Negotiating a Political Settlement in South Africa

ARE THERE LESSONS FOR BURMA?

Report of Workshops held in Chiangmai, Thailand & New Delhi, India April 2000
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Foreward

Since its establishment in 1995 by states from different parts of the world, International IDEA (International Institute for Democracy and Electoral Assistance) has been working towards promoting and advancing sustainable democracy world-wide. The Institute's main objective is to promote and facilitate national and international dialogues, enhancing and strengthening democratic development.

International IDEA is dedicated to supporting all aspects of the democratic process - before, after and between elections. Democracy is a long-term process and requires the building of trust among multiple partners, and it needs to be nurtured and strengthened over time. IDEA's contribution to the promotion of sustainable democracy has included initiatives in conflict management, and building national capacity to foster political transitions from authoritarianism and civil war situations towards governance based on democratic principles.

International IDEA's work in Burma has included initiatives to strengthen the capacities of the democratic opposition, ethnic nationalities and other stakeholders supportive of a peaceful transition to democratic governance. Towards this end, IDEA has facilitated several workshops to discuss the modalities of such a transition and to learn from comparative experiences of negotiated settlements. IDEA is open to engaging all stakeholders in this process.

This publication is the outcome of a series of workshops convened by IDEA to strengthen the prospects of a successful negotiated settlement in Burma. International IDEA presents this publication as a resource to be used by the community of practitioners and activists who are engaged in that long struggle to navigate peaceful political transition in Burma and anchor that peace by building sustainable democratic institutions and processes.

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secretary general
International IDEA
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IDEA also thanks the convenors of the National Reconciliation programme for its support in organising workshops in Chiangmai, Thailand and New Delhi, India. This publication is an outcome of those stimulating workshops.

International IDEA would also like to thank the International Development and Research Centre (IDRC) Canada, for its generous support of IDEA's Burma programme including this publication.
Glossary

ANC  African National Congress
CODESA  Congress for a Democratic South Africa
IFP  Inkatha Freedom Party
RENAMO  Mozambique National Resistance (Resistencia Nacional Moçambicana)
UNITA  National Union for the Total Independence of Angola (União Nacional para a Independência Total de Angola)
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1. Background

About International IDEA’s capacity-building work.

International IDEA’s mandate is to promote sustainable democracy around the world. International IDEA recognizes that sustainable democracy requires the participation of a broad range of national stakeholders, including:

• Government;
• Political opposition; and
• Civil-society groups.

Ethnic and religious minorities, and women have historically been excluded from nation-building and transition processes, but are nevertheless integral constituencies in these processes.

International IDEA has worked in many countries emerging from civil strife and decades of authoritarian rule -- for example, Bosnia, Burkina Faso, Guatemala, Indonesia and Nigeria. The Institute aims to facilitate dialogue amongst national stakeholders, helping them:

• Analyse their own context;
• Develop reform agendas that unite their communities; and
• Consolidate democracy and development.

Political dialogue is a sensitive process. It requires building up relationships of trust, investments in time, patience and commitment.
International IDEA’s work in Burma.

International IDEA is committed to facilitating and supporting political dialogues that will eventually lead to building a sustainable democracy in Burma. The situation in Burma presents many challenges to such a process. There are stark divisions between the military regime and the democratically-elected opposition, between the Burmans and other ethnic nationalities. Relations among the ethnic nationalities themselves are characterized by mutual suspicion and aloofness. Prospects for forging a common purpose to engage in dialogues for reform and nation-building appear bleak. Yet it is precisely in these circumstances that such an investment is most needed.

International IDEA hosted two workshops to support initiatives for reconciliation among the ethnic nationalities and to encourage dialogues on reforms supporting democratic pluralism. The first workshop was held 20 - 24 March 2000 in Chiang Mai, the second took place 24 - 28 March 2000 in New Delhi. Participants included significant role-players in the struggle for democracy in Burma, for example members of the ethnic communities participating in the National Reconciliation Programme.

The workshops

International IDEA introduced Mr Fink Haysom as a facilitator at these workshops. He presented an analysis of the South African transition, with examples drawn from other African states, as well as his personal experiences as an activist and negotiator in the different aspects and processes of the South African transition.

The workshops were designed to stimulate discussion about:
• Conflict management in a fractured society;
• Prospects for building foundations that support democratic transition; and
• Prospects for building bridges that link democratic transition.

Looking through the prism of the South African experience generated interest among the Burmese activists. Of especial interest was the strategic thinking that informed both the successes and failures of the South African experience. The workshops provided opportunities for the
Burmese to consider the relevance of the strategic options which had advanced the cause of democratic nation-building in South Africa and those that had set the cause back. It was hoped that through exposure to new perspectives, participants would be able to identify the strengths and weaknesses in their own situation in Burma. The differences in context and circumstances between Burma and South Africa were clearly recognized, and there was no attempt to glibly prescribe South African solutions to the Burmese situation.

Issues and comments from Burmese workshop participants

The Burmese participants raised many related questions, both at the New Delhi and Chiang Mai workshops, which have been grouped together. They are dealt with under the broad themes within which the various questions fell:

• The question of creating the conditions for a negotiated settlement;
• The process of negotiating a political settlement, and
• Some aspects of the South African process that may be relevant to the situation in Burma.

The Burmese participants acknowledged that there is a need for training, not only in negotiating skills, but also in the basic constitutional and political concepts necessary to engage in negotiations and in the political process. The Burmese have been disadvantaged, both by lack of education and by the extreme repression under which they have existed. The Burmese need to develop their understanding of constitutional concepts, in particular; federalism, federal relationships, and the rights, duties and structures of sub-national entities such as states and provinces, including the written constitutions of states. The Burmese need to prepare for negotiations and be placed in a position of knowledge, and also in a position in which they have common understanding with their allies on critical concepts, and of a future constitutional framework.
2. Introduction

The South African experience
In late 1989, Mme Mitterand hosted a seminar in Paris. The seminar brought together various elements of the internal and external resistance to apartheid rule. During the course of the seminar a speaker intimated that the then government was considering un-banning the ANC and other liberation movements and embarking on a path of seeking a negotiated settlement of South Africa's racial conflict. This suggestion was greeted with derision. In the previous decade South Africa had been through a period of unprecedented violence, mass action, violence and repression. The country had been in an almost permanent state of emergency. A peaceful and full transition to democracy was inconceivable. Indeed, the South African conflict was considered one of the most intractable anywhere. Yet within six months of the Paris seminar the liberation movements had been unbanned, political leaders had been freed from prison, and much of South Africa’s notorious, repressive and racist legislation had either been repealed, or was about to be repealed. South Africans of all kinds were to become involved in six years of negotiations which were to culminate in what has been called a miracle: a successful transition to a peaceful democracy. But the process was by no means smooth. It was accompanied by periods of stand-off, sporadic violence, and a continual war of political manoeuvre.

Lessons Learned
The first and most important lesson of the South African experience is the necessity of being intellectually and politically prepared to take advantage of rapidly changing circumstances. Even in a period when solutions appear improbable or impossible, the situation may change without warning. Other recent examples of such rapid shifts in the balance of political forces in countries which have endured decades of rule by apparently invincible military dictatorships are Nigeria, as well as Indonesia and East Timor.

Being prepared to make the most of new opportunities requires not merely developing a constitutional blueprint to have in your back pocket, but developing the capacity to deal with the challenges that such changed
circumstances bring to alliances, to leadership and particularly to the militant grass roots. A rigid position (an asset during times of repression and militant resistance) may be a barrier to the strategic flexibility that is required for engagement in negotiations. Consider carefully not only seeking short-term gains, but also how to consolidate the process of transition, sustain its momentum, and make the reform process irreversible.

3. Distinguishing between Burma and South Africa

It is necessary from the outset to stress the different circumstances and context of South Africa and Burma. It would be exceedingly presumptuous to insist that a solution appropriate to one country is also the right route for another. Yet, South Africans did search for, and learn from, relevant lessons and failures elsewhere. They drew on the latest constitutional “technologies”, and utilized them to find solutions to the South African problem, a problem many considered indissoluble. So it is appropriate that South Africans should similarly pass on what they learnt to other democratic movements. Those movements are free to reject the logic, the experience and the strategic thinking that is not pertinent to them. This is why International IDEA’s workshops commenced with a brief overview of the demographic, economic and political features of South Africa and its history, highlighting the specificity of both the South African and Burmese situations respectively.

Similarities between Burma and South Africa

Both Burma and apartheid South Africa experienced repression at the hands of a minority elite. They both experienced that repression primarily at the hands of an all-encompassing security apparatus. Yet, there are important differences between the “SLORC” method and stratagem in Burma, and South Africa’s apartheid regime.
Differences between Burma and South Africa

The most important differences that could be identified regarding the conditions of resistance in both countries include the following:

<table>
<thead>
<tr>
<th>South Africa</th>
<th>Burma</th>
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<tbody>
<tr>
<td>- Apartheid was predicated on the enforced compartmentalization of South Africa's majority black population into nine ethnic geographic units.</td>
<td>- The nature and legacy of resistance in Burma requires considered and deliberate alliance building between ethnic communities and Burman democrats if the opposition to military rule is to be effective.</td>
</tr>
<tr>
<td>- Resistance to apartheid focused on uniting democrats of all ethnic and racial components.</td>
<td></td>
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<tr>
<td>- The resistance movement was overwhelmingly national in character and purpose.</td>
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<tr>
<td>- An increasingly important method of resistance took place through the exploitation of legal space within the country.</td>
<td>- Current levels of repression in Burma place limitations on internal mobilization.</td>
</tr>
<tr>
<td>- The 1980s in particular saw the growth of a mass democratic movement comprised of a powerful trade union movement and popular civic organizations.</td>
<td>- Repression in Burma takes the particular form of a military junta.</td>
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<tr>
<td></td>
<td>- There is particular and direct involvement of the military as an institution and as an instrument.</td>
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| |)
| - There were also important considerations in regard to South Africa's reliance on world trade, the vulnerability of its developed economic infrastructure and accordingly its susceptibility to international pressure. | - Burma's position in the world economy, while disastrous for ordinary Burmese citizens, has served partly to insulate Burma from the impact of international pressure and sanctions. |

While these significant differences must be acknowledged, so must the fact that Burma is in a state of crisis, and has been for some time. An estimated 50 to 60 per cent of Burma's budget is spent on the military and the country remains subject to numerous external and internal pressures. At some stage, the regime will have to confront its political, economic and social viability. Therefore International IDEA's workshops were concerned to consider such questions as:
What range of factors could promote a negotiated settlement in Burma? What circumstances would bring the “SLORC” to the negotiating table?

4. PHASE ONE:
The pre-negotiation phase: Creating the conditions for a negotiated settlement

4.1 Subjective and objective factors

The difficulty that many of the representatives of the Burmese democracy movement and its component ethnic communities experience with workshops on conflict resolution relates to the fact that their adversary is not prepared to negotiate at all. In South Africa, the apartheid regime had for decades displayed an intransigent attitude to negotiating an inclusive non-racial democracy, or even sitting at the table with representatives of the liberation movements, so what were the circumstances that brought the protagonists in South Africa to the table? What made the circumstances ripe for negotiation?

There must be objective factors, that shake the confidence of the ruling elite in regard to their capacity to rule or govern in the same way forever. These objective factors are necessary, but not sufficient for the presence of the subjective will to negotiate. For negotiations to occur, there needs to be a measure of confidence in the negotiating process as well as a section of leadership willing to take the risks associated with negotiating with the enemy: these are the subjective factors. In general the objective and subjective conditions need to apply to both sides of the conflict before successful negotiations can be undertaken.

4.2 Objective factors

By 1990 (and with the benefit of hindsight) there had been an accumulation of objective factors exerting pressure on both sides to negotiate a settlement -- to find a solution to the South African conflict.
which was threatening to engulf the country in violence, bitterness and division. These pressures included:

4.2.1 International pressure
South Africa had been under increasing international pressure to abandon apartheid and to find a lasting solution to its racial conflict. That pressure had taken the form of:

• Economic sanctions,
• Trade sanctions,
• Cultural isolation,
• Sporting isolation, and
• Political isolation.

Cumulatively, all of these pressures were beginning to make their impact felt, both psychologically and economically. Additionally, the end of the Cold War and the disintegration of the old Soviet Union on the one hand had allowed Western nations, previously lukewarm to the ANC, to consider the liberation movement more favourably. On the other hand, the ANC had lost a major benefactor and source of military and financial support in the Soviet Union. The disappearance of a bi-polar world order undermined the rationale behind the apartheid regime’s reluctance to negotiate with the ANC. Simultaneously, it held out the opportunity for negotiations at a time when the ANC would be without its previous support.

