mainstream political parties and 73 from the Maoists. 48 seats were set aside to accommodate representatives of marginalised groups and “political personalities” – and also to include the ULF (which was not represented in the old parliament). In the end, apart from the Maoists, all other parties only appointed their own politicians (see below).

⁷⁰ Interview with Bhimarjun Acharya, nepalnews.com, 29 December 2006.

⁷¹ Rajendra Phuyal, “Sudhar gardai jana sakinchha”, *Kantipur*, 16 January 2006.

⁷² Janamorcha Nepal is a member of the SPA but its parliamentary representatives have split into three separate factions. See Crisis Group Report, *Nepal’s Peace Agreement*, op. cit.

⁷³ Crisis Group interviews, SPA and Maoists leaders, Kathmandu, January 2007.

2. Major features

The 330-member interim legislature will exercise law-making powers until the CA convenes (and assumes legislative authority alongside its constitution-drafting mandate).⁷⁴ Perhaps its most significant power is the ability, by two-thirds vote, to amend the interim constitution.⁷⁵ Other law-making rules apply to both the interim legislature and the CA in its legislative capacity.⁷⁶ As under the 1990 Constitution, “finance bills” are differentiated from other legislation and can only be introduced by the government.⁷⁷ The interim legislature is not limited to transitional tasks – there is no prohibition on longer-term legislation.

Like the ICDC draft, the interim constitution is detailed in a fashion more suitable to a durable, organic law than a transitional document. It contains 167 articles and two schedules (on the national flag and the manner of its own entrance into validity). The retention of the ICDC draft’s provisions on fundamental rights and directive principles means that important decisions about the allocation of rights and resources have been made by an unelected and unrepresentative entity that operated without adequate public consultation. It is doubtful whether an interim constitution should contain such long-term provisions on complex and potentially divisive issues. Of course, a cash-strapped, stop-gap coalition administration is unlikely to do much in these areas, but declaring ambitious targets risks fostering public disappointment in the constitutional process and its interim institutions. Strangely, the interim constitution’s preamble does not mention the one solid demonstration of public will – the April 2006 people’s movement – that led to its creation.

While the interim constitution makes few changes to the composition and structure of the judiciary, judges are required to swear an oath to it.⁷⁸ The chief justice had his oath of office administered by the prime minister. These provisions led judges and lawyers to warn that the independence of the judiciary had been compromised.

⁷⁴ Interim constitution, Art. 45.

⁷⁵ Ibid, Art. 148. This is in line with the majority needed to adopt a provision of the new constitution.

⁷⁶ Ibid, Arts. 59 & 83. The Legislature-Parliament is empowered to create its own rules (Art. 57); when the Constituent Assembly forms it may create a separate committee “for the regulation of its regular parliamentary activities” (Art. 83(1)).

⁷⁷ Ibid, Art. 84.

⁷⁸ Ibid, Art. 162(2).

The new dispensation has carefully restricted its definition of pluralism. Members of parties, or individuals, who were opposed to the April 2006 movement are banned from the interim legislature. (Twelve former parliamentarians had already been removed, and when the government realised that upper house member Lok Bahadur Thapa also had to be excluded because of his RPP(Nepal) membership, the 330-member legislature was reduced to 329-before its first sitting.) The number of royalists affected is tiny: given that they would have been too few to block legislation, their exclusion suggests vindictiveness more than a practical need to guard against palace meddling.⁷⁹ All parties represented in the interim legislature are automatically allowed to compete in the CA elections, even if they were not represented in the last parliament (thus including the CPN(M) and ULF). Other parties, whether old or new, have to re-register, and the smaller parties may find it difficult to assemble the required signatures of 10,000 registered electors.

3. Centralisation of power

The interim constitution creates three branches of government, executive, legislative and judiciary, but tilts power heavily toward the executive. Executive power is vested in a council of ministers led by a prime minister, who in effect doubles as head of state, “no power regarding the governance of the country” remaining with the palace.⁸⁰ The council of ministers appoints the army chief and makes up the national security council;⁸¹ it can declare a state of emergency, a power previously exercised by the king on the advice of the cabinet. Whereas the 1990 Constitution required parliamentary ratification of a state of emergency within three months, the interim

constitution demands approval within a month and prohibits more than one extension.⁸²

The king's power to “remove difficulties”, which proved a destabilising portion of the 1990 Constitution, is also transferred to the council of ministers (but not to the prime minister alone).⁸³ Thus, although Article 159(2) provides that the prime minister assumes the king's constitutional powers, the most significant emergency powers are vested collectively in the cabinet. If the SPA's constituents and Maoists take different stands, this will check any prime minister's desire to consolidate power; however, should both favour emergency powers, there would be little chance for others to stand in their way. Diluting the authority of a prime minister who wields residual monarchical powers is especially important because this structure of executive power will persist, “after necessary adjustments” following the first meeting of the CA.⁸⁴ A prime minister who is able to dominate the executive may be tempted to push for centralising power in a new chief executive, as opposed to a structure of checks and balances, in the hope that he will secure that position.

In some respects, the interim constitution tips the balance of power toward the executive and away from the legislature. The “Nepal Government” – the prime minister and his council of ministers⁸⁵ – can promulgate ordinances when the legislature is not in session.⁸⁶ Key offices, including the chief justice of the supreme court, the chief commissioner of the commission for the abuse of authority, and the election commission, are in effect in the hands of the prime minister.⁸⁷ The constitutional council, which has a pivotal role in several key appointments, is led by the prime minister and contains three ministers of

⁷⁹ The then Personal Representative of the UN Secretary-General (PRSG), Ian Martin (subsequently appointed Special Representative), warned that the obstruction of royalist party activities threatened the legitimacy of the process: “I am concerned to have received complaints from two political parties that their activities have been obstructed.... I must stress that the right of all political parties to carry out peaceful activities throughout the country is essential for the credibility of the electoral process, and the credibility of the electoral process is essential for the credibility of the constitution-making process”, press statement, OPRSG, 29 December 2006, Kathmandu.

⁸⁰ Interim constitution, Arts. 137, 159.

⁸¹ Ibid, Arts. 144, 145. The council of ministers is authorised to “control, mobilise and manage” the army. The powers of the national security council are not enumerated. Under the 1990 Constitution, a national security council was tasked with advising the king on the army's use, although its role was largely cosmetic, 1990 Constitution, Art. 118.

⁸² Compare interim constitution, Art. 143, with 1990 Constitution, Art. 115.

⁸³ Compare interim constitution, Art. 158, with 1990 Constitution, Art. 127. Given the unhappy experience of Gyanendra's invocation of Art. 127, it is surprising that it was replicated in the interim constitution.

⁸⁴ Interim constitution, Art. 44.

⁸⁵ Ibid, Art. 37(3).

⁸⁶ Ibid, Art. 88(1). This provision is similar to powers granted by the 1990 Constitution. The ordinance ceases to have legal force 60 days after the commencement of the next legislative session, Art. 88(2)(c). The interim constitution does not address the scenario in which more than 60 days elapse before the legislature meets, for example in a state of emergency. This leaves open as lawful the possibility of government by ordinance.

⁸⁷ Ibid, Arts. 103, 119, 128. The prime minister must appoint the chief justice and the election commissioners only on the recommendation of the constitutional council.

his choice, alongside the chief justice and the interim legislature speaker.⁸⁸

Given Nepal's unhappy history of abusive executives, the lack of procedural constraints on the scope of executive power has prompted widespread concern among independent commentators.⁸⁹ But the decision to concentrate power in the prime minister's hands was deliberate. Most parties saw it as the best way of sidelining the monarchy; the Maoists also believed that it would help circumvent the conservative instincts of the bureaucracy and judiciary. The power structure raises one unavoidable practical question: who will succeed the ageing and ailing Koirala if he has to leave before the end of the transitional period? The constitution mandates the deputy prime minister or most senior minister to "act as the Prime Minister until a new Prime Minister is selected".⁹⁰ If expectations that the Maoists will gain the deputy prime ministership prove correct, their nominee would be first in line for the country's highest office.

IV. THE CONSTITUENT ASSEMBLY

A. GOALS

There is no clear set of substantive commitments defining the constitution drafters' goal. Although the interim constitution specifies directive principles and fundamental rights, these cannot credibly bind the elected CA. Nevertheless, broad public agreement on core governance principles is reflected in the stated aims of the major parties.

The CPA's preamble lists the tasks of the new constitution: "progressive restructuring of the state"; resolution of "problems related with class, ethnicity, regional and gender differences"; and principles of "competitive multiparty democratic system, civil liberties, fundamental rights, human rights, complete press freedom, rule of law and all other norms and values of democratic system". (The interim constitution echoes this list but does not demand that the eventual constitution must be in accord with it.⁹¹) These principles are largely beyond contention – however much they continue to be violated in practice. Arguably, the CPA binds both the SPA and the Maoists as political actors even if the interim constitution cannot directly bind the CA or its delegates. At a minimum, they commit the Maoists to political pluralism, ruling out immediate pursuit of a one-party state, and the mainstream parties to remedying regional, ethnic and caste divisions.

A formal commitment by the SPA and the Maoists to abide by these principles during the CA could help stabilise the constitution-making process. Other nations have incorporated threshold substantive commitments in similar processes. South Africa's November 1993 interim constitution, for example, contained 34 "principles" that limited choices in the ultimate constitutional text; the South African Constitutional Court reviewed the draft constitution to enforce those principles.⁹² In the Nepali context, institutionalised commitment to addressing exclusion issues would be a threshold response to long-standing grievances of marginalised groups. Public commitments

⁸⁸ Ibid, Art. 149.

⁸⁹ A conservative commentary warned: "By vesting all the executive, legislative and judicial authority upon the Prime Minister, the interim constitution has side-stepped internationally set constitutional norms and values. The Prime Minister is now de facto head of government as well as the head of state...this interim constitution lays the ground in which a dictator can be born although in the garb of a democrat", Sanjaya Dhakal, "Interim Constitution: Laws and Flaws", *Spotlight*, 22 December 2006.

⁹⁰ Interim constitution, Art. 38(10).

⁹¹ Ibid, Preamble. In consequence, it would be difficult to argue that the interim constitution binds and limits the constituent assembly. But that is distinct from whether the SPA and Maoists are bound by the CPA.

⁹² Siri Gloppen, *South Africa: The Battle over the Constitution* (Aldershot, 1997), and Nicholas Haysom, "Negotiating the Political Settlement in South Africa. Are there lessons for other countries?", *Track Two*, vol. 11, no. 3.

could also strengthen consensus and hence the coherence of the resulting document.⁹³

B. ELECTIONS

The interim constitution's provisions for the CA electoral system were not fully elaborated and prompted protests at a perceived failure to address inequalities in representation. As earlier agreed in the CPA, the interim constitution provides for a 425-member CA – 205 elected through a first-past-the-post system (FPTP); 204 elected via proportional representation; and sixteen “distinguished persons” selected by the interim council of ministers.⁹⁴ Voters will probably cast two ballots, one for the majoritarian system, and one for the proportional system (in which the entire country will be treated as a single district).⁹⁵ However, the selection of which proportional method was the subject of lengthy debate, as was the question of whether there should be separate ballot papers.

In response to the protests in the Tarai plains,⁹⁶ the government and Maoists have agreed to alter the structures set out in the interim constitution. It had specified that the FPTP electoral units would be based on the existing parliamentary constituencies last used in 1999, although it did not specifically prohibit the redrawing of boundaries.⁹⁷ It also echoed the CPA stipulation that parties “should ensure proportional representation of oppressed groups, regions, Madhesi,⁹⁸ women, Dalit, and other groups”⁹⁹ without indicating how this should be done – a problematic task given that these are diverse, ill-defined, and overlapping groups. In the wake of Tarai unrest, the government has promised to redraw constituencies and increase their number there, as well as take other

measures to ensure a more directly proportional system.¹⁰⁰

Political compromise was always likely to produce a complex electoral system.¹⁰¹ The Maoists argued for proportional representation,¹⁰² hoping it would allow them to aggregate geographically diffuse support; the NC hoped to preserve its advantage under the 1990 system; the UML argued for a hybrid system with proportional voting within regional, rather than nationwide, units.¹⁰³ However, no final decisions on the electoral system have been put into law, and the election commission, which has started informal preparations, is calling increasingly urgently for the legal authority it needs to proceed.

Both large mainstream parties favour a parallel system in which their (probably significant) total of FPTP seats would be complemented by a share of the proportional seats in direct relation to their performance in that half of the poll. Others are pressing for a mixed member proportional (MMP) system, in which the proportionally allocated seats would bring each party's total representation (including constituency seats) in line with its share of the vote. This would undermine the advantages the larger parties would gain from the FPTP system, which can yield a majority of seats to a party even if it gets far less than a majority of votes. In late February 2007, an SPA-Maoist taskforce reportedly decided to use the parallel system and confirmed that there would be separate ballot papers and boxes for the FPTP and proportional votes.¹⁰⁴

The mixed system may thus be controversial but may also yield a significant unintended benefit: an

⁹³ For discussion of how a famous constitutional drafting process (the U.S.) achieved coherence, see William H. Riker, “The Lessons of 1787”, *Public Choice*, vol. 55, 1987, p. 9.

⁹⁴ Interim constitution, Art. 63(3).

⁹⁵ Interim constitution, Art. 63(3)(b).

