

THE FOG OF PEACE

COMPARING U.S. AND UN APPROACHES TO
CONFLICT MANAGEMENT IN NEPAL

WHY DID THE CONTRASTING STRATEGIES EMPLOYED BY THE UNITED STATES AND UNITED NATIONS FAIL TO SHAPE THE PREFERENCES OF THE UNIFIED COMMUNIST PARTY OF NEPAL (MAOIST)?

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List of Acronyms

CPA	Comprehensive Peace Agreement
CPN (UML)	Communist Party of Nepal (United Marxist Leninist)
FTO List	Foreign Terrorist Organization List
FTO	Foreign Terrorist Organization
GWOT	Global War on Terror
JMCC	Joint Monitoring Coordinating Committee
NA	Nepalese Army
NC	Nepali Congress
NDI	National Democratic Institute
NGO	Non-Governmental Organization
NSAG	Non-state Armed Group
OFAC	Office of Foreign Assets Control
PLA	People's Liberation Army
RNA	Royal Nepalese Army
SDGTs	Specially Designated Global Terrorists
SDN List	Specially Designated Nationals and Blocked Persons List
SDTs	Specially Designated Terrorists
SRSG	Specially Representative of the UN Secretary General
TEL	Terrorist Exclusion List
UCPN(M)	Unified Communist Party of Nepal (Maoist)
UNMIN	United Nations Mission in Nepal
YCL	Young Communist League

Introduction

In July 2009, during a major foreign policy address at the Council on Foreign Relations, U.S. Secretary of State Hillary Clinton defended President Barack Obama's decision to engage pariah states such as Iran, Sudan, and North Korea. In this speech, Secretary Clinton emphasized the realist benefits that would accrue from a more proactive engagement policy:

Our second policy approach is to lead with diplomacy, even in the cases of adversaries or nations with whom we disagree. We believe that doing so advances our interests and puts us in a better position to lead with our other partners...As long as engagement might advance our interests and our values, it is unwise to take it off the table (Clinton 2009)

While this speech articulated a clear policy shift on rogue states, Secretary Clinton provided no clarity as to whether the Administration would similarly engage rogue armed groups.

An engagement strategy is employed to change an adversary's perception of its self-interest while proposing attractive alternatives to its current course of action. The logic of engagement is not confined to state-to-state relations. It has been the rationale behind numerous UN-led mediation efforts with non-state armed groups (NSAGs) in conflict-affected countries. Traditionally, the UN has talked to everybody, including groups that are considered terrorists by the U.S. Alternatively, the U.S. rarely chooses to overtly engage armed groups. With certain notable exceptions (Mozambique, Sierra Leone) American Ambassadors in conflict-afflicted and post-conflict countries have generally chosen to ignore, isolate and/or sanction NSAGs.

U.S. and UN approaches to conflict management in Nepal were defined by this fundamental bifurcation over the efficacy of engagement. This study will consider why

the contrasting strategies employed by the U.S. and UN failed to shape the preferences of the Unified Communist Party of Nepal (Maoist)¹. I will argue that the United States and United Nations—two of the most influential foreign actors in post-conflict Nepal—employed incentives and disincentives to influence the Maoists that were not carefully calibrated or coordinated. These failed policies have produced a stagnant peace process.

The Maoists have been a specially designated terrorist entity by the U.S. since 2003. This paper will demonstrate that the language and mindset of counter-terrorism—which pre-dates the Global War on Terror (GWOT)—impeded the U.S.’ ability to contextually analyze the likelihood that the Maoists could moderate and evolve into a legitimate political party. The terrorist tag was the primary obstacle that prevented the U.S. from playing a more constructive role in Nepal’s peace process. Labeling a group a terrorist entity and cutting off the possibility for engagement can become a self-fulfilling prophecy, neutralizing incentives for an armed group to undergo the difficult transformation into a legitimate and nonviolent political party. I will argue that the political advantages of the proscription of the Maoists did not outweigh the legal obstacles it created.

Alternatively, the United Nations pursued a strategy of inducement and socialization, but failed to appropriately respond to Maoist actions that contravened the letter and the spirit of the Comprehensive Peace Agreement, the foundation of Nepal’s peace process. The United Nations Mission in Nepal (UNMIN) was established as a political mission with a narrow mandate, lacking both armed peacekeepers and the power to act as an official mediator. The UN’s approach to conflict management in Nepal

¹ This paper will refer to the UCPN(M), its predecessor the Communist Party of Nepal (Maoist), and the People’s Liberation Army (PLA) interchangeably as “the Maoists”.

suggests that they did not anticipate the possibility that the Maoists had entered into negotiations in bad faith.

Neither the U.S.' non-recognition strategy nor the U.N.'s engagement strategy succeeded in changing the Maoists' intentions, capabilities or behavior. Both strategies failed to influence the Maoists to adjust their preferences to those of the international community. The U.S. and the UN did not sufficiently diminish the incentives of prominent leaders in the Maoists to pursue destabilizing revolutionary goals.

Of all the NSAGs groups, why study Nepal's Maoists? First, the Maoists are one of the few insurgent forces to fight a state to a stalemate and then win a plurality of votes through an internationally monitored democratic election. Second, unlike most armed groups, it consults regularly with the United Nations and has—thus far—avoided the temptation to resume their “People’s War” in response to political setbacks. Third, they are an outlier among the groups proscribed by the U.S.: non-Islamic and unassociated with any powerful outside backer (they receive almost no funding from governments, Diaspora groups, or criminal networks) (Norris interview 2010). Fourth, as a non-strategic country, Nepal's peace process could be considered an experimental greenhouse for the engagement of more controversial armed groups. Unlike Palestine or Lebanon, U.S. engagement of the Maoists would precipitate little if any domestic political pressure, Congressional opposition, or negative media attention. Fifth, the Nepal case highlights the challenges of having relations with a country whose democratically elected government is led by a U.S. sanctioned terrorist group.

This paper will begin with a brief analysis of the conflict in Nepal, including a discussion of conflict drivers, the historical context, the main mechanisms of the peace

process, and the initial roles played by external actors. Part 2 will introduce the concept of “spoiler management” and examine the conduct of the Maoists since the commencement of the peace process in order to determine if they are negotiating in good faith. Part 3 will examine the U.S. policy toward the Maoists, including a detailed review of the terrorist list system. Arguments critical of U.S. policy will be considered—the proscription of the Maoists isolated the U.S. from the peace process; the conditions imposed by the U.S. lacked clear gradations; the terrorist tag impeded non-governmental peacebuilding efforts. Part 4 will examine the UN’s policy toward the Maoists and similarly consider critiques of the international organization’s more conciliatory approach—UNMIN’s mandate was flawed; the UN was not sufficiently empowered to act as a mediator; the UN had unrealistic faith in Nepal’s local ownership of the peace process; UNMIN possessed no credible deterrent for spoiling. Parts 3 and 4 draw heavily from interviews conducted in Kathmandu and Washington, several with participants in the ongoing peace process. Part 5 will test the relevance of spoiler management theories to the conflict in Nepal. The final section will review a series of lessons learned from Nepal’s peace process. I conclude with recommendations that the U.S. reform the terrorist list system and the UN properly calibrate its mandate in future peace operations and ensure that focused missions of limited duration remain focused and limited.

Nepal is illustrative of a challenge that governmental arbiters of peace processes will face during the interim period after a terrorist group (in this case the Maoists) has committed to peace talks but before it has agreed to disarm or reject violence. The terrorist group in transition emphasizes how far they have come, while the skeptics (in this case the U.S.) focuses on how much further they must go (to warrant a reevaluation

of their terrorist label). This misperception risks “poisoning the well” at critical stages of negotiations with armed groups. Without further reform, some armed groups will have no incentive to moderate and reform and no explicit pathway to follow should they wish to improve their relations with the United States (and the broader international community). On the opposite end of the spectrum, a third party (in this case the UN) that does not respond publicly and forcefully to blatant violations of the letter and spirit of a peace agreement will similarly fail to encourage moderation.

As the United States expands its role in stabilizing and rebuilding post-conflict states, policymakers would be wise to learn the lessons of the UN’s achievements and failures in spoiler management.

Part I: Background

A Grey Zone Between Winning and Losing the Peace

Nepal's peace process is either a remarkable success story or a disaster unfolding in slow motion. Its ambitions are seemingly limitless, seeking to address Nepal's systemic inequality, the rewriting of the constitution, and the integration of two antagonistic armies. For a period of time, the odds were stacked against the cynics: active combat between the Nepalese Army (NA)² and the Maoists had not reignited; the process was locally-owned and conducted through the framework of the Comprehensive Peace Agreement (CPA); significant consensus existed that reform was overdue and the monarchy should be replaced by a representative, democratic government; the United Nations had been invited by a coalition of parties to facilitate a consent-based peace process with widespread popular support; and a ceasefire was respected by both parties, despite retaining access to weapons lockers.

Neither the optimists nor the pessimists have been proven right as of this writing. The peace process has neither reached its "logical conclusion" (a phrase that has become stale with overuse in Nepal), nor has it collapsed. However, the prosperity and stability promised by Nepal's peace process seems far less likely today than it did in the heady days of the *Jana Andolan* (People's Movement).

² In the course of Nepal's peace process and the dissolution of the Monarchy, the Royal Nepalese Army was renamed the Nepalese Army (NA). When describing events that take place before this event, the author will refer to them as the RNA.

Historical Context

For over 200 years, Nepal existed as a feudal monarchy that was well insulated from penetration by foreign democratic trends. A brief flirtation with democracy in 1959 culminated in a constitution that created the *panchayat* system of government, which eschewed political parties in favor of royal paternalism. In 1990, a pro-democracy movement revived long-dormant political parties with the goal of creating a constitutional monarchy. Elections were held the following year, but produced a series of weak governments. Nepalis lost faith with the political process as the state continued to fail to deliver on promises of poverty reduction and economic development. Frustration and anger became endemic as corruption and nepotism eroded the legitimacy of one weak government after another.

In 1996, the Communist Party of Nepal (Maoist) coalesced from a number of small, leftist factions and launched a “People’s War” following the Nepali government’s rejection of a 40-point list of demands. For the first five years of the war, the majority of hostilities were confined to Maoist raids on remote police posts; it was not until November 2001 that the Royal Nepalese Army (RNA) was mobilized to fight the Maoists³ (Gersony 2003, 28). On June 1, 2001 the crown prince massacred King Birendra and much of the Royal Family, exacerbating the country’s pervasive sense of insecurity. The King’s brother, Gyanendra, ascended to the throne and deployed the RNA shortly thereafter.

³ There are many theories speculating on why the RNA was not mobilized sooner. One posits that the Palace actively discouraged a military response in order to discredit the nascent multi-party democratic system which had been launched in 1990 and demonstrate that the irresolute politicians were incapable of providing security throughout the country (Gersony 2003, 30)

The conflict killed more than 13,000 Nepalis; the majority of the victims were civilians. Human rights violations by both the RNA and the Maoists were rampant. Several thousand child soldiers were conscripted into the PLA; in a four-month period in 2005, the Maoists abducted 8,777 people, many of whom were children (BTI Index 2008, 17). State terror was also prevalent and many villages perceived the RNA as “distant, terrifying and unpredictable” (Hutt 2004, 270). Between November 2001 and the formal end of the conflict in 2006, 1,700 people were “disappeared,” of which 1,300 were attributed to the RNA (Human Rights Watch 2006).

At the apex of their power, the Maoists were governing nearly 70% of the countryside through shadow district-level governments and courts (Cochran-Budhathoki 2006). Their control was such that one journalist Sudheer Sharma described the police officials that were ostensibly in control of Maoist-held areas as Kathmandu’s “ambassadors” to the “Maoist nation” (Hutt 2004, 44).

The war reached a turning point during the *Jana Andolan* of 2006, when thousands of Nepalis took to the streets to protest the monarchy’s drift into authoritarianism. After a tense 17-day stand off, the King issued a royal proclamation calling for a restoration of the Parliament and endorsing negotiations with the Maoists. These negotiations led to the Comprehensive Peace Accord (CPA) in November 2006.⁴

In early 2008, the Maoists won a plurality of Parliamentary seats in Nepal’s first UN-monitored post-conflict election. They are the third U.S.-sanctioned terrorist group to win a democratic election (the others being Lebanon’s Hezbollah and Israel/Palestine’s Hamas).

⁴ These early stages of the peace process had a substantial degree of local ownership, with the UN and interested Embassies playing at most a secondary role (Suhrke 2009, 2).

Conflict Analysis

Nepal is a neo-feudal state. Only 29% of the population falls into the higher castes that dominate the country's political and economic spheres (Marks 2003, 3). Systemic exclusion permeates both rural and urban Nepal (Bonino and Donini 2009, 7). Discrimination against ethnicity, caste, gender, and regions are cited as the primary means of exclusion from avenues of personal advancement, government services, or access to justice (Hutt 2004, 17).

A variety of marginalized communities have significant grievances against the ruling elite, which enabled the Maoists to cultivate a relatively fluid ideological platform that appealed to Nepal's many fragmented constituencies. On the one hand, the Maoists were able to appropriate the specific claims of regional and ethnic struggles against the central government; on the other hand, they espoused a more generalized ideology of massive agrarian reform, land and wealth redistribution, and justice (Hutt 2004, 103).

The inequitable distribution of wealth reinforces divisions between urban and rural Nepalis, with the average income in Kathmandu, five times that of many rural districts (Hutt 2004, 17). Fifty years of donor aid have led to a concentration of resources in the capital that does not reach its intended beneficiaries in the periphery (Bonino and Donini 2009, 7). Nepal has the lowest per capita income in South Asia, and lacks a social safety net outside of patronage, yet "economic development has almost no place in the country's political discourse" (BTI 2007, 22).

Nepal's lack of democratic institutions forces citizens in isolated and rural areas to depend upon networks of patronage in order to receive any services from Kathmandu. These patronage networks are easily susceptible to corruption and abuse. Many rural Nepalis find themselves at the mercy of moneylenders who charge exorbitant interest on loans (Hutt 2004, 18). The practice of bonded labor is widespread, and certain groups—such as Tharus displaced by Royal land grants—have been especially vulnerable to exploitation (Gersony 2003, 33). The Maoist employ of People's Courts was meant to alleviate the burden of corruption that defined rural Nepalis interactions with the state (Hutt 2004, 18). The Maoists also capitalized on dissatisfaction with multi-party democracy, which failed to deliver material benefits or reduce corruption (Gersony 2003, 40). In addition to exclusionary political structures, cultural practices were perceived by the Maoists to impede social change, such as exorbitant dowry prices and the teaching of Sanskrit (Hutt 2004, 18). According to anthropologist Sara Schniederman, “Within the Maoist movement...villagers felt that they were empowered agents shaping and creating their country's destiny, not passive spectators watching from the political sidelines...” (Hutt 2004, 88).

The conduct of the war itself accelerated grievances, as more victims of individual acts of cruelty fled their villages and more young people were forced to migrate to urban centers after being accused by either the Maoists or the security forces of having suspect allegiances (Hutt 2004, 280).

The Maoist stronghold was and remains the hill districts of Rukum and Rolpa, also known as the Rapti River Valley. Amidst the backdrop of corruption and exclusion described above, incidents specific to this region were crucial factors in exacerbating

local grievances and providing the Maoists with a base of support. At the dawn of the Maoist insurgency in the nineties, the Rapti River Valley was isolated and infrastructure-poor. Rukum district lacked roads until 2003 (Gersony 2003, 7). Local traditional livelihoods—sheep herding, iron mining, and service in the British and Indian armies—had been in decline since the 1970s (Gersony 2003, 12). Specific government decisions aggravated the region’s already fragile economy, such as a crackdown on hashish and marijuana cultivation (that had previously been tolerated) beginning in 1976; the administrative transfer of Rukum’s capital in 1973, which disrupted networks of patronage and employment opportunities; police harassment of Hindu converts to Christianity; and government mismanagement of large-scale development projects—such as the incomplete Musikot Airport and Liwang Hospital—which became symbols of government neglect (Gersony 2003, 14, 17-23). Failed expectations linked to an ambitious USAID-funded rural development project (encompassing water and irrigation systems, farm-to-market roads, suspension bridges, construction of Village Development Council offices, promotion of off-season vegetable cultivation, apple orchard cultivation) in the 1970s and 1980s further exacerbated local alienation from the central government (Gersony 2003, 43-45).

Following the resumption of democracy in the 1990s, abuses of power by members of the Nepali Congress and harassment by the security apparatus of the United People’s Front (the predecessor to the Maoist party) culminated in Operation Romeo in 1995, which was described by USAID as a campaign of “massive brutal retaliation...[with]...widespread human rights abuses including torture, rape, detention and murder” (Hutt 2004, 5, 38). The culmination of these macro and micro conflict

drivers was a situation where, “...none supported the government as wholeheartedly as some supported the Maoists” (Hutt 2004, 19).

Nepali sociologist Saubhagya Shah has questioned the sincerity of the mainstream conflict narrative, arguing that other hill districts afflicted by greater social and economic marginalization than Rukum and Rolpa would have been better catalysts for rebellion (Hutt 2004, 193). Like many districts of Nepal, Rukum and Rolpa were impoverished, but they lacked “striking inequalities in land and other property ownership” that defined other regions; it was not the typical profile of a community that would be conducive to producing a communist insurgency (Gersony 2003, 9). It is worth noting that two of the Maoists’ most visible leaders, Pushpa Kamal Dahal (whose nom de guerre is *Prachanda*, the Fierce One) and Baburam Bhattarai are both high-caste Brahmins and that the majority of the Maoist leadership was composed of Brahmins and Chetris (Gersony 2003, 27). Dalits and Tharus are among the most marginalized groups in Nepal, yet they make up only a fraction of the ranks of the Maoists (Gersony 2003, 32-33). In the view of Bob Gersony, who conducted a conflict assessment of the Rapti river valley for USAID in 2003, “the ethnic and caste dimension is a contributory, facilitating factor of the Maoist revolt, not a principal, core or defining element of the movement” (Gersony 2003, 34).

The Comprehensive Peace Accord (CPA)

The CPA formally ended the conflict between the Nepalese state and the Maoists and dissolved the Maoists’ parallel government and judicial system. The agreement established a transitional government and an interim constitution, set a timeline for

elections, and pledged the belligerents to, “pursue a political system that fully complies with the universally accepted fundamental human rights, competitive multiparty democratic system, sovereignty inherent in the people and the supremacy of the people, constitutional check and balance, rule of law, social justice and equality, independent judiciary, periodic elections, monitoring by civil society, complete press freedom, people’s right to information, transparency and accountability in the activities of political parties, people’s participation and the concepts of impartial, competent, and fair administration” (Comprehensive Peace Agreement 2006).

The CPA was exceptionally ambitious, as were the dozen plus subsequent agreements⁵. These agreement addressed the federal structure of the future Nepali state; security sector reform and the integration of the NA and PLA; transitional justice and human rights; ending caste/ethnic/religious discrimination; land reform; the return of property seized during the conflict; the Constituent Assembly; and progressive economic reform. Most importantly, several of Nepal’s peace accords outlined a framework that sent the army to its barracks, and the Maoists to UN-monitored cantonments.

