

of course,)

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INSERT - last page.

It would, <sup>of course,</sup> be illusory to suggest that a shared interest in preserving the wealth of the country and averting a full-scale racial war ~~of uncontrollable dimensions~~ provides the basis for an easy constitutional formula acceptable to all major parties to the combat in South Africa, <sup>as well as</sup> ~~and~~ to the world community as a whole. The struggle over the constitution would be as difficult and protracted as the struggle in the streets. It is <sup>unfortunately</sup> unthinkable that the white minority will gracefully cede that they have no inherent right to own the property presently in their possession. It is equally unthinkable that the majority of the people will accept that the land - at present 87% of which is legally reserved to the whites - shall not be re-distributed. What could perhaps be agreed upon would be orderly and guaranteed procedures to ensure that the re-distribution of land and wealth took place <sup>rapidly and efficiently</sup> and that the

Todas as pessoas querem viver. Ninguém quer morrer. Por isso impõe-se encontrar coragem política e fazer parar o ameaçador processo em evolução. Importa cortar o passo ao armamentismo e proceder ao desarmamento e ao saneamento das relações.

No encontro com uma delegação do Congresso dos EUA que visitou Moscovo e foi chefiada pelo "speaker" O'Neill, já referi que somos partidários decididos do saneamento das relações soviético-americanas. Eis o ponto de vista da nossa direcção. Tiramos ilações sensatas e realistas da situação formada. O facto irrefutável é que não apenas apelamos ao saneamento da situação e melhoria das relações, mas igualmente avançamos com propostas concretas e damos, nós próprios, passos efectivos neste sentido. É natural que, ao fazê-lo, esperemos a correspondente resposta da parte norte-americana.

Lamentavelmente, a todas as tentativas de romper o círculo vicioso da corrida aos armamentos e das suspeitas mútuas ouvimos só uma resposta, negativa: "Não!", "Não!", "Não!", Propaganda!, Propaganda!, Propaganda!". Ora bem, políticos sérios não se comportam assim com os parceiros.

Apesar disso, consideramos que tudo quanto ouvimos de Washington acerca dos últimos passos da União Soviética, inclusive as nossas propostas para remover do ponto morto as conversações sobre a não-militarização do espaço, e sobretudo, armas estratégicas nucleares e armas de médio alcance, a nossa decisão de terminar as explosões nucleares etc., não representa a última palavra da administração norte-americana. Esperamos que assim seja.

Prezados Senhores,

considero que esta parte da nossa conversa, em que falamos aqui, face a face, é a mais importante. Esperamos que a nossa compreensão da situação criada no mundo e nas relações soviético-americanas, a nossa compreensão de que nesta situação importa actuar seja levada de forma clara e honesta ao conhecimento do povo norte-americano.

*For the meeting*

structures of the state, including the  
army and police, be completely transformed

~~so as to guarantee the necessary~~

so that they emerge as protectors rather  
than opponents of change. <sup>But</sup> There are signs  
that a wide range of social forces that  
previously supported apartheid or nurtured  
illusions that it could be reformed from  
within, are now convinced that the only  
solution is to work outside the institutions  
of ~~the~~ apartheid power and to acknowledge  
the African National Congress as the ~~principal~~  
~~main~~ leading political force in any  
process of change. A major factor influencing  
these forces is the acknowledgment that

A realidade do nosso tempo consiste em que o nível de desenvolvimento da ciência e técnica faz possível o aparecimento de uma situação qualitativamente nova, o início de uma etapa absolutamente nova da corrida aos armamentos. Tentei responder sinceramente às vossas perguntas e peço que as minhas respostas não sejam identificadas como uma nova "propaganda". É um facto que, já hoje, os Estados Unidos e a União Soviética têm bastantes dificuldades para chegarem a entendimentos e para darem passos ao encontro um do outro. É demasiadamente grande a desconfiança recíproca. Portanto, se a corrida aos armamentos entrar numa nova fase e se, para o efeito, forem efectivamente aplicadas as mais recentes realizações da ciência e técnica, não cairá uma das partes na tentação de aproveitar a suposta superioridade sobre a outra parte para deixar as mãos livres e dar o passo fatal? É uma etapa de muita responsabilidade.

Não obstante toda a agudeza das nossas relações bilaterais, algumas restrições continuam em vigor até hoje: a existência da paridade estratégico-militar que garante a ambas as partes uma certa segurança, o Tratado de defesa anti-míssil, o Tratado "SAIT-2" observado de facto, de não-proliferação das armas nucleares, o Tratado de proibição dos ensaios com armas nucleares em três ambientes. Estas restrições existem e exercem a sua influência. Sabe-se, no entanto, que já se procura torpedeá-las: foram postas em acção forças que pretendem levantar estas restrições que impedem a continuação do desenrolar da corrida aos armamentos.

Se não houvesse todos estes factores contentores, evidentemente que a competição na criação de novos e novos tipos de armas se desenrolaria a um ritmo sem precedentes. Acontece que todos os passos a serem dados neste plano por uma parte provocariam contramedidas da outra parte. A aparição de um veneno sempre faz aparecer um contraveno. Esta é uma lição da história e não se deve desprezá-la.