⁹⁶ The Tarai is the strip of low land that runs the length of the border with India. Due partly to migration from the hills since the 1960s, it is now home to around half of Nepal's population.

⁹⁷ Interim constitution, Art. 63(3)(a) speaks of districts “determined by the existing law prior to the implementation of this constitution”. This could cover either present districts or redistricting in accord with pre-interim constitution principles.

⁹⁸ “Madhesi” is the term by which Tarai residents (excluding migrants from the hills) prefer to describe themselves, although it can also be used pejoratively.

⁹⁹ Interim constitution, Art. 63(4).

¹⁰⁰ These measures were promised in an address to the nation by Prime Minister Koirala on 7 February 2007; a bill incorporating amendments to the interim constitution reflecting them was introduced to the interim legislature on 18 February.

¹⁰¹ Correcting some of the flaws of the 1990 system would not necessarily improve the representativeness of the overall system. A new census - needed to redraw accurate single-member districts - is not possible; even redrawn equi-population districts could be gerrymandered to skew results. In the Tarai, for example, many districts form thin north-south strips, diluting the Madhesi vote with votes from the hill regions.

¹⁰² Crisis Group interview, Baburam Bhattarai, Bhaktapur, October 2006.

¹⁰³ Crisis Group interview, Madhav Nepal, Lalitpur, October 2006. Although this proposal was not adopted for the CA elections the UML may advance it for future elections under the new constitution. See below.

¹⁰⁴ “Double ballot boxes, double ballots agreed”, *Kathmandu Post*, 23 February 2007.

assembly equally elected by proportional representation and by single-member districts would not have a natural bias toward one particular system; the public would be able to see whether different mechanisms yielded different distributions of power and the experience could inform debate within the CA over which system to make permanent.

The new electoral structure's impact on the distribution of political power is difficult to predict. It hinges on factors such as the type of proportional system adopted, the extent of mainstream party mobilisation outside district centres and the relative populations within districts (which has changed due to the conflict and may change again with efforts to return internally displaced persons). There also remain difficult questions about implementation of the 26 November 2006 citizenship law (particularly in the Tarai region) and reconstitution of the voter rolls (where the Maoist insistence on allowing internal migrants to register at their temporary addresses has led to friction).¹⁰⁵

Contrary to high public expectations, proportional representation is unlikely in itself to lessen the mainstream parties' strength. Rather, the parties' ability to designate lists for the proportional representation portion of the poll will provide a further lever for controlling representation in Kathmandu. Adding proportional representation to the mix could even increase the centralisation of political authority by weakening local control and scrutiny of political candidates. The decision to create a single national electoral district further distances elected representatives from local communities while heightening their dependence on leadership patronage to secure a favourable position on party lists.¹⁰⁶ If the existing single-member districts remain badly apportioned,¹⁰⁷ the new electoral system may not be more representative than its predecessors. If it is to make a difference, regulations that force parties to make their selection of candidates inclusive will be necessary, something that may be included in new legislation.¹⁰⁸

¹⁰⁵ Crisis Group Report, *Nepal's Peace Agreement*, op. cit., p. 14.

¹⁰⁶ Proportional representation will not in itself ameliorate social and political divides. See Crisis Group Report, *Toward a Lasting Peace in Nepal*, op. cit.; Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (New York, 1997), pp. 58-61.

¹⁰⁷ Crisis Group interview, international electoral expert, Kathmandu, October 2006.

¹⁰⁸ "Act to tame parties in the offing", *Himalayan Times*, 22 February 2007. Maoist leader Dinanath Sharma said the CPN(M) had insisted on including a clause in draft legislation

C. PROCEDURES

The CA will convene on the 21st day after election results are issued.¹⁰⁹ The interim constitution establishes an unusual decision-making system. The question of the "continuance of the monarchy" is straightforward: the CA must decide this by "simple majority in the first meeting".¹¹⁰ However, the remaining provisions are expected to be adopted unanimously, with time-consuming procedures for fresh consultations and voting if there is even one opposing vote. Each provision will be voted on in sequence and adopted if a quorum of two-thirds is in attendance and no opposing votes are cast.¹¹¹

Failing this, parliamentary party leaders must "consult each other to achieve consensus in such matters".¹¹² This consultation has to be completed within fifteen days and a fresh vote held within a further seven days – again with the requirement of unanimity for adoption.¹¹³ If there is still opposition, a final vote can pass the provision by a two-thirds majority if there is also a participating quorum of at least two-thirds of the CA.¹¹⁴ Separately, an absolute two-thirds vote can decide to refer to referendum "a decision on any matters of national importance, except when this conflicts with provisions elsewhere in the constitution".¹¹⁵ This excludes, for example, a referendum on the monarchy.¹¹⁶

requiring parties to include representation from all regions and communities.

¹⁰⁹ Interim constitution, Art. 69(1).

¹¹⁰ Ibid, Art. 159(3).

¹¹¹ Ibid, Art. 70(1)-(2). It is unclear from the text what happens if members in attendance abstain from voting.

¹¹² Ibid, Art. 70(3).

¹¹³ Ibid, Art. 70(4)-(5).

¹¹⁴ Ibid, Art. 70 (6).

¹¹⁵ Ibid, Art. 157. It is unclear whether the CA can order a referendum on constitutional provisions, as the procedure for decision is specified in the interim constitution; it may be that the interpretation of "matters of national importance" would be restricted in practice to non-constitutional issues.

¹¹⁶ Interim constitution, Art. 159(3) applies "notwithstanding anything contained elsewhere in this Constitution", including Article 157. The two-third voting rule is designed to encourage efforts to forge fairly wide consensus and does not appear contentious, though in other national contexts a similar rule has been the subject of considerable controversy. Between August 2006 and January 2007, for example, the Bolivian constituent assembly was deadlocked as the governing party and its opponents locked horns on whether to have a simple majority (the former's preference) or a two-thirds majority rule. In January 2007, the governing party agreed to a two-thirds rule, but supported violent street protests that threatened to sink the constituent assembly. See Crisis Group Latin

These provisions address certain potential problems but also raise their own difficulties. Disposing of the most emotive issue – the monarchy – at the outset should avoid the polarising danger of a referendum but could sour later debates as one group of delegates will have secured an enormous and immediate victory while others will have suffered a substantial setback. This risks making compromise and negotiation within the assembly more difficult; the result of the monarchy vote could also prompt spoiling efforts by disaffected outside groups.

Following the initial high-pressure meeting, the structural bias towards consensus-based decisions may either assuage tempers or allow losers to vent their frustration by obstructing progress. The unusual insistence on unanimity could push even barely contentious provisions to political party deliberation and a second or third vote. Delegating second-order deliberations to “political leaders” would shift authority from the elected body and invite a continuation of the top-level backroom deals that characterised the earlier peace negotiations. The provision for flexibility over referendums is sensible: constitution-making bodies often re-engineer their mandates and procedural rules when faced with unexpected consequences.¹¹⁷

The interim constitution is silent on a number of significant matters. Critically, it says nothing about how the CA will generate provisions or decide how to vote on them. For example, if different parties put forward competing versions of the same provision no means is specified for determining which to vote on first. Yet, the power to set the voting agenda can be decisive: where there are multiple options the sequencing of votes can shape the outcome.¹¹⁸ Here, too, important second-order decisions may well devolve to party leaders in closed-door discussions. This could emasculate the CA, with opaque private deliberations undermining public trust.

Options for discussion might be drafted by a technical entity such as the ICDC, although its weaknesses would have to be addressed in a new body. The

alternative texts for different constitutional provisions that it listed were simply those supplied by the parties themselves rather than by neutral experts. Alternatively, cross-party CA committees with technical support could carry out this task. In either case, a separate drafting body would develop options which would be available both to the plenary and the general public for critical examination. Issues such as these may be addressed in the procedural rules of the CA but will have to be negotiated in advance.

The interim constitution alludes to committees within the CA but leaves their responsibilities to be determined by a subsequent law or the CA itself.¹¹⁹ This is an important topic and deserves careful scrutiny. Committees, rather than ad hoc political negotiations, should play a part in setting the CA agenda and voting order in accordance with clear pre-established rules; they should also be subject to public scrutiny. Their composition is significant: a fair cross-section of members with reasonable independence from party leaders would promote more open and vigorous debate. Arguably, any law regulating CA procedures would be subject to revision by the assembly itself: as the sovereign representative of the Nepali people, its authority supersedes that of the political factions that drafted the interim constitution.

D. THE CONSTITUENT ASSEMBLY AS LEGISLATURE

The CA's dual function as constitution-making body and legislature was decided without detailed consideration of process-related implications. SPA and Maoist leaders cited only cost savings from a dual-function body as justification for their decision.¹²⁰ There are other practical justifications for the double role: once the CA is elected, the interim legislature would have minimal legitimacy and there is little reason to elect a separate legislative body simultaneously. However, the CA's twinning of roles raises the possibility of negotiated trade-offs between short-term legislative and long-term constitutional issues.¹²¹ Such compromises risk undermining the integrity of the final draft.

America Briefing N°13, Bolivia's Reforms: The Danger of New Conflicts, 8 January 2007.

¹¹⁷ Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (New York, 2000), pp. 105-107.

¹¹⁸ In the 1787 Philadelphia Convention that drafted the U.S. Constitution, for example, advocates of a strong federal government were able to set the course by opening debate with their model constitution, the Virginia Plan. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York, 1996), pp. 59-70.

¹¹⁹ Interim constitution, Arts. 78, 79.

¹²⁰ Crisis Group interviews, Kathmandu, October 2006.

¹²¹ The most common model for a dual-function legislature/constituent assembly is India's 1946 Assembly. That body, however, “was, in effect, a one-party assembly, in the hands of the mass party, the Indian National Congress.” Granville Austin, *The Indian Constitution: Cornerstone of a*

Like any other large elected body, a CA will be characterised by horse-trading and log-rolling. Given the high stakes – the power to rewrite the rules of the political game – members may employ greater efforts than usual to achieve their ends. In a combined legislature/constitution-making body, extra-constitutional resources (such as votes on ordinary legislation, favours outside political life) may become bargaining chips for constitutional issues.¹²² Constitution making always involves negotiated compromises between political visions, with the result that the final document is often a cumbersome blend of ideologies. However, limiting bargaining to constitutional issues makes sense: if delegates can bargain away important constitutional features in exchange for short-term party or personal gains, this will detract from the substance of the constitution and sap public confidence.

There are ways of limiting this risk. First, a restricted mandate for the CA as legislature would limit opportunities for horse-trading. Although the interim constitution imposes no restrictions, party leaders could agree to avoid all but essential legislation before a permanent, and more legitimate, legislature is in place. Secondly, effective mechanisms for collecting and reporting public views could help to constrain improper bargaining by establishing independent benchmarks against which CA decisions could be assessed. Thirdly, public involvement and demand for transparency could moderate representatives' behaviour. CA candidates could commit publicly to refrain from deal-making that links constitutional issues to short-term, parochial goals, while transparency in CA debates (with delegates having to explain their positions) would further limit improper bargaining.

E. DURATION

The interim constitution gives the CA two years to complete its work, with a possible six-month extension in case of a "declaration of an emergency situation".¹²³ This time-frame is consistent with recent international experience.¹²⁴ Constitution-making

processes involving extensive public consultation and official responses, however, tend toward the longer end of the range. The need for a state of emergency to permit an extension could lead to difficulties. If the CA is deadlocked, with mounting tensions, there could be an unhealthy temptation to use emergency powers to short-circuit constitutional debate. This problem would be especially acute if emergency powers were de facto concentrated in a strong prime minister who wishes to retain power. The provision for an early dissolution of the CA (by resolution passed by its own members)¹²⁵ also raises the worrying possibility of the constitutional process being suspended mid-way without any framework for the continuance of executive, legislative or constitution-drafting functions.

Still, the schedule is feasible and sets a useful target. A slipping timetable would risk undermining public confidence by raising suspicions that key players were unwilling to hand over power. Delays in the CPA and interim constitution negotiations spurred public concern about the parties' desire and capacity to deliver peace;¹²⁶ both sides' credibility was damaged by their inability to explain the slippage.¹²⁷ Further delays are unlikely to benefit either the SPA or the Maoists: if the momentum of the people's movement and the peace process is lost, their opponents stand to gain, and too much messy "muddling through" might prompt nostalgia for more authoritarian rule. A process that hews to the original timeframe will not only be legitimate but may more accurately reflect the broader popular aspirations of April 2006.

Nation (Delhi, 1966), p. 2. It thus did not have the tensions of a multi-party body.

¹²² This has long been a pervasive feature of constitution-making. See Jon Elster, "Arguing and Bargaining in Two Constituent Assemblies", *University of Pennsylvania Journal of Constitutional Law*, vol. 2, 1999-2000, p. 392.

¹²³ Interim constitution, Art. 64.

¹²⁴ East Timor drafted its constitution in about six months, Rwanda took 24 months, Uzbekistan fifteen and Kazakhstan eighteen. The Iraqi Transitional National Assembly elected in January 2005 had seven months to complete a constitution; the final product hardly impacted the country's deep social and

ethnic conflicts. See Crisis Group Middle East Report N°42, *Iraq: Don't Rush The Constitution*, 8 June 2005.

¹²⁵ Interim constitution, Art. 64.

¹²⁶ The interim constitution failed to appear at the end of November 2006 as stipulated in the CPA.