4.2.2 Economic pressures
By the 1990s South Africa was beginning to feel the economic pressures arising from sanctions. There was a realization that business confidence, as well as both foreign and domestic investment, were unlikely to return in the absence of political stability. South Africa, like all relatively developed economies at the time, was confronting the effects of globalization and the realization that it needed to trade in world markets to survive and prosper. An economic downturn would encourage a flight of both capital and white skills, thereby further compounding the depressed state of the economy. South Africa was experiencing the
economic pressure in many ways: difficulties in obtaining loans on the international money markets, falling currency, high inflation and negative growth.

4.2.3 Military factors
While the ANC's armed activities were unlikely to succeed in defeating the military capacity of the South African Defence Force, the war was having a debilitating effect psychologically, politically and economically. In particular the ever-increasing cost of the pervasive militarization of the society affected the economy in many ways, not least the emigration of military conscripts, the expense and difficulty of breaching the arms boycott and the growing insecurity of the white community.

4.2.4 Internal mass opposition
The presence in South Africa of continuous mass protests and resistance became an increasing political and economic threat to the regime's viability. As thousands upon thousands took to the streets, the cost of containing this militancy was overshadowed by the cost internationally of media coverage of its brutal suppression. Indeed the existence of internal resistance and mass campaigns served to increase international pressure.

4.2.5 The sustainability of minority rule
It is clear that the factors outlined above fortified each other and were inter-related. Each one magnified the others and led to an accumulation of problems, which threatened the viability of the existing order. However, these factors also posed long-term risks to the efficacy of any new order. A new order may not succeed in its task of reconstruction if the economy is debilitated, its infrastructure in collapse or beyond repair, and its citizens vengeful and deeply divided. It was this realization which gave rise to the recognition on both sides that a negotiated solution could not only expedite a transition, but might even be preferable to winning an all-out war. Both sides come to appreciate that the only long-term solution was a political one, and that the cost of an enduring low-intensity civil war would be disastrous for the country and the region.
4.3 Subjective factors

4.3.1 Liberation movements
The mere existence of crisis is not sufficient to prompt the parties to a political conflict to negotiate. Indeed, crisis can harden attitudes and produce a “siege mentality”. The elements of a “siege mentality” existed in South Africa, and are to be found in Burma too. It was therefore critical that both the ANC and the government recognized that a negotiated settlement was both possible and desirable. For the ANC, this realization came with an understanding that a negotiated settlement would not constitute second prize but would in fact constitute the first prize:

- Only a negotiated settlement could allow a new democracy to inherit an economic infrastructure and the necessary human capital to rebuild the country. The ANC had seen at first hand, in the countries where it had been based in exile, the consequences of inheriting a dilapidated economy lacking skills, capital, infrastructure and human goodwill. It had seen the debilitating effects of civil war on the newly-independent states of Zimbabwe, Mozambique and Angola.
- Critically, the ANC had also begun to achieve pre-eminence as the voice of the people, and could afford to take risks in achieving its goals.
- Finally, the ANC was fortunate in having a leader of the calibre of Nelson Mandela. It would be wrong to attribute the success of the transition entirely to one individual, thereby ignoring other conditions, the efforts of countless foot-soldiers, and the progressive collective leadership of the movement. However, Mandela was not only persuaded of the need to negotiate a settlement and to create a united and inclusive political order. He also had the strength of personality to take the opening steps in the process by initiating confidential discussions between himself and the leaders of the apartheid government. Mandela was able to straddle the divisions in society, to become a national symbol himself, and to undertake the important task of building confidence in negotiations and in the future.
4.3.2 The regime

On the part of the government and the National Party, the transition was made possible in part by F.W. de Klerk, the newly-elected president. Embarking on a strategy of negotiations with the enemy may be risky. Certainly in the early 1990s, F.W. de Klerk proved himself a risk-taker and, in so doing, demonstrated real leadership. Indeed, his political moves in early 1990, when he moved decisively and rapidly, exceeded all expectations (rather than “too little too late” as with his predecessors). Although F.W. de Klerk was to move more cautiously later on (to his cost) his early, fundamental shift in policy in 1990 (legalizing all the underground liberation movements, and repealing repressive legislation) brought him not merely great stature, but more critically, it gained him the initiative as the liberation movements struggled to catch up and to find an appropriate response. The reason for his shift in policy can partly be attributed to his recognition that the crisis in South Africa was real, and that its increasingly dirty war was not sustainable. On this issue, he carried with him some influential thinkers in the national security establishment. This, in turn, was made possible by the “confidence building measures”, undertaken overtly and covertly by both parties. The most important breakthroughs (in South Africa and elsewhere) often occur when key “securocrats” finally realize that the conflict cannot be won through military means, and that a political solution is required. Of course, such change in attitudes was made possible by the hard truth that the prevailing method of government was not sustainable.

4.3.3 “De-demonization” and confidence-building measures

It would be wrong to suggest that subjective factors simply “arise” fortuitously. It is the task of political actors to create these circumstances. Ironically, some of the barriers to creating the subjective conditions appropriate for negotiations are necessary for creating and maintaining militant opposition to an adversary. If the enemy has been persistently demonized, then both the government and the liberation movement face problems persuading their supporters and functionaries that the very same adversary who has been demonized can ever be a negotiating partner. The government and the ANC pointed out to their respective constituencies that negotiation was an activity to be engaged in with
enemies, not friends. But both sides were required to confront the legacy of their past propaganda. The ANC had to confront the high level of militancy amongst its cadres. Popular slogans, such as “long live the spirit of no compromise” or “freedom or death”, appear incompatible with the decision to start negotiating.

It is important to educate your supporters -- and the public at large -- that negotiations do not constitute capitulation. It is critical for the longer-term success of the negotiations that a higher level of strategic understanding of your political goals be achieved. Prepare your constituency for compromises, because a negotiated settlement is predicated on such compromises. However, just as important as addressing your own supporters, is the task of “addressing” the adversary’s supporters and doing so in such a manner as to build confidence in the negotiating process. A successful negotiation process requires confidence in the process from both leaders and their followers. The parties must recognize that each side is required to talk to its own constituency in a way which builds their confidence in their own leaders, i.e. by “talking down” the risks of the negotiating strategy, or by portraying the negotiations as the continuation of war by other means (to turn von Clausewitz’s dictum on its head).

Where the ANC had been most skilled, even as an exiled movement, was in communicating with the South African public at large, in a manner which emphasized that:

- The ANC’s programme and policies were unthreatening and acceptable — and that it was not the demon it was portrayed to be;
- The ANC had no intention of seeking racial revenge; and
- No solution was possible without the ANC — as demonstrated by its international and domestic popular support.

Mechanisms employed in this confidence-building process included:

- Issuing public statements;
- Issuing blueprints for a future society; and
- Conducting a series of direct face-to-face engagements with a panoply of civil society and political groupings in the country.
Indeed, the ANC began to look increasingly like a government-in-waiting, as sporting groups, student groups and businessmen made regular pilgrimages to Lusaka in Zambia to meet and consult with the patently reasonable leadership of the liberation movement. At the same time, Nelson Mandela was engaging government leaders and “securocrats” from his prison quarters, and impressing upon them both the feasibility and the necessity of normalizing South Africa’s fraught inter-group relations.

4.4 Making the negotiations option attractive

In summary then, the pre-conditions for negotiations in South Africa were:

- The existence of a economic and political crisis sufficient for the ruling elite to lose confidence in its capacity to continue to rule in the old way; and
- The creation of subjective conditions for risk-taking and sufficient confidence that mutually acceptable new ways of ruling could be negotiated.

Paradoxically, both parties will only begin negotiating if negotiation offers the possibility that they may both achieve their own very different, even mutually destructive, ambitions. At the outset, it is unnecessary for the adversarial parties have identical expectations of the negotiations’ outcome. Parties enter into negotiations, each with its own view of what will be achieved and what are the “non-negotiables” and “bottom lines”. In truth however, the negotiations will produce a result determined by a range of factors, not least being the dynamics of the negotiations themselves. What is important initially, is to get the parties to the table so that direct exchanges can commence and the concerns of both sides can begin to be addressed.

How did Nelson Mandela allay white fears?

Mandela’s initial approach was to insist that unless blacks and whites reached a peaceful agreement the country would face awesome,
debilitating and destructive civil war. He insisted that it was possible to find a mutually acceptable solution.

Mandela's approach was characterized by:
- his willingness to engage everybody and anybody on the necessity for a negotiated solution;
- his holding out the prospect of the amelioration of international pressure on South Africa on the sporting, cultural, and economic front provided that the negotiating process proceeded and certain benchmarks were achieved;
- his ability to establish a “larger-than-life” stature, transcending the divisions in South Africa.

Mandela was so successful that he informally developed the stature of the president before he was elected president. However, it needs to be stressed that it was not only Nelson Mandela that sought to allay the fears of an unpredictable, and hence frightening, future. The ANC was also required to indicate that it shared its leader’s perspective, and that it was both capable and competent to lead the country in a way in which all communities would be safe, secure and prosperous.

In what detail and for what purpose did the ANC circulate its constitutional blueprint prior to an agreement on the negotiating process?

The democratic forces did not release constitutional blueprints as a statement of non-negotiable constitutional demands. On the contrary, the ANC made it clear that it envisaged a democratic constitution-making process further down the line. It was necessary, however, to set out its vision and the constitutional blueprint served this purpose. Through its constitutional blueprint, the ANC was able to state its vision of a prosperous, stable and secure South Africa.

The blueprint addressed questions regarding:
- The Rule of Law,
- An equitable property regime, and
- Attitudes towards religious and cultural diversity.
So the ANC was able to commence the process of de-demonization, while at the same time injecting important questions into the national political discourse.

What was the role of the South African Defence Force, or its strategists, in approving or formulating F.W. de Klerk’s strategy of reform? It is not unusual for the military or security establishment to play a leading role in strategizing processes of reform. South Africa was no different. Close to F.W. de Klerk were a group of reformers, some of whom were associated with the national security establishment. These reformers did not represent the military as a single coherent institution. They represented a reforming section within it. It may be important in the course of promoting a climate for negotiations to keep open lines of communication, however informal, with reformist elements within the security establishment.

What methods did the ANC use to reach and form agreement with internal political groupings, civil-society groupings and elements in the broader society?

The ANC relied on broad platforms in which as many diverse groups as possible could comfortably participate. The ANC used all avenues to reach out to and engage with internal political movements, civil-society groupings and important sectors of society. Apart from direct invitations for such groups to meet the ANC and other liberation movements, the ANC sought to promote alliances with such groups, even prior to its unbanning, and to give a lead to such groups and solicit their backing for a comprehensive political settlement.

How did the South African democratic movement utilize the space to operate legally, internally and, where there was no such space, go about creating the legal space to develop an internal opposition movement? The democratic movement never ceased using whatever legal space there was, including resort to the courts to create such legal space. Unlike Burma, South Africa was thirsting for international interaction, both for psychological reasons (in the sporting and cultural sphere) and for economic reasons. South Africa needed to position itself within the world
economy during this period of globalization, yet its domestic policies caused increasing isolation. These pressures were utilized to force the government to appear less repressive and to allow legitimate protest. Under the protection of international scrutiny, the trade unions were able to develop organizational muscle, and to expand their presence throughout the mining and manufacturing industries. Trade unions came to play a vital role, both in expanding legal space and in using it in strikes, stay-aways and demonstrations. The democratic movement used international pressure from institutions such as universities and banks, to put pressure on South Africa to reform its policies and allow peaceful opposition. The internal democratic movement and the liberation movements made creative and regular use of the courts. Many of these applications to court, or defences conducted in court were successful and, even when they were not, they provided a forum and an opportunity to expose and to inform.

What was the role of “codes of conduct” for corporations that chose to do business with South Africa in defiance of the sanctions movement? The “codes of conduct” for multi-national corporations doing business in South Africa were a double-edged sword. On the one hand, they justified the breach of international sanctions by corporations doing business in South Africa, but on the other hand those corporations were required to act in accordance with “codes of conduct”, including recognition of trade unions and other organizations representing black workers at the workplace and in their communities.