Many international observers were optimistic that the CPA would herald a process that dismantled the structural obstacles to Nepal’s political, social and economic development. In the view of UN Resident and Humanitarian Coordinator Robert Piper,

⁵ Major agreements through June 2008: 12 Point understanding between the Seven Parties on 22 November, 2005; 8 point agreement between SPA and CPNM of 16 May 2006; The Code of Conduct for Ceasefire agreed between the Government of Nepal and the CPN (Maoist) on 25 May 2006 at Gokarna; Agreement between SPA and the CPNM on 8 November, 2006; Comprehensive Peace Accord of 21 November, 2006; Agreement on Monitoring of Management of Arms and Armies on 8 Dec 2006; Agreement between the Government and the Janjatis, 7 August 2007; Agreement between the Government and the MPRF on 30 August, 2007; Agreement between the Government and the Chure Bhabar Pradesh Ekta Samaj, 13 September, 2007; Agreement between the Government and the Badi rights struggle committee, 15 October, 2007; 23 Point Agreement between SPA top leaders on 23 Dec 2007; Agreement between the Government and the UDMF on 28 Feb, 2008; Agreement between the Government and the FRNF on 2 March, 2008; Agreement between the Government and the Federal Limbuwan State Council on 19 March, 2008; 10 Point Agreement on 1 April, 2008; Agreement between the Political Parties to Amend the Constitution and Take Forward the Peace Process on 25 June, 2008

the CPA recognized the profound patterns of inequity that stratified the country and mandated “open heart surgery...which could potentially unleash more rapid development in the next ten years than in the previous three decades” (Piper 2009). Security Council resolutions 1825 (2008), 1796 (2008), 1740 (2007), and 1864 (2009) reference the CPA as the basis for Nepal’s peace process.

This study will focus on period of Nepal’s peace process following the signing of the CPA in November 2006.⁶ Nepal’s peace process has no institutionalized structure and can be best thought of as the aggregation of a series of ongoing negotiations including the official negotiations between the leadership of the Maoists and Nepal’s traditional political parties⁷ over the major obstacles to consensus (including the return of land that was seized by the Maoists during the war and the extent of civilian control over the military); the formal negotiations over disarmament, arms monitoring, and security sector reform (with a central focus on the extent to which the NA and the PLA will be integrated) conducted through the UN-administered Joint Monitoring Coordinating Committee (JMCC); and the composition of the new constitution by the democratically-elected Constituent Assembly; and the informal, unofficial personal negotiations between the leadership of the various parties. Each group is simultaneously navigating internal splits between various factions.

⁶ For detailed accounts of peacemaking prior to the CPA, see Kiyoko Ogura, *Seeking State Power: The Communist Party of Nepal (Maoist)* (2008); Astrid Suhrke, *UN Support for Peacebuilding: Nepal as the Exceptional Case* (2009); Teresa Whitfield, *Masala Peacemaking: Nepal’s Peace Process and the Contribution of Outsiders* (2008)

⁷ Nepal’s largest established political parties are the Nepali Congress (NC), founded in 1947, and the Communist Party of Nepal (Unified Marxist-Leninist), founded in 1991. While both parties are influenced by communist ideology, neither maintains a standing army or espouses a violent revolutionary political program.

Part II: A Spoiler Management Analysis of Nepal's Maoists

Spoiler Management

Spoilers entered the lexicon of the UN in 2000 in the context of a comprehensive review of UN Peace Operations led by veteran diplomat Lakhdar Brahimi. The Brahimi Report (formally the *Report of the Panel on United Nations Peace Operations*) defined spoilers as “groups (including signatories) who renege on their commitments or otherwise seek to undermine a peace accord by violence” (Brahimi 2000, 4). Spoilers have threatened peace and prosperity since the earliest efforts to end wars and mitigate conflict. However, it is only since the United Nations took on an expansive responsibility for the maintenance of global peace and security that spoilers have been carefully studied with the intent to preempt and neutralize their intended damage. As the conflicts of the 1990s proliferated in the aftermath of the Cold War, spoilers came to be perceived as one of the greatest threats to civil war termination.

Traditionally, peacekeeping relied on lightly armed peacekeepers to maintain a buffer between belligerents and operated according to well-established principles of impartiality, consent and the use of force only in self-defense (Brahimi 2000, 9). However, the complexity and demands of contemporary peace operations in recent decades expanded the UN's responsibilities to include disarmament, demobilization and reintegration (DDR); election monitoring; institution building; third party mediation; and security sector reform (SSR). Peacekeepers are now inserted into dangerous and fragile environments, and the situations in which they are authorized to use force has generally expanded. A viable peace accord has become a prerequisite for these multidimensional

peace operations and the UN is expected to play a role in operationalizing the implementation of its component parts.

As the UN's peace enforcement responsibilities grew, peace operations encountered resistance from spoiler—the actors who had vested interests in the continuation of the conflict. The Brahimi Report insisted in no uncertain terms that the UN, “must be prepared to deal effectively with spoilers if it expects to achieve a consistent record of success” (Brahimi 2000, 4). With a mixed record on spoiler management since 2000, it is unclear if the UN has institutionalized this demand.

Several years prior to the release of the Brahimi Report, Stephen John Stedman (now with the Center for International Security and Cooperation at Stanford) wrote, “Spoiler Problems in Peace Processes,” for the journal *International Security*. This article was the first attempt to systematize spoiler behavior with the intent of developing effective management strategies for the “custodians”⁸ of peace processes (often the UN or a trusted third party). By defining spoiler behavior, Stedman hoped to encourage a more surgical, nuanced and effective guide to spoiler management by third parties⁹ (Stedman 1997, 6).

Stedman's posited that spoilers differ in their goals and commitment, which is largely the result of an endogenous, negotiated process between the leadership's hardliners and pragmatists. Stedman identified three types of spoilers: limited, greedy and total. Limited spoilers have limited goals—although their commitment to those goals might be strong—whereas total spoilers perceive the conflict as a zero-sum game where compromise is the equivalent of capitulation (Stedman 1997, 10). Total spoilers are often

⁸ Stedman defines peace custodians as: “...international actors whose task is to oversee the implementation of peace agreements” (Stedman 1997, 6).

⁹ In some sections of this paper, the terms “custodian” and “third party” are used interchangeably.

revolutionary and espouse a vision of violent upheaval in order to remake society. A greedy spoiler exists somewhere on the continuum between limited and total spoilers. Greedy spoilers are more pragmatic than total spoilers; their goals and commitment evolve based on a constant process of cost-benefit analysis.

Stedman's typology of spoilers was accompanied by a series of conflict management strategies for the peace process' designated custodians: inducement, socialization and coercion. A custodian that favors inducement will attempt to manage spoilers through addressing their grievances and offering positive "carrots" to encourage them to meet their obligations. Custodians who pursue a strategy of socialization will communicate desired normative behavior to the parties, with the intention of rewarding and punishing the spoilers according to the fluctuations in their commitment to that behavior. Coercion entails punishing (or threatening to punish) spoilers. Stedman prescribed the use of force or coercion to manage total spoilers, inducements to manage limited spoilers, and a long-term strategy of socialization to manage greedy spoilers.

Any party to a negotiation is a potential spoiler. Numerous parties to peace processes—both state and non-state actors—have been identified as spoilers, including Renamo in Mozambique, the Khmer Rouge and State of Cambodia in Cambodia, the CDR in Rwanda, and UNITA in Angola, among others in Sri Lanka, Israel/Palestine, Cyprus, and the former Yugoslavia (Stedman 1997, 19).

Nepal's Maoists: Terrorists, Spoilers, Neither or Both?

The Maoist sweep of the April 2008 elections took the international community (and perhaps the Maoists themselves) by surprise¹⁰. The Maoists won a plurality of seats in Parliament (which also functions as the Constituent Assembly), legitimizing their political platform. Although they are currently in opposition¹¹ to the ruling coalition government, they retain over 40% of Parliamentary seats.

Stedman argued that spoilers can be identified by looking at their *intentions*. In order to determine if a group is a spoiler, Stedman recommended interpreting their goals, the intent behind non-cooperation and the degree of commitment to the peace process, among other factors (Stedman 1997, 17). Maoist interests are paradoxical, as they are simultaneously dictated by pragmatism and seemingly inflexible ideology. Nepali and international analysts are divided over their true intentions.

Notwithstanding these doubts, the willingness of an insurgent army that held substantial territory to turn over its weapons and participate in a political process is significant and rare. Supporters of Maoist engagement emphasize the progress that has been made thus far. In a sympathetic narrative of the Maoist transition into politics, Kiyoko Ogura of the Berghof Research Center for Constructive Conflict Management writes: "...one of the factors ensuring steady progress in the peace process, despite frequent deadlocks, has been a strong commitment to a political solution from CPN (M) leadership. Another factor that played an important role at the negotiation table was the

¹⁰ A 2002 poll found that the Maoists would win only 10 percent of the seats in Parliament if they were allowed to compete in democratic elections (Rhode 2002).

¹¹ The Maoist-dominated government collapsed in May 2009 after a period of high stakes brinksmanship surrounding their attempted removal of the NA Chief of Staff.

flexibility on the part of the Maoists, especially their willingness to compromise” (Ogura 2008, 45). Analysts and scholars who share Ogura’s perspective are more tolerant of Maoist claims that their political participation represents a shift in strategy, rather than a temporary tactical adjustment. In the estimation of the International Crisis Group: “The argument that the Maoists have not changed course and are using the peace process as cynical cover for a violent insurrection can sound compelling...But it is wrong. However tenuous the Maoists’ devotion to pluralism and the norms of liberal democracy, their movement is engaged in an evolutionary process that has, over several years, already seen major shifts” (International Crisis Group August 2009, 7).

Several factors support this view. The Maoists have not explicitly broken the ceasefire by opening the weapons lockers and rearming or launching attacks on NA bases. Maoist leaders continuously engage with UN officials and have met repeatedly with Western ambassadors, lending credence to the idea that, “the many years the Maoists had devoted to thinking about negotiations and their pragmatic assessment of the strategic possibilities open to them well-positioned them for talks” (Whitfield 2009, 22). When the Maoists concluded a round of peaceful mass protests in November 2009, a major Nepali newspaper observed: “the Maoists leadership showed maturity and wisdom since the beginning of the first round of protests and maintained complete restraint against going down the confrontational path” (MyRepublica November 2009). This perspective sees the Maoists as evolving along a similar continuum as India’s Communist Party of India (Maoist), which functions as a largely moderate and nonviolent political force despite maintaining their revolutionary ideology (International Crisis Group August 2009, 7).

The Maoists have indeed made significant progress in transitioning from an insurgent force into a political party. However, an examination of the historical record reveals both explicit and subtle spoiling behavior, manifest as noncompliance with the CPA. This pattern suggests that political participation is a temporary tactic rather than a permanent strategic shift away from violent armed struggle.

Thomas Marks, a political risk analyst and scholar of Maoist insurgencies, downplays outward signs of Maoist moderation; he has identified several past instances in which they used peace talks to stall and distract the state while preparing for future attacks (Marks 2003, 7). This sentiment is echoed by editor of *Himal South Asia Magazine* Kanak Mani Dixit, who insists that the Maoists have only abandoned revolution in a “tactical sense” and remain committed to a “chaos theory” that seeks to advance violent revolutionary goals by relentlessly weakening state institutions and polarizing Nepali society (Dixit 2009, 4). The International Crisis Group—while largely supportive of the argument that the Maoist commitment to the peace process is genuine—has expressed concern that Maoist renunciations of violence and commitment to pluralism remain ambiguous (International Crisis Group February 2009, i). Prachanda has, “swung between urging consensus and threatening a capture of power” (International Crisis Group August 2009, 8). Despite clear prohibitions in the CPA on provocative gestures, numerous instances of combative rhetoric, extortion and intimidation have been reported.

Edward Newman of the United Nations University in Tokyo and Oliver Richmond of the University of St. Andrews argue that many spoilers do not seek a collapse of the peace agreement; rather, they seek to perpetuate the process indefinitely,

so that, “everything remains on the table, and disputants still have access to all of the indirect resources a peace process provides, including recognition, legitimacy, and resources, both financial and political” (Newman and Richmond 2006, 19). Spoilers will prolong the negotiating process in order to avoid costly concessions that would undermine their authority as resistance fighters (Newman and Richmond 2006, 31). Since entering into opposition in May 2009, the Maoists have employed the type of aggressive stalling tactics described by Newman and Richmond. They have withdrawn from active participation in the peace process and blocked the Parliament from functioning, insisting that obstructions will continue until they are able to carry out comprehensive security sector reform and resolve the issue of “civilian supremacy” over the military (United Nations Security Council October 2009, 2). The discharge of PLA combatants disqualified (4,008 in total, including 2,973 child soldiers) by the 2007 UNMIN verification process only began in late 2009 due to stalling and obfuscation by the Maoists. Notably, neither the National Peace and Rehabilitation Commission nor the High-level Truth and Reconciliation Commission mandated by the CPA have been created (although the other political parties are equally responsible for holding up the creation of these commissions).

What can be discerned from the Maoists’ erratic negotiating style? Oliver Richmond’s study of spoilers finds that those disputants who have motives other than reaching a negotiated solution to the conflict recognize the need to be seen to be cooperating with the international community. In these situations, peace talks represent a temporary tactical adjustment rather than a permanent strategic shift to nonviolent resistance. Richmond writes of the logic in this, “alternative approach which involves

minimal costs and concessions on their part, but allows the struggle to be continued at a low level... They engage in a process of acceptance and then rejection, in which they attempt to manipulate the process in their own favour without having to make the concessions the process is predicated upon” (Newman and Richmond 2006, 62). In an interview, editor of the Nepali Times Kunda Dixit described the Maoist approach to peace negotiations as “psychological warfare” in which they routinely threatened to go back to war; “they would pack up their papers and walk out of the room so each time the Ministers had to chase them and bring them back” (Dixit interview 2009).

Debate over the true intentions of the Maoists heightened in the spring of 2009, when a Nepali newspaper published an alleged secret Maoist plan to, “exacerbate the political uncertainty so that the Maoists can seize the state amid chaos and confusion,” penned by Maoist Finance Minister and chief ideologue Baburam Bhattarai (Adhikary 2009). A published exchange between Bhattarai and Britain’s World People’s Resistance Movement unnerved many Nepalis who had given the Maoists the benefit of the doubt. In the interview, which was widely publicized in Nepal, Bhattarai insisted that the Maoists had not given up a protracted people’s war¹², described liberal democracy as a form of bourgeois dictatorship and outlined a political program that included elements of anarchism and proletarian totalitarianism (World People’s Resistance Movement 2009).

¹² “...after 2006 we made a certain departure in our tactical line. Some people are confused about this and think we have abandoned PPW [Protracted People’s War] forever and adopted a peaceful path of social development. This confusion needs to be cleared. What we are saying is that People’s War is a multifaceted war where both the armed and political form of struggle needs to be combined... There are some ambiguous features in the Comprehensive Peace Agreement. Our understanding, the revolutionary party’s understanding, was that after abolishing the monarchy and establishing a bourgeois democratic republic, the proletarian party would take the initiative and launch forward the struggle towards New Democratic Revolution. We knew the bourgeois forces, after the abolition of the monarchy, would try to resist, and our main contradiction then would be with the bourgeois democratic parties. This we had foreseen. So we have not said that after the abolition of the monarchy we’ll stop there. We never said that. What we have said is that we would align with the bourgeois democratic parties to abolish the monarchy, and after the abolition of the monarchy then the contention would be between the bourgeois forces and the proletarian forces. A new field of struggle would start” (World People’s Resistance Movement 2009).

The most compelling indication of Maoist ulterior motives has been their refusal to dismantle the Young Communist League (YCL). The YCL is a youth militia formed as an auxiliary force of the PLA during the civil war that lies somewhere on the continuum between a service-oriented youth movement and a lightly armed gang of “quasi-fascist thugs” (Skar 2008, 5). The YCL has reportedly killed over 20 people and kidnapped over 700 since the signing of the CPA (Skar 2008, 6). They have become “notorious for kidnapping, beating and otherwise intimidating political opponents” (Suhrke 2009, 19). The Maoist leadership claims that the YCL has over 300,000 members, but the true size of the organization has not been verified (Phuyal 2007). Thousands of young PLA cadres have left the Maoist cantonments only to be rearmed and integrated into the YCL (Suhrke 2009, 38). CPA provisions related to dismantling the YCL and the establishment of a monitoring committee to ensure compliance have been ignored. The YCL has not been disarmed and are neither monitored by the UN nor interned in cantonments. The Maoists have been accused of maintaining the YCL to intimidate opponents and influence the outcome of future elections while official PLA cadres remain under close observation by the UN (International Crisis Group February 2009, 8).

Outside of Kathmandu, Maoist and YCL intimidation is pervasive. In an interview, the former Nepal country director of the National Democratic Institute (NDI) Dominic Cardy reported that NDI’s attempts to work with grassroots groups in rural Nepal were consistently blocked by Maoist cadres before, during and after the elections. “We never saw any change in behavior on the ground in the countryside outside of the [Kathmandu] valley – most people were too focused on what was going on in Kathmandu” (Cardy interview 2009). The limits of tolerance for subtle Maoist derogation from the CPA has

been tested by their activities in the rural districts—such as seizing small municipalities and reestablishing shadow government institutions. In November 2009 Deputy Prime Minister Bijaya Kumar Gachchhadar informed UNMIN that the government of Nepal viewed the declaration of autonomous regions and seizure of the Dhankuta Municipality to be serious violations of the CPA (MyRepublica November 2009).

Several blatant Maoist violations of the CPA have undermined conditions for peace. In a high profile incident in May 2008, businessman Ram Hari Shrestha was kidnapped, brought to a UN-monitored PLA cantonment in Chitwan district and murdered. Even after an arrest warrant had been issued for PLA commander Kali Bahadur Kham, Kham continued to meet with the Maoist Minister of Defense (United Nations Security Council, January 2009, 10).

A leaked January 2008 recording (known as the Shaktikhor video) of Prachanda addressing the combatants of the PLA's third division and bragging that the Maoists tricked UNMIN by inflating the number of verified PLA combatants has added credence to the notion that the capture of state power by violent means remains the Maoists' overriding goal. Even if the "facts were willfully distorted and underlying messages ignored," as is claimed by the International Crisis Group, the video was seen by many sectors of Nepali society as proof positive that the Maoist participation in the political process was revolution by other means (International Crisis Group 2009, 9). In a recent interview, UNMIN's former Special Representative to the Secretary General (SRSG) Ian Martin admitted that whether the Maoists had made a, "real lasting strategic choice to operate within a multi-party framework or whether that is a tactical stage on the way to revolution," remained an unanswered question (Martin interview 2010).

These incidents are compatible with the strategies of “stealth” that Stedman argues are employed by inside spoilers to maximize power and undermine the implementation of a peace agreement. Maoist compliance with and implementation of the CPA and subsequent peace accords has been halfhearted and inconsistent. More importantly, they have not taken any steps that would seriously impede their ability to resume the insurgency. The Maoists retain access to their weapons and could rearm within a matter of hours. This corresponds with Stedman’s claim that, “inside spoilers need to comply enough to convince others of their goodwill, but not so much that it weakens their offensive military capability” (Stedman 1997, 8).

According to Stedman’s typology, the Maoists are greedy spoilers whose goals contract or expand when faced with changing costs to noncompliance (Stedman 1997, 11). The goal of total revolution contracted when the Maoists recognized that they could not militarily defeat the NA. Despite their revolutionary agenda—an indicator of a total spoiler—they have demonstrated a willingness to compromise.