¹²⁷ Some steps in the negotiations were explained. See, e.g., "Talks Adjourned on Positive Note," *Kathmandu Post*, 9 October 2006, p.1. But these were exceptions.

V. THE POLITICAL PLAYERS

The constitutional transition will only be successful if it establishes democratic space and practices. None of the major political actors has a perfect record in this regard. The primary objective of the constitutional process is to protect democracy and fundamental rights by cementing the peace deal and the Maoist transition to multiparty politics, as well as removing the openings for power-grabs that the palace exploited under the 1990 dispensation. However, internal reform of the mainstream parties will also be essential if a more representative, responsive and inclusive democracy is to take root.¹²⁸

Dynamics within the interim legislature and CA may support these processes: there is little likelihood of the palace regaining any constitutional powers, the mainstream parties know it is in their interests to foreclose a possible resumption of the insurgency, and the Maoists have indicated they will push for a reformed multiparty system that does away with what they see as the weaknesses of the older, elitist model. But solid progress depends on closer attention to process and substantive issues and is prey to the goals of hierarchical leaderships who may find common cause in resisting certain changes.

A. THE MAINSTREAM PARTIES

1. Views on constitutional substance and procedures

Party leaders did not focus on procedural questions (such as the CA's mandate or rules for agenda-setting and voting) until late in the negotiating process. Substantive issues (such as the future of the monarchy and regional devolution) have received much more attention, and on some there is already detailed consensus within parties.

Nepali Congress (NC). During the peace negotiations, the NC operated in its usual centralised way, key decisions being taken by the party president, G.P. Koirala, without consultation with the broader membership.¹²⁹ Koirala took advantage of his developing

personal relationship with Maoist leader Prachanda to push the process forward¹³⁰ at the expense of building the party's capacity to develop stable internal consensus on difficult issues.¹³¹ Different NC factions incline towards republicanism or preserving the monarchy;¹³² there is confusion about whether and how the state ought to be restructured. One central committee member explained that federalism was "out of the question" but that some Congress leaders would support provincial governments with elected assemblies and substantial budgetary authority – implying that NC is uncomfortable with the label but may concede an almost-federal structure.¹³³ Other central committee members expressed reservations with this formulation, arguing that division of the country into discrete units would leave some sections vulnerable to "geopolitical" (i.e. Indian) influence.¹³⁴

In the event, the January 2007 Tarai unrest has pushed the party leadership towards accepting a joint SPA-Maoist platform of federalism in a concession to Madhesi activists. The other major area of disagreement is over the crucial question of restructuring the army and integrating former Maoist fighters into a new national force.

Congress thinking on the structure and functioning of the CA, a central committee member conceded, remains "in a rudimentary state", although the party has long had a clear antipathy toward proportional representation, which is perceived (perhaps incorrectly) as threatening its electoral advantage.¹³⁵ By delaying taking a position on the monarchy, NC has reduced royalists' opportunity to rally before the CA elections and hopes to improve its chances of capturing generally pro-palace votes without permanently alienating its republican-inclined cadres.

¹²⁸ This is true of other constitution-making situations. See Crisis Group Asia Report N°. 56, *Afghanistan's Flawed Constitutional Process*, 12 June 2003, pp. 27-29.

¹²⁹ The same was the case for the selection of the ten additional members of the interim legislature, where Koirala over-rode other party leaders' wishes. See below and Bishwamani Pokhrel, "Pariwar moh", *Samay*, 25 January 2007.

¹³⁰ Crisis Group Report, *Nepal's Peace Agreement*, op. cit.; Crisis Group interview, NC central committee members, Kathmandu, October 2006.

¹³¹ To the extent an "established" route exists: it is by the word of the prime minister. Especially given the present prime minister's age and health, this is hardly a durable solution.

¹³² Crisis Group interview, political scientist, Kathmandu, 8 October, 2006.

¹³³ Crisis Group interview, NC central committee member, Kathmandu, 14 October 2006. Federalism, particularly to the end of ensuring ethnic autonomy, takes many different forms. See Yash Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge, 2000).

¹³⁴ Crisis Group interview, NC central committee member, Kathmandu, 19 October 2006.

¹³⁵ Crisis Group interview, NC central committee member, Kathmandu, 18 October 2006.

UML. The UML is also divided on substantive issues and little concerned with issues of process. The central committee has endorsed republicanism but factions within the party still quietly take divergent positions.¹³⁶ The party favours proportional representation for a new national electoral system – the country would be divided into fourteen zones (probably the current ones), each with party lists that would have to include certain percentages of ethnic, women and dalit candidates. The zones would also be units on which some tax and resource allocation authority would be devolved.¹³⁷ Leaders are less clear about the functioning of the CA (for example, voting rules and the division of labour between plenary and committee sessions). “There’s a need to study the realities of a constituent assembly”, a senior central committee member admitted.¹³⁸

NC(D). An offshoot of the NC, it has also reserved judgement on the monarchy, its hesitation partly prompted by the two parties’ possible reunification.¹³⁹ A central committee member, however, observed that his party was “more progressive” than NC and criticised the palace’s habit of disrupting democracy.¹⁴⁰ Similarly, while the NC(D)’s January 2006 general convention endorsed federalism, the party has taken no clear position on how this ought to be achieved.¹⁴¹ Despite adopting certain policy positions close to the CPN(M), the NC(D) (and especially its leader, Sher Bahadur Deuba) has been consistently critical of Maoists.

Other SPA parties. For the NSP, key issues are proportional representation, citizenship for Madhesi and the introduction of federalism.¹⁴² Along with other Tarai-based political groups, it has criticised the interim constitution’s retention of the FPTP electoral system and demanded further reforms before polls

can go ahead. The smaller SPA parties have had minimal impact on the negotiations, although in many cases they have more fixed positions on constitutional issues.

Non-SPA parties. The traditionally pro-palace Rashtriya Prajatantra Party (RPP) and Rashtriya Janashakti Party (RJP) are not part of the SPA and have had only a marginal role in post-April 2006 events, despite being represented in parliament and seeking to operate as a constructive opposition. While they voted with the SPA to approve the interim constitution, both parties are pushing for amendments; the RPP has hinted that it will take a less palace-friendly line but has yet to clarify new policies.¹⁴³ Neither party opposed the interim legislature’s condemnation of the king’s 19 February 2007 Democracy Day address that sought to justify the royal coup.¹⁴⁴

The parties’ concentration on selected substantive matters has overshadowed consideration of the procedural choices involved in constitution making.¹⁴⁵ This may explain some of the weaknesses and inconsistencies of the interim constitution but is not a crippling problem: the interim constitution’s enactment, with the formation and operation of interim institutions, will likely stimulate crisper views on process.

2. Democratic reform

Mainstream party behaviour will have a critical impact on the shaping of a new constitution and its democratic credentials.¹⁴⁶ The dynamics of the process will present both opportunities and risks. The parties have acknowledged past failings, promised to change and are being pushed by the generally reformist public mood. The chances for positive change are much greater than when they had their

¹³⁶ Crisis Group interview, UML central committee member, Kathmandu, October 2006.

¹³⁷ Crisis Group interview, UML General Secretary Madhav Nepal, Kathmandu, 12 October 2006.

¹³⁸ Crisis Group interview, UML central committee member, Kathmandu, October 2006.

¹³⁹ The two parties are likely to reunite before the CA elections. Crisis Group interviews, NC and NC(D) central committee members, Kathmandu, October 2006. See Crisis Group Report, *Nepal’s Peace Agreement*, op. cit. for an explanation of the political calculations involved in reunification.

¹⁴⁰ Crisis Group interview, NC(D) central committee member, Kathmandu, October 2006.

¹⁴¹ Crisis Group interview, NC(D) central committee member, Kathmandu, October 2006.

¹⁴² Crisis Group interview, NSP(A) central committee member, Kathmandu, October 2006.

¹⁴³ The RPP has generated two more aggressively royalist but not very influential offshoots: the RPP (Nepal) and RPP (Nationalist).

¹⁴⁴ The interim legislature unanimously passed a motion of censure demanding government action against the king, “House directs govt to act against king”, *Himalayan Times*, 22 February 2007.

¹⁴⁵ The two key issues are: the horizontal division of authority between the three branches of central government – legislature, executive and judiciary; and the vertical allocation of responsibilities between the national government and sub-national units at the federal, provincial or local level.

¹⁴⁶ Parties, indeed, are “an essential part of the democratic system” because “it is political parties which set up the candidates, and campaign actively for votes” and embody “the constant flux of interest formation in society” in a way that more fixed constitutional settlements cannot. Sudipta Kaviraj (ed.) *Politics in India* (Delhi, 1997), pp. 255-261.

backs to the wall after the royal coup. However, the nature of coalition government in the run-up to a hotly contested election will likely encourage them to revert to less palatable, but tried and tested, tactics: they will need cash to run campaigns (and have limited scruples on its origins) and senior leaders may be more concerned about their personal prospects than principles of inclusion. The SPA's distribution of interim legislature seats initially intended for independent civil society nominees shows how far there is still to go: all went to party members (mostly senior leaders and, in the case of NC, even to relatives of G.P. Koirala).¹⁴⁷

The hierarchical, patronage-based parties have done little to address social grievances, while past perceptions of corruption and incompetence boosted support for the palace and the Maoists as potentially more effective alternative rulers. The unrest in the Tarai that has been building since late 2006 is only one indication of the dangers invited by the political elite's narrow base.¹⁴⁸ At the same time, however, it offers more positive inspiration: in an election where many voters are disillusioned, and major parties may have few distinctive policies, reaching out to marginalised communities is one of the most promising strategies to win new voters. This has not been the parties' forte – had they taken this route in the early 1990s, the Maoists might never have been able to take root – and even regional-based groups such as the NSP(A) have found themselves outflanked by more extreme rhetoric. But Tarai grievances are not unreasonable and key demands are all negotiable. This could yet be a useful wake-up call for party leaders.

Internal democracy also needs attention. It is unrealistic to expect hierarchical parties to transform their organisational dynamics overnight but most parties would benefit from more transparent internal debate. The difficulties they are facing in reaching decisions on contentious issues would be reduced if there were productive discussion at all levels of the

¹⁴⁷ The parties split the 48 seats to benefit themselves rather than to provide wider representation, as the interim constitution demands. Apart from allowing the inclusion of the ULF, which was not represented in the 1999 parliament, these seats were meant to go to "people-based and professional organisations, class organisations and professional bodies, oppressed ethnic groups, backward regions, indigenous communities, women and various political personalities nominated through understanding", interim constitution, Art. 45(c). The division was: ten seats each for the NC, UML and CPN(M); six for NC(D) and three each for NSP(A), NWPP, ULF and Janamorcha Nepal.

¹⁴⁸ See below.

party. Deeper policy debates could also draw on outside expertise, as well as on the direct experience of the local party activists, who are most in touch with the public.

Steps along these lines would start to address the corrosive influence of patronage. Within most parties, leaders with financial resources build personal followings, secure party offices and reward their followers with jobs and money-making opportunities. Potential leaders who are short of cash may find themselves unable to rise if less scrupulous rivals buy promotions.¹⁴⁹ Transparency in debate and decision-making, including on key constitutional questions, is one means to dilute patronage power and reduce its impact on policy choices.

In the interval before the CA, the parties might also benefit from more inclusive internal debates on procedural and substantive constitutional matters. To articulate more meaningful constitutional agendas, they could draw on academics, lawyers, and journalists, who have been sidelined in the past. Both Congress and the UML, for example, have cadres who bring intellectual heft to bear on difficult political issues, although they have had little part in policy-making. As a former adviser to a senior NC leader explained, opportunities for their substantive input are ill-structured and often frustrated.¹⁵⁰ Parties could introduce a system of "position papers" by academics and lawyers to present options on different constitutional issues. Creation of such opportunities is largely a question of intra-party initiative. Strengthening their intellectual and policy-making capacities is one way to professionalise parties and diminish patronage-based politics.

B. THE MAOISTS

The Maoists have in successive agreements promised to join competitive multiparty politics.¹⁵¹ While the interim constitution has sidelined the monarchy and opened the door to a share in government, the CA elections will be the critical point for the leadership to justify its revised strategy to cadres. However much it insists its approach has changed, there will be an

¹⁴⁹ Crisis Group interview, Nepali political analyst, Lalitpur, October 2006.

¹⁵⁰ Crisis Group interview, Kathmandu, October 2006.

¹⁵¹ The most significant commitment was made in the November 2005 twelve-point agreement, Crisis Group Report, *Nepal's New Alliance*, op. cit.; it was reaffirmed in subsequent agreements, including the CPA and the interim constitution.

ingrained tendency to rely on long-standing tactics of intimidation and coercion.

Nevertheless, the Maoists have potentially strong issues on which to campaign – their selection of representatives for the interim legislature indicates the ease with which they can present a more progressive public face than the mainstream parties. Despite opinion polling efforts, no one can confidently predict their share of the vote. Many non-Maoists will be hoping for a happy medium: high enough to lock them into the process and feel they have a stake in making it work but not enough to give them decisive influence. But the Maoist leadership will need to show some results if cadres are not to be alienated: the decision on the fate of the monarchy will be an early test.