How did the democratic opposition manage to co-ordinate the different elements of the struggle, namely the international anti-apartheid movement, the economic sanctions, the military/armed struggle, and the internal mass-based resistance? There is always the possibility that there will be no co-ordination between the different elements of the struggle for democracy, particularly between the international and internal sections. In South African the ANC had managed to establish itself internationally and domestically as the leading element of the democratic movement and was accordingly able to give direction to the many groupings and parties involved in the broad
struggle against apartheid. Had this not been the case it is likely that what appeared a coherent opposition movement might well have degenerated into factions, contradictory demands, and leadership squabbles. The democratic opposition in South Africa was also fortunate in having a world-recognized leader in the form of Nelson Mandela around whom the opposition could unite. Burma possibly has the same advantage, which could be used to similar effect.

In Burma, those who promote the ethnic nationalities have been “demonized” as persons seeking to destroy the Burmese state and seeking to fragment it into a number of sovereign units. How can the process of “demonization” of human rights activists be combated?

In South Africa there was greater access to international news and information. Accordingly, it was more difficult to cast human rights activists as “backward” or “unpatriotic”. In Burma’s situation the task of combating the “demonization” of the democratic movement and its activists can only be undertaken within a general strategy to promote the democratic opposition. The particularities of such a strategy are, however, for the Burmese to determine. But opening Burma up to information and news should be a component of this strategy and it is to prevent this access that the junta takes such extreme measures to control communications to and from Burma.
5. PHASE TWO: Establishing and sustaining the negotiating process

5.1 Dealing with preconditions: “Levelling the playing fields”

The negotiations and transition in South Africa underwent a number of phases. The first phase of the negotiations proper can be called “the phase of establishing the preconditions for political settlement talks”. After the release of Nelson Mandela in February 1990, and the unbanning of the liberation movement, the subject of the talks between government and the ANC concerned not the political settlement of South Africa’s conflict per se, but the precondition for such settlement talks to take place. Discussions on the pr-conditions took place between 1990 and 1993 and proved to be amongst the most difficult. The discussions can be classified under the following headings:

• Establishing the conditions for political normalization (sometimes referred to as the “pre-conditions for substantive talks” or “levelling the playing fields”);
• Protecting the process from the violence taking place around it; and
• Agreeing the process of constitution making – the actual form and procedure for conducting substantive negotiations.

What the pre-conditions for substantive negotiations will be in any given situation, depends on the context and history of that country. There is an argument that such negotiations should not be subject to pre-conditions. These burden the process with demands, which should flow out of the talks proper. In South Africa, however, the political position of the liberation movement after 30 years as a banned organization necessitated that certain laws be put in place or legal measures be taken before the ANC could legitimately engage with the government, in the eyes of its supporters. Issues to be addressed included, for example, the fact that many ANC cadres were in exile or in jail, and that organization and its supporters lived under a harsh and racist legislative framework. From the government’s perspective, it would also not have been possible to undertake
negotiations while the ANC was still engaged in armed conflict. In any event both sides needed to demonstrate to their respective followers the possibilities as well as the fruits of negotiation.

Fortunately both sides appreciated that their adversary needed to gain something tangible from participating in the negotiations. The ANC demanded and secured:

- Release of political prisoners;
- Granting of temporary amnesty for its cadres and leaders returning from exile;
- Repeal of politically repressive legislation; and
- Repeal of racial legislation.

These demands were justified on the grounds that it was necessary to level the political playing fields and to allow free political activity while the talks took place.

For its part, the government demanded that the ANC:

- Declare a cease fire; and
- Make provision for the handing over of weapons or “decommissioning”.

The ANC rejected this latter demand, pointing out that it would be vulnerable to a change of heart by the government and that the process had not yet become “irreversible”. The ANC did however recognise the equivalent need for the government to demonstrate a peace dividend as a consequence of negotiating with the ANC. So the ANC agreed to a temporary suspension of hostilities, with an agreement to decommission once the talks were completed and the process had become irreversible.

From the experience in South Africa and elsewhere, the importance of clarifying precisely the obligations and nature of any cease fire agreement is critical. The failure to spell out what exact obligations exist in regard to the bearer of arms, more particularly when and to whom such arms are to be surrendered, can be a source of enduring conflict which will bedevil the subsequent negotiations (for example, Northern Ireland).
5.2 Protecting the process from violence

5.2.1 Violent challenges to the negotiations
The period of negotiations is at best a period of instability. Acts of violence or spontaneous outbursts of mayhem can de-rail the process and cast doubts on the good faith of either, or both, parties. In South Africa, the process was particularly subject to outbreaks of wanton violence, mostly perpetrated by those seeking to bring the talks to an end. Third parties who wish the talks to fail, notably hard-liners in one camp, can disrupt the talks by acting as agents provocateurs (in South Africa this agency or element was referred to as “the third force”). Between 1990 and 1993 negotiations were suspended on more than one occasion because of such violence, and the country was brought to the very edge of destruction by the assassination of an ANC leader, Chris Hani.

The particular violence that manifested itself during the negotiation phase was violence between supporters of the Inkatha Freedom Party (IFP) and ANC supporters. Between 1985 and 1995 over 10,000 people were killed, and an estimated 30,000 left homeless, from acts of violence and reprisals in KwaZulu Natal and on the Witwatersrand (the industrial heartland). The violence was alleged then (and established later) to be perpetrated in collusion with elements of the government’s security forces. It was to the government’s advantage for such violence to be seen as “black-on-black” violence - as internecine warfare which did not involve the government. As large numbers of ANC activists were killed and black communities destabilized, the ANC and the IFP were stigmatized as irresponsible agents of the violence. There were few, if any, prosecutions of the perpetrators of the violence. Victim communities appealed repeatedly to Mandela to arm them or at least stop the violence. After a massacre in an East Rand township all further talks were called off. It was only after the assassination of Chris Hani, when the country teetered on the verge of civil war, that the leaders on both sides recognized the urgency in expediting the settlement talks to prevent a recurrence. The ANC in particular recognized that the best method of preventing such a recurrence was the swift transition to a democracy.
5.2.2 The National Peace Accord

The mechanism, established during this period to minimize the violence, was a National Peace Accord. The National Peace Accord was deliberately established as a national structure involving diverse elements of civil society and the full range of political opinion. The strategic thinking which informed this mechanism was recognition that agreements and negotiations between only the two adversarial parties were proving fragile.

Previous attempts to establish “peace pacts” had foundered because they had frequently been:

• Sabotaged by external elements;
• Used by the negotiating parties only to secure a breathing space; and
• Used by the negotiating parties to make them appear supportive of the peace initiative.

It was felt that a multilateral approach to the peace initiative would have the advantages of:

• Forcing the negotiating parties into the initiative;
• Forcing the police into a role where they would be required to maintain law and order, and protect communities.

In other words, a body comprised of diverse elements of civil society, plus a wide range of political parties (for whose support the principal antagonists in the conflict were themselves competing) was more likely to guarantee peace than a bilateral engagement. In short, the pact would be held in place, like a jigsaw puzzle piece. A belligerent party would not have the manoeuvrability to appear peaceful one day and be war-like the next.

For the National Peace Accord to work, it required local-level structures. Local peace committees were established in every village affected by the violence. They acted as an early-warning mechanism, mediators and peace marshals. Most importantly, they created a structure within which South Africans from all sides were required to work together to resolve conflicts. They thus became a nation-wide school -- teaching conflict
resolution techniques and giving experience to many ordinary South Africans in managing political and racial diversity.

5.3 Agreeing on the constitution-making process

5.3.1 Agreeing on the process
It was not until the violence had threatened to de-rail the transition, that the parties finally agreed the process of constitution-making, which they did in a memorandum of understanding in late 1992.

The central questions in dispute with regard to the constitution-making process were:

- Should the process be a democratic one, and hence legitimate in the eyes of the majority of South Africans?
- Should the process be undemocratic but inclusive, and hence enjoy the support of diverse elements including minorities.

The objection raised to a democratic process, that is a process in which the negotiating parties would be represented in proportion to their popular support, was that it granted little protection to minorities who feared that their particular concerns and interests would be over-ridden by the majority. This group of parties which included the IFP wanted the Constitution to be drawn up by a convention in which all political parties would have one vote, regardless of their support. Those who favoured the democratic process stressed that a constitution drafted against the wishes of the majority by self-appointed politicians would never be legitimate or accepted. It would have no lasting value. This conflict over the process to be followed further fuelled the violence affecting the country.

The technique used to overcome this impasse was to adopt a two-phase approach to the constitution-making process.

5.3.2 Phase one: Establishing binding principles prior to elections
The unrepresentative but inclusive forum of political parties would agree on a set of binding constitutional principles referred to as the “sacred principles” (in Namibia, which used a similar device). These principles,
although drafted by an unrepresentative body, would have to be reflected in the final constitution. The multi-party forum would also be required to draft an interim constitution to govern the country while the first democratically-elected Assembly drafted the final constitution.

The multi-party forum would agree on the principles and interim constitution as well as the legislation required for holding democratic elections. This included such important legislation as that establishing the independent electoral commission, an independent broadcasting authority, and the establishment of a body to supervise the government, pending the first elections.

5.3.3 Phase two: Operationalising the binding principles through the Constitution

The second phase was to begin after the first elections, when the new, democratically-elected National Assembly, sitting as a Constitutional Assembly, would draft a final Constitution. This phase would culminate in the adoption of the final Constitution. The final Constitution would not come into effect until the Constitutional Court had certified that it was consistent with the constitutional principles.

In this way, the device of “binding constitutional principles” was used as a key to unlock the impasse thrown up by the necessity of meeting both the conditions of legitimacy and of inclusivity. Minorities would know that the final Constitution, fleshed out and developed by a democratic body, would at least respect the core principles negotiated in advance.
6. PHASE THREE:
The making of the constitution

The constitution-making process followed the two-phased procedure referred to above. Between 1993 and April 1994, the multi-party forum agreed the constitutional principles and the Interim Constitution. The first attempt at a multi-party process, the Congress for a Democratic South Africa (CODESA) collapsed, partly because of the violence, but partly because of the inappropriate structure of the negotiations. The principle problems during this first experience of multi-party negotiations can be traced to:

- The failure of face-to-face talks involving too many parties; and
- The absence of a decision-making formula for the forum combined with a lack of will to compromise on important questions.

However, the second attempt at multi-party negotiations attempted to build on the lessons of the first:

- Relying on bi-lateral negotiations between the government and the ANC as the driving force;
- Using broad alliances, led respectively by the ANC and the government, to ensure agreement between all the other parties represented in the talks;
- Making extensive use of “experts” to prepare third-party formulations of the problem questions, thus saving any party from having to concede to an adversary’s text; and
- Employing the device of “sufficient consensus” to establish agreement.

“Sufficient consensus” did not require unanimity, but it did require significant consensus and consensus at least between the major players. Such a formula required a politically literate and intelligent handling of the floor by the chairpersons. “Sufficient consensus” allows a process which is predicated on a consensus between the negotiating parties (and thus requires real give-and-take, and agreement) but allows for that consensus to be assumed if all the important players are in agreement. A...
single insignificant party can thus not hold the process to ransom.

The multi-party process and its executive committee became in a real sense the guardians and promoters of the negotiation process. The delegates were required to defend the process from attacks by their own parties, and from criticism from sectors of the public. During the run-up to the elections an executive committee of the process became the Transitional Executive Council. It was responsible for supervising the government administration of the country and the electoral process, ensuring not only fairness of the elections, but that the result would be accepted by winners and losers alike.

The second phase of the constitution-making process commenced on May 1994 and was completed in February 1997 when the new constitution came into effect. The first draft of the new constitution was rejected by the Constitutional Court on account of its failure to comply satisfactorily with all the binding constitutional principles.

6.1 Inclusivity

One of the significant achievements of the constitution-making process was the fact that the final Constitution enjoyed overwhelming support. A 98 per cent majority in the Constitutional Assembly adopted the Constitution. One of the consistent themes that had informed the constitution-making process was the need to be inclusive in both the process and the product. There were three aspects of the constitution-making process, that reflect this:

- The desire to ensure that all shades of opinion were represented in all the processes, and had the fullest opportunity to participate in the making of the Constitution. This approach was informed by the need for stability and hence co-ownership of the constitutional framework by those who were a small minority but potentially disruptive if they positioned themselves outside the Constitution.
• The need to ensure that the end-product addressed in a meaningful way both the rightful demands of the majority and the real concerns of the minorities. It was important that no single party could claim that the Constitution was theirs and theirs alone. All parties (it was hoped) would be able to say “We influenced and helped shape this Constitution”. The Constitution could not reflect everything that every party wanted. Every party was required to compromise on some features of its text, but also to see its influence on other features.