Are the Maoists the only spoilers in Nepal? Certainly not. Each of the key actors in Nepal’s peace process has emerged at various junctures to obstruct or delay progress in the implementation of the CPA (Norris interview 2010). SRSG Ian Martin has expressed the view that, “Although there are many ways the Maoists themselves have not acted fully in accord with the letter and the spirit of the peace agreement, it is in some respects the non-Maoist side that has challenged some of the fundamentals of the peace process, particularly the commitment to integrate at least some of the Maoist army into the Nepal Army as well as the commitment to socioeconomic change” (Martin interview 2010). It is beyond the scope of this paper to catalogue the full extent of spoiling behavior in Nepal,

but it is necessary to briefly touch on the ways that neighboring India has played the role of a spoiler, conditioning the responses of both the military and the NC behind the scenes (Norris interview 2010). The Chr. Michelsen Institute's Astrid Surkhe detected significant Indian influence over the direction of the peace process, even if it was not easily identifiable. "Indian power was rarely displayed openly and at times appeared incoherent, yet it lay as a constant shadow over Nepalese politics - a constitutive power that set boundaries and constrained choices" (Suhrke 2009, 12). According to several sources, UNMIN's unsustainable mandate was the result of India's objection to a large-scale UN presence in its backyard (Suhrke 2009, 21). India rejected language that would have created an official mediation role for UNMIN, blocked UNMIN efforts to intervene in the Madhesi conflict in eastern Nepal (a conflict distinct from that between the RNA and the Maoists, but with serious potential to destabilize the country), and helped to orchestrate the conditions that led to the collapse of the Maoist government (Whitfield 2010, 12-15).

The International Crisis Group claims that the Indian government emboldened the NA to obstruct negotiations, most notably by encouraging them to begin recruiting for 2800 vacancies in late 2008, a move that nearly derailed peace talks (International Crisis Group October 2009, 2-3, 5). Additionally, the NA has been accused of using its psychological operations unit to push anti-Maoist propaganda into Nepal's mainstream media (International Crisis Group October 2009, 5)

Several Nepali interviewees claimed that U.S. policy in Nepal was a reflection of American deference to Indian interests. One interviewee claimed, "India always has their own motive. Either they need water or something else, so they won't support us

wholeheartedly. That is why we need America. If the U.S. always collaborates with India for bigger issues, then we will always be suppressed by the Indians.”

Considering the legitimacy conferred upon the Maoists by both their participation in the peace process and their subsequent election victory, can they still be labeled spoilers? The U.S. lists the Maoists as a "Specially Designated Global Terrorist"¹³ organization (Travel Warning: Nepal 2009). The most recent Congressional Research Service report on Nepal outlines the challenges of bilateral relations with a state governed by a proscribed NSAG: “The United States has viewed the Maoists’ past plans to institute a one-party republic, collectivize agriculture, re-educate ‘class enemies’ and export revolution as undermining regional stability as well as the promotion of democracy and development for Nepal. The United States is now presented with the situation of having to develop a relationship with a democratically elected group that it recently opposed” (Vaughn 2008, 10-11). In the next section, we will examine the diplomatic difficulties that ensue when the U.S. labels a sovereign government a terrorist entity.

¹³ For more information on the significance of this designation, see Part 3.

Part III: The U.S. Approach to Conflict Management in Nepal

The U.S. conflict management strategy in Nepal can be viewed as having three phases. During the height of the insurgency, the U.S. supported the King and RNA unconditionally. The U.S. provided resources, training and equipment to the RNA during the war, the Maoists were officially proscribed as a terrorist group, and American officials publicly warned the King and political establishment against engaging the Maoists before they disarm (Vaughn 2008, 11). A second phase occurred after the Maoists entered the peace process. U.S. policy was schizophrenic, as the Embassy tacitly supported the peace process, while simultaneously attempting to isolate the Maoists; this policy became more complicated once the Maoists won a plurality of votes in the national election. The third phase began with the appointment of Nancy Powell as Ambassador; Powell was a career diplomat whose support for the peace process was more hands-on than her predecessors (Mallik interview 2009). The degree to which the U.S. approach shifted after Powell's appointment is reflected in the markedly different impressions of U.S.-UN cooperation by UNMIN political affairs officers (Kathy Jones Interview 2009; John Norris Interview 2010). While the current chief of political affairs at UNMIN reported consistent coordination and cooperation with the U.S. Embassy, UNMIN's initial political chief John Norris—who built up the mission in 2007—emphasized the daylight between the U.S. and UN positions in Nepal.

After the proscription of the Maoists in 2003, the “terrorist tag” became the primary lens through which the U.S. perceived the conflict and intervened to mitigate its effects. The U.S. has employed a series of “terror lists” since 1996 to prevent terrorist financing and provide policy makers with tools to financially and symbolically sanction

armed groups that have attacked or intend to attack American citizens and interests. However, the terrorist lists were simultaneously an instrument of and an obstacle to effective statecraft in Nepal. The terrorist lists exist in a gray zone where law meets policy; they merit closer study as their impact on Nepal's peace process was substantial.

Designating Terrorist Groups in the U.S.

The contemporary U.S system for designating terrorist entities was born with Executive Order 12947 in January 1995, followed closely by the U.S. Antiterrorism and Effective Death Penalty Act of 1996¹⁴ (Pillar 2001, 150). The 1996 legislation provided the executive branch with the authority to create a definitive list of terrorist groups, the Foreign Terrorist Organization (FTO) list. FTOs were folded into a growing U.S. sanctions regime, joining rogue states and a category of groups and individuals known as Specially Designated Nationals (SDNs) (Hutner 2009)¹⁵. Today, all FTOs are also classified as SDNs.

Terrorist designations are assigned through a process involving representatives from the Departments of State, Justice, and Treasury, as well as the intelligence services. To make it onto the list, FTOs must be foreign organizations, actively engage in violent terrorist activities, and pose a threat to U.S. national security, economic interests, or simply individual citizens (Pillar 2001, 150). This criteria is guided by Title 22 of the U.S. Code, Section 2656f(d), which defines terrorism as: "Premeditated, politically

¹⁴ Pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), as amended under the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132) (Cronin 2003, 1).

¹⁵ The term SDN can be traced back to the Trading with the Enemy Act (1917) and the International Emergency Economic Powers Act (1977) (Hutner 2009). Today, a wide assortment of violent armed groups, terrorist entities, individuals, criminal syndicates, and foreign corporations are classified as SDNs.

motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience” (Hoffman 1998, 38).

The Specially Designated Nationals and Blocked Persons List (SDN list) is a master list maintained by the Treasury Department’s Office of Foreign Assets Control (OFAC) and is best understood as the primary means by which foreign policy is *implemented* through sanctions against *both* groups and individuals. It is the largest terrorist list, containing thousands of sanctioned individuals and entities (United State Department of Treasury 2009). The SDN list contains the groups proscribed by the FTO, a second group of individuals known as Specially Designated Terrorists (SDTs), and a third group of individuals known as Specially Designated Global Terrorists (SDGTs)¹⁶. The Department of Treasury uses the SDN list—and only the SDN list—when pursuing the assets of individuals and groups (including charitable organizations) that are identified as supporters of terrorist groups (Hutner 2009).

The SDN list is different in form and content from the FTO list, which is used by the U.S. government to name and shame groups as an expression of foreign policy (Hutner 2009). Currently, forty-four groups¹⁷ are designated as FTOs (Department of State 2009). The FTO list is managed by the Department of State; it can be distinguished from those lists administered by the Department of the Treasury because of the “symbolic, public role it plays as a tool of U.S. counterterrorism policy” (Cronin 2003, 5). According to Matthew Levitt of the Washington Institute for Near East Policy, “In some ways the FTO is more important because it is *the* lists of foreign terrorist organizations. The treasury lists aren’t meant to be *the* list, but they are meant to be a

¹⁶ The Specially Designated Global Terrorists (SDGT) list is an additional list created by Presidential Executive Order 13224 in September 2001 (Cronin 2003, 4).

¹⁷ The FTO list does not include individual terrorists.

disruption tool, to name and shame, and to freeze funds and ban business transactions” (Levitt interview 2009).

The terrorist lists are not static. In the first review of the FTO, twenty-seven groups were re-designated as terrorist entities, one was added, and three were removed (the Manuel Rodriguez Patriotic Front Dissidents, the Democratic Front for the Liberation of Palestine, and the Khmer Rouge). The Islamic Movement of Uzbekistan was the first group to be added to the FTO outside of the formal review process (Cronin 2009, 6). An FTO designation is challengeable in court and designations are subject to judicial review (they must be renewed every two years). The Mujahedin-e Khalq (MEK), Liberation Tigers of Tamil Eelam (LTTE) and Turkish Kurdistan Worker’s Party (PKK) have all argued (and lost) against their designation in U.S. courts (Cronin 2003, 10).

The 2001 USA Patriot Act empowered the Secretary of State to create the Terrorist Exclusion List (TEL), which primarily serves to prevent foreign nationals associated with a group on the TEL from entering the United States (and provides a legal pathway for forcible deportation if they are already in the U.S.) (U.S. Department of State 2002). The TEL’s designation criteria and process are broader and less rigorous than the FTO (Cronin 2003, 5). However, the TEL’s intent is similar to that of the FTO list; it isolates and stigmatizes groups that are viewed to be a threat to U.S. security (but not a serious enough threat to warrant an FTO-designation). Membership in a TEL-designated organization, as well as fundraising, recruiting or providing material support for a TEL-designated organization, are all grounds for exclusion or deportation. Unlike a FTO designation, a TEL designation is not challengeable in court.

When a group is listed, its assets are immediately frozen. Material support of a proscribed group or individual is illegal. Any “U.S. person”—including U.S. citizens, permanent legal residents, corporations incorporated in the U.S., American NGOs, or foreign NGOs that have a presence in the U.S.¹⁸—must comply with the sanctions (Hutner 2009). However, the Office of Foreign Assets Control at the Department of Treasury has the authority to issue licenses (known as OFAC licenses) that “permit a person or entity to engage in a transaction which otherwise would be prohibited” (U.S. Department of Treasury 2010). Members of the U.S. diplomatic community are not exempt and must abide by the terms of the sanctions; a diplomat that wishes to meet a member of a proscribed group must obtain an OFAC license. NGOs (who are U.S. persons) who anticipate interactions with proscribed groups must apply for OFAC licenses or risk a potential enforcement action (civil or criminal) (Hutner 2009).

OFAC is responsible for implementing the competing concerns of the U.S. government’s foreign policy organs. OFAC implements—but does not make—foreign policy; as a result they have a strong sense of mission and see themselves as “soldiers on the carpet” (Hutner 2009). OFAC considers humanitarian needs when implementing sanctions, but they are occasionally given guidance that is not consistent with the delivery of aid or the promotion of peacebuilding (Hutner 2009).

Terrorist lists are an important element of U.S. counter-terrorism policy. The lists coordinate and focus the efforts of various agencies to combat terrorism. There is no law

¹⁸ Foreign NGOs with offices in the U.S. present certain complications for the U.S. terrorist list system. Only the U.S. office of a foreign NGO is required to comply with U.S. law—the parent organization is not similarly bound. They are only considered a “U.S. person”—and required to comply with U.S. laws—to the extent that they have a presence in the U.S. On a related note, foreign NGOs that receive funding from a U.S. person (including the U.S. government) are not considered U.S. persons, but if these entities do not comply with U.S. sanctions, they risk losing their funding stream and/or putting the U.S. person who provided them with resources in violation of the sanctions.

that requires the lists to be complete aggregates of all groups engaged in terrorism; the lists are one of several policy tools employed by the U.S. to achieve certain goals (Levitt interview 2009). According to Matthew Levitt, the terrorist lists “...provide the government with a multifaceted arsenal of administrative, legal and political means of combating terrorism” (Levitt 2001, 3). They bring “legal clarity to efforts to identify and prosecute” terrorists and provide a frame of reference by which those people and organizations who interact with proscribed groups—such as charities, humanitarian groups and peacebuilding groups—can determine which groups they can and cannot interact with and what type of conduct is impermissible (Cronin 2003, 7). Additionally, the lists facilitate the complex process of cutting off a terrorist organization’s access to funding and prevent their membership from entering the United States (Cronin 2003, 7).

U.S. Terrorist Lists and the Proscription of Nepal’s Maoists

A review of the last decade’s U.S. Department of State *Patterns of Global Terrorism* reports demonstrates the evolution of the U.S. perception of the Maoists and the actions that have contributed to their proscription. The Maoists were not mentioned in the 2000 *Patterns of Global Terrorism* report, even though their war against Nepal’s government had been launched four years prior to its publication (United States 2001, 35). While the Maoists were referenced in the brief entry on Nepal in 2001 report, they were not identified as an FTO. The report highlighted Maoist attacks on government officials, commercial enterprises, unarmed civilians, and international relief

organizations; the murder of a U.S. embassy local employee; and bombings at a Coca Cola factory and bottling plant in which no one was injured (United States 2002, 11-12).

The 2002 *Patterns of Global Terrorism* report called the Maoist insurgency a “continuing threat to U.S. citizens and property in Nepal” and cited the November 2001 and January and April 2002 Coca-Cola bottling plant bombings (United States 2003). Intriguingly, the extent of the damage caused by the attacks is not described and—unlike the 2001 report—the report failed to indicate that no one was injured¹⁹ (United States 2003). The murder of the two Embassy guards was interpreted as a serious escalation, and the Maoists’ refusal to participate in the investigation surrounding these deaths continues to be a major element of the U.S. proscription policy today.

Information on the Maoists in the subsequent *Patterns of Global Terrorism* reports (renamed *Country Reports on Terrorism* in 2004) repeated much of the boilerplate in the previous reports, without providing a detailed description of increases or decreases in certain types of attacks. The 2004 report describes the bombing of the American Center in Kathmandu; there were no injuries, but the blast damaged the building (United States 2005). The 2008 report notes that, “Despite their electoral victory, the Maoists remained a U.S.-designated terrorist entity under the Terrorism Exclusion List” (United States 2009, 142). The report is silent on the ramifications of this development.

¹⁹ “In 2002, Maoists claimed responsibility for assassinating two U.S. Embassy guards, citing anti-Maoist spying, and in a press statement threatened foreign embassy—including the U.S.—missions, to deter foreign support for the Nepalese Government. Maoists, targeting U.S. symbols, also bombed Coca-Cola bottling plants in April and January 2002 and November 2001. In May, Maoists destroyed a Pepsi Cola truck and its contents” (United States 2003).

U.S. Strategy: Compellence through non-engagement²⁰

Following the terrorist attacks of September 11th, U.S. ambassadors in Nepal began to state publicly that the U.S. considered the fight against the Maoists to be part of the global war on terror. This statement made by Ambassador Michael Malinowski's in February 2002 is emblematic of American rhetoric in Nepal following 9/11:

Nepal is currently plagued with a terrorism that is shaking its very foundation as a nation. These terrorists, under the guise of Maoism or the so called 'people's war,' are fundamentally the same as terrorists elsewhere—be they members of the Shining Path, Abu Sayaf, the Khmer Rouge, or Al Qaeda... They are radicals who seek to impose their narrow views and beliefs on others, despite the popular will of those they seek to influence or convert (Gersony 2003, 81)

This period of the conflict was categorized by U.S. denunciations of Maoist violence and the Embassy's strong support of the Palace and the RNA. James Moriarty replaced Michael Malinowski as U.S. Ambassador to Nepal and continued to speak out against the Maoists in public speeches and interviews. Moriarty warned Nepal's political elites against negotiating the 12 Point Agreement of 2005 with the Maoists, arguing that the U.S., "...views the uneasy partnership between the parties and the Maoists as wrongheaded...[W]e believe cooperation along current lines between the Maoists and the parties is fraught with danger—for the political parties themselves, and for the future of the Nepalese people" (Varadarajan 2006).

Secretary of State Colin Powell visited Kathmandu in 2002 in order to enlist the King's support in the U.S.-led war on terror (including securing rights to overflights of Nepali airspace for the war in Afghanistan) and reinforce American support of a coercive approach to the Maoists, which was interpreted by India as a serious intrusion on their

²⁰ Much of the material in this section—including unattributed quotations—is drawn from an off the record talk given by a senior U.S. diplomat at the U.S. Institute of Peace.

sphere of influence (Hutt 2004, 197, 215). U.S. bilateral aid to Nepal increased from \$.02 million to \$29.5 million following the 9/11 attacks, prompting *The Bulletin of Atomic Scientists* to call Nepal one of the “winners” in the Global War on Terror (Gabelnick and Schroeder 2003, 38).

A statement by the Maoists on October 21, 2003, threatened attacks against international non-governmental organizations and Nepali non-governmental organizations funded or run by “American imperialism.” On October 31, 2003—probably unrelated to the October 21 threats—the Department of State designated the Communist Party of Nepal (Maoist) as a terrorist organization under Executive Order 13224. The Maoists were subsequently added to the Terrorist Exclusion List and the Specially Designated Nationals and Blocked Persons list—however, the Maoists have never been included in the State Department’s Foreign Terrorist Organization list. As a result of the Maoists’ proscription, U.S. diplomats were banned from any interaction with the Maoists, restrained by both political²¹ and legal barriers. Absent direct interaction with the Maoists, the Embassy relied upon intermediaries for information and to communicate demands, both before and during the peace process. The Maoists responded to their terrorist designation with a campaign dubbed, “All Americans out of Nepal,” which resulted in higher bribes for American trekkers at Maoist checkpoints rather than an escalation of anti-American violence (Gersony 2003, 4).

The timing of the designation was somewhat suspicious, as it occurred shortly after the Government of Nepal had stopped referring to the Maoists as terrorists and initiated negotiations (the negotiations eventually broke down). Some analysts have speculated that the King used the terrorist designation as a pretext to deploy the RNA and

²¹ See pg. 41 for background on the Embassy contact policy.

escalate the war (Bjornehed 2006). Gary Leupp of Tufts University wrote, “It may be a signal to the Nepali political establishment that it must not allow the Maoists to negotiate their way into power” (Leupp 2003).

The U.S. pursued a strategy of conditional recognition throughout the peace process; the Maoists would earn the right of contact with the Embassy through demonstrated behavior change. One of the most visible critics of the U.S. policy was former U.S. President Jimmy Carter. Carter began publicly advocating a revision of the Maoists’ terrorist designation as early as 2007: “When the Maoists laid their arms within cantonments and joined the government, in my opinion, our government should have recognized them as [sic] legitimate political party and dealt with them as other nations did” (Pradhan, Wagle, Jayshi and Wagle 2008). Carter’s advocacy invited an angry response from Ambassador Moriarty: “Having made such a big deal of not dealing with the Maoists until they change their behaviour, if we now (develop contact with them) despite not having seen them change their behaviour, then they will think they don’t need to change any longer” (Nepalnews 2007). Most importantly, no lenience was shown to the Maoists following their decision to commit to the ceasefire and peace process. The Embassy did not immediately acknowledge this important transition with any tangible actions or symbolic gestures.

The Nepali media seized on comments by Moriarty in February 2007 that he would shake hands with Prachanda after the Maoists renounced violence; in his final interviews as Ambassador, Moriarty expressed regret that he would have to leave without shaking the Maoist leader’s hand (Nepalnews 2007). Ambassador Nancy Powell arrived in Nepal in the shadow of this symbolic statement. Powell’s tone and rhetoric were

considerably more subdued than her predecessors, and she made a concerted effort to appear neutral (Mallik interview 2009).