1. Views on constitutional substance and procedures

The Maoists are in one respect victims of their own political success – the mainstream parties' endorsement of their headline constitutional change agenda threatens to undermine their unique appeal. Maoist leaders, however, see the parties' promises to address social exclusion as rhetoric, not real commitment (an interpretation for which mainstream party behaviour gives some evidence). Aggressive republicanism distinguishes them from their rivals, especially Congress.¹⁵² In the meantime they plan to use the interim legislature and continued street demonstrations as twin means to push their agenda.¹⁵³

According to Maoist leader Baburam Bhattarai, the party expects to win a majority in CA elections but would remain in the assembly with a smaller share of the vote.¹⁵⁴ A Maoist majority is implausible, even if not altogether impossible; more likely is a respectable, but less than decisive, share. One August-September 2006 poll suggested they could secure about 15 per cent (against 25 per cent each for NC

and UML);¹⁵⁵ a subsequent September survey put the Maoists at 16 per cent, but ahead of all the other parties, a finding repeated in a January 2007 survey.¹⁵⁶ Still, the Maoists calculate they can build their electoral base by pointing to their consistently republican line, as well as by capitalising on discontent with the mainstream parties' failure to address regional, ethnic group and caste differences.¹⁵⁷ Their yield of seats will also depend on the proportional system adopted; a multi-member system would compensate for their expected weakness in FPTP constituencies (but it appears that this option has been rejected; see above).

Beyond their vigorous opposition to the monarchy, the Maoists have a broad agenda – although more detailed in some parts than others. Presenting themselves as the party of the previously disenfranchised, with “anti-feudal” policies, gives possible widespread appeal. According to a senior military commander, voters will have four reasons to be attracted to the Maoist platform – class, regional origin, gender or ethnicity. Through “scientific” land reform, select industrialisation and devolution of economic power to a local level, the Maoists claim they will be able to ameliorate the position of these previously excluded groups.¹⁵⁸ By contrast, Bhattarai argues, the mainstream parties such as the NC and UML “represent the same class groups and the big capitalist groups” and not the general populace.¹⁵⁹ Unsurprisingly, the Maoists have pushed for early land reform within the transitional process, even securing a commitment from the SPA to this in the CPA.¹⁶⁰ A central concern of the Maoist

¹⁵⁵ “Nepal: A Cautiously Optimistic Public”, Greenberg Quinlan Rosner Research, 17 September 2006, p. 13.

¹⁵⁶ Both the September 2006 and January 2007 polls were carried out by Interdisciplinary Analysts. Their findings are presented comparatively in “Nepal Contemporary Political Situation IV: Political Opinion Poll Top-Line Findings”, Interdisciplinary Analysts, 5 February 2007, Kathmandu. While the positions of all parties remained broadly similar in these two surveys, “don't know/cannot say” responses increased from 15.5 to 27.3 per cent, suggesting that undecided voters may form a crucial swing constituency.

¹⁵⁷ The January 2007 merger of the independent Society for the Liberation of Dalit Castes Nepal (SLDCN) with the Maoists' Nepal Dalit Liberation Front suggests the CPN(M) is actively pursuing strategies to tie in such support. “Dalit morchaharubich ekikaran”, *Janadesh*, 30 January 2007. The SLDCN's Padmalal Bishwokarma was nominated by the Maoists as one of their ten non-party MLPs; Maoist central advisor Tilak Pariyar is now coordinator of the merged organisation.

¹⁵⁸ Crisis Group interview, member of Maoist negotiation team, October 2006.

¹⁵⁹ Crisis Group interview, Bhaktapur, 16 October 2006.

¹⁶⁰ CPA, para 11.

¹⁵² Crisis Group interviews, Maoist leaders and cadres, Kathmandu, October 2006. Some Congress-oriented commentators argue that since late 2005 Maoists publications have used the phrase “end of absolute monarchy,” rather than “abolition” of the monarchy, allowing for some compromise with NC's ceremonial monarchy proposal. Krishna P. Khanal, “The Maoist Agenda of Restructuring the State: An Appraisal”, in Lok Raj Baral (ed.), *Nepal: Faces of Insurgency* (Delhi, 2006), p. 165.

¹⁵³ “Maobadile sadak ra sadanbata eksath awaj uthaune”, *Janadesh*, 30 January 2007.

¹⁵⁴ Crisis Group interview, Bhaktapur, October 2006.

reform agenda is the army, which they insist must be completely restructured. They also call for punishment of individual officers responsible for war crimes.¹⁶¹

2. Democratic reform

The Maoists have much more to do to establish solid democratic credentials but the constitutional process may both encourage and hinder this. Their likely behaviour will be conditioned as much by shifting external dynamics as by their established political and organisational culture. Reformers within the movement may be boosted by successful participation in an interim government but the fact that this foothold in central power had to be gained at the cost of demanding that low-level cadres surrender local influence increases vertical tensions. Maoist leaders have shown they can adapt their tactics and reorient their strategy to make the most of the process. They probably remain Nepal's most disciplined and effective political force but they are not immune to miscalculation, internal disputes and personality clashes.

The start of real campaigning will force the Maoists to pay more attention to the support they currently have and the level of backing they can hope to build. This, too, may invite negative responses (such as resorting to intimidation or coercion), positive initiatives to win hearts and minds by demonstrating a reformed character and showcasing popular policies or – most likely – a combination of both. Interestingly, they have already rehabilitated some former leaders who had left the party or surrendered to the government.¹⁶² Leaders are well aware that certain behaviour, such as “tax” collection, is deeply unpopular; they have also acknowledged that they have made “mistakes” in the course of their insurgency and need to make amends.¹⁶³ But they are wary of relinquishing forms of power that can still be used as bargaining chips, are worried about alienating cadres and calculate that some of the measures they were meant to relinquish (such as their “people’s courts”) may still boost their popularity.

Although the Maoists have proved adept at public debate, they are not yet comfortable with some forms

of discussion. Leaders express ambivalence about independent public outreach efforts in terms that suggest they could try to obstruct them. According to Bhattarai, civil society-led public education is “not necessary”; funds “are better spent on the poor than on creating a new class that benefits from the constitution-making process”.¹⁶⁴ Whatever the flaws of NGO public education efforts, however, neither the Maoists nor any other political party is entitled to block them. The CPA commits its signatories to respect the “fundamental rights of the Nepalese people to cast their votes in the CA polls without any kind of fear” – an expansive repudiation of coercion which includes respect for education, campaigning and debate in the run-up to the polls. However, the peace deal does not entirely eliminate Maoist capacity for armed violence: it does not mention their militia forces, and the arms management process is unlikely to be watertight.

Still, the Maoists do not appear to have obstructed civil society efforts so far; nor have their violations of the CPA been as egregious as some reports imply. They have allowed re-establishment of hundreds of police posts and have been willing to compromise with the SPA and actively cooperate on certain matters. Most encouragingly for those Maoists who want to make a success of multiparty politics – and most discouragingly for those who hoped the mainstream parties would reform and reassert themselves – the SPA has left the Maoists considerable space in which to operate. Their selection of interim legislature members was a masterstroke, with their diverse contingent in stark contrast to the conspicuously unrepresentative delegations of the mainstream parties. The latter sacrificed a chance to win back ground by using their “civil society” nominations to give seats to their own inner circles. Only the Maoists nominated a range of non-party members, who they said, would be free of the party whip to vote with their conscience. Competitive politics may offer the Maoists significant openings to win real electoral support.

C. THE RELUCTANT, THE RESISTANT AND THE REBELLIOUS

Although no single spoiler is likely to be able to derail the constitutional process, a number of political groups and institutions are far from enthusiastic supporters. The palace is not ready to cooperate in its own dissolution; the army may not go on the

¹⁶¹ Crisis Group interview, Baburam Bhattarai, Bhaktapur, 16 October 2006.

¹⁶² Crisis Group interviews, Maoist cadres, Kathmandu, January 2007.

¹⁶³ The most notable such apology was made by Prachanda in his first official public appearance in Kathmandu, addressing a large crowd of supporters on 13 February 2007.

¹⁶⁴ Crisis Group interview, Baburam Bhattarai, Bhaktapur, 16 October 2006.

offensive to rescue it but will resist major structural reform. Neither the interim constitution nor the CA will find it easy to displace entrenched institutional practices with new, untested rules. Unwritten conventions underwrite the palace's maintenance of some influence, especially with the survival of the palace secretariat.¹⁶⁵ Institutions such as the civil service have been a source of stability during periods of rapid change but may become barriers to reform. Violent groups (especially those in the Tarai) may make more active attempts to disrupt the process. They, in combination with weak response to grievances which could be addressed by negotiation, will present the most serious threat if they choose to oppose the polls and mobilise enough support to make parts of the country ungovernable – a tactic in which the Maoists have provided master classes.

The palace. The palace has played no overt role in negotiating the constitutional transition, although it has not lost all its allies or means to exert some influence. In late 2006, the king started selective consultations about political developments but said he would maintain a “respectful silence”.¹⁶⁶ Nevertheless, just days after his car was stoned when he visited Pashupatinath temple on the occasion of the Shivaratri festival, he risked another political venture by making a public address on Democracy Day.¹⁶⁷ He attempted once again to justify the royal coup, arguing that “it is clear that the prevailing situation compelled us to take the 1 February 2005 step in accordance with the people's aspirations...”.¹⁶⁸ This renewed foray seems unlikely to boost the monarchy's dwindling popularity. Gyanendra lost much of his personal influence by failing to deliver on the promises he made when he seized power.¹⁶⁹ His

relative restraint since April 2006 has not restored his image: surveys suggest that support for retaining the monarchy continues to shrink.¹⁷⁰

That the monarchy's future will be decided in the CA and not by a referendum means royalists will not have a clearly defined moment around which to rally support.¹⁷¹ This may promote stability in the CA election process, where the monarchy will be only one of several prominent issues. Monarchists will have to mobilise as a political party, or through influencing other parties, rather than by direct appeal to the public.¹⁷² This may benefit the palace: manipulating a small number of CA delegates may be more promising than trying to persuade sceptical voters.

The king's fall from power and popularity does not automatically mean an end to the royal institution. Congress and the NC(D) may back a ceremonial role – or at least not rule it out – with an eye to winning support from those who still want some sort of monarchy.¹⁷³ However, the public mood is making leaders rethink their position: a motion condemning the king's Democracy Day address and demanding action against him was introduced into the interim legislature by the NC. Pro-palace forces still retain some stake in the political transition. Despite the exclusion of hardline royalists from the interim legislature, monarchists will have a voice in pre-

¹⁶⁵ For example, the NA performed a ceremonial salute for the king on the occasion of the Basanta panchami religious festival. Similarly, Chief of Army Staff Rookmangad Katwal had continued the traditional practice of paying respects to the king during the autumn Dasain festival. See Crisis Group Report, *Nepal's Peace Agreement*, op. cit.

¹⁶⁶ King Gyanendra has met former Prime Ministers Surya Bahadur Thapa, Kirtinidhi Bista and Lokendra Bahadur Chand and other royalist politicians such as Bishwabandhu Thapa, Pashupati Shamsher Rana and Rabindra Nath Sharma. “Ke gardaichha darbar”, *Samay*, 18 January 2007.

¹⁶⁷ The address was apparently not authorised by the government but was nevertheless broadcast on state-run media, prompting questions over who had approved or allowed it.

¹⁶⁸ King Gyanendra, Democracy Day address, 19 February 2007.

¹⁶⁹ The King's failure to capitalise on his February 2005 move was rapidly evident. See Crisis Group Asia Report N°106, *Nepal's New Alliance*, op. cit., pp.25-26.

¹⁷⁰ A September 2006 opinion poll suggested that 48 per cent of the population wanted to keep the monarchy - with support higher among women and older people, Greenberg Quinlan, op. cit., p. 52. However, four opinion polls conducted by Interdisciplinary Analysts suggest support for retention of the monarchy has been falling, from 80.6 per cent in December 2004 to 44.9 per cent in January 2007, “Nepal Contemporary Political Situation IV”, op. cit.

¹⁷¹ In 1980 the palace used a referendum to shore up the Panchayat system, then under attack from demonstrating students. Although the 1980 referendum ended in an endorsement of the Panchayat system (with a 54.8 per cent yes vote), the narrowness of the vote was viewed as a moral victory for democratic forces. Lok Raj Baral, *Nepal's Politics of Referendum: A Study of Groups, Personalities and Trends* (Vikas Publishing House, 1983); R. Andrew Nickson, “Democratization and the Growth of Communism in Nepal”, in Deepak Thapa (ed.), *Understanding the Maoist Movement of Nepal* (Kathmandu, 2003), p. 7.

¹⁷² A referendum would also have surfaced and emphasised deep-seated social differences just at the moment when Nepalis were seeking consensus on many of difficult political questions. Crisis Group interview, former NC advisor, Kathmandu, October 2006.

¹⁷³ See Crisis Group Report, *Nepal's Peace Agreement*, op. cit., for an explanation of NC political calculations on the monarchy.

election debates and will presumably win some representation in the CA.¹⁷⁴ This reduces their incentive to reject or disrupt the process but the electoral arithmetic is still far from favourable for them.