• The imperative that the constitution-making process should involve, as far as possible, society at large. It is not the lawyers or the politicians whose rights are protected by the Constitution. It is not lawyers or politicians who will defend those rights, nor the Constitution itself, at the barricades or in the streets. A Constitution which is drawn up without popular participation will have little resonance in the hearts and minds of the people who are its final guardians. Quite considerable effort had been invested in popularizing the constitutional debates by disseminating information through the mass media, particularly the radio. This was important as South Africa has a high illiteracy rate.

6.2 Popular participation
Members of Parliament were required on a bi-partisan basis to travel throughout the country, not to preach but to listen at public meetings to what ordinary people felt should be addressed by the Constitution. This popular consultation was followed by a broad-based public campaign to solicit written submissions from ordinary people as well as civil society. It was hoped that over onehundred thousand submissions would be received, but as it turned out a staggering two million submissions were received. Many of these did not address the constitutional debates but raised the problems of ordinary people: domestic abuse, livestock theft, unemployment, etc. Yet in reality these issues are connected to constitutional questions, such as the Rule of Law, gender equality, effective government services, responsive local government.
It was critical that the Constitution addressed some of these issues, and it is for this reason that the South African Constitution pays attention to social and economic rights, domestic violence and fair labour practices.
Efforts were also undertaken to ensure that the Constitution was written in a style that could be read by ordinary people. All of these aspects were designed to help, not only political parties, but ordinary people, see their Constitution as a constitution which they shaped, which they own, and which "talks" to their concerns.

6.3 Confronting the past in order to face the future
The question arises in most peace talks or political settlement negotiations as to how the past deeds of either one or both sides to the conflict will be dealt with. There may not be a universally correct response to this thorny question. In many negotiations merely raising the question can upset the talks, and the peace of mind of one or both sides to the conflict. Many negotiators are tempted to ignore questions of past human rights abuses, past embezzlement of public funds, etc., in the interests of peace. However this may be short sighted. In the first place there will be some pressure to provide certainty in regard to the following issues:

• Victims and relatives of victims will want to know the facts of who did what to whom, and will want to know the fate or whereabouts of their relatives,
• Combatants on both sides will want to know if they risk punishment and imprisonment if, respectively, they come in from exile or the bush, or hand over power.

Lack of clarity on these issues may lead to last-minute resistance to a changeover (as was the case in South Africa). In the longer term, the past will cast a shadow over the future if it is not dealt with in some way. Lingering resentment, suspicions and accusations, even revenge will come to the fore if no process is provided for, and preferably agreed upon. There is a need for a process to deal with the diverse interests of victims, perpetrators and society at large to prevent the reoccurrence of the barbarism of the past. There are numerous examples of countries where there was an attempt to sweep the ugly past under the carpet only to have it emerge in the form of intra-community violence at a later stage.
In South Africa this issue was dealt with in a comprehensive framework that provided for:

- Rigorous investigation into human rights abuses committed by both sides to the conflict;
- Granting amnesty to perpetrators of such abuses provided they “told all” to a judicial panel, and their crimes were intended to further a political objective; and
- Granting reparations and compensation, both symbolic and material, to victims of such abuses.

The jury may still be out on how successfully the Truth and Reconciliation Commission managed to accomplish these tasks. There is no doubt that the “truth telling” part of the process was painful, as was the amnesty process for both perpetrators and victims. However, South Africa would not have been able to reconcile, to look forward, to construct a foundation for the future, without such a process. Nor would it have been possible to guarantee the success of the first transitional measures without some assurances to the combatants in the conflict.

**Issues and comments from Burmese workshop participants regarding the question of sustaining and conducting negotiations**

What was the role of women in the constitution-making process and how did they manage to persuade their male colleagues to treat them as equals?

Women played a most significant role in South Africa’s constitution-making process. The principle was established at the multi-party negotiating forum that 50 per cent of each party’s voting delegates must be women. Many parties were initially resistant to what they viewed as an imposition on their right to choose their delegates to the negotiations. And they were sceptical about the capacity of women to participate in the negotiations at this level. But by the end of the process all parties had come to accept the equal participation of women. Women were able to bring shared experiences and perspectives, across party lines. More importantly, women were able to act in a united way in respect of gender-
related issues (e.g. treatment of rural women under customary law). These issues were eventually resolved in favour of the equality of women. This was a result of joint efforts of women across the political spectrum. In Burundi the absence of women from the constitution-making process is notable, and can be felt in the quality of the negotiations themselves.

How can women be promoted to a prominent role in the Burma? It has been said that women in Burma are invisible. Where they do play a part they tend to be confined to gender specific roles, such as providing food and other logistical assistance. This tendency is not specific only to Burma. It does, however, emphasize the need to promote actively the participation of women at all levels of the political process, including within political parties. This in turn places a premium on training women, developing their skills to enable them to take their rightful place within the political movement and training men so that they accept this need.

What was the role of South African religious leaders both in the constitution-making process and afterwards in the process of transformation?

Although some religious leaders wanted the church to adopt a more apolitical or neutral profile in the struggle, the nature of the conflict in South Africa politicized all aspects of life. Religious leaders played a significant role:

• During the struggle against apartheid;
• During the negotiating process, as leaders of civil society;
• During the transition, in the national peace accord structures; and
• After the negotiations, in the Truth and Reconciliation Commission.

Leaders from all religions proved to be important agents of political mobilization. They were, in general, opposed to the policies of racial discrimination, but they were also perceived as being independent of political parties. Accordingly, religious leaders were able to act as peacemakers in regard to the issues which divided communities or political parties. Some religious leaders ran for political office in the first elections, whilst others, such as Archbishop Tutu, argued for a return to
a more orthodox religious role after a political settlement had been reached. Notwithstanding Archbishop Tutu's intention to return to a purely religious role, he was requested to, and did, chair the Truth and Reconciliation Commission, an independent but very political function.

What was the nature of the opposition to the transformation process by the IFP? What was the role of ethnic communities in the process of transformation? Why did the IFP adopt the attitude it did in opposing the ANC and what were its demands? What was the social and ethnic basis of the IFP?

The origins and the nature of the conflict between Inkatha and the ANC can be found in the specific history and personalities dominating South Africa in the 1980s. The IFP presented itself as the most ethnic of the parties and argued for the strongest form of federalism in its constitutional demands. It became the flag-bearer for regional autonomy and the retention of the power of traditional leaders (opposing local democratic structures). The reasons for this attitude arose out of the fear that the IFP leaders had of retribution by a nationally-dominant ANC, for the violence which had bedevilled the KwaZulu Natal Province during the period of ANC opposition to the IFP. The IFP did not represent Zulus as a whole (approximately 50 per cent supported the ANC). The origins of the conflict between the IFP and the ANC lay in the latter's rejection of the IFP strategy of participating in what were called apartheid structures, as well as the alleged collaborative relationship between the regime's security apparatus and the IFP. Nonetheless, there may well be questions of ethnic identity, which South Africa still has to confront.

How did the ANC encourage the other parties to stay in the negotiating process even when it became apparent that such parties would not achieve the outcome that they wished? Once parties participate in peace talks/political negotiations, they find they do not have complete freedom of action. Parties who abandon a peace process may find themselves marginalized, isolated, or the subject of international condemnation. The ANC for its part, sought to reward its negotiating partners by progressively supporting the normalization of South Africa's economic, sporting and cultural life. At a critical point in
the negotiations, when the political reality has fundamentally changed, the process can be termed “irreversible”, in the sense that the status quo ante cannot be re-established.

Why did M r F.W. de Klerk and M r M andela not participate directly in the negotiating process?
It was considered important to have a mechanism at a level higher than the negotiators to resolve deadlocks or breakdowns in the negotiations. Had M andela and F.W. de Klerk participated directly in the on-going constitutional negotiations, there would have been no such higher authority. Furthermore, M andela and FW de Klerk were spared any damage to their stature and personality that may have followed direct engagement in acrimonious exchanges.

How can negotiating partners build trust between one another, and remove suspicions and distrust that are the legacy of their past interaction?
Important elements for a successful outcome to negotiations include the following:

• Negotiating with integrity;
• Fulfilling your obligations; and
• Treating your adversary with appropriate professionalism.

But the importance of social interaction and spending time with one another in negotiations also needs to be emphasized. It cannot be expected that high levels of cordiality and amicability should be present at the outset of negotiations. One way of fostering trust is through the collegial and mutual responsibility that arises from working together.

In Burma at the time of the democratic rupture in 1990 there was a 100-day vacuum period when the military junta was compelled to allow a democratic transition. Did the democratic forces properly use this moment? What should be done in the context of the regime’s refusal to talk to Aung San Suu Kyi? How should the Burmese Democratic movement deal with the junta’s constitutional proposals -- a detailed
draft constitution comprising 104 articles which has emerged from a
contention convened and controlled by the junta itself?

It is not possible to give precise answers to the concrete strategic possibi-
lties arising out of the Burmese struggle, at least not on the basis of anot-
er country's experience. However, it is important to bear in mind that:

• Predicaments that seem rigid and unchanging can alter rapidly (as we
have seen recently in East Timor, Indonesia, Yugoslavia, etc).
• You should be prepared to use opportunities not only to advance, but
also to consolidate your position, and to attempt to prevent the resto-
ration of the status quo ante.
• You should not allow the junta to determine either the issues or the per-
sonalities through which any engagement is to be conducted. However,
every opportunity for engagement with the junta should be examined
to see in what way it can be exploited to move the situation forward.
• The National Convention Constitution need not be accepted on the
terms put forward by the junta, but could still serve as a basis for enga-
ging on constitutional issues, to advance counter proposals, and as a
method of raising hitherto prohibited political discourse.
7. Substantive choices in the South African constitution-making process

The substantive choices in the South African constitutional design may not be suitable for any country other than South Africa. For this reason when canvassing the substantive choices made by South Africa’s founding fathers and mothers, it is not the detail which would be of relevance to Burma, but rather the underlying motivation which informed those choices.

There are four broad concerns that the constitution was required to address:

- The constitution should be an enduring and binding contract between all its people. The constitution is a most significant document because it sets the rules by which the society is governed, it captures the highest aspirations of its people and provides security to minorities while guaranteeing accountable and democratic government for the population at large. It is not to be regarded as a technical document to be crafted by experts -- whether local or foreign.

- While the substantive choices made in the process were informed by extensive international research and examination of comparative systems, the choices had to be home-grown and informed by South African concerns so that the constitution would capture the specific nature of a contract between its people.

- The constitution must reflect the society’s concerns and its history. In this sense, “a constitution is a national biography”. In the issues it addresses, a constitution reflects its past. Thus the South African Constitution reflects an enduring commitment to justice, reconciliation, human rights, liberty in place of oppression, but above all, a commitment to the equality of all its citizens regardless of gender, race or ethnicity.

- A constitution should also address the future. Attempts to build structures or fix positions with particular living personalities in mind must be resisted. Constitutions should not be adapted to fit personalities, but vice versa.

The same considerations, which informed the design of the constitution-making process, informed the product of that process. That is, the
constitution should be inclusive and yet legitimate. The constitutional structures and text should give all groups appropriate protection from abuse of power. Yet the constitution must ensure that the structures of government give effect to the choices and mandates emanating from the people -- not least by way of regular elections, on the basis of universal suffrage, at every level of government.

Finally, the constitution-making process and the constitutional choices made in that process were designed to foster nation-building. Nation-building is not a simple matter of creating a central state structure, or of imposing a single uniform identity, but rather of allowing for the appropriate expression of people’s multiple identities within a national project. The Constitution is thus the document that captures national aspirations, as well as the aspirations of its component parts. A nation seldom has an opportunity in such an all-embracing activity as constitution-making to exercise its sovereignty and to express its nationhood.

The way these concerns are reflected in some of the concrete choices made by the Constitutional Assembly include the following:

7.1 The Constitutional State
South Africa abandoned Westminster-style parliamentary sovereignty, which was its colonial legacy, and adopted the model of a constitutional state. In a constitutional state government and parliament are governed by a fundamental law, the constitution. The constitution imposes limits on what the president and parliament can do, and prescribes that they have no powers other than those given to them by the constitution. Such a system relies fundamentally on the Rule of Law (including the efficacy and independence of the judiciary), and the notion that the constitution is more important than the will of temporary majorities. For such a constitution to be enduring however, it must enshrine and express the democratic principle, and not frustrate it.

7.2 Government of National Unity
The Constitution provided for a period of five years in which the opposition parties would participate in the government. It was intended
that this period should serve as a stabilizing period of nation building, in which both the majority party and the opposition would share responsibility for managing the transition.

7.3 Bill of Rights

South Africa’s Constitution sought to enshrine an extensive and progressive charter of fundamental rights. These rights may not be abridged or violated by government, or by other sources of power. Some of the distinctive features of this Bill of Rights -- which sought to build on an evolving world-wide human rights culture -- are set out briefly below.