The U.S. Embassy did not avoid all contact with the Maoists. The election of the Maoists in 2008 created new opportunities for the Ambassador to advance American influence, notwithstanding the continuation of the terrorist tag. Powell used her official duties to consult with government ministries to establish contact with Maoist ministers. Following the election, the Embassy obtained an OFAC license²², which enabled the Embassy to continue financial aid flows to the Government of Nepal so long as no contracts were issued directly to the Maoists; while most aid went to NGOs, the assistance that needed to be funneled through the government was facilitated by the OFAC waiver²³ (Dhakal and Jayshi 2009). The waiver allowed diplomats and aid workers to be more engaged in the constitutional process, as well as with grass roots political organizations.

Ambassador Powell met with Prachanda—the first official U.S. contact with the Maoists—in May 2008 (Al Jazeera 2008). According to a U.S. diplomat with knowledge of the state of affairs in Nepal, the OFAC waiver, “contributed to the U.S. having a bigger role in influencing the peace process”. Ambassador Powell’s meetings with Maoist leaders allowed her both to listen to their grievances and to clearly and directly articulate the concerns of the U.S. She used these opportunities to impress upon Prachanda the need for the Maoists’ stated commitment to peace and democracy to be matched by actions (Dhakal and Jayshi 2009). Publicly, the Embassy remained skeptical

²² However, the OFAC waiver was delayed, complicating these tentative early steps of U.S. engagement.

²³ The OFAC license authorized “activities with the Government of Nepal sponsored by USAID or State notwithstanding any involvement of the Communist Party of Nepal-Maoist, which has been designated as a Specially Designated Terrorist group under Executive Orders 13224 and 13372” (OFAC License for Nepal 2007).

of the Maoists' commitment to the peace process, as well as the applicability of Maoism to the political and economic context of Nepal. When pressed on the issue of the terrorist tag, Powell specified the lack of a formal renunciation of violence, the actions of the YCL, attacks on the media, and the absence of an investigation or formal apology by the Maoists for the deaths of two US embassy security guards as impediments to delisting (Dhakal and Jayshi 2009). Powell insisted that the designation should remain until "there is concrete evidence of a real change in behavior" (Dhakal and Jayshi 2009).

On the heels of Ambassador Powell's initiation of contact with the Maoists, Deputy Assistant Secretary of State Evan Feigenbaum met with key Maoist leaders and announced that the Embassy's contact policy had been revised (Labott 2008). Following his first meeting with Prachanda, Feigenbaum told a press conference: "In terms of next steps, I really wouldn't want to speculate. It is going to depend. They are on the (terrorism) list, they remain on the list for the moment" (Kumar 2008).

Every U.S. Embassy has a country-specific contact policy that guides the conduct of diplomats, U.S. nationals and affiliated NGOs in their interactions with armed groups. The contact policy often compliments a terrorist designation. In some cases the contact policy will deter contact with groups that have not been officially sanctioned, while in others the contact policy allows Embassy officials to work with members of proscribed groups.

The maintenance of the terrorist tag combined with the revision of the Embassy contact policy resulted in an iterative process of political theater, where Nepali journalists questioned visiting State Department officials—such as Deputy Assistant Secretary of State Evan Feigenbaum; Assistant Secretary, Bureau of South and Central Asian Affairs

Robert Blake; and Assistant Secretary of State for South and Central Asian Affairs Richard Boucher—on when and how the terrorist tag would be removed, and the officials would routinely respond with the same criteria: the Maoists needed to publicly renounce violence; they needed to stop using violence as a political tool and reign in the YCL; and they needed to demonstrate a good faith effort in the peace process (Blake 2009). During a press conference in February 2009, Secretary Boucher insisted that the U.S. was reviewing the feasibility of removing the Maoists from the TEL and the SDN List, but explained, “the more they act within the political system and abandon the past practices of terrorism and violence, the easier it will be for us to finish the review” (Sharma 2008). However, in all of these public statements, no concrete “road map” to legitimacy was outlined publicly. It was only in January 2010, nearly four years after the end of hostilities, when the U.S. Principal Deputy Assistant Secretary of State for South and Central Asian Affairs Patrick Moon delivered a more specific set of criteria (Basnet 2010)²⁴.

²⁴ From My Republica: “According to sources, the conditions are A) renounce violence and terrorism, B) demonstrate commitment to the peace process, C) make the Maoist-aligned Young Communist League (YCL) renounce violence and orient it towards reform, and D) bring out the truth about the killing of two US Mission staffers in Kathmandu. Under category A, the Maoists will have to renounce violence not just in words, but also in their actions. Under category B, there are four items the Maoists will have to address: 1) The Maoists should actively participate in parliament and the constitution-making process. 2) They should hand over the murderers of Ramhari Shrestha to civilian authorities for legal action. Kathmandu-based businessman Shrestha was allegedly kidnapped and subsequently murdered by Maoist combatants at Shaktikhor cantonment in 2008. The prime accused in the case, Kali Babadur Kham, is currently a Maoist central committee member. 3) They should trace the guilty behind the Madi massacre and hand them over to the civilian authorities. 4) They should make public the status of 14 enforced disappearance cases committed by the Maoists between November 2002 and October 2004 in Bardiya district. As per this condition the Maoists will have to help the government in the criminal investigation of these cases and in taking legal action against the guilty so as to address the report of the OHCHR. Under category C, the party should make the YCL renounce violence and orient it towards reform. The US does not merely want the Maoists to do this in words, but also in actual practice. The YCL chief will have to publicly vow that the YCL is a purely political organization, and doesn’t adopt violent tactics. Even this will not be enough. The ICRC, the UN and independent political observers will verify if the YCL has really renounced violence and is reform-oriented. Under the fourth category, the US wants the Maoists to provide facts about the murder of two US Mission employees in Kathmandu as well as the bombing of the American Center in Kathmandu in 2004. Not only that, the US has demanded that the Maoists formally tell the National Human Rights

Various Nepali actors in politics, the media and civil society who were once skeptical of the terrorist tag have come to embrace it. In an interview, Former Finance Minister and Peace Ministry Secretary Vidyadhar Mallik explained that the “watch and see policy” has merits because it demands consistency from the Maoists, keeps a constant pressure on the group to “convert into a political party,” and “denounces violent actions not only by words but by deeds (Mallik interview 2009). Mallik explained that traditional Nepali political parties have urged the U.S. not to drop the terrorist tag because doing so would prematurely send a message to Nepalis that the Maoists have completed their transition into a moderate, legitimate party (Mallik interview 2009). Mallik emphasized the moral authority of the U.S., who continuously denounced the Maoists when other Embassies chose to ignore or tolerate violence, extortions and threats (Mallik interview 2009). After trade union members affiliated with the Maoists stormed the office of a major Nepali media company, editor of the Nepali Times Kunda Dixit became an outspoken critic of the Maoists’ intimidation of the press. In an interview, Mr. Dixit insisted that the U.S. terrorist tag was appropriate, as the Maoists had not abandoned violence as a political tool (Dixit interview 2009). He argued that American efforts needed to focus on supporting the moderate political parties in Nepal, despite their flaws: “The others may be messy and corrupt but they believe in the ballot and in democracy and they don’t believe in violence” (Dixit interview 2009). Even Ambassador Moriarty has been absolved to some degree: “Moriarty was very confrontational, and we all criticized him. He was our favorite voodoo doll, he and his predecessor were both very hardline...but in hindsight everything they said is turning out to be true: ‘Don’t trust the

Commission (NHRC) that the party was behind those incidents of violence, and compensate the kin of the victims (Basnet 2010).

Maoists. This is just a tactical move’. They were right all along” (Dixit 2009). Several other civil society leaders in Kathmandu expressed the same sentiment.

As of April 2010, the Maoists remain on the Terrorist Exclusion List and the Specially Designated Nationals and Blocked Persons list. In an interview, the Maoists’ legal advisor Khimlal Devkota insisted that the terrorist tag has not resulted in any tangible effect on Nepal’s domestic or regional politics, and U.S. efforts to isolate the Maoists have only amounted to giving them visa problems when they wanted to travel out of the country (Devkota interview 2009).

Critique of the U.S. Approach

There are several critiques of the U.S. approach to conflict management in Nepal. First, the employ of the terrorist tag isolated the U.S. from the peace process and increased the likelihood that they would misread Maoist intentions and capabilities. Second, the conditions imposed by the U.S. were too high and lacked gradations that could be objectively measured. Third, the terrorist tag impeded non-governmental peacebuilding efforts. Fourth, proscription itself is an ineffective technique with more costs than benefits.

The employ of the terrorist tag isolated the U.S. from the peace process and increased the likelihood that they would misread Maoist intentions and capabilities

The obstacles created by proscription of the Maoists in Nepal demonstrate the ways that the terror lists more generally impede effective U.S. participation in peace processes when one party is considered a terrorist entity (with whom we do not negotiate) rather than a non-state armed group or spoiler (with whom we might negotiate). In Nepal the U.S. was absent from the table when it needed to be present, leaving a vacuum that was filled by India and the United Nations.

Georgetown University's Paul Pillar is one of the few scholars to have extensively studied the impact of terrorist lists on the U.S.' ability to balance counter-terrorism with conflict management. In an interview, Pillar emphasized the benefits of constructive engagement with terrorist entities in order to understand their grievances and ideology, while allowing representatives from the U.S. to express their own concerns (Pillar interview 2009). Pillar suggests that the U.S.' strategic interests might be better served by supporting a peace process rather than providing assistance to an ally's efforts to eradicate a terrorist group: "If engagement in a peace process seems more feasible than eradication, the US should encourage the start of such a process or support—even indirectly as an interested outsider—any process that has already begun..." (Pillar 2004, 474).

In the period surrounding the proscription of the Maoists, U.S. actions and rhetoric sent signals that it favored eradication over negotiations (Ricigliano 2005, 70). The Embassy was slow to react when the King declared a state of emergency in February

2005 and consolidated his power by dissolving Parliament and imprisoning politicians (Norris interview 2010). In an interview, Kunda Dixit said, “During the war the king and the army used the U.S. terror tag to their full advantage” (Dixit interview 2009).

Dominic Cardy of NDI criticized the terrorist lists as a “blunt instrument” in Nepal that, “limited the U.S.’ effectiveness in the early days of the peace process,” and, “stopped engagement that might have been more effective—if the Maoists were spoken to at a senior level by an Ambassador early in the peace process then things could have moved forward” (Cardy interview 2009). According to John Norris, former Chief of Political Affairs for UNMIN, the U.S.’ inability to adapt to Nepal’s rapidly evolving political dynamics stemmed from both a fundamental misperception of the Maoists and an inability to distinguish Nepal from the broader Global War on Terror:

The U.S. approach reflected the spread of anti-terrorism and the personality of Ambassadors Moriarity and Malinowsky, who were quite hard-line and made inaccurate comparisons between the Maoists and Pol Pot...There were lots to dislike about the Maoists human rights record, attacks on teachers, attacks on politicians, extortion, lots of bad behavior...but there was nothing to suggest that the Maoists were going to tear down any building over two stories and go on a genocidal rampage. That was irresponsible language for any diplomat to use without some pretty hard evidence (Norris interview 2010).

This perception inevitably colored the Embassy’s approach, cost them future credibility during negotiations, and contributed to suspicion of their intentions (Norris interview 2010). Ironically, a conflict assessment commissioned by USAID to gain a better understanding of the intentions and capabilities of the Maoists (including the root causes of the conflict, the degree to which the Maoists resembled the Khmer Rouge, and the conduct of Maoists in territory that they held) was severely constrained by the Maoist inclusion on the TEL, which prohibited the author’s interactions with the Maoists or travel through their territory (Gersony 2003, 4). Ultimately, the study found that the

comparison between the Maoists and the Khmer Rouge were exaggerated²⁵, but noted that, “The question of [the Maoists’] ultimate aims remain legitimate” (Gersony 2003, 100).

The politics of the terrorist tag also discredited legitimate criticism of the Maoists. According to Dominic Cardy, “It was hard for the U.S. to counter the Maoist argument when they were effectively saying, ‘We don’t care what you do, you are going to be on this list for a long, long time’...For a long time it wasn’t clear what they had to do, even though it was pretty obvious to an objective observer, still the U.S. policy allowed the Maoists to carry on presenting the U.S. as a bogeyman. Every time someone would legitimately criticize them they could just say this is George Bush’s imperialism rearing its ugly head” (Cardy interview 2009). UNMIN’s John Norris attributed these early setbacks to a “failure of imagination on the part of U.S. policymakers” that was doubly reinforced by the demonization of the Maoists and the Embassy’s lack of understanding of a peace process’ “natural give and take” that comes from hands on experience navigating a country through a post-conflict period:

You have a rebel group whose leadership does seem sincere about wanting to enter the mainstream. Yes, they want to maximize their share of the pie, yes they want to maximize their political influence and their gains which is not an unusual political calculation for any party or organization, but they need some help in bringing the cadre along with them. As a head of a rebel organization they are always vulnerable to criticism that they’ve compromised too much, that they are not hard-line enough...so the U.S. failed to understand that some modest concessions here and there would go a long ways in making the Maoists less reactionary over time...the approach was how do we direct and control the Maoists rather than how do we manage a process where both sides engage in a reasonable give and take and get to a better place (Norris interview 2010).

²⁵ “...the level of violence against civilians has been much lower, and the Maoists have implemented none of the radical social and economic policies which the Khmer Rouge applied throughout areas under their control” (Gersony 2003, 100).

Pillar argues that the existence of moderate “pragmatists” within the group’s leadership is an important measure of whether or not to engage (Pillar 2004, 474). The lack of trust and access stemming from the U.S. proscription constrained the Embassy’s ability to separate the pragmatists from the extremists (John Norris interview 2010). The U.S. lost a crucial early opportunity to strengthen the pragmatists within the Maoist leadership and isolate the elements that opposed negotiations and nonviolent political contestation.

Nicolas Florquin and Elisabeth Decrey Warner of Geneva Call argue that proscription weakens moderates and strengthens hardliners. Hardliners are able to point to the proscription as evidence that negotiations will be unlikely as long as they are considered a terrorist organization. According to Liz Philipson of the London School of Economics, “Listing an organization as ‘terrorist’ potentially lengthens the path to non-violent politics for that group...” (Ricigliano 2005, 70).

In an interview, Dr. Duman Thapa of the Asian Studies Center for Peace and Conflict Transformation explained that while some of the Maoists might be terrorists, every member of the organization was not, including the two hundred plus democratically elected Maoist Parliamentarians. “The best thing would be to identify the terrorists, then sit down the other Maoists and ask them if they can separate themselves from these people” (Thapa interview 2009). This sentiment was echoed by Vidyadhar Mallik, the former Finance Minister, who expressed regret that the U.S. proscription of the Maoists was not accompanied by concurrent support of the pragmatists within their ranks, which in his view included Prachanda. “The pragmatic elements of the Maoists need support to manage their own people. The easiest way to change their behavior and

control the hardliners is to look within their own leadership and support the pragmatists...” (Mallik interview 2009).

Without access to the Maoists themselves at crucial stages early in the peace process, the U.S. Embassy was flying blind. According to UNMIN’s John Norris, the U.S. Embassy’s lack of access shaped their analysis and forced the to rely on a limited circle of elite Brahmin contacts and dubious intelligence sources. “They just didn’t know the Maoists well, they didn’t know what their thinking was, they didn’t know what their motivation was...So you had a double whammy with an Embassy that already had some formal constraints on how it dealt with the Maoists plus not a very good understanding of what the Maoists were doing. If you don’t understand how an organization works, you tend to see it as a monolith, you assume the worst about their motivations and you don’t understand that some of their concerns are legitimate” (Norris interview 2010).

According to peacebuilding expert John Paul Lederach, this is a common feature of the international community’s approach to peacebuilding; “...the international community most often seeks out and relates to hierarchical leaders on all sides of an internal conflict as if they had exclusive power, even when, as is often the case, power maybe far more diffuse and fractionated” (Lederach 1998, 40).

In an interview, SRSG Ian Martin attributed the American application of the terrorist label to the reactive atmosphere following 9/11. “It’s hard to imagine the terrorist label being applied in the same situation if it occurred today. If you had a movement in another place, with violence at the same level as that of Nepal’s Maoists, you would quite rightly criticize them and apply leverage to stop their bad behavior, but the group would hardly reach the threshold of deserving the “terrorist organization” label. Instead, you

would say it is a political party that's carrying out continued acts of violence and extortion. There's a difference." (Martin interview 2010).

The conditions imposed by the U.S. were too high and lacked gradations that could be objectively measured.

According to Paul Pillar, the efficacy of U.S. efforts to shape the preferences of terrorist groups, "depends on U.S. willingness to change [sanctions] when the behavior that was the reason for enacting them in the first place has changed..." (Pillar 2004, 474). U.S. policy did not adapt to the Maoists' decision to participate in elections.

The peacebuilding consortium Conciliation Resources criticizes the listing process for lacking a "roadmap" for an armed group to follow in pursuit of the lifting of sanctions. "Criteria for lifting or suspending sanctions should be conditionally linked to the target's demonstrable good faith engagement in processes to resolve conflict and implement agreements, as well as their adherence to other international norms and standards" (Conciliation Resources 2008, 4). While a group's leaders may understand what they need to do to get off the list, the rank and file might remain in the dark. Those forces of moderation outside the leadership are thus deprived of the ability to exert meaningful and informed pressure on their leaders. In an interview, Maoist legal advisor Khimlal Devkota argued that preconditions for U.S. engagement would not work and emphasized that the U.S. has not recognized the many ways in which the Maoists have moved away from their conduct as insurgents. "The U.S. doesn't need to list us as a terrorist. We have a fundamental departure from the war to the peace process. Peace is

our preference. On the basis of this agenda it should be revised” (Devkota interview 2009). ASPECT’s Dr. Duman Thapa expressed his frustration with the approach of the U.S. embassy. “I used to tell [Ambassador Moriarty], can you do something that will motivate them? We should not expect someone to behave decently in a year – the whole crowd is illiterate and unemployed. Is there anything that we can do other than just putting conditions to facilitate the process so that those people who are motivated to fight may want to accept going back to their own society? Where is the mechanism so that you can measure the degree of compliance with the conditions? If you look at the Maoist behavior over the last several years, the scale of violence has reduced dramatically” (Thapa interview 2009).

In an interview, NDI’s Dominic Cardy pushed back against this interpretation. “After the civil war ended the Maoists were less violent, but that was because the Maoists didn’t need to use violence anymore. They had access to state power, which they used very effectively. Some of the most alarming incidents were when the Maoists convinced the local authorities to side with them when they clearly broke the law. The cadres could do whatever they wanted. There was a total lack of interest among the international community to do anything about this” (Cardy interview 2009). The U.S. is wary that a change in policy that de-lists the Maoists and recognizes them could be manipulated to undermine Nepal’s nonviolent political opposition. The most powerful disincentive for the U.S. to recognize a terrorist group as political party would be suspicion of their motives, based on intelligence, past actions, or statements from leaders that frame negotiations as a temporary, tactical component of the larger struggle. The Maoists leadership has made such statements, most notoriously in the Shaktikhor video.

The U.S. has also been criticized for the lack of transparency in the designation process itself, especially the process by which a group can be removed from the terrorist lists. Foreign publics are confused by the overlapping list system. “Many of these lists are taken as some sort of grand pronouncement as evilness or lack of evilness as opposed to a more precise tool that has certain legal consequences” (Pillar interview 2009). According to Cronin, “...having such a high-profile list can politicize and oversimplify what is actually a complex web of legal sanctions” (Cronin 2003, 10).

The terrorist tag impeded non-governmental peacebuilding efforts.