The army. The Nepalese Army (NA) remains wary of the peace process and suspicious of both the Maoists and the mainstream parties. Nevertheless, it has been conspicuously well behaved in its involvement in the mechanics of the peace process. Senior officers have no desire to integrate large numbers of former Maoist fighters into a restructured national force and are happy to delay discussion of such changes. But day-to-day cooperation with Maoist commanders and the UN on the Joint Monitoring Coordination Committee (JMCC) has been positive and has helped the cantonment process move forward in a constructive atmosphere.¹⁷⁵ The NA has little outlet for its conservative political instincts: it has been unable (perhaps unwilling) to prevent the monarchy's marginalisation, while gradual moves to reduce its autonomy have not been dramatic enough to prompt resistance.¹⁷⁶

The NA successfully – and crudely – pressured the post-April government not to interfere in its chain of command but now faces internal political challenges. The then number two, Rookmangad Katwal, ensured his succession as chief of army staff but has discovered this is a mixed blessing. Viewed with suspicion by some as an outsider (he is not from a traditional officer clan) and by others as too fanatical a royalist, he must guide the army through a difficult

transition. Despite a reshuffle of the higher ranks, some senior positions are still vacant and, with no three-star generals in country,¹⁷⁷ Katwal looks slightly isolated at the top. Securing his own position, the army's basic interests and its international reputation will probably leave little scope for active spoiling of the peace process unless the broader political landscape changes significantly.

The judiciary. One potential vehicle for disruption of the constituent transition is the traditionally conservative supreme court.¹⁷⁸ Three separate petitions filed there challenged the validity of the May 2006 House of Representatives proclamation stripping the King's powers.¹⁷⁹ These efforts raised the possibility, albeit remote, of a judicial order invalidating that proclamation and the subsequent endorsement by the House of the interim constitution. Supreme Court judges had already refused to swear new oaths of office on the basis of the May 2006 proclamation.

Chief Justice Dilip Kumar Paudel's eventual willingness to swear a new oath of office to the prime minister under the interim constitution suggests that a compromise has been reached.¹⁸⁰ Supreme court judges had decided to call for amendment of the interim constitution's judicial provisions but left it too late to submit a proposal.¹⁸¹ It may be that demoralisation reduces the court's willingness to deliver verdicts against the executive. Nevertheless, dissatisfaction within the judiciary (and among lawyers of various

¹⁷⁴ In general, ethnic advocates for redivision of the country along ethnically defined lines approach the coming political transition as if past political elites, and in particular high-caste Bahuns and Chhetris, no longer have political power or a large stake in the political process. Crisis Group interviews, ethnic rights NGOs, Kathmandu, October 2006. This is a miscalculation. Advocates for greater equity in Nepal's national political arrangements are more likely to achieve their goals if they can persuade still-powerful elites that this is in their interests. By presenting their grievances in zero-sum terms, ethnic activists undercut their political aspirations.

¹⁷⁵ Crisis Group interviews, JMCC members, Kathmandu December 2006 and January 2007. PRSG Ian Martin commented that "The JMCC is now meeting regularly, with excellent cooperation between the Nepal Army and PLA representatives, and between each of them and the United Nations". Press Statement, 5 January 2007, OPRSG, Kathmandu.

¹⁷⁶ Some messages suggesting a distinct cooling of relations with the palace have been sent. For example, the king's last principle military secretary, Major-General Gajendra Limbu, was quietly retired at the end of December 2006 when under normal circumstances his term would have been extended.

¹⁷⁷ The NA has two Lieutenant-General positions. One post was left vacant by Katwal's promotion; the other is held by Lt.-Gen. Balananda Sharma, who is shortly to return to Nepal after a lengthy posting as a UN peacekeeping mission commander. Delay and confusion in army promotions and senior officer transfers has sparked discontent within the army and towards the government. "Senama rajnitikaran", *Saptahik Vimarsha*, 2 February 2007.

¹⁷⁸ Among the Supreme Court decisions resented for their conservative tilt is the 1 June 1999 order that prohibited the use of local and regional language by local administrative bodies under the Local Self-Governance Act of 1999. Whelpton, *A History*, op. cit., p. 232.

¹⁷⁹ These were filed by lawyers Achyut Prasad Kharel, Shree Prasad Upadhyay, Amita Shrestha and Arun Subedi.

¹⁸⁰ Paudel only agreed to take a new the oath under the interim constitution three days after its promulgation. "Aaphaile shapath nalie pradhannyayadishlai", *Kantipur*, 19 January 2007. According to Interim Constitution Article 162(2) judges refusing to take new oaths will be dismissed.

¹⁸¹ The interim constitution was promulgated one day after their decision to recommend changes. They had proposed changes to articles 103(1), 105(1) and (2), 106 (1) and (2), 107(4), 109(4), 112, 113, 117, 149(2), 155(1) and 162(2). Madhav Dhungel, "Naitik sankatma nyayadhishharu", *Nepal*, 21 January 2007.

political persuasions) over the interim constitution's concentration of executive power may lead to challenges to government authority. Conservative judges could be a convenient front for monarchists to pursue extra-parliamentary openings for preserving royal powers; they should also check government excesses.

The bureaucracy. The bureaucracy has been a source of stability in a turbulent period – especially given its ability to work according to unwritten conventions amid legal and constitutional uncertainty. But this stability could also obstruct constitutional change. The civil service is highly unrepresentative,¹⁸² enjoys its centralised authority, is conservative in its day-to-day behaviour and does not stand up to political leaders (be they the king or party politicians) when they violate the rules of government.¹⁸³

The interim period will strain the bureaucracy but also offer openings for gradual reform. Tasks such as distributing citizenship papers, re-establishing local governance and preparing for elections will stretch ministries and other departments to the limit; political parties – including, once they join the interim government, the Maoists – will probably seek to influence appointments and shape the way civil servants work within ministries under their control; external pressure to alter working practices (for example, from the international financial institutions) will be maintained. A civil service commission has already drawn up a ten-year plan.¹⁸⁴ Even if this is implemented, more radical measures to make the bureaucracy representative and accountable may well be needed.

Violent opposition. Organised protests and armed action in the Tarai since late 2006 have indicated the potential for violent opposition to the peace process. Two armed factions – Jay Krishna Goit and Jwala Singh's branches of the Janatantrik Tarai Mukti Morcha (JTMM)¹⁸⁵ – have been trying to build a power base in the eastern Tarai; there are also eastern

hill-based groups such as the Kirat Workers' Party that claim an independent armed capacity. However, none of these groups is yet significant in a purely military sense; the leverage they have is a widespread feeling that the interim constitution does not address major grievances, and the mainstream parties will not provide an outlet for demands. Even the Maoist-affiliated Kirant Rastriya Morcha has expressed dissatisfaction over its own party's ethnic policy.¹⁸⁶ Such discontent, exacerbated by inadequate public consultation, has allowed more radical fronts such as the Madhesi People's Rights Forum¹⁸⁷ to gain sudden prominence and has left space for opportunistic meddling, be it by royalists, religious activists or cross-border criminals.¹⁸⁸

The spike in violence in the Tarai showed how easy it is to undermine fragile governance and policing. Repeated curfews and police shootings did little to restore order; the latter, as during the Maoist conflict, only added fuel to the fire. Activists' demands are negotiable and the violence may force the government and Maoists to engage in substantive talks.¹⁸⁹ However, the rapid spread and scale of unrest is a stark warning that determined opposition and political intransigence in Kathmandu could cause serious problems.¹⁹⁰

¹⁸² On representation in the civil service and elsewhere, see Fatik Bahadur Thapa, "Report on involvement of indigenous nationalities in the state mechanism", Nepal Federation of Indigenous Nationalities, Kathmandu, January 2006.

¹⁸³ See "Employees intensify stir", *Kathmandu Post*, 11 April 2006 and Crisis Group Report, *From People Power to Peace?*, op. cit.

¹⁸⁴ "Mid-term report on civil service's 10-year vision paper submitted", nepalnews.com, 3 December 2006.

¹⁸⁵ Goit formed the JTMM on 16 January 2005, just after his dismissal as chairman of the Maoist-affiliated Madhesi Rastriya Mukti Morcha. Jwala Singh (Nagendra Paswan) led a split in 2006, forming his own faction.

¹⁸⁶ Om Aastha Rai, "Sashankit", *Samaya*, 1 February 2007.

¹⁸⁷ Known in Nepali as the Madhesi Janadhikar Forum; the English-language press has (confusingly) used the acronyms MPRF and MJF interchangeably but they refer to the same organisation. MPRF Chairman Upendra Yadav is a former UML parliamentary candidate who joined the Maoists before leaving the party in 2004.

¹⁸⁸ On the accusation that royalists were responsible for instigating trouble in the Tarai, see "Late-night crackdown on royalists", *Himalayan Times*, 30 January 2007 and "Nepalese former minister arrested", BBC News, 30 January 2007.

¹⁸⁹ The primary demands are for a proportional representation system for the constituent assembly elections, a federal state structure and citizenship rights for Madhesis.

¹⁹⁰ Ian Martin warned that "The role of my Office is to support a free and fair Constituent Assembly process, and the efforts we are supporting to make this possible on the agreed schedule can only be jeopardised if the situation in the Terai continues or escalates", press statement, OPRSG, 26 January 2007, Kathmandu. Chief Election Commissioner Bhoj Raj Pokhrel similarly cautioned that such unrest threatens the election timetable, "Terai unrest may delay CA polls: CEC Pokhrel", nepalnews.com, 27 January 2007.

VI. PUBLIC PARTICIPATION

The constitutional transition requires a consensus among key political actors but public involvement is also vital.¹⁹¹ The 1990 Constitution came to be regarded as illegitimate in part because it was not seen to derive from a public consultative process. Legitimacy, and hence stability, typically flow from the perception of public involvement in a constitution's preparation.¹⁹² A visibly public drafting process would make the new constitution a more stable framework for resolving future political disputes. There is in any case little prospect of suppressing social fault-lines (for instance, of ethnic and religious identity) via a top-down process. One consequence of the Maoist insurgency is that Nepal can no longer avoid discussing long-standing inequities. Constitution making cannot be solely an elite affair.¹⁹³

Discontent about exclusion has procedural as well as substantive facets. The public scepticism that resulted from the absence of a visibly participatory drafting process has been a major factor in the collapse of Nepal's five past constitutions. Diverse and overlapping NGO projects to "educate" the public and gather views have already begun. Public participation in constitution making, however, needs more than public input. It also needs an institutional mechanism to collate, process and inject views into elite decision-making processes. There is no such mechanism, and

¹⁹¹ A study of several constitution-making processes by UNDP and the U.S. Institute for Peace concluded that "those cases in which the entire constitution-making process remained secretive and closed have permitted deal making among elites but have not typically produced either the most vibrant of constitutional democracies or the most stable governments over the long term". Quoted in Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights: Building the Rule of Law After Military Interventions* (New York, 2006), p. 95.

¹⁹² A comparative study of twelve constitutional-making processes concluded "Constitutions that were representative or involved a process of consultation and participation were perceived as more legitimate and hence received greater public support". Kirsti Samuels, "Constitutional Drafting Processes and Democratization: A Discussion of Twelve Case Studies", International Institute for Democracy and Electoral Assistance, p. 5; see also Vivien Hart, United States Institute of Peace (USIP), "Democratic Constitution Making" *USIP Special Report*, no. 107, July 2003, pp. 4-7.

¹⁹³ The alternative would be analogous to 1990: elite consensus twinned with popular dissatisfaction. In other contexts, this has proved a volatile mix. Kirsti Samuels, "Post-Conflict Peace-Building and Constitution-Making", *Chicago Journal of International Law*, vol. 6, 2005-2006, p. 670.

neither the CPA nor the interim constitution proposed one. Without an intermediary institution such as a constitutional commission, public participation will likely be token, and public confidence in the resulting settlement will suffer. This role could be played by the proposed CA secretariat, if suitably empowered and staffed, or by an independent body along the lines of a constitutional commission.

A. EDUCATION, DISSEMINATION AND DISCUSSION

Public education has been led by the media and also backed by NGO efforts. As elections draw closer, however, party campaigning and government outreach efforts will be increasingly important. In addition, other non-governmental entities such as trade unions, professional associations, religious organisations and regional, ethnic and other single-issue pressure groups are mobilising for particular constitutional changes.

Public debate on the constitution will be decentralised and uncoordinated – natural in a healthy democracy. But public education efforts raise two more serious concerns. First, they are predicated on the assumption that citizens' participation in constitution making will go beyond merely voting for CA delegates. As discussed above, institutional avenues for meaningful involvement do not yet exist. Secondly, many public education initiatives are grounded in a "consciousness-raising" model which assumes that knowledge flows down from civil society opinion-formers to the "grassroots".¹⁹⁴ This may simply reinforce elite agendas – especially in the case of single-issue advocacy groups. Information about the constitution-making process certainly needs wide dissemination¹⁹⁵ but public involvement should not be top-down. Nepalis who are not part of political elites (including civil society leaders) should be able to articulate interests and goals which are not well reflected in the political establishment.

Ethnic and linguistic differences in public education also merit careful attention. While ethnicity may not be the most significant of Nepal's social fault lines, it receives disproportionate attention. Ethnic groups are

¹⁹⁴ Crisis Group interview, political scientist, Kathmandu, October 2006.

¹⁹⁵ One poll found that only 35 per cent of Nepalis had heard only "a little" or "not heard" about the constituent assembly, with 61 per cent having heard "some" or "a lot" about the assembly. Only 1 per cent of those polled, however, expressed any disapproval of the idea. Greenberg Quinlan, op. cit., p. 10.

more coordinated than, for example, the decentralised community of Kathmandu-based dalit advocacy groups.¹⁹⁶ Yet dalits tend to be among the poorest citizens and face discrimination even from members of ethnic groups.¹⁹⁷ Self-designated ethnic civil society leaders, moreover, do not necessarily reflect fully or accurately the views of the rural communities for which they purport to speak;¹⁹⁸ in particular, cultural and linguistic issues raised by civil society elites may only imperfectly reflect needs of a broader rural community.