7.3.1 The constitution goes beyond the normal political and civil rights to enshrine certain socio-economic rights, such as the rights to basic education, nutrition, shelter and emergency health care.

7.3.2 The Bill of Rights takes on board more recent concerns, neglected by the older, more established, and more "primitive" constitutional texts such as the United States constitution. Thus the Bill of Rights addresses issues such as gender rights, environmental rights and the rights of the child.

7.3.3 The Bill of Rights elevates the equality of citizens to a higher principle, but accommodates the need to redress the inequalities of the past.

7.3.4 The Bill of Rights displays a concern to prevent abuses associated with a repressive state, by insisting on the liberty of individuals and by limiting the power of the state to derogate from these rights even in a state of emergency.

7.3.5 Bill of Rights enshrines certain more contemporary rights of citizenship, the right to information and the right to administrative justice. These latter rights are important for a vigorous civil society (during the course of the struggle South Africa witnessed the development of robust civil society organizations and institutions, and these were able to influence the content of the Bill of Rights).
7.4 Strong Parliament
In dealing with the structures of government the Constitution gives pre-eminence to the Legislature rather than the Executive. Constitution makers were anxious to avoid a monarchical style of executive government that has blighted so many developing countries. For this reason the Executive is accountable to the Legislature which indirectly elects the President. A President may not remain in office for more than two terms. The Legislature is given a strong overseer’s role over the actions of the Executive, including over such issues as military deployment.

7.5 Institutions supporting democracy
The South African Constitution creates numerous institutions independent of executive interference to ensure that its constitutional promises are kept. For example, there is a Public Protector to monitor the performance of the public service, and to prevent corruption. There is a Human Rights Commission, and a Gender Equality Commission. The Auditor General is established to ensure that public monies voted by the legislature are spent in accordance with the budget and the proper procedures. The Independent Electoral Commission is established to ensure and manage free and fair elections.

7.6 Electoral System
The Constitution enshrines the principle of proportional representation. This is a departure from the Anglo-American “first-past-the-post” system that had previously applied in South Africa. The reason for selecting proportional representation (proposed by the ANC, even though it would have obtained greater representation under the previous system) was the concern to ensure that as many significant minority parties or interests as existed in society would find some representation in the Legislature. In Lesotho recently, under the “first-past-the-post” system, opposition parties obtained 40 per cent of the vote but less than two per cent of the seats. This became a source of political instability in the country. The South African constitution makers were concerned to give effect to the philosophy of L.B. Johnson, who once said, “It’s better to have a son-of-a-bitch inside the tent throwing stones out than outside the tent throwing stones in”. In short, it is better that Parliament has all
interest groups participating in its deliberations, rather than exclude a significant minority from the political system.

7.7 Language and Culture
The constitution-makers were concerned to differentiate between the concepts of equality on the one hand, and uniformity or "sameness" on the other. The right to be different was protected in the constitution. This means that the right to belong to, and to practise, different cultures and religions, and to speak one's language, is protected -- as are individuals' rights to practise their own culture and religion in community with others. Amongst other consequences, the state is secular or neutral in regard to religious preference, and enshrines the equality of the 11 official languages. Although it allows regional preferences in language usage, National Government must recognize the equality of all 11 languages. Regrettably, the impracticality of functioning with 11 languages has seen the rise in prominence of the use of English as the unofficial common language of government.

7.8 Federal or regional decentralization
The founding mothers and fathers opted for a form of federalism, that is relatively unitary, or subject to the concern for building national consensus. In this regard South Africa reflects its very different history to that of Burma. An explanation of both its federal characteristics as well as its concern with national unity is required.

The impulse towards federalism in South Africa arises not from any pre-colonial regional states but rather in consideration of the need for effective and accountable government. Effective and accountable government requires that at the level of provinces or states there should be an accountable legislature and executive. A government closer to the people is more responsive to them. There was also recognition that diversity of cultural, physical and demographic features can best be accommodated within a federal framework which allows for diversity in laws and implementation, as well as methods of service delivery appropriate to different circumstances in different regions.

South Africa's experience of federalism had been of an artificially imposed ethnic fragmentation whose long-term purpose had been to
disenfranchise blacks, and to justify the absence of their political rights in “white” South Africa. These artificially imposed ethnic governments had developed reputations as corrupt, repressive and unpopular ruling cliques. Thus, in its founding constitution, the new republic was anxious to reconcile hitherto fragmented and divided South Africans, and to render their political identity subject to the larger imperative for national reconstruction and reconciliation.

In concrete terms, there are three significant features to South Africa’s federal framework:

• Many of the powers of the State are shared (or concurrent) between national and provincial/state levels. In cases of a conflict between the contradictory provisions of state and national laws the question is resolved by recourse to a formula which determines that the provincial/state law will be pre-eminent unless the national government can prove that one of a specified number of national interests applies. In practice, the states have preponderant responsibility for public service functions, although the national level sets much of the legislation establishing norms and standards. In cases of a collapse or failure in a state/provincial government the national government may intervene. What this formula purports to recognize, is that the complexity of twenty-first-century life means that there may be many levels of government, including local government, which have a legitimate interest in the same areas of socio-economic life. Even something as parochial as traffic laws may require some national intervention, i.e. which side of the road vehicles must drive on.

• The Constitution seeks to find a trade-off between:
  • the power of the national government to intervene in areas of concurrent competence; and
  • granting a second parliamentary chamber influence (and even veto) over national legislation, by means of increased power of the state/provincial level of governments.

The National Council of Provinces comprises inter alia members of the provincial governments (not merely elected representatives from the provinces). These delegates have to obtain mandates from their provincial governments, thereby making the Council of Provinces a true insti-
tution of provincial interests, and not merely a senate. Through this House, the provinces can exercise considerable collective influence over national policies. The purpose of this institution is to create a centripetal dynamic within the federal framework. The state/provincial governments are required to assume responsibility -- not only for their own provinces, but to assume co-responsibility for the management of the nation as a whole. Instead of a state/province deciding on issues, for example water supply, in isolation from its neighbouring provinces down-river, they would, through the mechanism of the Council of Provinces, discuss the need to share clean water.

• Within the federal framework, the Constitution recognizes and entrenches local government powers against encroachment from the other levels of government. In this way the Constitution reflects the tendency to see local government as an important engine of development and popular democratic participation.

7.9 Decentralization and financial matters

The Constitution devotes a chapter to financial matters -- the Financial Constitution. Leaving aside technical questions, it is important to grasp that a coherent federal framework requires the protection and distribution not only of executive and legislative powers, but of fiscal and financial powers as well. The South African Constitution attempts to protect the right of provinces to an equitable share of national revenue. The equity of this share relates to two different considerations:

• There must be an equitable division horizontally -- that is, between the national level of government (for debt servicing, defence, justice etc.) and the provincial government (to meet the obligation to provide basic services).

• There must be an equitable division vertically - that is, between each state in accordance with its needs, its contribution, its demographic profile etc. This is to protect individual states from being victimized, or starved of resources, without which a state's legal powers are only theoretical.
A related question is the power to raise or collect taxes. Tax collection is usually a matter to be decided in accordance with the criteria of efficacy and efficiency. Certain taxes can best be collected only at a particular level of government. The question of raising (establishing and settling) taxes is a much more political question, and it involves the question of a state's entitlement to raise taxes of a particular kind. Whether a country opts to place tax-raising powers within a macro-economic framework, or whether it accords greater fiscal autonomy to states, the issue should be dealt with by the constitutional text, as should the question of the province/states' rights in respect of natural resources in their territory.

The South African Constitution does not envisage that the states would have a right to secede. However, the Ethiopian constitution-drafting process dealt with this issue first, and it is instructive in this regard. By conceding at the outset that states would have a right to secede the emotive content of this issue was taken out of the constitution-making process, hence facilitating the speedy negotiation of the constitutional text as a whole. The Ethiopian constitution-making process, certainly in its emphasis on autonomy of its regions and in granting the right to secede, gave expression to that country's particular history and experience. Mengistu's regime had ruthlessly suppressed cultural and regional identity in Ethiopia. The struggle against that regime had accordingly (and contrary to the South African experience) taken the form of a struggle for ethnic identity and autonomy.
7.10 Critical observations of the constitution

Three aspects of the Constitution which merit critical observation are:

- The detail in which it was written;
- The cost of its structures; and
- The impracticality of some of its provisions -- having regard to the realistic capacity of the public service and national resources.

7.10.1 Detailed drafting

The context in which the constitution was written, that is, as an outcome of negotiations between parties which were distrustful of each other, means that the constitution contains numerous checks and balances, including institutions and elaborated provisions which serve to direct the functioning of government. In contrast, the more usual tendency is to draft constitutions in the form of more general statements, so as to allow the constitution to be applied and developed in line with changing circumstances from one generation to another.

7.10.2 Cost of structures

The negotiators, particularly the constitutional lawyers, were left to find compromise formulations without regard to the overall costs of government. Because of the high premium placed on establishing a system of democratic government, the matter of expense was not properly considered. As a result, it can be argued that the new structures and levels of government have absorbed much of the anticipated "peace dividend". Funds that were expected to be available from the dissolution of the security apparatus, have partly been absorbed by new structures of government. Even then, many of the so-called independent constitutional institutions have complained of a critical lack of funding which hampers their work. With the benefit of hindsight, it appears that some institutions could have been amalgamated, and thereafter better funded. However, once constitutional structures are established, it is exceedingly difficult to abolish them.
7.10.3 Impractical provisions

It is tempting in the constitution-making process, particularly where the Constitution is itself a kind of social compact, to introduce very idealistic and detailed prescriptions on government. The reasons for doing so are both distrust of government and the more laudable aspiration of preventing the re-occurrence of past excesses. However, one of the first imperatives facing the new order in South Africa was (and remains) deliver on the promise of more effective government and improved quality of life for all. This is necessary if only to prevent disillusionment with the democratic project. The South African Constitution is particularly susceptible to the tendency to judicialize many potential political points of conflict and to make many of the government processes cumbersome. In a situation where the democratic opposition had no experience in government there was an overly optimistic understanding of what was possible.

Questions by the Burmese participants on the South African negotiating process: substantive constitutional choices:

What did the parties agree in regard to the question of resolving land disputes? Land issues are important in Burma and the question arises in what way should any settlement provide for a resolution of outstanding land questions?

In South Africa the legacy of removing black South Africans from land demarcated as “white”, as well as the historical process of dispossessing the peasantry, has made the question of land redistribution a hot issue. The matter was resolved by means of establishing a process to investigate land claims and providing for special consideration of land restitution by a land claims court. A carefully-crafted property clause allows the State some latitude in establishing an equitable land ownership regime. In this formula, the notion of fair compensation -- if land is expropriated for a land reform programme -- may take into account a variety of factors such as the way the land was acquired in the first place, not only the market value. In practice however, the legal nature of the mechanism has had the consequence that the resolution of such issues has been slow and expensive.
What is the Constitutional Court? How is the judiciary established? What are the powers of the Constitutional Court? Do the courts make use of the jury system? Why does the South African settlement rely so extensively on the legal resolution of political questions?

The South African constitution relies extensively on judicial mechanisms to resolve political issues and to mediate between competing political claims, even between levels of government. The Bill of Rights and the courts provide core security to minorities while guaranteeing the proper operation of democratic structures. This situation exists because South Africans have faith in judicial mechanisms. In other countries however, constitutional negotiations have had to focus on the distribution of power as the parties either have no faith in the institutions, or have no experience of an independent judiciary. In South Africa the political settlement relies on a Constitutional Court to enforce the Constitution even against parliament or the president. This places a premium on the method of appointing judges and on the institutional independence of the judiciary. The judiciary is appointed by the Executive on the recommendation of a Judicial Service Commission. The Judicial Service Commission is a body in which all stakeholders, including opposition parties, are represented. South Africa does not make use of the jury system but it does allow for lay assessors (up to two) to sit with judges and magistrates in criminal cases.

What is the meaning of self-determination and in what way can the examples of self-determination be of assistance in the Burmese situation?

In international human rights law there has been increasing emphasis and recognition of the right to self-determination, particularly by communities and “peoples”. The exact content of such a right, varies according to the circumstances and the nature of the group claiming the right. In the South African Constitution this issue is left open. Self-determination may mean rights in respect of culture and language, or it may in other circumstances include the right to self-government. In general, the content of a particular demand for self-determination is a matter to be determined politically and in this regard should form the
central element of negotiation between those ethnic nationalities demanding self-determination and the democratic movement.