Complications related to terrorist designations have strained relations between U.S. embassies and the practitioners of conflict resolution operating in fragile states. When a group is listed as an FTO or SDN, its property is considered “blocked”. A U.S. citizen or affiliated NGO cannot engage in a transaction that has a tangible or intangible economic value with a blocked group or individual (Hutner 2009). In light of these restrictions, U.S. nationals and affiliated NGOs²⁶ that interact with sanctioned groups for peacebuilding or humanitarian purposes must be extremely cautious.

The majority of material support statutes ((18 U.S.C. §§ 2339, 2339A, 2339B, 2339C, and 2339D) preexisted 9/11 (NYU 2010, 48). As originally construed, material support prosecutions were not meant to target, “activities protected by the First Amendment, including humanitarian and political donations to the nonviolent activities of any persons or groups” (Peterson 2008, 22). However, since the 1996 Antiterrorism

²⁶ For the purposes of this paper, “affiliated NGOs” refers to domestic and international NGOs contracted to the USG or receiving funds from the USG

and Effective Death Penalty Act, the definition of material support has evolved to encompass a increasing number and type of activities, while the activities exempted from prosecution has narrowed (Peterson 2008, 318). Congress passed these material support statutes in order to make FTOs "radioactive" (Landman 2010, 10). The statute of most concern to peacebuilding practitioners is 2339B, which criminalizes training ("instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance" ("advice or assistance derived from scientific, technical or other specialized knowledge") (Peterson 2008, 299). According to Andrew Peterson of NYU's Center on Law and Security, "The definition includes all tangible and intangible property, as well as any service; it is difficult to think of what it does not include" (Peterson 2008, 299).

Providing any service that can be construed as having monetary value—such as providing advice, sharing expertise, reviewing a contract, providing transportation costs—is considered a violation (Hutner 2009). Advice provided by a peacebuilding NGO is considered to have intangible economic value. A peace agreement to which an NSAG is a party is considered a tangible good; if the NSAG is proscribed, the peace agreement is considered to be its property and must be treated as frozen (Hutner 2009). Acting as a negotiator on the behalf of an SDN or holding meetings or conferences for a proscribed group is illegal²⁷ (Hutner 2009). For peacebuilding groups that see conducting workshops and promoting dialogue as critical elements of their work, these are highly sensitive issues. Providing lunch, transportation or training can constitute material support for terrorism. The advice provided by peacebuilding organizations does "derive

²⁷ At the moment, it is unclear whether or not a conference in which a proscribed group or person is in attendance is illegal; the legality depends heavily upon the facts and circumstances surrounding the proscribed group/individual's participation (Hutner 2009)

from scientific, technical, or other specialized knowledge,” which makes such advice illegal (Landman 2010, 6). Should the Department of Justice be so inclined, the provider of these goods and services would be vulnerable to prosecution in a U.S. court.

Septuagenarian civil rights lawyer Ralph D. Fertig challenged the U.S. government’s definition of material support when it impeded his organization’s—the Humanitarian Law Project—ability to work advising the Kurdistan Workers Party (PKK) in Turkey. In a recent interview with the New York Times, Fertig clarified his intentions: “Violence? Terrorism?...Totally repudiate it. My mission would be to work with them on peaceful resolutions of their conflicts, to try to convince them to use nonviolent means of protest on the model of Mahatma Gandhi and Martin Luther King” (Liptak 2010). The Humanitarian Law Project’s brief to the Court sought to distinguish their intentions from those with violent aims: “[p]rovide training in the use of humanitarian and international law for the peaceful resolution of disputes, engage in political advocacy on behalf of the Kurds living in Turkey, and teach the PKK how to petition for relief before representative bodies like the United Nations.” (Landman 2010, 2)

In several subsequent Ninth Circuit Court cases, the Humanitarian Law Project challenged the inclusion of “training” in the Antiterrorism and Effective Death Penalty Act and the “expert advice and assistance” language of the Patriot Act. In the former, the court found the term “training”, “too nebulous to provide sufficient notice as to the activities proscribed by the statute”; in the latter, the court found that the “expert advice and assistance” language was, “unconstitutionally vague,” and “chilled protected First Amendment activities” (Peterson 2008, 332). The Government appealed and in February 2010 the Supreme Court heard arguments on the constitutionality of the “material

support” statute in *Holder v. Humanitarian Law Project*, No. 08-1498, and *Humanitarian Law Project v. Holder*, No. 09-89 (Liptak 2010). A decision is expected in June 2010.

Liz Philipson of the London School of Economics writes that despite the intent of the 1996 legislation, “Peacemakers working directly with listed groups risk being labeled terrorist sympathizers. Peacemakers are also in danger of operating outside the law if they meet representatives of a listed group in certain circumstances, even if it is to advocate peace or mediate” (Ricigliano 2005, 70). A U.S. national or affiliated NGO that regularly communicates with a proscribed group might risk alienating donors or hurting their reputation. As a result, the lists have catalyzed a self-cautioning conservatism in the peacebuilding community.

In conversations with several scholars and NGO officials involved in peacebuilding in Nepal²⁸, the general impression was that of frustration and confusion. One recounted being frozen out of project funding after American donors learned that he/she was working with the Maoists. Donors cited fears of being connected with financing terror. “U.S. law cuts Americans out of the dialogue process,” said one interviewee.

Networks of personal relationships are far more important than formal institutions in Nepal’s local political landscape (Hutt 2004, 230). The U.S. Embassy in Kathmandu is small and staffed by diplomats with minimal experience in the country; as a result, their aggregate web of personal relationships is anchored to Kathmandu and does not penetrate the crucial networks that are influential within the Maoists and their constituents. Several interviewees explained that their work with the Maoists (and with armed groups in general) is dependent upon trust, which is hard-won and easily lost. The proscription of a

²⁸ The interviewees referenced in this section asked that their identities remain confidential

NSAG complicates or categorically severs these personal relations. As a result, considerable institutional knowledge and communications channels are lost.

While the interviewees acknowledged that the Embassy is now able to communicate with the Maoist leadership they lack critical connections with the mid-level cadres and commanders, which limits their understanding of Maoist decision-making and complicates attempts to change their perceptions of the organization's self-interest. One interviewee recalled a conversation with a mid-level commander who was considering publicly challenging hardliners at a major meeting and advocating a more conciliatory approach to negotiations. The interviewee suspected that the commander was not yet committed to this course of action and was unsure of the strength of his arguments.

However, the interviewee was unable to provide advice or encouragement, knowing full well that doing so could be interpreted by the Department of Justice as providing material support to a terrorist. The interviewee recalled that many cadres he/she interacted with were eager for knowledge of other conflicts and asked a considerable amount of questions that he/she was unable to answer. "What they want is comparative knowledge. How were other groups successful in Latin America and South Africa? This is different than telling them how to build a bomb. You can't even give them advice on how to change their direction and move toward nonviolence". In one situation, members of a peacebuilding NGO who had been given permission by the embassy to interact with the Maoists were advised to speak with a lilt, as if they are asking a question, in order to avoid the prohibition on giving advice (which could be interpreted as training). These situations were mirror images of the dilemma faced by Robert Fertig in *Holder v. Humanitarian Law Project* and *Humanitarian Law Project v. Holder* (Liptak 2010).

Interactions with officials at the State Department provided little clarity. Interviewees reported State Department and Justice Department lawyers giving contradictory information, or different officials within the same agency providing contradictory or vague guidance. Some officials appeared ignorant of the legal consequences of interacting with the Maoists, as well as the appropriate procedures in obtaining an OFAC waiver. One practitioner recounted being contracted by the State Department to conduct training workshops with the PLA without being offered an OFAC waiver. Another practitioner recounted being given permission to engage the Maoists on a particular issue by the Embassy, only to be told by his/her NGO—the implementing partner—not to make contact out of fear that the Embassy was not applying the law appropriately. In another incident, the implementing NGO required written approval for contact with a Maoist even after the Embassy had approved the contact verbally. Another NGO (not operating in Nepal) was approached by the State Department to provide legal advice to an SDN; when they requested an OFAC waiver, they were told that it was unnecessary, because the contact was in the interest of “peace”, which is “intangible”. These anecdotes underscore arguments that the terrorist designation process fails to enhance legal clarity.

Track 2 mediation with NSAGs remains a contentious issue. Dr. Matthew Levitt rejects the argument that NGOs have a role to play in facilitating peace processes when governments have chosen to disengage. “Track 2 with violent extremists who refuse to renounce violence is a very bad idea. It cuts out the moderates and even the relative moderates at the knees if we engage those who say you can do it my way or you will face violence” (Levitt interview 2009). Levitt makes a clear distinction between engaging

states like Iran—sovereign states that don’t require contact with the U.S. to claim legitimacy—and non-state actors who, “desperately crave this type of legitimacy and play it to great advantage” (Levitt interview 2009). The University of Wisconsin’s Robert Ricigliano has stressed the importance of connecting track two initiatives with official mediation efforts by governments, but also offers a note of caution. “An effective track two actor may have a high level of technical and process expertise, and acquired knowledge of the armed group, but without track one political pressure, help and backing, professional mediators or facilitators would be lost...Track two actors do not always conduct themselves responsibly or act with sufficient accountability” (Ricigliano 2005, 59). One Nepali interviewee complained of the efforts of (mostly European) conflict resolution efforts in Nepal: “They saw [the Maoists] as a political group and almost justified armed struggle...they were naïve”²⁹.

The widely quoted mantra in the field is that you cannot have, “tea with a terrorist”. However, even if an NGO employee does opt to pay for a terrorist’s tea—or provide advice for the purpose of peacebuilding—it is unlikely that he/she will face prosecution by the Department of Justice. A February 2000 memo from the U.S. Department of Justices’ Working Group on NGOs and Terrorist Financing touched on this issue and outlined ways to prevent USAID money from unintentionally falling into the hands of terrorists states: “[the problem that we are seeking to remedy] is not USAID grant recipients ‘associating’ with terrorist groups...In our judgment, any prospective remedy should not be concerned with the social affiliations or political activities of the grantee and its officers. The focus should instead be on the more direct question of where USAID grantees direct their money” (Breinholt 2000, 3). OFAC decides the utility of

²⁹ Confidential Interview

prosecuting someone who has allegedly provided material support to a terrorist group and the Department of Justice has prosecutorial discretion; it is unlikely that either of these organizations would seek the arrest and prosecution of a hapless NGO employee for providing goods or services of minimal value to a member of a proscribed group for the purpose of peacebuilding. Although a senior official at the Carter Center insisted that obtaining an OFAC waiver was the hardest obstacle for the organization to overcome in Nepal, Jimmy Carter was able to meet with the Maoists before the 2008 election despite their proscription (Agence France Presse 2008).

Since 2001, 23% of terrorism prosecutions in the U.S. have been material support cases guided by 2339B; 150 individuals have been prosecuted with a 70% conviction rate (Landman 2010, 4, 5). However, of these cases, 67% related to plots with specific targets (NYU 2010, 49). Of the 24 “non-target” cases, 9 involved individuals who had been trained in terrorist camps; others engaged in a range of quasi-criminal activities such as providing broadcasts from Hezbollah’s al Manar television, providing medical services and martial arts training to fighters in Afghanistan, or attempting to sell weapons or false identification to terrorists (NYU 2010, 49-51). Of all the cases reviewed in a report on post-9/11 terrorist trials by NYU’s Center on Law and Security, none revolved around the provision of expert advice and assistance and/or training in the interest of peacebuilding.

Notwithstanding suspicions of Maoist intentions, the U.S. invested in peacebuilding in Nepal. The U.S. funded the Nepal Transition to Peace Forum, the Ministry of Peace and Reconstruction and several dozen district-level Local Peace Committees (United States 2009, 7). However, certain restrictions guided the conduct these initiatives, including strict compliance with OFAC regulations, prohibitions on

offering advice or expertise, and an institutional bias against one-on-one meetings with the Maoists (Sapkota interview 2009). The U.S. peace initiatives only began to include the Maoists without restrictions in 2009 and—in a departure from local customs—no tea was offered to the Maoist participants (Sapkota interview 2009). The Maoists were similarly excluded from aid flows that supported training and resources for political parties, primarily through the National Democratic Institute (Norris interview 2010). It is impossible to measure how much more effective these initiatives could have been if they were launched—without restrictions—earlier in the peace process.

Proscription itself is an ineffective technique with more costs than benefits.

The policy of proscription has many critics both inside and outside of Nepal. Many in the peacebuilding community perceives engagement with armed group as a key policy instrument to end violent conflict and save lives. In making the case for talking to armed groups, former U.S. President Jimmy Carter argues, “with whom are you going to discuss a conflict if you don’t discuss it with the people who are involved in the conflict, who have caused the conflict from the beginning, and who are still engaged in trying to kill each other...you don’t fight with weapons and bullets. You fight it by talking to them” (Ricigliano 2005, 10, 21). A 2009 Conciliation Resources policy memo states: “Talking to armed groups can improve understanding of the conflict and obstacles to settling it, can help build mutual confidence, and can pave the way towards sustainable conflict resolution” (Conciliation Resources 2009, 2). Both the LTTE in Sri Lanka and the Communist Party of the Philippines cited their listing as terrorists—the former on the

EU list, the latter on the American list—as motivation from withdrawing from peace talks (Florquin and Warner 2008, 19-20). Kristina Thorne of the HD Centre has faulted the U.S. lists for not considering exemptions for groups that are involved in ongoing peace processes and for precluding the possibility of relaxing sanctions in step with significant behavior change (Thorne 2006, 7).

Paul Pillar has criticized the lists for stressing, “uniformity rather than variation,” and for being too bureaucratic and slow to “respond to the changes in the gallery of international terrorists” (Pillar 2001, 150-54). All of the groups on the terrorist lists are violent, but some are more violent. All of the groups are dangerous, but some are more dangerous. The lists force the U.S. to adopt a uniform policy that disregards the variety among terrorist entities (size, location, religious or ideological affiliation, level of sophistication) and the likelihood that different groups will respond to incentives and engagement in different ways. According to Oxford University’s Audrey Kurth Cronin, the FTO list is, “...overly mechanistic, restrictive and inflexible, especially in an area of foreign policy that requires flexibility” (Cronin 2003, 12). Kunda Dixit, who supports the terrorist tag, recognized that “lumping [the Maoists] with al Qaeda is not wise and opens you up to accusations of hypocrisy” (Dixit interview 2009). Other critics have gone farther, insisting that several of the groups appeared on the FTO as concessions to countries that supported the U.S. war in Iraq. Human Rights Watch’s Joanne Mariner writes, “It may be that all of the groups discussed above are linked to terrible crimes. But there is no dearth of violent groups in the world that the United States has not decided to name as its terrorist enemies. Allowing political influences to taint terrorist designations trivializes the terrorist threat. The decision to name a group to any of the U.S. terrorism

lists should be based on strict and objective criteria, not awarded as a diplomatic favor” (Mariner 2003).

However, the terrorist list in Nepal has not been completely rigid. It was sufficiently flexible to allow Prachanda—as Nepal’s Prime Minister—to visit the United States for the 2008 UN General Assembly and attend a gala dinner hosted by President George W. Bush, despite the Maoists’ proscription (Agence France Presse 2008). A political advisor at the U.S. Embassy argued that the Embassy’s contact policy directs the application of the terrorist list, not the other way around. “The contact policy reinforces the legal restrictions in the two terrorist designations, but it is separate from them. In theory, the Maoists could be on the terrorist lists and we could still have contacts. Similarly, they could be off the lists, and we could have no contacts...I would say that contacts with the Maoists have been complicated by the Maoists' behavior, not the TEL” (Martin interview 2009).

A terrorist listing is much easier to do than to undo. The President, the Secretary of State and the Congress have the power to remove a group from the lists at any time if he/she/it determines that the circumstances that compelled the U.S. to designate the group have changed or that such an action is in the interest of U.S. national security (Cronin 2003, 2). However, this power is rarely used. The investment of such grave authority in a single node of the government has created an institutional obstacle where the costs of de-listing a terrorist organization far outweigh the benefits for the decision makers involved. SRSF Ian Martin’s critique of the U.S. employ of terrorist lists in Nepal follows this logic: “If the situation can be looked at as Nepal alone, then there would probably not be thought to be any strong argument for maintaining the label. I

think the problem is that the terrorist label is part of a much more generalized policy, so in the interest of consistency certain steps have to be followed – when and how you take people off particular lists” (Martin interview 2010).

The current system creates perverse incentives for listing a group and against de-listing a group. Taking responsibility for listing a group can boost a public official’s terror-fighting credentials, while de-listing a group could expose the Secretary of State to accusations of being “soft on terror”. A former-U.S. ambassador described the lists as “feel good mechanisms more than impact mechanisms,” where a legislator can get “brownie points” for listing a group but not for lifting a ban.

Within the bureaucracy of the State Department, few mid-level officials will risk their careers on the behalf of a group that they are not entirely certain is committed to moderation and nonviolence. Advocates of engaging an NSAG must demonstrate that the benefits of delisting outweigh the political benefits of a designation that placates either an allied government or a domestic constituency. A senior diplomat at the U.S. Embassy in Nepal explained that de-listing the Maoists in Nepal—even after the elections—would have required a leap of faith at a time when confidence was constantly being undermined by mob violence, attacks on journalist, and public denunciations of the U.S. The burden of proof for de-listing remains on the Maoist leadership, who have not yet seen fit to assuage the doubts of their potential allies in the U.S. Embassy.

Part IV: The UNMIN Approach to Conflict Management in Nepal

While U.S. policy in Nepal was aloof and reactive, the U.N. was seized and proactive. The U.S.' absence from the table was filled by the presence of the UN (ad the less perceptible influence of India). The UN has no such legal or reputational restrictions on talking to non-state armed groups or terrorists. The UN has long abided by a commitment to talk to everyone—with and without blood on their hands—in service of conflict mitigation. But was this approach any more successful in winning the peace in Nepal?

A light UN monitoring mission with limited powers was formally requested the day after the signing of the CPA (Whitfield 2008, 28). The United Nations Mission in Nepal was established by Security Council Resolution 1740 on January 23, 2007. UNMIN challenged the convention of peace operations with broad political responsibilities and a heavy military footprint (Whitfield 2010, 3). The mission—not a peacekeeping but a political mission—was mandated to monitor the two armies' compliance with the ceasefire, assist the parties through a Joint Monitoring Coordinating Committee (JMCC) in implementing their agreement on the management of arms and armed personnel, and provide technical support for the election of a Constituent Assembly (S/RES/1740, 2007). The mission was assigned a Special Representative of the Secretary General—former Secretary General of Amnesty International Ian Martin—signifying the UN's commitment to and prioritization of Nepal's peace process.

UNMIN had no formal powers to mediate as a neutral third party and the offer of the UN's "good offices" was rejected and written out of the mandate (Suhrke 2009, 16). However, UNMIN pursued these objectives "discreetly" by communicating messages

between parties, proposing confidence-building measures, and “advising on longer-term strategies to address distrust and tension among the parties” (Whitfeld 2010, 14).

UNMIN was unique in its lack of mediation powers, absence of peacekeepers and (intended) limited duration; only six of the approximately fifty peace operations undertaken concurrently by the UN had a similar form and function (Suhrke 2009, 1).

The Department of Peacekeeping Operations resisted the deployment of an all-civilian mission, but relented when faced with the choice between a civilian mission or no mission (Suhrke 2009, 23). According to SRSG Ian Martin, “I don’t think that there was any way that the UN could have said, ‘Yes we’re willing to help, but we’ll only help if you give us a larger role’” (Martin interview 2010).