NGOs are potentially important for disseminating information about the constitution and have been effective in some areas. However, they are likely to be overshadowed by political party efforts – despite their weaknesses, the parties still have nationwide networks and are not necessarily seen as any more corrupt and self-serving than many NGOs. The major vehicle for debate and information dissemination will be the media. Protecting its freedoms will be important: threats to journalists could compromise wide discussion.¹⁹⁹ The interim constitution guarantees press freedom but includes restrictive provisions which could be very broadly interpreted.²⁰⁰ Federation of Nepalese Journalists President Bishnu

Nisthuri has warned that the SPA and Maoists have not created a genuinely free media environment.²⁰¹ Still, the quantity and quality of debate is encouraging. Apart from news reporting and detailed opinion pieces in the established press, a number of initiatives to make the most of radio networks are expanding the scope.²⁰²

B. INCLUSIVENESS

Overcentralisation of the state and resulting inequities in resource distribution and political power (often following caste, ethnic and geographic lines) helped the Maoists to recruit support, but their mobilisation around these issues has raised expectations and radicalised activists. Constitution making must permit the articulation of identity-based grievances while preventing ethnic, linguistic or cultural polarisation. Recognising this, the CPA signatories vowed to end all forms of discrimination.²⁰³ However, constitutional change alone cannot achieve such a dramatic transformation. The SPA and the Maoists will have to manage expectations more realistically while finding creative, equitable solutions to social and political conflicts that the party governments of the 1990s did not resolve.

The interim constitution removes the 1990 document's limitation on ethnically-defined parties, albeit in vague terms that leave open the possibility of new restraints.²⁰⁴ Nevertheless, there is little indication that

¹⁹⁶ Crisis Group interview, dalit NGO leader, Kathmandu, October 2006. Ethnic groups' exclusion from political posts varies widely. See Krishna Hachhethu, "The Question of Inclusion and Exclusion in Nepal: Interface Between State and Ethnicity", conference paper presented at "The Agenda of Transformation: Inclusion in Nepali Democracy", Social Science Baha, 24-26 April 2003, Kathmandu.

¹⁹⁷ Hari Prasad Bhattarai, "Cultural Diversity and Pluralism in Nepal: Emerging Issues and the Search for a New Paradigm", *Contributions to Nepalese Studies*, vol. 21, no. 2, July 2004, p. 309.

¹⁹⁸ In particular, the umbrella organisation NEFIN does not represent every ethnic group (and has made decisions on defining which populations deserve separate classification – currently a total of 59 groups) nor does it necessarily reflect political formations within communities. Crisis group interviews, Nepali political analysts, Kathmandu, October 2006.

¹⁹⁹ On concerns related to Tarai violence see "CPJ calls for probe into attacks on journalists in Nepalgunj", Committee to Protect Journalists, New York, 3 January 2007, at <http://www.cpj.org/news/2007/asia/nepal03jan07na.html> and "FNJ concerned over continued attack against media", nepalnews.com, 30 January 2007.

²⁰⁰ The government can restrict "any act which may undermine the sovereignty or integrity of Nepal, or which may jeopardise the harmonious relations subsisting among the peoples of various castes, tribes or communities; or on any act of sedition, defamation, contempt of court or incitement to an offence; or on any act which may be contrary to decent public behaviour or morality". Art. 15(1). This may contravene ICCPR Art. 19(3).

²⁰¹ "FNJ marks 'black day'", nepalnews.com, 2 February 2007.

²⁰² For example, a daily discussion program produced by Antenna Foundation uses two-way satellite links to enable nationwide phone-in debates with invited guests. By offering freephone access in different regions of the country this has encouraged a broad cross-section of people to participate, bridging technical and financial constraints.

²⁰³ It promised an end to "discriminations based on class, ethnicity, lingual [sic], gender, cultural, religion and region and to deconstruct the centralised and unitary structure of the state and to reconstruct it into an inclusive, democratic and forward-looking state". CPA, Art. 10.1.

²⁰⁴ The interim constitution prohibits restrictions on political parties (Art. 141(1)) but bars parties with "objectives contrary to the spirit and norms of the preamble of this constitution" (Art. 141(3)). It also bars the registration of "any political party if any Nepali citizen is discriminated against becoming a member of the political party on the basis of religion, caste, tribe, language or sex or if the name, objectives, insignia or flag of such political parties is of a nature that it would disturb the religious or communal harmony or of the nature to divide the country, or such party constitution or rules are for purposes of protecting and promoting a party-less or single party system of governance" (142(4)). This echoes Article 112 (2) and (3)

new parties organised on ethnic lines will be able to build sufficient presence to translate into meaningful CA representation.²⁰⁵ Mainstream parties will therefore remain vehicles for marginalised groups, but they must overcome histories of discrimination and neglect if they are to compete effectively with the Maoists for minority votes. Strengthening internal democracy would provide greater opportunities for ethnic minorities, women, and dalits in policy-making. However, few party leaders expressed interest in such internal reform.

In attempting to deal with long-ignored inequalities, Nepal risks transforming ethnic divisions into new causes of conflict. The Maoists, for example, have raised perhaps unrealistic hopes by promising “self-determination” for some (but not all) geographically concentrated ethnic groups.²⁰⁶ The mainstream parties are unlikely to have the credibility to address these exclusions if they remain dominated by a limited set of ethnic groups and castes.

One NC central committee member argued that inclusiveness could be addressed by altering the party's constitution to include a specific reference to the importance of “inclusive democracy”.²⁰⁷ Mainstream

of the 1990 Constitution, which prohibited any party with an ideology that was “inconsistent with [the] Constitution” and parties formed “on the basis of religion, community, caste, tribe or region”; these provisions were used to prevent the registration of ethnic and region-based parties.

²⁰⁵ One leader of an ethnic federation has mooted formation of a political party but this idea has yet to develop. Crisis Group interviews, Nepali political analysts, Kathmandu, October 2006. Ethnic and regional parties, including the Nepal Sadbhavana Party, have fared poorly in past elections, a pattern that is unlikely to change. However, the Tarai protests focused renewed attention on regional issues and may well lead to the creation of new parties. In 1991 the Nepal Rastriya Janamukti Party campaigned for ethnic quotas within the political and administrative system: The largest share of the vote it received in any constituency was 14 per cent. In 1994, it failed to break the 3 per cent threshold required for recognition as a national party. John Whelpton, “Political Identity in Nepal: State, Nation, and Community”, in Gellner, et al., *Nationalism and Ethnicity*, op. cit., pp. 59-60.

²⁰⁶ Crisis Group interview, Baburam Bhattarai, Bhaktapur, October 2006, Maoist leaders are now careful to avoid talk of “self-determination” that might suggest a right to secede. Backing off from the Maoists' initial proposal of nine ethnically defined federal units, Bhattarai suggested that there should be “roughly” nine to eleven provinces, that self-determination applies in “principle” but not in “practice”, and that linguistic and territorial divisions also matter. This suggests the Maoists have realised the risk in their earlier rhetoric.

²⁰⁷ Crisis Group interview, NC central committee member, Kathmandu, 18 October 2006.

party failure over a decade of democratic rule to ameliorate social divisions, however, means that promises alone are unlikely to be sufficient. Opening party hierarchies to more ethnic minorities, dalits, and women would be one way to make a concrete start.²⁰⁸

The interim constitution takes a step in the right direction by requiring that party executive committees have “an inclusive system...for the inclusion of women, [and] Dalits including the members from neglected and suppressed regions”.²⁰⁹ It does not define what an “inclusive system” would be but one example is provided by the NC(D), whose January 2006 convention ruled that eight of eighteen central committee seats must be allocated to women and previously marginalised minorities.²¹⁰ Progress is not guaranteed: other parties have yet to follow, and the NC(D)'s innovation may be lost if it reunites with NC. Still, the interim constitution's provision may stimulate internal debate if parties feel pressured to live up to it. Cross-party caucuses to push for inclusion measures may also gain in influence, building on the precedent of the cross-party women's group that played an important role on the ICDC's composition.

C. FROM CONSULTATION TO PARTICIPATION

Public involvement means more than just consultation. It entails public spaces and institutions through which members of the public can engage, and be seen to engage, with political elites. It is not sufficient to allow a say but then not to reflect views in the final document. Indeed, allowing the public to voice opinions and then failing to heed them would undermine the resulting constitution's legitimacy. There is a need for mechanisms to incorporate the public contribution into the constitutional fabric.

The ICDC learned that it is easier to gather views than to process them. Its experience suggests the need for a separate, professionally-staffed body to manage the technical side of the constitution-making process. A possible candidate for this role has been identified by the interim constitution, which calls for a “Secretariat of the Constituent Assembly”, tasked with managing

²⁰⁸ Dalit activists, for example, stress the difficulty that dalit candidates have in winning national elections and also obtaining positions within political parties – including the CPN(M). Crisis Group interviews, Kathmandu October 2006.

²⁰⁹ Interim constitution, Art. 142(3)(c).

²¹⁰ Crisis Group interview, NC(D) central committee member, Kathmandu, October 2006.

“the work” of the assembly (responsibilities to be determined by a subsequent law).²¹¹ Another option would be to have a more aggressively conceived “constitutional commission”.²¹²

Whether a secretariat or a commission, the body's tasks would likely include drafting options for constitutional provisions (and explaining the implications of each); encouraging public submissions (by facilitating public education and outreach); processing public submissions and ensuring they are considered; and handling public communications about the process (to keep expectations realistic). To complete these tasks successfully means starting before the CA is formed: apart from technical drafting, most are important for the pre-election period.

D. INTERNATIONAL EXPERIENCE

Bureaucratic lethargy is a danger with any government body, and a new institution risks emasculation by patronage appointments – the fate, for example, of the Peace Secretariat.²¹³ Nevertheless there are models of constitutional commissions that the interim government might study. Experience from other nations suggests that planning and budgeting for effective public participation should begin as early as possible. The Kenyan constitutional commission, established in 2000, prepared and held educational meetings in every district in the country, collected 36,000 submissions and processed them into a manageable form for the constitutional convention held in 2003-2004.²¹⁴

Other relatively impoverished nations have also concluded that extensive public participation in constitution making is worth the financial cost. In April 1994, Eritrea initiated a two-year constitution-

making process that involved “literally thousands of meetings and seminars” and a broad variety of educational tools “from comic books to musical plays, radio broadcasts to secondary school essay contests”. At one stage, 147,000 citizens debated constitutional proposals in 157 locations in the country, while another 11,000 participated in debates in sixteen overseas sites. The process was budgeted at \$4.3 million;²¹⁵ the resulting constitution, adopted in 1997, was considered to have “a large measure of legitimacy”.²¹⁶ Writing in 1998, the chair of the constitutional commission argued that broad public consultation had not only entrenched the constitution as a legitimate political institution, but had also deepened popular involvement in democratic processes, as the public’s “initial diffidence...gradually gave way to more vigorous and candid involvement” in constitution making.²¹⁷

Benefits from public education processes are uncertain and rarely take immediate, tangible form. Public consultation, however thorough, will not necessarily overcome elite political resistance. The Constitution of Kenya Review Commission, for example, identified popular concerns (such as housing) that nevertheless did not make it into the final document because politicians stymied their adoption.²¹⁸ And misconceived initiatives can be counterproductive. During Rwanda's 2002 constitution-making exercise, educational efforts were generally construed as “instructions from the state” and did not add to the legitimacy of the process.²¹⁹ In Afghanistan, a national consultation process in June and July 2003 produced no perceptible changes in the draft constitution – indeed, it transparently prioritised the

²¹¹ Interim constitution, Art. 80.

²¹² This recommendation has already been made to the SPA and the Maoists in strong terms by a UNDP-sponsored constitutional adviser. Crisis Group interview, Professor Yash Ghai, Lalitpur, October 2006.

²¹³ Crisis Group interview, Western diplomat, Kathmandu, October 2006. The Peace Secretariat was established in 2004 to support the government's efforts to seek a peaceful resolution of the conflict. It was only minimally effective and was sidelined under the post-February 2005 royal administration.

²¹⁴ Crisis Group interview, Yash Ghai, Kathmandu, October 2006; Yash Ghai and Jill Cottrell, “Constitutional Ability, Inclusion, Participation, Discipline”, *Nepali Times*, 27 October 2006. See also Jill Cottrell and Yash Ghai, “Constitution Making and Democratisation in Kenya (2000-2005)”, *Democratisation* 14:1 (2007) pp. 1-25.

²¹⁵ Richard A. Rosen, “Constitutional Process, Constitutionalism, and the Eritrean Experience”, *North Carolina Journal of International Law and Commercial Regulation*, Winter 1999, pp. 285-99. Eritrea in 1994 did not have political competition like Nepal's today, but did contain dangerous ethnic and religious divisions.

²¹⁶ Göte Hanssen, “Building New States: Lessons From Eritrea” United Nations University Discussion Paper 2001/66, available at <http://www.wider.unu.edu/publications/dps/dp2001-66.pdf>.