To what extent does the South African settlement recognize that citizens have duties as well as rights?

The South African Bill of Rights does not place as much emphasis on duties as it does on rights. A constitution reflects a country’s history, and in South Africa that history has been characterized by a denial of rights. Additionally, the imposition of duties rather than rights has sometimes been the hallmark of undemocratic constitutions.

How did South Africa demarcate the boundaries of provinces and what was the relationship between the boundaries of provinces and the boundaries of the old homelands?

There is no formal connection between the boundaries of provinces and the old homelands. The boundaries of the homelands were, in any event, a product of colonial conquest and apartheid rather than real residential patterns or community boundaries. The pre-eminent criteria for drafting the new boundaries of provinces were ostensibly those that related to effective and efficient government, i.e. administrative utility. In reality however, all the provinces (save two) contain a pre-eminent ethnic grouping. As such, the provinces allow for an expression of ethnic identity.

Should a constitution make provision for the right of secession of provinces/states?

The South African Constitution does not make provision for secession by provinces. In many negotiations this issue would be considered one of the most difficult. However, the Ethiopian Constitution accepted the principle of secession as one of the first issues to be agreed. By so doing, it allowed for a more rational and focused negotiation of the powers of the provinces. Had the principle not been accepted early on in Ethiopia, it would have formed an unspoken consideration behind the resolution of all other issues.

How did the South African settlement deal with the unequal distribution of economic resources? How does the South African
Constitution deal with apartheid structures, which deprived blacks access to economic power?
The South African settlement is still confronting disparities and inequalities, which are a legacy of apartheid. However the Constitution does allow for affirmative action and for the redressing of the inequalities of the past. Access to political power through a democratic process is not merely a substitute for economic influence -- it is a means to direct and influence the economy. The new government is accordingly addressing these issues. However it must do so within the context of, and the discipline arising out of, globalization.

The South African constitution by and large resolved the question of access to equality and to rights through a model of individual rights. How did it deal, in this context, with group rights and the question of ethnicity?
South Africa's Constitution guarantees language, cultural and religious rights to all individuals. If infringed upon, these rights are enforceable through a court of law. South Africa grants 11 languages equal status as national languages. It also grants groups the right to practise their culture and language. However this right is subject to a caveat that it may not serve as a basis for discrimination against any citizen. In general, the issue of ethnicity has not been the sharp and acrimonious issue that it is in many other African countries.

How did the South African Constitution resolve and deal with the question of gender equality?
South Africa's Constitution places considerable emphasis on the question of gender equality. The Constitution does not allow gender equality to be sacrificed for the benefit of cultural or religious rights. However the best guarantee of gender equality is the adequate representation of women in parliament, and this is a matter to be determined by the political parties. The ANC requires one-third of its MPs to be women and the South African cabinet has a large number of women ministers and deputy ministers. A commission to monitor gender equality was established by the Constitution.
How did the South African Constitution provide for the eradication of corruption and the promotion of clean government?

South Africa's Constitution establishes a number of institutions and organs to monitor both government and the civil service. These include:

- An Auditor General (to ensure public monies are spent in accordance with the laws and rules);
- A Public Service Commission (to monitor the treatment of and service by public servants);
- A Human Rights Commission (to monitor respect for human rights);
- A Gender Equality Commission;
- A Public Protector (to investigate executive behaviours and corruption);
- An Independent Police Complaints Directorate (to investigate offences committed by the police themselves);
- Civilian oversight over the military, the police and the intelligence services;
- An independent judiciary; and
- An Independent Electoral Commission (to ensure impartial and fair elections).

What was the role of the National Council of Provinces? How was it structured to give provinces an appropriate influence over national affairs? How are the delegates from the provinces chosen and how can it be ensured that they represent provincial interests?

The National Council of Provinces ensures that provinces' interests are represented in parliament. It does so by requiring provincial parliaments to send their sitting members and their premiers to the sessions of the Council, and requires such delegates to vote in accordance with a mandate given to them by their provincial legislature. In this way, each provincial legislature separately considers national legislation and is compelled to assume co-responsibility for national affairs.

How does South Africa intend to deal with the problem that will arise if immigrants flood in from poorer countries to the North?

South Africa has no distinctive policy for dealing with immigrants other than attempting to comply with its international obligations. However, there have been indications of hostility to foreigners and a xenophobic
reaction to rising crime and unemployment. South Africa, like all countries in transition, is compelled to deliver a “democracy dividend” to its citizens (health, education and employment). If it fails to do so, democracy is discredited and in this regard South Africa is experiencing domestic pressure to deal more firmly with immigrants. This same consideration applies to the question of crime and personal security.

How is it possible to promote stable government in South Africa when the provision of civil liberties may lead to disorder, protection for criminals and ineffective policing?

It is not civil liberties that have led to a rise in crime but ineffective policing. Unfortunately, many citizens equate rising crime with the new Constitution and mistakenly call for the return of the death penalty and harsher punishment in the belief that this will diminish criminal behaviour. In truth, arrest rates are so low that the question of punishment does not enter the criminal mind. Until there is more effective policing the question of harsher punishments will not cure inadequacies in the criminal justice system.
8. Lessons from the South African negotiations

Having reviewed the six years of negotiations it is possible to draw out some lessons which may have some broader application. Some of these are techniques or approaches, which were used successfully to build consensus, and some of them are drawn from the mistakes that were made in the course of the negotiations. Certain lessons apply only to particular contexts, and may even appear to contradict other lessons. The purpose of highlighting them is to emphasize that negotiations are an important political tool. Protagonists in an intense political conflict would not consider sending poorly-trained or poorly-armed militants into battle, yet they may treat negotiations in a cavalier manner, without proper consideration of the techniques and strategies required to achieve the desired political result.

8.1 Include all parties

In general it is important to be inclusive in regard to the process, particularly where the objective is to create a framework in which a variety of parties are to be bound. An inclusive process provides a better platform for stability, for acceptance of the political order, and loyalty to the nation. Even a small minority, standing outside the political framework, can seriously destabilize and disrupt a new constitutional state.

8.2 Promote joint ownership of the process and the product

Before the parties participating in the process have a commitment to meeting its obligations, they must believe they have joint ownership of the process. Bear in mind that frequently an opponent, or its chief negotiator, needs to be able to sell the agreement to their principals, and to their party’s constituency. In South Africa the National Party’s chief negotiators were perhaps the ANC’s most effective allies. Their task of convincing their principals to accept agreements reached was frequently more difficult than that faced by the ANC’s negotiators. This is possible only when opponents are committed to the success of the process because they are joint owners of the process. It is important for an agreement to
reflect the shared concerns of the parties and not be viewed as meeting the demands of one party only. Parties who co-own the process are more likely to claim ownership of the end product. But this is not necessarily so. The content of the agreement must also reflect joint ownership. Parties should not lightly claim an agreement as a victory for themselves and a defeat of the “enemy”.

8.3 Build trust between the negotiators
There are a number of ways of building both personal and professional relationships of trust. What is poisonous to such relationships, is if one party fails to keep to its commitments, or to its side of the bargain. This applies particularly to agreements regarding confidentiality of the negotiations. More than one negotiation process has broken down simply because one or other party has attempted to exploit the meeting by revealing aspects of the negotiations to the media in breach of a confidentiality agreement.

8.4 Attempt to avoid negotiating with messengers
It is relatively common for leaders to send to negotiations representatives who have no mandate to truly negotiate, but in effect are simply relaying messages. In such circumstances, the real negotiators are not present in the process, are not subject to its pressures or its disciplines, and may have limited commitment to the success of its outcome. In South Africa a division could be detected between insiders (from all parties) and those who were not part of the process, particularly members of the Government Cabinet. Where such outsiders can veto the product of the negotiations, it is preferable to find methods of involving them more directly.

8.5 Parties should avoid accepting responsibility for meeting or keeping to conditions that they cannot meet, keep or enforce
This applies particularly to accepting responsibility for the conduct of parties, or armed wings of parties, which are not under the authority of the negotiating party. Failure to meet commitments undermines the process, and reduces the status (domestically and internationally) of the party which does so. It also casts doubt on the capacity of the negotiator
to be an effective party to the negotiations, and to speak for its constituency.

8.6 Principles and details: “pigs” and “swans”
The importance of having negotiators who can negotiate both general principles and detailed implementation cannot be over-emphasized. Negotiating teams should be made up of both pigs and swans. Swans are negotiators who have a special capacity to secure broad agreement on matters of principle (they can glide upstream over troubled water). The problem with swans is that frequently they are not the appropriate people to hold the ground won in negotiations on matters of principle. Ultimately, it is details which fix the agreement and its implementation, and the swans find themselves blown backwards by the wind. Pigs, on the other hand, hold their ground by battening down the details of the agreement. Negotiating teams frequently require both swans and pigs to reach effective agreements. In South Africa, agreements on the release of political prisoners, for example, generated considerable animosity and frustration in the course of their implementation as the principals neglected to negotiate definitions, timeframes and similar details.

8.7 Agree to the rules of the process, in particular the eligibility of parties, at the outset
Because the leadership and nature of parties can change, the process should take into account who should be able to participate at the negotiations in advance. This is so especially when one or other side tries to swamp the process with surrogate parties, or additional representatives.

If there is a misunderstanding as to the rules of the process complications will arise, including possible allegations of bad faith. If the rules have not been negotiated, or have not been negotiated in proper detail, it may be difficult, or even impossible, to re-negotiate the rules of the process. This is particularly so when the new rules may favour one side or the other in regard to a particular issue under discussion or in dispute. It is far better to agree on the rules of procedure as well as the obligations of the parties with cool heads, rather than in the heat of debate.
8.8 Choose an appropriate decision-making formula

Depending on the nature of the negotiations and the bodies represented, the decision-making formula may take a consensus or a majoritarian form. In the South African process, an important development was the application of "sufficient consensus". This was significant consensus in regard to which all the major players were in agreement. It effectively prevented small players, who carried little weight in the society, from using a veto to block the process. Significant problems can arise further down the line if there is no clarity on the decision-making formula as well as the decision-making powers of the negotiating forum itself.

8.9 Take care in how you “set” the negotiating table

“Setting” the negotiation table is a generic term that covers the arrangements regarding:

• Who actually sits at the negotiating table (which parties and represented by whom);
• Where they sit (in a hall, round a table, and will some parties sit in some form of pre-eminence); and
• In what sequence they sit (in delegation, in mixed format, across the table etc).

Different negotiations require different formats and “setting” the table correctly can be decisive in promoting an agreement.

8.10 Treat both your opponents and your allies with respect

It is important to avoid triumphalism at the conclusion of an agreement. Triumphalism can cause your opponents to become suspicious of the agreement or incur the wrath of their supporters. In any event, it is not conducive to the process of building joint ownership of the agreement. If this is true for your opponents, it is also true for your allies, who should not be treated as junior partners. It is vital to treat both your opponents and allies with respect at least publicly.
8.11 Develop an awareness of the multiple audiences that a party is required to address in regard to the negotiations

In addressing the issues, demands and related matters, you must be aware that the audiences listening include not only your own supporters, but the constituencies of the other parties and civil society elements. It may be necessary to talk in different ways when making statements directed at different audiences. And take note that this rule applies to your adversary as well. Accordingly, do not be offended if your opponent “talks up” their performance at the negotiations when talking to their constituency. For these reasons, clear lines of communication between adversaries are needed so that misunderstandings do not arise out of what is in reality merely a public relations exercise.

8.12 Maintain constant communication with your own grass-roots or constituency

It is important to build-in both time and opportunity for obtaining the consent or views of your support base. This is critical if your agreement is going to be observed by your supporters. Such communication not only keeps your support base informed and avoids suspicions of the negotiations, but is an important opportunity to introduce them to strategic considerations and thinking, which in turn allows them to appreciate the nature of the agreement and the negotiations. It is important for grassroots and leadership alike to appreciate that negotiating with an adversary does not constitute capitulation.

8.13 Consider when to hold confidential negotiations and when to conduct them in public

Certain kinds of negotiations can only be held in private, but in other circumstances the very confidentiality of the negotiations can arouse suspicion. In general, negotiations conducted publicly frequently give rise to posturing and are used as a public-relations exercise. Parties to the negotiations use their enhanced visibility to talk not to the other parties in the negotiations, but to their constituencies. When this occurs, parties may find their opponents unwilling to compromise - the focus shifts away from responding to the substance of the negotiations, to how a party will appear to outsiders.
8.14 Be creative and flexible in the use of negotiating forms

Where there are two major contending forces, negotiations may be conducted best bi-laterally. Where the objective is an inclusive agreement of diverse parties, multi-lateral negotiations are suggested. In the case of the National Peace Accord, multi-lateralism and inclusivity were used so as to put pressure on the major parties to submit to the popular demand for peace. In certain circumstances it may be preferable to leave the highest level of leadership out of the negotiations so that they can play a mediating role in the event of a deadlock. In South Africa provision was made for such deadlock breaking at two levels:

- The channel involving the two chief negotiators Roelf Meyer and Cyril Ramaphosa; and
- The summit involving Mr Mandela and Mr F.W. de Klerk.