After the elections, UNMIN continued to execute its responsibilities for arm monitoring, overseeing the discharge and rehabilitation of disqualified PLA combatants, monitoring the political situation in the country, and monitoring human rights (United Nations Security Council October 2009, 6-8). Currently, 19,602 PLA combatants are under the supervision of UN monitors in cantonments spread across the country (Ogura 2010).

UN Strategy: Inducements and socialization without teeth

UNMIN pursued a policy of inducements mixed with socialization by investing in building relationships with Maoist leaders and lightly censuring their transgressions when necessary. UNMIN viewed the Maoists’ decision to enter negotiations to be a critical window of opportunity and capitalized on these relationships to move the organization

toward a peaceful path. In a personal interview, SRSF Ian Martin argued, “I think if you can move that relationship in the right way, you can possibly have an influence on the thinking of the leadership of an insurgent movement...Ultimately, you want to persuade it to enter a peaceful democratic path. Now, engagement is an important way of doing that and in the case of Nepal, the Maoists were open to that engagement... Now if you say this is a terrorist organization, and we therefore can’t deal with it and dealing with it is illegal, you deny yourself the opportunity for that engagement” (Martin interview 2010).

If UNMIN conceptualizes success as ensuring the Maoists’ continued cooperation and preventing a return to war, then they have achieved their mission’s objective. UNMIN has competently monitored the two armies and served as a trustworthy steward of the elections (Suhrke 2009, 5). The symbolic presence of the UN is perceived to have deescalated the conflict, changed the acceptable rules of the political game, and exerted a psychological impact on the belligerents that deterred violence (Upadhyay and Adhikari 2009).

UNMIN’s model has been championed by several scholars, most notably Astrid Suhrke of Norway’s Chr. Michelsen Institute. In the view of Suhrke and other proponents of the UNMIN model, the violations to the CPA, “...pale in significance compared to the general picture of two armies emerging from a bitter ten-year civil war to basically observe the peace agreement and related accords with only very light international monitoring (Suhrke 2009, 32). UNMIN has been able to restrain the Maoists and the other parties at moments that were crucial for preserving the peace; Ian Martin personally intervened on eve of the elections to prevent an RNA Special Forces raid on the Maoists

headquarters in Kathmandu following the kidnapping of two off-duty soldiers (Suhrke 2009, 33).

As socialization requires both carrots and sticks, UNMIN speaks out against the Maoists in an effort to communicate a mode of normative behavior. Following the release of the Shaktikhor video, UNMIN asked Prachanda for an explanation and warned that such provocations threatened the peace process as a whole. According to UNMIN, “The message was heard” (Jones interview 2009). In his final statement to the Security Council as SRSG, Ian Martin questioned the Maoist’s sincerity in implementing the peace accords and long-term adherence to multi-party democracy and condemned their continued use of violence and threats (Martin 2009, 5).

In the Secretary General’s routine reports to the Security Council, the Maoists have been chastised for a number of violations, some of which were described by the Secretary General as “serious violations” of the Agreement on the Monitoring of the Management of Arms and Armies (United Nations Security Council October 2009, 6). The annual report of the office of the Special Representative of the Secretary General for Children and Armed Conflict continues to censure the Maoists, while the Special Representative of the Secretary General for Children and Armed Conflict has criticized their failure to commence the long-delayed discharge of the 2,973 minors from the Maoist army cantonments in late 2009 (United Nations Security Council October 2009, 5).

However, the failure of UNMIN to respond quickly and publicly to flagrant violations of the CPA prompted many Nepalis to question UNMIN’s neutrality. One prominent Nepali newspaper editorialized that UNMIN’s failure to stop the murder of kidnapped businessman Ram Hari Shrestha or to sanction the Maoists in its aftermath,

“gives credence to the general presumption in Nepal that the UNMIN officials are friendly towards the Maoists and that the authorities are there only to pocket money for their non-performances and high negligence as well” (Suhrke 2009, 19).

Critique of the UN Approach

There are several critiques of the UN approach to conflict management in Nepal. First, UNMIN’s mandate was flawed and the UN was not sufficiently empowered to act as a mediator. Second, the UN had unrealistic faith in the ability of the Nepali actors’ local ownership to strengthen and guide the process. Third, there was no credible deterrent for spoiling.

Limited Mandate/Not sufficiently empowered to act as a mediator

The UN’s services as a neutral third party in post-conflict environments provides a vital guarantee to parties who lack credible assurances that their antagonists won’t cheat in implementing their peace process commitments (Walter 2004, 436). However, the UN was not empowered by their mandate to serve as a mediator in Nepal’s conflict. The drafters of the original mandate did not appear to envision a long-term role for the mission beyond the conclusion of its election assistance duties; the mission’s continuous renewal was unanticipated (Suhrke 2009, 15). UNMIN’s limited role as a custodian of peace has muddled its articulation of the desired normative behavior by the Maoists.

Despite the absence of an official mandate to act as a mediator, Astrid Suhrke emphasizes the importance of UNMIN's "watchdog function" to "keep the parties' feet to the fire," and to, "uphold the morality of the peace agreement, so to speak, by monitoring adherence and calling on the parties to honor their commitments and obligations" (Suhrke 2009, 45-46).

Soon after Resolution 1740, the limitations of UNMIN's mandate became apparent. According to a high level working group of UN officials, Nepali nationals and scholars convened by the Center on International Cooperation, the narrow mandate was the "core weakness" of the mission (Whitfield 2010, 3). Some participants questioned whether the UN should have even created an assistance mission with a "less than satisfactory ('iffy') mandate in the first place" (Whitfield 2010, 8).

The UN's high visibility brought expectations that exceeded its mandate (Whitfield 2010, 7). As far back as December 2007 the International Crisis Group was advising UNMIN to clarify its role and improve communications with the Nepali populace (International Crisis Group 2007, 2). UNMIN was widely viewed as having too high a profile and spending too much money for the limited value that it added to the peace process itself; when UNMIN finally began to be more vocal about pushing the parties to fulfill their obligations under the CPA it was viewed as too little, too late (International Crisis Group 2007, 13)³⁰.

Security Council Resolutions renewing UNMIN's mandate missed opportunities to censure the Maoists for specific or general violations of the CPA. The most castigatory

³⁰ SRSF Ian Martin was forced to defend UNMIN's conduct and clarify the mandate regularly: "Nobody wanted thousands of blue helmets in Nepal. The Nepali actors didn't, the regional neighbours certainly didn't, the UN didn't...you're not talking about a body that has enforcement authority...the criticism addresses it as if there was both an enforcement mandate and an enforcement capacity" (Upadhyay and Adhikari 2009).

language in Security Council Resolution 1879 is contained in the pre-ambulatory section paragraphs: “*Noting* with concern recent developments, and encouraging renewed and sustained efforts to create a unified approach among the political parties, including through the proposal for a high-level consultative mechanism as a forum for discussion on critical peace process issues” (S/RES/1879 2009). None of these “recent developments” are specified, and no party is singled out for noncompliance with the CPA—implicitly suggesting that all parties are equally to blame for the continued stalemate. Such excessive impartiality is also found in the operative paragraphs: “*Welcomes* progress achieved so far, and calls upon all political parties in Nepal to expedite the peace process, and to work together in a spirit of cooperation, consensus and compromise in order to continue the transition to a durable long-term solution to enable the country to move to a peaceful, democratic and more prosperous future;” (S/RES/1879 2009). This is consistent with language in previous resolutions renewing UNMIN’s mandate, including resolutions 1825 (2008), 1796 (2008), 1740 (2007), and 1864 (2009). Stronger language in the pre-ambulatory section, such as, “Expressing its utmost concern...”, “Deeply concerned by...”, “Expressing its grave concern...”, “*Deploring*...”, or in the operative section (“*Demands*”), would have sent a clearer message that continued spoiling would not be tolerated by the international community. The Center on International Cooperation working group correctly faults the UN for failing to exercise sufficient leverage on the Nepal Army, but it overlooks the under-utilized leverage that UNMIN had over the Maoists (Whitfield 2010, 22).

Overestimated Faith in Local Ownership

Nepal's peace process has been perceived as a unique case where local buy-in has superceded the need for a multidimensional UN presence (Suhrke 2009, 46). When nearing the end of his tenure as SRSg, Ian Martin was questioned about the UN's inability to impose itself more forcefully to ensure compliance with the CPA and deter spoiling. "Even when the UN does have thousands of armed troops on the ground it doesn't necessarily result in a better outcome in terms of the behaviour of the parties. Because peace processes really depend to the extent to which parties themselves respect commitments that they've made," he said (Upadhyay and Adhikari 2009). Teresa Whitfield stresses the greatest strength of the Nepali peace process was its local ownership (Whitfield 2008, 33). By this line of reasoning, a quieter UN role was essential to motivate the various parties to find their own solutions to Nepal's multi-faceted challenges.

However, the elevation of local ownership at the expense of formal international mediation contradicted the guidelines set down in the *Department of Peacekeeping Operations Capstone Doctrine*: "The need for even-handedness towards the parties should not become an excuse for inaction in the face of behavior that clearly works against the peace process. Just as a good referee is impartial, but will penalize infractions, so a peacekeeping operation should not condone actions by the parties that violate the undertakings of the peace process..." (United Nations Department of Peacekeeping Operations 2008, 32). Despite the benefits of local ownership, Nepal's peace process has

been hampered by the absence of an impartial third party that is empowered to censure noncompliance with the CPA and actions that contravene its letter and spirit.

Astrid Suhrke's report, *UN Support for Peacebuilding: Nepal as the Exceptional Case*, endorses the concept of a "measured and moderate" role for international custodians, providing that the parties are dedicated to peace process (Suhrke 2009, 2). But Suhrke does not address how the international community should make that determination. The spoiler management literature³¹ is replete with different strategies to reach beyond the fog of peace and determine whether a party is truly committed to a peaceful settlement and the compromises that it will inevitably entail. To assume ipso facto that parties that enter into a peace process are committed to its successful conclusion—in Nepal or elsewhere—may relieve the UN of its traditional heavy-handed and often ineffective role as a custodian, but at the risk of creating opportunities for abuse by potential spoilers. It is still premature to determine if this mechanism is working in Nepal, as the peace process is far from a conclusion and Nepalis have not ruled out the possibility of a return to war.

UNMIN's supporters generally laud the process' local ownership, but then proceed to fault the local owners for failing to implement the provisions of the peace agreements. Suhrke faults the Nepalis for failing to establish a high-level commission to, "monitor and facilitate the implementation of the peace agreement" (Suhrke 2009, 45-46). In an interview SRSF Ian Martin said, "I do think that it was a strength of the process that it was a Nepali owned process, but I think greater UN support to implementation of commitments that the parties had negotiated themselves would have benefited the process and would have avoided some of the charges and counter charges

³¹ See Part 5 for an in depth analysis of the spoiler management literature

that have jeopardized the process” (Martin interview 2010). Martin’s deference to the Nepali parties was excessive and reflected an under-estimation of UNMIN’s potential to influence spoilers and preserve the peace process. The Fletcher School of Law and Diplomacy’s Ian Johnstone warns that the international community’s satisfaction in taking a step back can sometimes be self-deluding, as “rigid adherence to ‘local ownership’ can mean deferring to local power brokers that may lack the legitimacy and capacity to deliver sustainable peace” (Johnstone 2007, 14-15). UNMIN wielded symbolic power and Nepal’s press and people closely scrutinized its public statements and actions. While local ownership in Nepal is unique and laudable, it has not produced results. Thus far, the parties have only resisted the temptations to return to war; meeting the bare minimum standard for success does not endorse the strategy.

Nepal’s political environment is too polarized for an unmediated peace process, and UNMIN was not designed or empowered to demand, compel or coerce the compliance of the belligerents. Advocates of the UN’s cultivation of local ownership in Nepal transform UNMIN’s greatest weakness into its greatest strength.

No credible deterrent for spoiling

Since the dawn of modern peacekeeping, impartiality—the refusal for UN missions to take sides in a conflict or alter the military balance—has been a fundamental principle. But the *Brahimi Report* argued that UN erroneously perceived impartiality and neutrality as synonymous. Brahimi insisted that non-intervention was not the same as impartiality. While not going so far as to suggest that the UN should (or could) become a

party to a conflict, Brahimi suggested that peace operations should act forcefully—but without bias—to counter spoilers and preserve a peace accord (Brahimi 2009, 9).

Crucially, Brahimi cautioned against the tendency to apply “best case scenario” planning to situations that could degenerate in a “worst case” scenario (Brahimi 2009, 11). This guidance was ignored by UNMIN’s planners. Boilerplate statements expressing concerns about political violence are common, but are not backed up by forceful condemnations when such violence occurs. No action taken by UNMIN has compelled the Maoists to disarm and disband the YCL (or at least make a good faith effort).

In treating the Maoists as a party of equal stature to the NA and the traditional political parties—rather than as insurgents—the UN “conferred a measure of status and reduced their isolation” (Suhrke 2009, 24). UNMIN continually employed legitimizing language that carefully equated the Maoists with the established political parties, as well as the PLA with the NA³². The UN has been extremely hesitant to alienate the Maoists from the peace process, a fact that the Maoists have exploited, most notably in their refusal to disband the YCL. According to Dominic Cardy, “Placating the Maoists because of a fear that they would drop out of the peace process allowed them to behave incredibly badly”³³ (Cardy interview 2009). Beyond their ability to legitimize the Maoists as a

³² This quote from Ian Martin’s response to a loaded interview question alleging that UNMIN was biased in favor of the Maoists is illustrative: “When an international third party is accused of bias, it is more often accused of bias in relation to the non-state actor. Because at the beginning of any peace process the state naturally feels it is the legitimate actor, and the other side are rebels, insurgents or terrorists. And yet the nature of the peace process is that you have to recognize that there are two sides to it. Not treat them as identical, or equal in all respects, but nonetheless recognize the success of a process does involve an effective involvement with both sides” (Upadhyay and Adhikari 2009).

³³ Cardy elaborated on this point during our interview: “The Maoists would have been quite willing to make compromises if they had been pressured into doing it, but they never were. They were allowed to continue to carry on as a paramilitary organization using force whenever it suited them and they were consistently rewarded by the international community for bad behavior. By trying to be kind the international community really screwed up and made things worse. How was the bad behavior rewarded? Massive increases in foreign aid compared to previous levels; it was inexplicable how much slack they were cut. You had a lot of people who were openly sympathetic to the Maoists and the way that they were

political party, the UN possessed no inducements that could be withdrawn to deter spoiling. Resources for humanitarian assistance and reconstruction could have been strategically proffered and withdrawn, but UNMIN did not bring such funds to the table (Suhrke 2009, 15). In a sense, the UNMIN pursued an inducement strategy even though it lacked attractive inducements.

Stedman has written that, “Mediators, who have vested interest and substantial investment of time, energy, and honor in seeing settlements implemented, tend to interpret acts of noncompliance as being motivated by fear rather than insincerity” (Newman and Richmond 2006, 30). The institutional pressure to preserve the peace process at all costs created perverse incentives for Ian Martin and UNMIN to do everything in their power to prevent the talks from breaking down, which in turn left the process vulnerable to Maoist manipulation. Considering the limitations of UNMIN’s mandate, did they have any other option? Stedman’s consideration of coercive withdrawal—where the custodian threatens to withdraw international support and presence from the peace process—might provide an answer (Stedman 1997, 14). It is possible that the threat of punitive withdrawal of UNMIN would have been a credible threat to the Maoists, as well as an embarrassment to the other parties who obstructed the peace process. This strategy was suggested by a number of participants in the Center on International Cooperation working group (Whitfield 2010, 15),

SRSG Aldo Ajello employed coercive withdrawal in Mozambique by to deter RENAMO spoiling and change the leadership’s perception of their self interest.

carrying on. Other political parties members were being killed and beaten and chased out of towns on a daily basis...[the international community] gave no incentive to the Maoists to change. So they became more and more badly behaved as we moved toward the elections, until they realized that all they had to do was make threats and they would probably be rewarded” (Cardy interview 2009).

Throughout Mozambique's peace process, Ajello catered to RENAMO's desire to be portrayed as a legitimate, nationalist party fighting for a just cause (Stedman 1997, 37). However, he recognized that RENAMO had not yet internalized liberal democracy or considered the role it would play as a moderate, nonviolent opposition if it lost the post-conflict election. Ajello exploited his leverage as the gatekeeper to international legitimacy and skillfully administered a \$15 million fund that was distributed to reward compliance and held back to punish noncompliance. The allocation and withdrawal of these monies was meant to socialize RENAMO to the UN's conception of normative political party behavior. Crucially, this fund paid RENAMO's leader a \$300,000 a month "salary", a powerful incentive to assure continued compliance (Greenhill and Major 2007, 26). At a particularly critical moment, Ajello threatened to withdraw the UN in response to RENAMO's failures to meet its obligations; the threat was sufficient to compel RENAMO (Stedman 1997, 38).

Like Ajello in Mozambique, Ian Martin took great pains to keep the Maoists engaged in the peace process by playing to their desire for legitimacy. However, Martin preferred inducements to a fault and was reluctant to punish Maoist noncompliance—despite the risk that spoiler management strategies based on inducement and socialization, "risk strengthening the spoiler by rewarding it" (Stedman 1997, 15). Martin resisted the temptation to use coercive methods—even more forceful public statements or sanctioning language in Security Council resolutions. Punitive withdrawal is predicated on the assumption that the spoiler desires international engagement and the legitimacy it confers upon them. It would have been (and still might be) especially well-suited to spoiler management in Nepal, considering the Maoists' desire for an active UN role in

Nepal (Whitfield 2008, 6). Ajello's employ of the withdrawal strategy in Mozambique was risky; it is possible that RENAMO would have held their ground, precipitating a UN pullout and a return to war. Martin was not willing to take this risk. UNMIN prioritized losing the cooperation of the Maoists over preserving the sanctity of the CPA.

Part V: Application of the Literature on Spoiler Management to Nepal

Judging by the criteria laid out in the spoiler management literature, Nepal's conflict is especially promising for peace. Nepal lacks many of the elements that induces spoiling, such as lucrative natural resources, easily exportable commodities like diamonds or gold, an ideologically motivated external state sponsor (although India did provide some refuge for Maoist leaders during the war), and a conflict-supportive wealthy Diaspora. So why have the U.S. and UN failed to facilitate a successful peace process?

Terrorist Tag as an Obstacle to Effective U.S. Spoiler Management

The U.S. experience in Nepal demonstrates how the terrorism lists will complicate U.S. efforts to act as a mediator and/or peace custodian in future conflicts. A wider range of conflict management options are available to the U.S. if certain groups on the list who could be described as and terrorists are defined instead as potential spoilers, even though the label commands less attention. U.S. interests are often tied to the resolution of the a protracted conflict where a terrorist group is a party and a negotiated political solution is possible.

A senior U.S. diplomat familiar with the state of affairs in Nepal acknowledged that the removal of the U.S. terrorist tag was of only peripheral concern to the Maoists. "The Maoists are pretty unaffected by sanctions and the moral stigma wore off a long time ago". The Maoists do not need to seek legitimacy from the Americans, as they have found it elsewhere—first with the UN and later at the ballot box. The second key

objective of the terrorist list—freezing the assets of proscribed groups—has little application in Nepal, where the Maoists are not dependent on external assets (Ricigliano 2005, 70). Absent these crucial pressure points, the U.S. proscription has not compelled the Maoists to adapt their preferences to those of the U.S. The Maoist legal advisor Khimlal Devkota insisted that the tag has resulted in not tangible effect on Nepal’s domestic or regional politics, and that U.S. efforts to isolate the Maoists only amounted to giving them visa problems when they wanted to travel out of the country (Devkota interview 2009).