²¹⁷ Bereket Habte Selassie, “Building a New Constitution for Eritrea”, *Journal of Democracy*, vol. 9, 1998, p. 173. Selassie is a highly respected professor of African studies at the University of North Carolina, Chapel Hill, not a political figure.

²¹⁸ Crisis Group interview, Yash Ghai, Kathmandu, October 2006; Yash Ghai, *Reviewing the Constitution: A Guide to the Kenyan Constitution* (Nairobi, 2002), pp. 12, 16-17, 24.

²¹⁹ Crisis Group Africa Report N°. 53, *Rwanda At The End Of The Transition: A Necessary Political Liberalization* 13 November 2002, pp. 6-7.

input and interests of the incumbent government,²²⁰ resulting in a constitution that centralised power in the hands of the president and his allies.²²¹

International practices thus do not offer Nepal an infallible model. But the precedents are worth studying, especially when they appear to fit with the country's own experiences.

VII. INTERNATIONAL ASSISTANCE

Constitution making is, and must remain, nationally owned. Nevertheless, internationals can further the goal of an inclusive process in several ways. Beyond diplomatic pressure on the pivotal political actors, they can provide important assistance not only for education and dialogue on issues, but also for the electoral commission and election monitoring, human rights and ceasefire monitoring, and the as yet undefined "civil affairs" component of the UN mission.

A. PRINCIPLES AND PRACTICALITIES

Nepal's rich history of debate on constitutional and political issues means that it does not require foreign hand-holders. Technical assistance that assumes the portability of constitutional models from one context to another is inherently suspect, however easy it might be to assume that the country's size and geography suggest parallels. Any efforts by donors to promote parochial models would in any case likely receive a cool welcome.²²²

Nepalis have formulated and driven forward their roadmap for constitutional change. This national ownership enhances the prospects for success but does not exclude an international role. External players can pressure all sides to follow clearly recognised democratic rules and can support monitoring to ensure that the elections are free and fair. Technical assistance should help cultivate Nepali intermediaries – part of "civil society"²²³ – who can develop and disseminate ideas about both constitutional process and substance.

Numerous Nepali academics associated with Tribhuvan University and private foundations have studied and commented on electoral and structural options in constitution making.²²⁴ The forthcoming

²²² In fact, determining when an institutional design feature from one context will be successful in another context is extremely difficult. See Mark Tushnet, "Returning with Interest: Observations on the Putative Benefit of Studying Comparative Constitutional Law", *University of Pennsylvania Journal of Constitutional Law*, vol. 1, Fall 1998, p. 325.

²²³ "Civil society", a problematic term with many possible significations, is loosely used here in the basic sense of non-governmental and non-political structures and networks such as academia, the press, non-governmental organisations, community associations and the like.

²²⁴ Recent books on the constitutional process by Nepali experts include Bhimarjun Acharya, *Making Constitution*

²²⁰ See Crisis Group Asia Briefing N°29, *Afghanistan: The Constitutional Loya Jirga*, 12 December 2003.

²²¹ Stromseth et al, op. cit., p. 97.

International IDEA compilation of Nepali perspectives on constitutional options illustrates the breadth and richness of national debate and should help develop it further. Kathmandu-based institutions such as the Social Science Baha and the Martin Chautari provide forums for public discussion and publish useful resources.²²⁵ Nepal also has a wide range of both Nepali- and English-language periodicals. Its relatively vibrant media provides vehicles for disseminating Kathmandu debates to the broader country. In particular, radio and weeklies such as *Himal Khabarpatrik*, *Nepal*, and *Samay* reach a broad national audience.

B. POLITICAL CONTEXT

Progress in the peace process has improved international unity. While some powerful players retain differing perspectives in private, all were quick to welcome the promulgation of the interim constitution and congratulate political leaders on the formation of the interim legislature. India is, as always, the dominant outside force. It was instrumental in shaping the framework for the peace process and is engaged in almost every aspect of Nepal's politics. It is comfortable with a CA – the same mechanism it used to draft its own constitution between 1947 and 1950.²²⁶ Beyond the purely political, its major long-term concern is to build closer economic links that tie Nepal into its own economic progress. This will raise nationalist hackles if it means more Indian capital holding sway but offers one of the best means of reducing the likelihood of future conflict – provided the fruits of economic development are fairly shared, something that India has yet to achieve domestically.

The U.S. is still in the painful process of readjusting its analysis and policy following the success of the April movement and Nepal's resounding rejection of Washington's long-standing contention that party-

Through Constituent Assembly (Kathmandu, 2006); Birendra Prasad Mishra, Taranath Dahal, Bholanath Dhungana, Sanjiv Ghimire, *Samvidhansabhako samrachana ra nirvachan paddhati* (Kathmandu, 2006); and Taranath Dahal (ed.), *Samaveshi loktantra* (Kathmandu, 2006).

²²⁵ For example, the Social Science Baha is publishing "concept briefs" in Nepali on about 30 key concepts and terms. Each between two and four pages, 100,000 copies will be printed and distributed to all village development committees, as well as being disseminated in the media and being the subject of discussion groups.

²²⁶ The 1990 Constitution was influenced by both its Indian and British counterparts; Indian precedents are frequently cited in supreme court arguments and judgements.

palace unity against the Maoists was the only way forward. The U.S. still formally lists the CPN(M) as a terrorist organisation and had warned that it will freeze aid to any ministries controlled by Maoists after the formation of the interim government. Even the establishment of the interim legislature prompted the suspension of a significant project on rule of law and respect for human rights.²²⁷ However, the U.S. Department of Treasury's Office of Foreign Assets Control subsequently granted a license allowing the State Department and the U.S. Agency for International Development (USAID) to continue providing assistance even if Maoists join the government.²²⁸ Other international players, most notably China,²²⁹ are less constrained by rigid positions. Most donors have publicly supported the peace process, but have done little to ensure coordination of assistance.

C. THE UN MISSION

On 23 January 2007 the Security Council unanimously adopted Resolution 1740, establishing a UN political mission in Nepal (UNMIN) led by a Special Representative of the Secretary-General. The mission's twelve-month mandate reflects the original request of the SPA and Maoists²³⁰ and the recommendations of the UN's December 2006 Technical Assessment Mission.²³¹ Its five specific tasks cover three areas: monitoring the management of arms and armed personnel and assisting the parties to implement their agreement; assisting in monitoring ceasefire arrangements; and providing technical support for the planning, preparation and conduct of CA elections, reviewing all technical aspects of the

²²⁷ "No trust", *Newsfront*, 29 January 2007. In fact, the rules on dealing with terrorist organisations can be worked around. This has happened, for example, to a limited degree in Lebanon, where Hizbollah, also listed by the U.S. as a terrorist organisation, is part (albeit an uneasy one) of a government with which Washington maintains close relations. Crisis Group interview, retired U.S. diplomat, January 2007.

²²⁸ "OFAC license ensures continued U.S. aid to Government of Nepal", U.S. embassy press release, Kathmandu, 7 February 2007.

²²⁹ See Crisis Group Report, *Nepal's Peace Agreement*, op. cit. on China's willingness to deal with the Maoists after April 2006.

²³⁰ See Crisis Group Report, *Nepal's Peace Agreement*, op. cit.

²³¹ The UN's Technical Assessment Mission, led by Personal Representative of the Secretary-General Ian Martin, visited Nepal in December 2006. See Crisis Group Report, *Nepal's Peace Agreement*, op. cit. The Secretary-General submitted his report to the Security Council on 9 January 2007. "Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process", UN Security Council, S/2007/7.

electoral process and reporting on the conduct of the election.²³²

The UN has already played a crucial role in overseeing the initial registration of Maoist weapons and fighters, as well as chairing the Joint Monitoring Coordination Committee, which brings together Maoist and state military representatives to manage the process. The establishment of a full, Security Council-mandated mission confirms the UN's engagement, gives it the capacity to fulfil the tasks requested of it and places it firmly at the centre of international assistance in specific areas. This makes coordination more feasible and should encourage political consensus on the overall direction of the process. The Secretary-General's report to the Security Council also placed great stress on the need for an inclusive process, concluding with foresight that:

The significant political process that Nepal has set in motion represents a crucial opportunity for the country to reshape its structures and institutions to reflect the capacities and meet the aspirations of all its peoples. The greatest challenge in the months ahead may be to ensure that Nepal's remarkable diversity becomes an abiding strength rather than a source of division.²³³

UNMIN does not have any specific mandate to assist the constitution-making process and the UN more generally has no formal role in this area. However, the UNDP has set up a constitution advisory support unit (CASU), in part at the request of the diplomatic community, to provide input. CASU and UNMIN work closely where possible and brief each other on relevant developments. CASU has established working relations with political parties, public and parliamentary officers, and civil society and professional organisations.²³⁴

²³² The full text of UN Security Council Resolution 1740 is in Appendix B.

²³³ "Report of the Secretary-General", op. cit., p.16. PRSG Ian Martin underlined this stress on inclusiveness in a press statement warning that the Tarai unrest could threaten the peace process. Press Statement, 26 January 2007, UNMIN.

²³⁴ CASU's activities have included consultations with political parties and the Peace Secretariat on the peace settlement and the interim constitution; commentaries on the draft peace accord and the draft interim constitution; preparation of materials for use in civic education; and establishment of translation services and facilitation of workshops and conferences. Projected activities include training workshops on constitution making for parties and induction courses for CA members.

D. AREAS OF ENGAGEMENT

Areas where international aid to the constitutional process is already deployed, or could usefully be developed, include:

Election assistance. UNMIN's mandate gives the UN a central role in technical assistance and electoral monitoring, but other donors have also pledged help. India has offered advice and practical aid; its deputy chief election commissioner and other senior officials have visited to advise counterparts, and it is planning further training and material support.²³⁵ The Japanese government has donated computer equipment, ballot boxes and training;²³⁶ the European Commission is keen to help and sent an election observation exploratory mission to discuss how.²³⁷ Independent organisations, most notably the U.S.-based Carter Center (which has already established a country office), will boost the international monitoring capacity.²³⁸ India, while wary of external political intervention, enthusiastically backs a large monitoring presence. "We'd like to see the country crawling with observers", said a senior diplomat. "There has to be national monitoring too but an international presence will do much more to reassure voters".²³⁹

Rule of law and human rights. Functioning law and order and institutionalised protection of human rights are essential components of a secure electoral environment. Some states were quick to develop military aid strategies for counter-insurgency but all have struggled to find the right way to assist civilian policing in the transitional period. "The Nepal Police and Armed Police Force have long wish-lists for equipment", an ambassador said, "but even if we supply everything they want, that won't necessarily boost their low morale or translate their nationwide presence into a feeling of public security".²⁴⁰

The interim constitution suggests that citizens' rights are not in the forefront of politicians' thinking:

²³⁵ Crisis Group interview, senior Indian diplomat, Kathmandu, January 2007.

²³⁶ "Japan to assist in CA elections, arms monitoring", ekantipur.com, 24 January 2007.

²³⁷ The 7-15 February mission was to assess the advisability, usefulness and feasibility of deploying a long term EU Election Observation Mission for the constituent assembly elections. European Commission email communication with Crisis Group, January 2007.

²³⁸ Crisis Group interviews, Carter Center officials, Kathmandu, January 2007.

²³⁹ Crisis Group interview, senior Indian diplomat, Kathmandu, January 2007.

²⁴⁰ Crisis Group interview, Kathmandu, January 2007.

empowering the interim cabinet with an unrestricted right to grant pardons seems to pre-empt public debate on transitional justice, for example.²⁴¹ The balancing of peace and justice priorities, for example with respect to the treatment of human rights abuses committed by both sides during the civil conflict, is inherently sensitive and should be left to a national decision-making process. But the international community can justifiably press all parties to abide by international standards (for example, by ensuring that the National Human Rights Commission appointment procedure meets the Paris Principles standard)²⁴² and live up to the CPA commitments, as well as insist, as the UN High Commissioner for Human Rights (OHCHR) did forcefully during a January 2007 visit, that rights issues not be swept aside by political elites for their own convenience.²⁴³ UNMIN has responsibilities in this area (as well as providing police advisers);²⁴⁴ OHCHR will continue to play a parallel role but also has to renegotiate its mandate with the government.

Voter education. Donors have already committed significant sums to aid public outreach. UK, Swiss, and Australian aid agencies, for example, are using a multi-year multi-million dollar Rights, Democracy and Inclusion Fund to support public education; the Canadian Cooperation Office has allocated \$1.2 million for the same purpose.²⁴⁵ These funds are focused on “grassroots” education. As some donor agencies acknowledge, gauging the success of such efforts is difficult.²⁴⁶ Maoist concerns that they risk

simply enriching NGOs may be tinged with political partisanship but cannot be dismissed out of hand.²⁴⁷

Donors should also consider ways of “bringing more ideas into the slipstream” while building up Nepali civil society.²⁴⁸ An example of how indigenous thinking can be supported while enhancing the general quality of debate is the already mentioned UNDP/International IDEA-funded volume of essays on constitutional topics by Nepali scholars.²⁴⁹ Such a book can feed into press and radio discussion of issues²⁵⁰ and inform intra-party debates. Some overlap in efforts is inevitable but UNDP has established a centralised database of projects related to constitutional education;²⁵¹ UNMIN’s responsibility for electoral assistance, coupled with its civil affairs capacity, may provide additional coordination capacity.