8.15 Maximize the participation of women

In South Africa the special attention paid to maximizing the participation of women in the negotiations was considered important for many reasons. All the political parties were required to ensure that women made up fifty per cent of their voting delegates. Initial reservations to this prescriptive ruling -- even resentment against this externally imposed quota -- gave way to some surprise on the part of all the participants at the special value and perspectives that women brought to the negotiations.

It should be self-evident that in any situation where more than fifty per cent of the population are women, they should be well represented in negotiating teams across the political spectrum. However, this is seldom the case. As one Burmese workshop participant put it, “women are usually a silent and invisible component of our political organizations”. Women bring a capacity to find common ground to the table, not least because they share a distinct experience and often a common perspective on the problems experienced by women, perspectives that cut across political positions. In South Africa, the establishment of a multi-party women’s coalition was to play an important role in bridging colour, class and political differences. Also, the presence of women at the negotiations increases the likelihood that the outcome of the negotiations and the political culture that emerges will be gender sensitive and address gender
issues. Women have often found that after political negotiations have been concluded (in their absence) the task of establishing a gender agenda is as difficult as it was before.

8.16 Build alliances for a coherent negotiating process
It is in the interests of the leading and contending forces in a negotiating process to build alliances with political and civil society allies, either within the negotiating process or outside it. Building alliances can:

- Promote inclusivity (by maximising the range of groups involved in the negotiations); and
- Address the need for the process to be manageable and effective.

In a situation with a variety of loose organizations, each claiming its right to control the process or determine its outcome, negotiations are often chaotic, frustrating and flounder without direction. Building coherent blocs of political opinion allows the negotiations to take place between a few (preferably two) pre-eminent positions. For those blocs to maintain coherence, alliances need to be developed between the allies in each bloc. Generally, a party may have to take a leading role in encouraging the crystallization of an alliance around it. In South Africa the negotiations were given direction and coherence because all 24 parties recognized that, despite their formal equality of status, there were in fact two lead players, the ANC and the ruling regime. It then fell upon these two lead players to ensure that deals struck between them would be accepted by the alliance partners falling under their respective umbrellas. By contrast the Burundian peace talks (and a few others) were a shambolic process because of the inability of the various participants to recognize the key players.

8.17 Develop a single text
It is not unusual for negotiations to commence with a profusion of contending texts and proposals. This proliferation of texts may serve the initial purpose of bringing all parties on board. However, it is advisable at an appropriate moment to consolidate the proposals into an appropriate text, even if the text itself allows for options and contending solutions. A
single text allows all the parties to concentrate on the text that is before everyone. Where there is a proliferation of texts the parties talk only about their own proposals and so talk past each other. In addition the parties become entrenched in the formulations they originally proposed, with a text they know and are comfortable with, and movement to a compromise position becomes ever more difficult. In South Africa third parties or experts were used to generate common texts, which (as described in paragraph 8.18) allowed for parties to accept compromises without losing face.

**8.18 Using third parties or experts to mediate or to make independent proposals**

Whether, and when, to use third parties (i.e. experts, foreigners or international organizations) is a matter of judgement. But the following considerations may assist:

- Agreement forged between parties without any external assistance is likely to be one in which the parties have a greater pride, sense of achievement and ownership;
- Constitutional negotiations (negotiations concerning the causes of bitter division) should be approached as an opportunity for nation-building and promoting a common culture of national self-reliance;
- Use of third parties can be both a strategically important tool in forging consensus as well as a necessity imposed by the conditions under which the negotiations take place;
- Where the relationship between the parties is so antagonistic, or where there is little prospect of finding agreement on the basic elements of the negotiating process (e.g. who will chair the talks, deciding the venue or the agenda of the talks) then it may be necessary to request the assistance of an international or independent agency to play that role. The involvement of such an agency, organization, or nation state can also serve to internationalize the negotiations and assist in imposing restraints on a regime in power.

The most important task for experts or third parties, is generating proposals and propositions in circumstances where the parties themselves could never accept, or be seen to be accepting, proposals emanating from
their enemy or even compromising on their own propositions. This is often the case in the politically-charged atmosphere of peace negotiations. Proposals by politically-literate third parties, who are informed and acquainted with the fall-back positions of both parties, can serve to provide propositions acceptable to both because they involve no loss of face.

8.19 Learn negotiating skills, prepare for negotiations, analyse your adversary

Key political actors regard political and military engagement as a professional activity, yet regard negotiations as an intuitive or amateur activity. But negotiations will often be the most important determinate of the outcome of any struggle for democracy and liberty. The same players who might arrive at the negotiating table with neither preparatory training nor strategic thinking, would never dream of sending their fighters into action without proper training, weaponry and logistical support.

Preparing for negotiations may involve undertaking the following:

- Comparative international research;
- Diplomatic ground work;
- Internal strategizing and formulation;
- Preparation of opening and fall-back positions;
- Analysing your adversary's position;
- Analysing your adversary's strengths and weaknesses; and
- Formulating ways to accommodate your adversary's anxieties while meeting your own objectives.

8.20 Avoid unskilled negotiators as opponents

It is a questionable blessing to have unskilled and unprepared negotiating partners. It is certainly possible in the short term to exploit confusion, ignorance and inexperience in an adversary. But the problem in negotiating with such opponents is that they do not follow the rules of negotiation. They may renege on undertakings or agreements. Most often however, if your adversaries lack confidence, they will take no risks, be
uncomfortable in the negotiating process, and will balk at entering serious negotiations. The frustration of dealing with such negotiators is greater than any short-term advantages. In South Africa, ironically, the ANC possessed the more astute negotiators, better armed with comparative research (from their greater international exposure) and better equipped with an intellectual support-base experienced in negotiations (from years of trade union negotiations at both shop-floor and industry-wide levels). Authoritarian governments usually have no negotiating experience, as they have never had to negotiate. The South African government was initially awkward and hesitant in the cut and thrust of bargaining. Recently, during negotiations in the Great Lakes region, it was recognized that all parties needed basic training in negotiations for the peace talks to work effectively.

8.21 Time-frames and deadlock-breaking -- avoid an endless negotiating process
Some of the most important issues to establish in a negotiating process, and in regard to any substantive constitutional reform being negotiated, are the questions of time-frames and deadlock-breaking mechanisms.

8.21.1 Time-frames.
Time-frames set out the period within which elements of the process must be finalized. The objection to time-frames is that they impose an external discipline or parameters on a difficult and sensitive process. In reality, at least one of the parties usually has an interest in establishing, or being seen to participate in a negotiating process, but has little enthusiasm for any alteration of the status quo. Parties who enter into a process without time-frames may find themselves trapped in a process without an end, where they are obliged to continue negotiating, but there is no serious intention to affect a real transition or a real peace.

8.21.2 Deadlock-breaking mechanisms.
Deadlock-breaking mechanisms are methods by which deadlocks or impasses that serve to prevent any agreement being reached or the process being finalised can be overcome. Such mechanisms may include:
• Third-party arbitration by an international organization -- in the Arusha Peace and Reconciliation Agreement for Burundi, third-party intervention is to be used.
• Bringing into play some means of disadvantaging an intransigent party -- in South Africa a referendum was to be used to resolve deadlocks in the Constitutional Assembly.

8.21.3 Carrots and sticks
One way of ensuring continuing momentum to the negotiations is to tie carrots and sticks (rewards and penalties) to the completion of phases of the negotiations. A common benchmark, used in South Africa (and elsewhere) is “irreversibility”. Irreversibility marks the point where the process is so advanced, that the status quo cannot be restored. When regimes enter into a negotiating process only to avert international censure, to secure the lifting of boycotts and sanctions, the relief or reward should be tied to the irreversibility of reform processes, not merely their commencement.

8.22 Develop mechanisms for dealing with internal division and anticipate problems
The negotiating process places stress on political organizations. Apart from being a period of heightened political activity and intrigue, there will be behind-the-scenes positioning for political leadership. Compromises reached in the course of negotiations will expose party leaders to criticisms and even ridicule. Unity within alliances and within political parties will be tested. In addition the political unity of a resistance movement will be tested, as the prospect of a multi-party electoral democracy becomes more real. It is important to anticipate such divisions, and to establish mechanisms and structures for dealing with political difference without compromising the negotiations themselves. The problems may include issues relating to converting broad resistance movements or family parties into political parties.

8.23 You must win victories, or make gains to justify your participation
For a negotiating process to be sustainable it needs to be viewed as a plausible strategy for accommodating the objectives of all parties. It is critical that political parties and their constituencies perceive the
advantage of negotiations as a means of resolving difference. Therefore from the outset the participating parties should be able to justify their participation with regard to a distinct improvement in the position of the party, its supporters or the citizens at large. Parties need concessions from their negotiating partners to satisfy their own militants. Strategic approaches to negotiations will recognize this. In South Africa the measures designed to build confidence in the negotiating strategy involved securing the release of political prisoners and the repeal of racist legislation. In the absence of visible benefits from the negotiating strategy, critics will increasingly spread scepticism concerning the fruitfulness of the negotiations.

8.24 Your opponents have to justify their participation
A mature approach to the negotiating process recognizes that both parties need to justify “sitting down with the enemy”. For negotiations to succeed it is critical that the major players on either side retain the confidence of their supporters. So it is necessary to recognize that your opponent must show the visible benefits of negotiating with you. In South Africa the ANC recognized this factor and suspended, temporarily, its armed struggle so that the regime could justify negotiating with it.

It is short-sighted to believe that undermining and dividing a negotiating partner will strengthen the outcome of the negotiations in your favour. Such strategies may lead to:

• Introducing an atmosphere of hostility and distrust into the negotiations;
• Withdrawal of the opposition if they feel overly threatened or humiliated through the negotiations;
• The opposition only remaining in the negotiations as a hollow shell, without its constituency (e.g. the armed forces).

A fragmented and disintegrating adversary is not always optimal. You may find that your opponent's forces coalesce behind a party that is then outside the discipline and reach of the negotiations process, or that the opposition's authority has been weakened to the point that they cannot sell, and hence can not sign, the agreement.
8.25 The risks of delaying, stalling or suspending negotiations

There will probably be deadlocks in any negotiating process. But do not underestimate the importance of maintaining the momentum of the negotiations. Progress in the negotiations begets progress. One agreement induces another. When some parties are successfully negotiating, other parties will join the process. The contrary is also true. When the negotiations are suspended, the process usually moves backwards. It is like walking in the opposite direction to a moving staircase. If you stand still, you go backwards. The personal chemistry between the negotiators is eroded. The parties dig deeper trenches around their positions. Off-the-table developments may subject the process, already fragile and possibly discredited, to possible rupture. There may always be a good reason to suspend negotiations -- sometimes to exercise organizational or political muscle -- but suspension should be undertaken with the knowledge of its consequences. In South Africa the suspension of the negotiations after CODESA came to be seen as a mistake, as the security and political situation deteriorated sharply.

8.26 Distinguish between “interest” and “position”

The cardinal rule for effective negotiation is to distinguish between:

- Interest -- the objectives you seek to protect or achieve; and
- Position -- the exact mechanisms, formulations, or propositions advanced as the means to achieve your objectives.

The most common barrier to effective negotiations is the confusion between interest and position. Parties frequently lose sight of the interests and objectives, which inform their positions. They become obsessed with defending the proposals (positions), which are only the means. Effective negotiation requires the parties to:

- Look behind their respective positions;
- Identify the true interests or underlying objectives; and
- Identify compromises which, as far as possible, allow both parties to have their real interests addressed.
On the other hand, positional bargaining occurs when parties become obsessed with their position and find it difficult to shift from that position.