A group that is labeled a terrorist entity remains beyond the pale, an eternal outside spoiler. Through the lens of the terror lists, an outside spoiler can never “graduate” to become an inside spoiler, even though the latter is often preferable to the former. When the U.S. criminalizes all associations with terrorists, it effectively removes the bridge between outside and inside spoiling. Yet the spoiler management literature identifies the benefits of a third party coaxing an outsider spoiler into a negotiated peace process. Once such a group has entered into a peace process, they evolve from being an outside spoiler—over whom a peace custodian has little leverage—into insider spoilers—who can be skillfully managed in some, but not all, circumstances. If the spoiler management studies are to be believed, traditional modes of statecraft are as applicable to armed groups as spoilers (inducement, persuasion, compellence, denial). This challenges the traditional perception that only a denial strategy will suffice when a state is confronted with a terrorist threat. If the working assumption is that a terrorist group will never enter into a peace process in good faith, then an Embassy cannot serve as a “peace

custodian” no matter the prospects for peace. As a result, the U.S. is absent from the negotiating table, and their ability to guide a peace process is radically curtailed.

In Nepal, the terrorist tag conditioned U.S. conflict management policy and reduced the Embassy’s public role to leading a debate over whether or not the Maoists should be “on the list” or “off the list”. Cronin writes, “The statement that a group is ‘one the list’ or ‘off the list’ can be very misleading, and its significance is often misunderstood” (Cronin 2003, 9). In an interview, Paul Pillar elicited a similar position: “Whenever there is some public discourse about whether a group should be ‘on’ or ‘off’ the list, these are the terms, not ‘what is the consequence of being on the list and would that particular tool be useful in regard to this particular group’. That is more important than ‘does this group deserve to be called a terrorist or not’” (Pillar interview 2009).

Spoiler Management and UNMIN³⁴

Approximately half of all countries that break the pattern of violence and emerge from war relapse into violence within five years (Newman and Richmond 2006, 1). Such a poor track record indicates that some peace processes are premature, while others are simply unworkable. Spoiler management scholars assume that disputants do not always become involved in a peace settlement in pursuit of a compromised solution. Some parties possess what Oliver Richmond defines as “devious objectives”, such as buying time to rearm and regroup, internationalizing the conflict, profiting materially, gaining legitimacy as a political actor, gaining international recognition, easing or avoiding

³⁴ The paper proceeds without addressing a key critique of this body of literature: the concept of spoilers has been critiqued for being inherently subjective and dependent on the bias of the labeling party (Newman and Richmond 2006, 4).

sanctions, using the media to advance their cause, and “avoiding costly concessions by prolonging the process itself” (Newman and Richmond 2006, 2). This is little indication that the Maoists are currently rearming. However, they have succeeded in gaining international recognition and legitimacy. We now turn to several leading scholars of spoiler management and apply their theories to the practice of the UN in Nepal.

John Stephen Stedman: Intentions of the Spoiler

Stedman argues that successful management (and ultimately, neutralization) of spoilers is dependent upon the custodian first identifying spoiler type and second responding to the spoiler with the corresponding strategy. Once custodians have identified what type of spoiler they are dealing with, they must calibrate an appropriately *reactive* response. As outlined earlier, Stedman’s proposed strategy to counter greedy spoilers was socialization. We have demonstrated that this policy did not succeed in Nepal.

Kelly Greenhill and Solomon Major: Capabilities of the Spoiler

A decade after Stedman’s article appeared, Kelly Greenhill and Solomon Major published a retort to Stedman’s theory, also in *International Security*. While extolling the contributions that Stedman’s scholarship has made to peacebuilding, the authors frame an alternative understanding of spoiler motivation, necessitating a different approach to spoiler management. They contest Stedman’s central thesis that *endogenous* factors

determine spoiler type and subsequent custodian strategy and propose that the *exogenous* environment determines the type of spoiler (Greenhill and Major 2007, 8). The authors flip Stedman's thesis on its head. If the "prevailing opportunity structure" and the "relative power of parties to peace accords" are determinant of the negotiation strategies pursued by the parties, then spoiler identification is not essential to spoiler management (Greenhill and Major 2007, 8). The authors reject the idea that spoilers can be assigned distinctive types, as, "...every real or potential spoiler will be as greedy as he thinks he can afford to be" (Greenhill and Major 2007, 11). Custodians are far more influential in this model. They can influence parties—irregardless of their goals—by *proactively* creating the appropriate incentives and disincentives to behavior change.

Kelly Greenhill and Solomon Major insist that a group's intentions are irrelevant and focus instead on *capabilities* given the prevailing opportunity structure. According to the authors, "would-be spoilers with the power to unilaterally alter the precarious balance negotiated into peace accords are likely to do so, whereas those with less power are likely to continue to sue for peace to maintain their otherwise shaky position" (Greenhill and Major 2007, 9). This analytical approach seems to cohere with the Maoist's erratic behavior. The international community's presence necessitates a modicum of professionalism, so the Maoists provide the minimum amount of compliance necessary to placate UNMIN and avoid censure. The Maoists choose peaceful protest and principled opposition to advance some of their goals and mob violence and intimidation to advance others. The political capital accrued by their behavior as a "democratic" and "nonviolent" opposition combined with the limited powers of UNMIN created a permissive environment for their more extreme spoiler behavior. Maoist violence and intimidation

was less constrained once their election victory confirmed that they were in a position of strength with or without continued progress in peace negotiations.

If Greenhill and Major are correct and, “the distribution of relative power and the availability of sufficient carrots and sticks are the primary variables that determine whether a spoiler will undermine a peace process,” then UNMIN could have imposed greater costs to potential spoilers with a more robust mandate and at least a limited peacekeeping presence. In their system, a more robust disarmament process would have further reduced the Maoists’ capacity to undermine the negotiations. This could have included a second round of DDR for the YCL, or the imposition of additional obstacles to PLA rearmament.

Barbara F. Walter and Virginia Page Fontina: Perceptions of Vulnerability

Barbara F. Walter is another key contributor to the debate over spoiler management. Walter’s research demonstrates that only 20% of civil wars have been resolved by negotiations and argues that the high rate of failure is due to the absence of a third party to enforce the terms of the peace agreement (Walter 2004, 436). The implementation of the terms of a peace agreement inherently weakens each of the parties as they take steps to deescalate, demobilize and disarm. When parties lack credible guarantees that their antagonists will fulfill their peace process commitments, their suspicions provide compelling incentives to cheat. Crucially, this holds across parties with different goals and ideologies (Walter 2004, 436). Walter’s model assumes that all parties are genuinely committed to peace, but are unable to disarm due to a lack of trust

in the other party's intentions (Newman and Richmond 2006, 14). Peace custodians must provide guarantees against unilateral defection from the process and protect a vulnerable party that is in the midst of disarming.

This theory is somewhat at odds with Stedman as well as Greenhill and Major, as Walter finds that *perceptions of vulnerability* will encourage spoiling, rather than intentions or capabilities. When an outsider is able to step in and provide a credible deterrent to backsliding or double-dealing, the parties will have the reassurance necessary to fulfill their own obligations even if it weakens their military capabilities. When third parties raise the costs of cheating, the belligerents' reciprocal promises gain credibility, increasing the likelihood that they will cooperate (Walter 2004, 41).

Using the Walter model, Nepal can be interpreted as either a resounding success or a stillborn failure. Limited disarmament was secured with minimal coercive capacity on the part of the custodian; however, it is unlikely that the security guarantee that Walter insists is vital to the sustainability of a peace process is possible without either full disarmament or a more credible external deterrent. To be successful, a third party must communicate the willingness to use force and have a military capability sufficient to punish parties that violate the peace accords (Walter 2004, 441). Walter explicitly argues that peacekeeping can only end a war if it is backed by a promise to use force (Walter 2004, 446). In Walter's conception, successful peace operations are partial exercises that require the guarantor to sanction the parties who are breaking the rules.

Virginia Page Fontina of Columbia University echoes Walter's hypothesis and argues that peacekeepers condition the post-war environment by changing the incentives of belligerents and reducing their uncertainty about their antagonists' intentions through a

variety of actions: improving lines of communication and sharing information about the other parties' intentions; intervening to deescalate accidental violations of the peace; deterring each side from attempting to "hijack" the post-conflict political process; and demobilizing combatants (Fontina 2008, 9, 16, 80). In addition, peacekeepers provide a critical service in holding the parties to their promises through non-coercive and coercive means: demonstrating the dedication of the international community to the resolution of the conflict; raising the costs of defection from the agreement through the symbolic sanction of the international community; exposing clandestine defections through intelligence; and serving as a trip wire that signals to belligerents that a more robust intervention will follow if peace talks break down (Fontina 2008, 9, 16, 80). Several commentators have pointed out that these roles were effectively filled by UNMIN without resorting to a show of force³⁵; however, the specter of coercive methods is absent from Nepal, which influences the political calculations of the parties and perpetuates inside spoiling.

In her quantitative review of UN peace operations, Fontina found that peacekeeping reduced the risk of relapse to war by more than half—with less conservative estimates reducing the risk 75-85% (Fontina 2008, 9). "The deeper the animosity and the higher the level of mistrust between the belligerent, the greater the need for outsiders to help cement the peace" (Fontina 2008, 22). Both of these conditions

³⁵ See Astrid Suhrke: "This skeletal structure – with peak strength of around 200 persons including Nepalese support assistance – was the grand total of UNMIN's monitoring capacity to ensure that the agreement to constrain the two armies was observed. Yet it did the trick. In the year-and-a half period leading up to the elections, the head of the contingent, General Jan Erik Wilhelmsen, could report that 'there were no hostilities, nor clashes between the Parties, no attempts to occupy new ground, no laying of mines, no supply of ammunition or weaponry, no arming of civilians, no training of terrorists.... no bombing of civilians and very limited hostile propaganda'... On a smaller scale at the field level, the Joint Monitoring Teams of Nepalese and Maoist soldiers plus an international observer helped to defuse local disputes and established communication channels that cut across institutional enemy lines in the best tradition of confidence and peacebuilding practices" (Suhrke 2009, 32-33).

were abundantly evident in Nepal, which would have compelled a peace custodian guided by Walter and Fontina to adopt a more robust peacekeeping presence. This perspective is reinforced by the scholarship of Michael Doyle and Nicholas Sambanis, whose research asserts that among UN post-conflict interventions, "...multidimensional missions provide most value-added, and...international assistance can substitute for local capacity" (Suhrke 2009, 46).

While these scholars emphasize the importance of deterring overt aggression (and reassuring those who fear such actions), they are less explicit about parties with "devious objectives" who are not likely to defect from an agreement entirely, but poison the process in less perceptible ways. For the most part, the use of coercive force against the Maoists would be excessive. However, if credibility is central to successful deterrence, deploying peacekeepers would have signaled that any party rearming and resuming the armed struggle would find itself opposed not only by their domestic antagonists, but by the collective will of the UN as well. It is unclear if such signals can be sent from a mission with as light as footprint as UNMIN's.

Fontina argues that consent-based peacekeeping missions that lack coercive powers might be able to deter defection, but only under two conditions. First, if the parties are dependent on outside aid and the international community is willing to condition aid on progress in the peace process. This was not the case in Nepal; aid conditionality was not on the table and the various bilateral donors were not interested in initiating a concerted and coordinated process. Second, if, "the collective disapprobation by the international community is costly...The legitimacy of an international organization like the UN gives peacekeepers the ability to confer or withhold legitimacy from the

peacekept” (Fontina 91, 2008). UNMIN held substantial power in this respect, but as we examined in previous section, they were unwilling to exploit it.

Astrid Suhrke argues that the unarmed UN military monitors in Nepal were sufficient to provide the “security guarantee” that Walter insists are only possible with a robust and capable force. “The Nepalese case shows that this guarantee can come in many forms...the 182 UN observers armed solely with a blue UN cap and dispersed in Nepal’s difficult terrain certainly could not prevent a return to violence if the parties were bent on this course. They could not even monitor the cantoned armies on a regular basis. Yet their very presence served as a trip wire and hence a deterrence against defections from the agreement...” (Suhrke 2009, 45). Yet Suhrke has drawn her conclusions too soon. Peace is far from consolidated in Nepal, and this paper has outlined a series of serious defections that call into question the Maoists commitment to the CPA. None of the Nepali parties have fully disarmed, and mistrust remains pervasive. Suhrke admits that the monitors were unable to stop 8,600 people from leaving the PLA cantonments and/or preventing their recruitment into the Young Communist League, which was able to freely continue its destabilizing activities; “the UN monitors had no capacity to record, let alone prevent, such slippage and spontaneous demobilization” (Suhrke 2009, 40). Unarmed monitors were sufficient to implement the skeleton of a peace agreement and run an election, but have not provided the security guarantee that is necessary for the country’s long-term stabilization.

A surge of peacekeepers would not necessarily have been a silver bullet in Nepal, a country with difficult terrain and a larger population than Iraq. Peace operations are often “improvised and ad hoc,” burdened by unrealistic expectations and interoperability

challenges, and are, “perennially understaffed and underequipped” (Fontina 2008, 76). In the face of these caveats, “It would thus not be surprising if the presence of peacekeepers made no difference at all” (Fontina 2008, 76). Yet Fontina’s quantitative analysis demonstrates that peace is more likely to hold when peacekeepers are present than when they are not, in both consent-based and robust enforcement mission. Peacekeepers could have preformed several important functions in Nepal: monitoring cantonments and preventing spontaneous demobilizations, disarming the YCC, supporting the police to fill the security vacuum and deter criminality, and preventing the emergence of new armed groups. Despite her endorsement of the UNMIN model, Suhrke recognizes that the limited UN presence and unstable Nepali ownership could be linked to Nepal’s “...condition of lawlessness,” and, “...scattered, low-level violence arising from the legacy of the war” (Suhrke 2009, 19, 48).

Had Barbara Walter’s scholarship guide the creation of UNMIN, the UN’s Department of Peacekeeping Operations would have been successful in pressuring the Security Council to reject the minimalist model³⁶ and to adopt either a traditional peacekeeping mission with a Chapter VI mandate or a more robust Chapter VII mission³⁷. UNMIN’s planners appear to have ignored Walter’s warning that, “observers or unarmed peacekeepers with no military backup will have little positive effect on either

³⁶ Suhrke draws the opposite conclusion, who argues that the success of the minimalist mission has a “lessons-learned relevance” for the UN Secretariat and DPKO (Suhrke 2009, 45).

³⁷ There were serious hurdles to overcome if the DPKO was set on introducing peacekeepers. Suhrke summarizes, “Why the sensitivity? On the Nepalese side there were several concerns. There was a strong sense of national pride. Nepal had a long tradition of providing peacekeepers to the UN – in fact, this had been one of the two principal roles of the Nepal Army prior to the insurgency (the other was ceremonial functions at the Palace). The prospect of Nepal itself needing foreign peacekeepers was disturbing and humiliating, and not only to the army. Nepal, it was broadly understood in the public at large, was a sender of peacekeepers, not a receiver. Both the Maoists and the Nepal Army recognized that the presence of international peacekeepers represented a limitation on their status and a potential constraint on their power and movement” (Suhrke 2009, 23). However, the alternative, to reject an operational model that was insufficient to the challenges in Nepal, remained an unexplored option.

negotiations or treaty implementation” (Walter 2004, 446). UNMIN—a political mission—did not meet Walter’s criteria. The 186 unarmed monitors did not have the capacity to coerce any potential spoilers; at most they could maintain surveillance of the weapons storage areas, and investigate breaches of the CPA, which (in principle) would be addressed by the JMCC (Upadhyay and Adhikari 2009). The Center on International Cooperation working group expressed concern that UNMIN’s inability to adapt to a deteriorating security situation would put, “UNMIN’s credibility, and that of the United Nations behind it, on the line” (Whitfield 2010, 4). Nepal might potentially be an outlier, one of few cases that did not require peacekeepers to prevent a relapse into war. However, absent the full implementation of the CPA, it is still too early to draw that conclusion with any finality.

Marie-Joelle Zahar: Loyalty to the Process

Marie-Joelle Zahar of the Université de Montréal argues that peace custodians must “steer peace” in order to “consolidate insider loyalty to the process” (Newman and Richmond 2006, 41). She defines three types of loyalty: compliance-based loyalty relates to the legalistic implementation of peace agreements; process-based loyalty relates to the creation of new institutions; and peacebuilding-based loyalty relates to the creation of new relationships between disputants. In her discussion of process-based loyalty, Zahar highlights the attractiveness of power-sharing agreements to mediators. In this model, the parties are induced against spoiling through a guarantee against future political exclusion. However, of the three approaches Zahar endorses peacebuilding-based loyalty in order to

“...forge meaningful long-term relationships between former adversaries and create a strong belief amongst them in the goals and values of conflict resolution” (Newman and Richmond 2006, 55).

Zahar does not offer a clear road map, but suggests that imposing arbitrary deadlines to peace operations is detrimental (Newman and Richmond 2006, 53). She also warns against a peace custodian’s use of coercive force (Newman and Richmond 2006, 53). Therefore, a peace custodian must remain engaged in long-term peacebuilding beyond the early victories of a post-conflict election or a power sharing agreement, and resist the temptation to resort to force when faced with spoiling behavior.

UNMIN has generally followed this trajectory, continuously extending its mandate and supporting (along with UNDP) peacebuilding initiatives. However, UNMIN has significantly downsized their presence and are no longer led by a Special Representative (Suhrke 2009, 16). Prior to Ian Martin’s departure, a group of military observers cautioned that the reduction of UNMIN’s staff was premature considering the scope of the remaining security challenges (Suhrke 2009, 30). Zahar would have advocated a longer-term duration for UNMIN and endorsed the light footprint model that favored unarmed monitors over peacekeepers.

Ekaterina Stepanova

Ekaterina Stepanova of Russia’s Center for International Security at the Institute of World Economy and International Relations endorses Kelly and Greenhill’s thesis that

a spoiler's capabilities to disrupt a peace process is more important than their intentions (Newman and Richmond 2006, 90)³⁸.

Stepanova's solution to the spoiler dilemma is to empower moderates, but does not provide a detailed blueprint, or—more importantly for the Nepal case—how to distinguish between apparent moderates with “devious objectives” and true moderates dedicated to negotiations (Newman and Richmond 2006, 101). Stepanova advises the peace custodian to encourage demilitarization generally, as well as precipitating the political transformation of the armed group and encouraging them to form separate political wings to widen the gap between moderate and radical elements (Newman and Richmond 2006, 93). However, she simultaneously recognizes that such a process can have an unexpected destabilizing role on the political system as a whole, a risk that she considers worth taking (Newman and Richmond 2006, 93-94). Stepanova has a high tolerance for violence in this context. “Violence is neither antithetical nor alien to peace processes – it accompanies peace processes...thus acts of violence by parties and factions, including acts designed specifically to disrupt negotiations, should be expected and taken into account in the very design of the peace process” (Newman and Richmond 2006, 82).