Ongoing development assistance. The bulk of foreign help still comes as development aid. Major bilateral and multilateral donors adapted to the changed circumstances of the conflict but have been quick to revert to more traditional practices as the peace process has taken hold. However, development engagement does not take place in a vacuum; it can affect the constitutional and political process. Some institutions may not appreciate the delicacy of the interim environment; for example, the World Bank’s strong pressure on the government to liberalise labour laws does not take into account problems of the SPA administration’s legitimacy and the potential unpopularity of such measures.²⁵²

More broadly, increased attention to the need for inclusive development will be hard to translate into action without determined leadership. Aid institutions largely reflect the established social hierarchy, are often professionally and politically conservative and may resist social change. Still, the donor community

²⁴¹ It may be that the pardon provision, like many other articles, was an unthinking replication of the 1990 Constitution rather than a deliberate initiative.

²⁴² See “Nepal – ICJ welcomes NHRC as constitutional body: Raises concerns regarding independence of appointments process”, International Commission of Jurists press release, Geneva, 24 January 2007.

²⁴³ On a visit to Nepal, United Nations High Commissioner for Human Rights Louise Arbour emphasised that ending impunity and resolving cases of forced disappearance would not jeopardise the peace process and should not be sidelined, statement to the press, 24 January 2007, Kathmandu. Her strong statement was partly in response to criticism that OHCHR should not pressure the government on internal matters. See “HR bodies should be careful not to disturb communal harmony, PM tells Arbour”, *Kathmandu Post*, 21 January 2007.

²⁴⁴ For UNMIN responsibilities, see Appendix B below.

²⁴⁵ Crisis Group interviews, donors, Kathmandu, October 2006.

²⁴⁶ Crisis Group interview, Kathmandu, October 2006.

²⁴⁷ Crisis Group interview, Baburam Bhattarai, Bhaktapur, 16 October 2006.

²⁴⁸ Crisis Group interview, senior journalist, Kathmandu, October 2006.

²⁴⁹ Crisis Group interview, Yash Ghai, Lalitpur, October 2006.

²⁵⁰ FM radio, which includes national and local commercial stations as well as a successful non-profit community sector, is probably the most effective vehicle for disseminating information outside the Kathmandu valley. Print has an increasing reach, with news weeklies such as *Himal Khabarpatrika, Nepal* and *Samay* distributed nationwide and a profusion of local papers, but print media are still constrained by poor rural distribution networks and low literacy rates.

²⁵¹ Crisis Group interview, UNDP staff members, Kathmandu, October 2006.

²⁵² Crisis Group interview, senior Western donor, Kathmandu, January 2007.

has tools and mechanisms that can help it chart a constructive course. The Basic Operating Guidelines that were developed in a conflict context may remain relevant as a means for pressuring all sides to behave responsibly.²⁵³ The postponed Nepal Development Forum,²⁵⁴ which brings together donors and the government, may go ahead as a Peace and Development Forum which could consider the links between development and the political process and build a more solid base for a coordinated approach.

VIII. CONCLUSION

Nepal's constitution-making process has tough targets to meet: it must conclusively settle the decade-long civil war and build a solid foundation to address deep-rooted ethnic, caste and social divisions. It has to achieve this while consolidating a weakened democracy and building public participation. Balancing elite and mass concerns and paying appropriate attention to both substantive and procedural issues is far from straightforward.

Mainstream political parties will remain key actors, especially if they seize this opportunity to increase their inclusiveness, promote internal democracy and tackle the worst excesses of patronage. The Maoists were a driving force for a CA. They now have to translate the achievement of this goal into votes – and work hard to prove that their movement can adapt itself to democratic rules. Other political parties, civil society and the international community should maintain pressure on them to keep their promise to abandon violence. The SPA in particular can also promote Maoist engagement by committing to clear processes, meeting agreed deadlines and doing more to lead by example when demonstrating democratic values.

Both mainstream parties and Maoists would benefit from richer internal debates on constitutional issues. It may be that many options are quietly being considered by party leaders, and certainly the media and special interest groups are not short of proposals. But there is no substitute for a wider debate which links parties' internal discussions to broader popular concerns. Similarly, transparency of policy discussion and the decision-making process should extend from the interim period into the CA itself. If that body is seen to proceed in a legitimate and relatively democratic manner, it will be more difficult for any political actor to repudiate its product or for the public to wish to do so.

Even a successful CA cannot in itself resolve the social and political conflicts that fuelled the Maoist insurgency. As the recent flare-up of tension in the Tarai has shown, these can take on new, more virulent forms until they are more fully addressed. Nevertheless, the constitution-making process is the best opportunity to reshape state structures and reform the political parties that will have to consolidate democracy and prevent a return to violent conflict.

Kathmandu/Brussels, 26 February 2007

²⁵³ The Basic Operating Guidelines were developed by a consortium of major European donors in collaboration with the UN.

²⁵⁴ This biannual forum should have convened in 2006 but was postponed because of the unfavourable political situation.

APPENDIX A

MAP OF NEPAL



APPENDIX B

ABOUT THE INTERNATIONAL CRISIS GROUP

UNITED NATIONS SECURITY COUNCIL RESOLUTION 1740 (2007)

The Security Council,

Welcoming the signing on 21 November by the Government of Nepal and the Communist Party of Nepal (Maoist) of a Comprehensive Peace Agreement, and the stated commitment of both parties to transforming the existing ceasefire into a permanent and sustainable peace and commending the steps taken to date to implement the Agreement,

Taking note of the request of the parties for United Nations assistance in implementing key aspects of the Agreement, in particular monitoring of arrangements relating to the management of arms and armed personnel of both sides and election monitoring,

Recalling the letter of the Secretary-General of 22 November 2006 (S/2006/920) and the statement of its President of 1 December (S/PRST/2006/49), and welcoming progress made in dispatching an advance deployment of monitors and electoral personnel to Nepal,

Recognizing the strong desire of the Nepalese people for peace and the restoration of democracy and the importance in this respect of the implementation of the Comprehensive Peace Agreement, and encouraging the parties to maintain that momentum,

Recognizing the need to pay special attention to the needs of women, children and traditionally marginalized groups in the peace process, as mentioned in the Comprehensive Peace Agreement,

Welcoming the Secretary-General's report of 9 January 2007 (S/2007/7) and having considered its recommendations, which are based on the request of the signatories of the Comprehensive Peace Agreement and the findings of the technical assessment mission,

Expressing its readiness to support the peace process in Nepal in the timely and effective implementation of the Comprehensive Peace Agreement,

Reaffirming the sovereignty, territorial integrity and political independence of Nepal and its ownership of the implementation of the Comprehensive Peace Agreement,

Expressing appreciation for the efforts of the Secretary-General and his Personal Representative, the United Nations Country Team including the Office of the High Commissioner for Human Rights and other United Nations representatives in Nepal,

1. *Decides* to establish a United Nations political mission in Nepal (UNMIN) under the leadership of a Special Representative of the Secretary-General and with the following mandate based on the recommendations of the Secretary-General in his report:
 - (a) To monitor the management of arms and armed personnel of both sides, in line with the provisions of the Comprehensive Peace Agreement;
 - (b) To assist the parties through a Joint Monitoring Coordinating Committee in implementing their agreement on the management of arms and armed personnel of both sides, as provided for in that agreement;
 - (c) To assist in the monitoring of the ceasefire arrangements;
 - (d) To provide technical support for the planning, preparation and conduct of the election of a Constituent Assembly in a free and fair atmosphere, in consultation with the parties;

- (e) To provide a small team of electoral monitors to review all technical aspects of the electoral process, and report on the conduct of the election;
- 2. *Decides* that the mandate of UNMIN, in view of the particular circumstances, will be for a period of 12 months from the date of this resolution, and expresses its intention to terminate or further extend that mandate upon request of the Government of Nepal, taking into consideration the Secretary-General's expectation that UNMIN will be a focussed mission of limited duration;
- 3. *Welcomes* the Secretary-General's proposal that his Special Representative will coordinate the United Nations effort in Nepal in support of the peace process, in close consultation with the relevant parties in Nepal and in close cooperation with other international actors;
- 4. *Requests* the Secretary-General to keep the Council regularly informed of progress in implementing this resolution;
- 5. *Requests* the parties in Nepal to take the necessary steps to promote the safety, security and freedom of movement of UNMIN and associated personnel in executing the tasks defined in the mandate;
- 6. *Decides* to remain seized of the matter.

APPENDIX C

ABOUT THE INTERNATIONAL CRISIS GROUP

The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organisation, with nearly 120 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

Crisis Group's approach is grounded in field research. Teams of political analysts are located within or close by countries at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, it produces analytical reports containing practical recommendations targeted at key international decision-takers. Crisis Group also publishes *CrisisWatch*, a twelve-page monthly bulletin, providing a succinct regular update on the state of play in all the most significant situations of conflict or potential conflict around the world.

Crisis Group's reports and briefing papers are distributed widely by email and printed copy to officials in foreign ministries and international organisations and made available simultaneously on the website, www.crisisgroup.org. Crisis Group works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

The Crisis Group Board – which includes prominent figures from the fields of politics, diplomacy, business and the media – is directly involved in helping to bring the reports and recommendations to the attention of senior policy-makers around the world. Crisis Group is co-chaired by the former European Commissioner for External Relations Christopher Patten and former U.S. Ambassador Thomas Pickering. Its President and Chief Executive since January 2000 has been former Australian Foreign Minister Gareth Evans.

Crisis Group's international headquarters are in Brussels, with advocacy offices in Washington DC (where it is based as a legal entity), New York, London and Moscow. The organisation currently operates thirteen field offices (in Amman, Bishkek, Bogotá, Cairo, Dakar, Dushanbe, Islamabad, Jakarta, Kabul, Nairobi, Pristina, Seoul and Tbilisi), with analysts working in over 50 crisis-affected countries and territories across four continents. In Africa, this includes Angola, Burundi, Côte d'Ivoire, Democratic Republic of the Congo, Eritrea, Ethiopia, Guinea, Liberia, Rwanda, the Sahel region, Sierra Leone, Somalia, Sudan, Uganda and Zimbabwe; in Asia,

Afghanistan, Indonesia, Kashmir, Kazakhstan, Kyrgyzstan, Myanmar/Burma, Nepal, North Korea, Pakistan, Sri Lanka, Tajikistan, Turkmenistan and Uzbekistan; in Europe, Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Kosovo, Macedonia, Moldova, Montenegro and Serbia; in the Middle East, the whole region from North Africa to Iran; and in Latin America, Colombia, the Andean region and Haiti.

Crisis Group raises funds from governments, charitable foundations, companies and individual donors. The following governmental departments and agencies currently provide funding: Australian Agency for International Development, Austrian Federal Ministry of Foreign Affairs, Belgian Ministry of Foreign Affairs, Canadian Department of Foreign Affairs and International Trade, Canadian International Development Agency, Canadian International Development Research Centre, Czech Ministry of Foreign Affairs, Dutch Ministry of Foreign Affairs, Finnish Ministry of Foreign Affairs, French Ministry of Foreign Affairs, German Foreign Office, Irish Department of Foreign Affairs, Japanese International Cooperation Agency, Principality of Liechtenstein Ministry of Foreign Affairs, Luxembourg Ministry of Foreign Affairs, New Zealand Agency for International Development, Royal Danish Ministry of Foreign Affairs, Royal Norwegian Ministry of Foreign Affairs, Swedish Ministry for Foreign Affairs, Swiss Federal Department of Foreign Affairs, Turkish Ministry of Foreign Affairs, United Kingdom Foreign and Commonwealth Office, United Kingdom Department for International Development, U.S. Agency for International Development.

Foundation and private sector donors include Carnegie Corporation of New York, Carso Foundation, Compton Foundation, Ford Foundation, Fundación DARA Internacional, Iara Lee and George Gund III Foundation, William & Flora Hewlett Foundation, Hunt Alternatives Fund, Kimsey Foundation, Korea Foundation, John D. & Catherine T. MacArthur Foundation, Charles Stewart Mott Foundation, Open Society Institute, Pierre and Pamela Omidyar Fund, Victor Pinchuk Foundation, Ploughshares Fund, ProVictimis Foundation, Radcliffe Foundation, Sigrid Rausing Trust, Rockefeller Philanthropy Advisors and Viva Trust.

February 2007

APPENDIX D

CRISIS GROUP REPORTS AND BRIEFINGS ON ASIA SINCE 2004

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The Curse of Cotton: Central Asia's Destructive Monoculture, Asia Report N°93, 28 February 2005 (also available in Russian)

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Uzbekistan: The Andijon Uprising, Asia Briefing N°38, 25 May 2005 (also available in Russian)

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Nepal: Dangerous Plans for Village Militias, Asia Briefing N°30, 17 February 2004 (also available in Nepali)

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Afghanistan: From Presidential to Parliamentary Elections, Asia Report N°88, 23 November 2004

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Afghanistan: Getting Disarmament Back on Track, Asia Briefing N°35, 23 February 2005

Nepal: Responding to the Royal Coup, Asia Briefing N°35, 24 February 2005

Nepal: Dealing with a Human Rights Crisis, Asia Report N°94, 24 March 2005

The State of Sectarianism in Pakistan, Asia Report N°95, 18 April 2005

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Towards a Lasting Peace in Nepal: The Constitutional Issues, Asia Report N°99, 15 June 2005

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