8.27 Creative or dangerous ambiguity
How precise should an agreement be? Should there be precisely the same understanding of the problems and solutions amongst all the parties? The truth is that ambiguity can be both a blessing and a curse. It is a curse where there is indeed a need for both parties to have exactly the same understanding of a matter (whether it regards the process or the outcome). On the other hand there are a variety of situations in which it is not possible for the parties to have precisely the same understanding of the matter. In the Burundian negotiations, for example, the parties were required to reach agreement on the history of Burundi. Such agreement as was reached necessarily relied on general statements that would satisfy both sides, either because of the generality or the ambiguity. In reality there are issues to which reference must be made in a peace agreement but which are not ripe for finalization. There are also issues which are not central, and where a solution acceptable to one side may not be acceptable to another. In such cases the need to make progress in the talks, to prevent a deadlock, may allow the parties the licence to frame the solution in a creatively ambiguous manner, each side aware but ignoring the differences yielded by the formulation.

8.28 By-pass problems
Because of the imperative of making progress in the negotiations, negotiators can and should, look to the areas where they can obtain agreement, rather than commencing with an initial item upon which they are unlikely to find agreement, at least until greater common purpose has been found. For this reason, negotiators should pass over areas in which no consensus can be reached, rather than imposing a rigid sequence or order of matters to be agreed.

8.29 Process solution to substance impasse
Certain issues will not yield a solution shared by all parties. For example, one party may demand the release of political prisoners, and the issue will
consequently arise as to the definition and identification of political crimes. However, not all problems or issues require final resolution at the negotiations.

Many intractable matters can be:

• Deferred to a later stage of the negotiations, by agreement;
• Deferred to another process or body;
• Resolved by means of establishing a resolution structure, mechanism or body;
• Resolved by identifying an international organization to facilitate resolution; or
• Resolved by formulating a procedure which will deal with or “process” the problem, for example:
  ... establishing an independent commission to define political crimes and to identify political prisoners; and
  ... establishing a representative or expert body to establish the share of national assets or revenue to be apportioned to states, regions or provinces, instead of attempting to resolve such technical issues at high level negotiations.

8.30 Conditional bargaining

In negotiations many parties, quite understandably, will not offer compromises for fear that would weaken or diminish their negotiating position without extracting corresponding concessions from the adversary. In such cases both parties can be encouraged to offer additional compromises, that is compromises which do not come into force unless conditions regarding matching compromises are also tabled. In this way parties preserve their overall position, and can be encouraged to enter the bargaining process without losing any ground.

8.31 Single-issue negotiations do not allow trade-offs

Where negotiations concern a single issue, with a “yes-no” outcome, negotiations are self-evidently difficult. Such negotiations do not allow for compromises, for matching trade-offs or for bargaining. They are blunt negotiations in which one party must concede, and may be unwilling to do so, if only because of the appearance of defeat. For this
reason it is preferable to enter into negotiations over many issues. This allows for "package bargaining", where concessions on one issue can be matched by victories on other issues. Where there is a single issue of substance it may be of use to break the issue into component parts and present it as a set of issues (e.g. cease-fire negotiations, amnesty, etc).

Similarly, negotiations should not be conducted in an ordered sequence in which each issue must be separately negotiated in isolation before preceding to the next. Negotiating in this fashion reduces a basket of issues to a sequence of single-issue negotiations. In South Africa, in the final hours before the expiry of the deadline for agreeing on a new constitution, a number of emotive issues were outstanding. The parties' mandates had been exhausted on each of them. It would not have been possible to reach a settlement if each issue had had to be negotiated separately. A final solution became possible only when all these intractable issues were collected together and a package of concessions was agreed in terms of which the parties were able to share a balance of losses and gains.

8.32 Choosing your targets: Using compromise as an offensive weapon

To some, the concept of compromise suggests a weakening of a party's position and a concession to the other side. This defeatist and defensive understanding of a compromise misconstrues the nature of negotiations. Offering to compromise can be a most aggressive and strategic intervention, throwing adversaries off-guard and placing them under inordinate pressure to make a concession. By compromising, a party can seize the initiative in negotiations and shape the areas in which the adversary is required to compromise. If a party desperately needs to protect its interests regarding issue A, it may make compromises in the areas of B and C; while pressurizing its adversary to compromise in area A. Once again this underscores the importance of properly preparing for and developing a negotiating strategy.

8.33 Preconditions, “opening” and “fall-back” positions

The question of whether a party should insist on preconditions being met before it negotiates, will depend on the context and circumstances of the
negotiations. In general, preconditions can be unhelpful to the party advancing them, especially if the preconditions are rejected and the negotiations do not get underway. There is no opportunity to develop reformulated preconditions. Parties who insist on preconditions are frequently left with no option but to capitulate and abandon these preconditions, if only to allow negotiations to get underway. It is only in face-to-face negotiations that so-called preconditions can be addressed. Similarly, it is important to distinguish and consider the difference between opening positions and fall-back positions. Such a distinction enables a party to negotiate without an all-or-nothing approach. In an all-or-nothing approach, unless the demand is met in the terms in which it is advanced, the party is required to either capitulate or abandon the negotiations.

8.34 “Sunset” and “sunrise” provisions
In negotiations there are frequently issues of fundamental importance to one party and yet unacceptable to the other, at least in the short term. In South Africa some intractable issues were resolved only with the help of sunset or sunrise conditions:

8.34.1 A sunset clause allows for:
• Introducing a provision which will lapse after a period of time (say five to ten years);
• Introducing an expedient provision that provides reassurance to the other side, but will not become an enduring feature of the country’s political and economic life; and
• Letting both sides claim advantage from the measure, the one in the short-term and the other in the long-term.

For example:
• In South Africa the political settlement provided for a government of national unity which was subject to a sunset clause.
• In Indonesia more recently, an initiative was proposed providing a sunset clause in regard to the participation by the military in legislative bodies. This clause would have allowed for the principle of demilitarizing the legislature to be accepted immediately, but would
have engendered only limited opposition to the measure in view of its deferred implementation.

8.34.2 A sunrise **clause** allows for:
- Enshrining some essential element of a party’s political programme in the settlement and as a central feature of the future dispensation;
- Deferring implementation temporarily in the interests of creating the conditions for transition; and
- Letting both sides claim advantage from the measure, the one in the short-term and the other in the long-term.

For example:
- In South Africa the political settlement provided for a sunrise clause on democratically-elected local governments. This addressed the concerns of traditional leaders on the one hand, and the anxieties of certain predominantly white rate-payers on the other, and was to be fully affected only after a period of time.

8.35 Distinguishing the specific phases and commitments in a cease-fire agreement

Many political or peace negotiations involve contending belligerent parties. Although this publication has concerned itself with methodological rather than substantive issues, a word of caution is warranted with regard to the question of agreeing a cessation of hostilities and a comprehensive cease-fire. In most, if not all of the negotiations, one of the recurring themes in the sustainability of peace agreements concerns the adequacy of the text dealing with cease-fire aspects. It is important to spell out the fundamental aspects clearly. Many of the technical aspects of a cease-fire agreement can be left to the relevant military experts and personnel.

However, the baseline distinction must be clearly and commonly understood between:

- Suspending hostilities, pending the negotiation of a cease-fire; and
- Negotiating a comprehensive cease-fire itself, together with the obligations of the belligerent forces at each stage.
There is no place for “creative ambiguity” regarding questions such as:

- When are the belligerent forces to cease armed actions?
- When are the belligerent forces to decommission — surrender their weapons and ordinance?
- When are the belligerent forces to commence the process of integration or demobilization, as the case may be?
- How are combatants to be identified? and
- How is responsibility for breaches of the agreement to be dealt with?

Confusion over these issues bedevilled the South African process, and continues to be a source of tension in the Northern Ireland peace process and in various African peace initiatives.

8.36 Give considered attention to the details of implementation

There are a variety of modalities of implementation. A recent survey of peace agreements concluded in Africa reveal that it is at the beginning of the implementation stage that agreements breakdown or fail to take off.

Consider:

- Ways in which agencies will be precisely identified to implement the agreement;
- Ways in which agencies will be mandated to implement the agreement;
- Ways in which all parties assume joint responsibility (i.e. a joint implementation committee); and
- Ways of invoking the necessary external guarantees to hold the process to its agreed course.

The implementation plan may have to:

- Distinguish various phases of the implementation;
- Establish its time-frames;
- Identify the international bodies, friendly states or moral guarantors who will play specified roles in the process;
- Specify who will represent the process in its dealings with the outside world; and
- Specify where the funds for implementation will come from.
Questions by the Burmese participants on the South African negotiating process:

What does "sufficient consensus" actually mean? Why provide for "sufficient consensus"?

In multi-party negotiations, and in the absence of any agreement on decision making, it is not unusual for the decision-making to be by consensus. In such an event all parties are held captive by the veto of any one party. This can make negotiations tedious, cumbersome and difficult to manage.

On the other hand, if decision-making is going to be by majority vote, then many parties will not participate, not least because no negotiations need take place at all. In such a situation a decision will be taken, not in accordance with the weight (or the reasoning) of the parties, but in accordance with the sentiment of the majority of the participating parties even though such parties may not have substantial support or influence outside the process. In such circumstances the important parties may not wish to participate for fear of being outvoted.

"Sufficient consensus" is a compromise between these two positions. In effect it guarantees for the major players that their consent is a prerequisite before a decision can be made, but it removes the veto from smaller or individual parties. The notion of "sufficient consensus", developed in South Africa, has now been used in other negotiating processes.

How do you reconcile the flexibility of the negotiating process, including the recognition that time periods cannot be fixed too precisely, with the advice that one must fix precise time-frames to the stages of the negotiating process?

All negotiating processes need to be approached with a measure of flexibility, both in regard to time-periods as well as the subject of the negotiations. However, such flexibility should be by agreement of the parties and not because one party has the capacity to drag out the negotiations or to stall the negotiations. In any negotiations there is normally a party which is seeking to negotiate change, and a party which
is seeking to resist change. In such circumstances, the party resisting change always has a vested interest in drawing the negotiations out, and the party seeking change is under pressure to make compromises simply to obtain the changes sought. It is in this context that it is important, even critical, that time-frames be fixed to the negotiations in advance.

Can “sunset” clauses be used to reduce the pre-eminence of the military in the political life of the nation?
A sunset clause can be used to provide for a phased reduction of the role of the military in any society. Indeed a sunset clause would lend itself to such a task because it allows negotiators to deal in principle with the confinement of the military to a proper military mandate, while not directly threatening the status quo. Such a sunset clause has been proposed for Indonesia where the TNI has a right to representation in all legislative structures.

Can you give an example of the use of “creative ambiguity”?
Creative ambiguity is a label used to describe an agreement in such general terms that it embraces the different understandings and demands of various parties. For example, if there is agreement that “the states/provinces shall have all the necessary legislative executive and financial powers to perform their functions”, then this would allow both parties to have very different conceptions of what the appropriate powers of provinces or states might be. Yet it is possible to proceed to negotiate the next item on the agenda, deferring a concrete specification of the powers of provinces to a later stage at which there is greater clarity on the federal structures and a greater degree of consensus on the shape of the future state. This is useful when an earlier attempt to resolve difficult questions would lead to a breakdown in the negotiations, or provide an impasse beyond which the negotiations cannot proceed.

Can you give a specific example to explain the formulation of a process solution to a substantive impasse?
A process solution to a substantive impasse involves recognition that it is not possible to bridge the differences that exist between the parties in the negotiations.
However, it may be possible to:
• specify another agency which could be charged with resolving the impasse; or
• specify a procedure by which the solution is to be found (e.g. through fact finding or judicial body, or a commission to be established by the parties).

The way in which the problem will be solved in the future is agreed rather than attempting to resolve it there and then.

Can you explain how and why agreement on a significant issue might be deferred?

Agreeing on a significant issue might be deferred if:
• Agreement would be impossible to obtain because of the acrimony between the parties;
• Agreement would be impossible to obtain because the levels of trust do not permit an agreement on that issue at that stage of the negotiations;
• The parties have not considered the matter properly; or
• “Risk-taking” is not possible at that stage in the negotiations.

In such circumstances the issue could either be moved further down the agenda, or a process solution to the issue could be found.

Can you explain how to prepare for dialogue and negotiations? Did both the South African liberation movements and the regime prepare for the negotiations?

There are a number of ways to prepare for the negotiations:
• Do your homework in regard to:
  ... the technical aspects to be negotiated,
  ... the technical skills of negotiation.
• Prepare for negotiations by gathering information about your adversary’s positions, distinguishing between your adversary’s positions and interests.
• Experiment by exploring alternatives which would meet the interests of both parties. Consider:
alternatives to the positions of your own side,
alternatives to the positions of your adversary.

• Acquaint yourself with the position of the negotiating teams of the
  other parties to the negotiations.
• Do the necessary groundwork in your own movement/party so that you
  can negotiate with the appropriate mandate and with the necessary tac-
  tical flexibility.