Stepanova's assessment of the Maoists would hinge on an analysis of their coercive capabilities and the population's level of tolerance for continued violence. “One

³⁸ “The armed actors' structural capabilities and extremist ideologies are also their main comparative advantage in an asymmetrical confrontation. At the stage of a peace process, as long as spoilers of this type keep specific organizational/structural capabilities and extremist ideologies, they will retain the capability to disrupt seriously or even undermine negotiations and peace implementation by terrorist means, if and when they wish and decide to do so. Even if these armed actors have not yet acted like spoilers, they still remain potential spoilers that can put both peace negotiations and peace implementation at risk. Even partial accommodation of their concerns would not necessarily prevent them from acting as spoilers, unless their capabilities to mount terrorist attacks are also neutralized” (Newman and Richmond 2006, 92). After three years of concerted efforts by the UN, UNMIN cannot say with any certainty that they have neutralized the Maoists' ability to disrupt or undermine negotiations if and when they decide to do so.

of the main strengths of the peace process is not the absence of violence since negotiations started...it is whether the peace process can continue despite incidents of violence, whether violence is not allowed to spin out of control” (Newman and Richmond 2006, 83). Since negotiations have not yet broken down in the face of the levels of violence and intimidation described earlier, Stepanova would likely not label the Maoists spoilers and support continued efforts to empower moderates, perhaps with a renewed emphasis on cleaving them away from hardliners.

The level of violence in Nepal may be below the threshold that Stepanova has constructed (it is not clearly articulated), but it is hard to identify any precautions that UNMIN took to anticipate acts of violence in either the mission’s design or implementation phase.

Conclusion

Spoiler management scholars offer relevant guide posts for peace custodians during the crucial period immediately following the cessation of hostilities while a strategy and mission is still in the design phase. However, they offer limited insight into how a peace custodian can deter spoilers after a peace process has stagnated, especially when one party is an inside spoiler with “devious objectives”.

Part VI: Lessons Learned

In their compilation of essays reflecting contemporary trends in scholarship on spoiler management, editors Edward Newman and Oliver Richmond argue that, "...third parties need to have a very clear idea about what aspect of their proposals, or desired outcome, is likely to conflict with that of disputants, and of the inter-linkages between moderates, hard-liners and radicals" (Newman and Richmond 2009, 18). UNMIN failed the first test, having misjudged the extent to which their desired outcome conflicted with those of the disputants. UNMIN was too aspirational in its vision of an end state, a fact that was evident in November 2009 when the ruling coalition condemned UN Secretary General Ban Ki Moon's advocacy of the formation of a unity government as a violation of Nepal's sovereignty (My Republica 2009). However, UNMIN's personal relationships with the Maoist leadership gave it an analytical clarity lacked by the U.S. Embassy. The U.S. failed the second test, as their self-imposed isolation from the peace process impeded their understanding of the interplay between hardliners and pragmatists within the Maoists. However, the Embassy's refusal to impose a particular end state enabled them to avoid being manipulated by empty Maoist promises of future moderation.

The Maoists bear a significant share of the responsibility for their isolation from the U.S. They ignored a critical window of opportunity after their first meeting with a high level U.S. official, Deputy Assistant Secretary of State Evan Feigenbaum, and failed to take advantage of the shift in U.S. policy. According to Kunda Dixit, Maoist abuses did not diminish after their democratic ascension. "In government the Maoists continued to use violence as a political weapon and use the YCL as a vanguard to intimidate and kill opponent while having a cloak of legitimacy from the elections prompted second

thoughts from the Americans. Now the ones who don't want the terrorist tag lifted have the upper hand" (Dixit interview 2009). The Maoists squandered an opportunity to demonstrate a genuine commitment to nonviolence and liberalism.

Recommendations for U.S. Policy

I. U.S. Ambassadors in fragile states emerging from conflict should carefully manage U.S. neutrality

The U.S. Ambassador's public posture makes a difference, even when their actions are constrained by the same bureaucratic restrictions (in this case, the TEL and SDN lists). Ambassadors chosen to lead an Embassy in a country emerging from conflict should have prior experience with post-conflict environments, a less combative public persona, and an overall "lighter touch". A majority of Nepali interviewees stressed the contrast between Ambassadors Moriarty and Powell, with an express preference for the style of the latter. Even those Nepalis whose sympathies were decidedly anti-Maoist insisted that American diplomats should strive to be neutral and that Moriarty had overstepped his bounds by taking sides in the conflict. UNMIN was also able to collaborate with the Embassy more openly once a more "pragmatic" Ambassador was leading the U.S. effort (Whitfield 2009, 30)

II. Reform the Terrorist List system

The process of designating terrorist groups should be better calibrated to fight terror while anticipating the potential for engaging armed groups inclined toward moderation and political participation. The terrorist lists provide valuable standardized frames of reference for U.S. efforts to curb financing for terrorist attacks while enabling the United States to publicly pronounce its opposition to specific terrorist groups. However, the lists are inflexible and lack clear gradations (Pillar 2001, 150-54). The United State should craft a more flexible and surgical designation process to reflect the fluctuating identities of armed groups. This can be accomplished in several ways:

Clarify a Path to Legitimacy: The stigma of being labeled a terrorist movement by the United States may compel some armed groups to change paths. But without information on how to be removed from a terror list, there is no incentive for groups to reform and no pathway for them to follow. The United States should clearly articulate a process—both words and actions measurable by benchmarks—that terrorist entities can follow to remove themselves from the web of terrorist lists. Often, demands are communicated to a group's leadership through intermediaries; however, these guidelines often do not filter out beyond the inner circle. This information should be published on the State Department's website and be easily accessible by the proscribed group's foot soldiers and constituency who can determine for themselves whether or not American demands are unreasonable.

Offer Probation for Groups in Transition: Terrorist lists should permit exemptions for groups that are involved in ongoing peace processes and create an opening to reduce sanctions in step with significant behavior change (Thorne 2006, 7). An objective, apolitical assessment of whether a terrorist group has entered into negotiations as part of a spoiling strategy or out of a genuine willingness to moderate and participate is far more constructive than the current policy of naming and shaming. Groups that meet certain positive criteria, such as commitments to ceasefires, electoral success, or active involvement in peace accords should be offered some variation of probationary status as an incentive for continued constructive behavior and good faith negotiations. This sliding scale would have been useful in Nepal, where the Maoists could have been rewarded for their initial steps toward moderation and political participation, but without entirely removing the stigma of U.S. symbolic sanctions when spoiling behavior became more manifest.

Consider Exemptions for Peacebuilding: The 1996 Antiterrorism and Effective Death Penalty Act and subsequent statutes intended to make terrorist groups “radioactive,” but they failed to anticipate the possibility that engagement of NSAGs by non-governmental peacebuilding organizations might be in the interests of the U.S. Groups and individuals should not shunned, demonized or prosecuted for promoting peaceful solutions to protracted conflict.

OFAC should make a determination on whether or not peacebuilding provides tangible or intangible goods. The stronger argument favors an intangible status; peacebuilding can be distinguished from humanitarian support, since the services

provided aren't subject to diversion. The workshops, advice and mediations training provided by peacebuilding NGOs is not going to be diverted to give a military advantage to insurgents or free up resources for military spending in the same way that a humanitarian group's provision of food or social services might. Such reforms would be greatly bolstered with the support of a coalition of legislators in Congress willing to speak out on the potential benefits of having NGOs promoting peace in fragile states where the U.S. cannot actively engage.

In the interim, OFAC should proactively open a direct channel to peacebuilding NGOs, providing clear instructions on the process of obtaining an OFAC waiver while facilitating and expediting specific requests. For their part, peacebuilding organizations should revisit their monitoring and evaluation standards and demonstrate a higher level of due diligence and transparency in reporting their activities and interactions with NSAGs to OFAC.

In *Holder v. Humanitarian Law Project*, the Supreme Court has an opportunity to provide legal clarity to peacebuilding practitioners, providing that the Court considers the specific type of training and advice that they provide NSAGs. A New York Times editorial on the case, while insisting that, "Congress has a right to ban people from directly assisting these groups, even if that assistance is delivered in the form of spoken words," argued for better legal clarity that would serve the interests of the scholars and practitioners of peacebuilding: "These rights need to be made clear in advance. It is not enough for the government simply to say it will not prosecute in these cases. As long as people fear being sentenced to 15 years in prison, they are likely to avoid engaging even in protected speech" (New York Times 2010). Advancing legal clarity will go a long way

toward calming the fears of American (and American-funded) peacebuilding NGOs that have remained hesitant to engage proscribed NSAGs.

Recommendations for UN Policy

I. Focused missions of limited duration should remain focused and limited

If the Security Council wishes to create a “focused mission of limited duration”—as they did in the case of UNMIN—the mission should remain focused and limited (Suhrke 2009, 15). The expectations of Nepalis were raised and disappointed by the UN’s presence and apparent role at the negotiating table. In the future, Special Representatives should be cautious not to send mixed signals; if they are not empowered to act as mediators, they should abstain from participating in the peace process entirely. Special Representatives of such missions should be instructed to offer technical support, but to limit their contacts with political leaders. A vague offer of the UN’s “good offices” that is not encapsulated in the mission’s mandate will only sow confusion.

The Center on International Cooperation working group draws the wrong lesson from UNMIN’s experience: “If a problematic mandate nevertheless transpires, further thought should be given to the communication of its limitations...as well as specification of the need to introduce modification to the mandate if the operating environment changes substantially” (Whitfield 2010, 21). Communication of a mission’s limitations will be fraught with difficulties in any post-conflict environments. The *Brahimi Report* standard should apply: a peace operation—whether in the guise of an unarmed political

mission or a multi-dimensional peacekeeping mission—simply should not be approved if the mandate is inappropriate. The UN must strive for “clear, credible and achievable” mandates in peace operations (Brahimi 2000, 10). When a conflict dynamic requires a peacekeeping mission, a political mission should not be offered as a band-aid.

II. Planners of missions with limited mandates need to anticipate a security vacuum during a demobilization process

Post-conflict reconstruction processes must carefully phase elections within the continuum of an intervention. In Nepal, elections occurred before the major elements of the CPA were implemented and before combatants were disarmed and demobilized. Astrid Suhrke acknowledges that the Maoist maintenance of, “a rebel army during elections and for an undefined transition period cast doubt on the [their] commitment to ‘move along the new peaceful political stream,’” but she determines that the UN presence in Nepal was sufficient to offset these fears (Suhrke 2008, 7).

UN monitoring of the two armies was instrumentalized by the Maoists, as it, “enabled the Maoists to postpone demobilization until after the constituent assembly elections” (Suhrke 2009, 19). The UN’s failure to demobilize the PLA cost them their leverage over the Maoist leadership following their electoral victory. The NA was unlikely to launch a preemptive strike while under UN observation, especially when they depended on the UN for access to lucrative peacekeeping missions abroad. In contrast, the Maoists were forced to give up very little in terms of their coercive capability. UNMIN’s unarmed arms monitors were at most a temporary impediment to rearmament.

This fact was not lost on Nepalis, who recognized that little stood in the way of the Maoists rearming if they chose to do so. The arms monitors provided little security guarantee to the population in the run up to the elections, especially when the duration of their tenure in Nepal was uncertain and their capacity to counter a show of force by either party was limited. According to the Center on International Cooperation working group, “UNMIN’s light monitoring would by no means be in a position to monitor, let alone avert or address the consequences of, large scale violations” or to manage an increase of violence around the cantonments (Whitfield 2010, 11). UNMIN failed to address the uninterrupted recruitment of former PLA cadres and newly indoctrinated youths into the YCL. In the security vacuum following the signing of the CPA, the YCL has grown exponentially, playing an increasingly assertive and destabilizing role in Nepal.

One of the peace custodian’s primary responsibilities is to prevent military power from being translated into political gains (Fontina 2008, 22). Elections cannot meet this condition if they are prejudiced by common knowledge that belligerents have neither disarmed nor abandoned violence (and thus can resume the war at any time). The date of a post-conflict election should not be set until considerable progress in demobilization has been made. If belligerents insist on a premature election, the UN should consider withdrawing its election-monitoring services.

A critical window of opportunity for conflict management was lost in the months between the *Jana Andolan* and Nepal’s 2008 election. Leadership that is invested in better cooperation between the U.S. and the UN will be more likely to coordinate if they can utilize an established consensus-building process. The UN should consider

collaborating with a consortium of Embassies, including the U.S., to test the ripeness³⁹ of a potential peace agreement. Most public statements by UN officials and scholars writing on the Nepali conflict presume that the two sides had reached a “mutually hurting stalemate”⁴⁰. Even though conditions for peace were especially promising in 2005-2007, a more rigorous and objective assessment would have helped build international consensus around a shared understanding of the intentions of the parties. Such an assessment—if conducted neutrally by independent professional scholars—could have served as a foundation for greater U.S.-UN cooperation, as well as provided an objective criteria for repealing the U.S. terrorist tag either temporarily or permanently.

In future scenarios, influential international actors should exploit opportunities for peace making collaboratively. If the evaluation determines that peace is not yet ripe, the UN should avoid committing resources and the various unilateral sanctions should hold. But if it is determined that peace is ripe, then key embassies—with the U.S. in the lead—should do what is necessary to be at the table and support UN peacemaking efforts wholeheartedly.

³⁹ William Zartman pioneered the concept of “ripeness” in peace negotiations. “The concept of a ripe moment centers on the parties’ perception of a Mutually Hurting Stalemate (MHS) -- a situation in which neither side can win, yet continuing the conflict will be very harmful to each (although not necessarily in equal degree nor for the same reasons). Also contributing to “ripeness” is an impending, past, or recently avoided catastrophe. This further encourages the parties to seek an alternative policy or ‘way out,’ since, the catastrophe provides a deadline or a lesson indicating that pain might be sharply increased if something is not done about it soon... Ripeness is only a condition, necessary but not sufficient for the initiation of negotiations. It is not self-fulfilling or self-implementing. It must be seized, either directly by the parties or, if not, through the persuasion of a mediator.” (Zartman 2003). For a discussion of the applicability of “ripeness” in third party intervention, see: Marieke Kleiboer, “Ripeness of Conflict: A Fruitful Notion?” *Journal of Peace Research*, vol. 31, no. 1, 1994, pp. 109-116

⁴⁰ Suhrke is emblematic: “A limited observer mission of this kind has greater chance of success if the belligerents have reached a mutually hurting stalemate, are relatively well organized, and are at least tactically committed to the peace agreement” (Suhrke 2008, 45). Suhrke does not share the criteria that she has used to determine that the parties have reached a mutually hurting statement, nor does she explain how a limited observer mission can operate effectively when a party is tactically—but no strategically—committed to a peace agreement.

Conclusion

Nepal's peace process has suffered from both underestimation and overestimation. First, the U.S. underestimated the role that it could play, through both moral suasion and its willingness to impose tough consequences for noncompliance with the CPA. The U.S. response was conditioned by the dictates of counter-terrorism. At crucial moments of opportunity, the U.S. would have been wise to follow the mantra of Secretary of State Clinton invoked in this article's opening paragraph: "As long as engagement might advance our interests and our values, it is unwise to take it off the table".

Second, the UN overestimated the prospects for peace, creating an unarmed political mission with an extremely limited mandate. The presence of the UN in a post-conflict environment creates certain expectations, and the mandate of the mission must be able to meet those expectations. Even with the guidance provided by the *Brahimi Report*, UNMIN knowingly walked into a mission with a flawed mandate. A fear of alienating the Maoists and an institutional predisposition to inducements undermined their ability to effectively censure Maoists spoiling. The UN has learned the hard way that inconsistency hobbles spoiler management. Both approaches failed to change the Maoists' intentions, capabilities, and behavior.

The shortsightedness of both the U.S. and UN contributed to the present stagnation—and perhaps the future failure—of Nepal's peace process.

Methodology

This article draws from multiple disciplines. Authoritative sources—including books, journal articles, position papers, institutional documents, conference proceedings, and news articles—on spoiler management, terrorism and counter-terrorism, the history of the Nepalese peace process, UN peacekeeping doctrine, political violence, and peacebuilding were consulted. Fifteen interviews were conducted with UN officials, U.S. officials and NGO workers in Kathmandu and Washington, DC from June 2009-March 2010. Nepali nationals were informally and formally consulted, included members of the peacebuilding community, the media, and the Maoist party. The section on U.S. terrorism blacklists was influenced considerably by a conference held at the U.S. Institute of Peace on October 27, 2009: *Mediating Peace with Proscribed Armed Groups: A Policy Debate on Modes of Engagement and the Implications of US Anti-Terrorism Laws for Mediators*.

Sample Interview Questions

U.S. Officials

- What are the unique needs of a country undergoing a major political transition like Nepal?
- How does the Maoists' inclusion on the TEL handicap your efforts? Are steps being taken to "downgrade" them? What steps – what is the process? How does this complicate your work on a day-to-day routine basis?
- During his last trip to Nepal, Secretary Richard Boucher said, "'We have started the process. We will take the Maoist out of the list if they reject terrorism and stop violence.'" How is that decision being made? What factors are being monitored, and what group or individual is tasked with making recommendations to that end?

- Can you tell me more about the Nepal Local Stabilization Initiative, and the Department of Defense 1207 transfer authority process that funds it? What is the risk of this funding stream being shut off?
- How did the country-specific mission objective in Nepal change, when the government was controlled by the Maoists (following the election)?
- How do the UN and US approaches to these processes differ? In what ways are the US and UN in alignment?
- What is the strategic significance of Nepal to the US?
- What are the carrots and sticks that the US can employ in influencing Nepal?

Nepali Intellectuals and Commentators

- Does the US play a constructive role in the peace process? What more could it do?
- Should the US continue to list the Maoists as a terrorist organization? How has the terrorist designation affected peacebuilding efforts?
- How can the international community address the growing frustration of the Maoists in cantonments who have yet to receive the benefits of demobilization?
- Is Nepal a failed state, as has been claimed by the recently released failed states index?
- What should the U.S. do to help stabilize Nepal?

United Nations Officials

- Is Nepal a failed state, as has been claimed by the recently released failed states index?
- What are the main impediments preventing UNMIN from reaching its objectives in Nepal?
- What impact has the US listing of the Maoists as a terrorist organization had on the peace process?

- How should the international community address the growing frustration of the Maoists in cantonments who have yet to receive the benefits of demobilization?
- How would you categorize the SSR and DDR processes in Nepal?
- How do the UN and US approaches to these processes differ? In what ways are the US and UN in alignment?
- How do the US and UN collaborate and coordinate their respective roles in Nepal's peace process?

Limitations

The research is limited by the absence of numerous authoritative texts on Nepal's peace process available in English, the author's inability to speak and/or read Nepali, and the author's focus on Kathmandu "elites" as interview subjects. Research was further constrained by a lack of access to additional U.S. diplomats serving in Nepal between 2001-2009. Additionally, some information that would have been valuable to this study is classified.

List of Interviewees⁴¹

- Dominic Cardy (National Democratic Institute)
- Heather Coyne (U.S. Institute of Peace)
- Khimlal Devkota (UCPN(M))
- Kunda Dixit (The Nepali Times)
- Susan Hutner (Davis Polk & Wardwell LLP)
- Kathy Jones (UNMIN)
- Dr. Matthew Levitt (Washington Institute on Near East Policy)
- Vidyadhar Mallik (Nepal Transition to Peace Forum)

⁴¹ Several sources for this research asked to remain confidential.

- Ian Martin (UNMIN)
- William Martin (U.S. Embassy)
- John Norris (UNMIN)
- Paul Pillar (Georgetown University)
- Robert Piper (UNDP)
- Bishnu Sapkota (Nepal Transition to Peace Forum)
- Dr. Duman Thapa (ASPECT)

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