A que chegaremos então?

Eu diria assim: O tempo passa, o comboio poderá partir se não actuarmos com bastante rapidez. Este foi o segundo motivo que me levou a responder às perguntas formuladas pela revista "Time".

Preamble (part)

The Republic of South Africa is constituted as an independent, <sup>united</sup> non-racial, rooted and democratic state. ~~is stated in~~

1) Name.

~~King, Biko~~

1) Fundamental objectives of the Constitution: (?)

2) ~~Organs~~ Structure of Government

President

Power & duties, Oath

Term of office.

Vice-President

Parliament

Elections

Functions of

~~the cabinet~~

Elections

Elections

Judiciary

Composition, selection and functions

Structure, appointments, term of office, functions.

Council of Ministers

3) Territorial and Administrative Divisions  
Principles of Regional and Local Government

5) Fundamental Rights and Duties of Citizens.

6) Commissions

Constitutional  
Affirmative Action  
Public Service

Composition, appointments, functions.

6) International ~~Agreements~~ Non-aligned, Peace, L.A.P., U.N., O.A.U.

7) Transitional ~~Agreements~~ Arrangements.

7) Symbols, Flag, anthem, ? Language (?), Prescribed Part.

Sub - areas - Economic,  
Education

Awaiting their reports.

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Demographic study unit.

Existing patterns of residence and  
distribution.

People

Not merely have a right, but how to  
exercise - shall be made effective  
by approp. leg. & admin. action.

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Distinguish - policy of org. - constitutional  
principles.

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U.N. Charter

O.A.U.

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Devise forms of legal & local govt.  
that will be consistent with  
const. aims.

Needs. for maintaining an ongoing  
legal system while rapidly  
dismantling the legal & institutional  
structures of apartheid.

Interim govt. to arrange election - voter roll delimit.

~~Executive~~

The Presidency.

Executive type  
Elected by <sup>unfranchised</sup> voters

Way implemented

How many candidates?  
Rounds?

7 years.

Powers - C.I.N.C.  
Appoints govt.

depends on transitional arrangements.

depends - how power transferred.

depends on first govt.

President

Vice-President

[ticket].

Paired. Joint candidacy.

NBC  
Material on distrib-  
attitudes.

Cabinet - Ministers by  
P.M. → Heads of  
of State  
President.  
Depts with  
specified functions.

Have a seat in Natl. Assembly  
but can appoint 10. Emphasis primacy of Assembly

Draw attention to Public Service Commission.

- has to transform: bureaus - used to  
applying pass laws.

Reconstitute of Serv. Com. - to ~~reconstitute~~ renovate Public Serv.

- prevent racism & tribalism.

Armed Forces - Pres. appts. - F. Charter.

Police.

Security.

Draw atten. N.B.C. - even formula - F. Charter -

- tremendous job: study manpower requirements  
[see Demogr. survey].

Central.

Regions instead of Provinces.

Districts. Cities.

Electors?

Local

People's power.

Involve minorities

Accustom people

Albie Sachs, on holiday,  
sends the following:



Some ideas re the process of  
transition:

### ① Constituent Assembly

Sooner or later there will have  
to be a body elected by universal  
suffrage to represent the new  
sovereignty and legitimise the  
whole process

that we want  
new constitution  
later, after a

Thus, we want to negotiate a  
process, not a const., they want  
to negotiate a const., not a process,  
[Lancaster House]

August 1990  
Towards a  
new  
constitution.  
- origins of  
2 stage process.  
Int. Const.

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Some ideas re the process of  
transition:

### ① Constituent Assembly

Sooner or later there will have  
to be a body elected by universal  
suffrage to represent the new  
sovereignty and legitimise the  
whole process. The difference is  
that we want it now, before a  
new constitution, they want it  
later, after a new constitution.

Thus, we want to negotiate a  
process, not a <sup>[Namibia]</sup> const., they want  
to negotiate a const., not a process.  
[Lancaster House]



There might be a fall-back position which prevents a total clash between the two positions, namely, the negotiation of principles and procedures to govern the Assembly, with the final task of drafting the const. being left to the Assembly.

This is effectively what happened in Namibia. The 1982 Statement of Principles drafted by the Contact Group, coupled with proportional representation and the two-thirds majority rule, served as the foundation of the process of constitution-making. The elected



Assembly then established an all-party const. committee, which, with the technical assistance of three outside legal experts (Arthur, Marinus and Gerhard) rapidly and by consensus drafted a new constitution.

The 1982 Statement of Principles in fact comes close to our guidelines in most fundamental respects, and could even be considered by us as a tactically advantageous starting-off point. ~~The only weak part~~  
~~It~~ It accepts a united, non-racial and democratic country, guaranteeing fundamental rights and freedoms. The one sensitive formulation - and it is



an important one, relates to the necessity for paying 'just compensation' in relation to property expropriated in the public interest. In my view, the word 'just' qualifies the word 'compensation' and permits factors other than purely market considerations to be taken into account. If the Statement of Principles idea is followed, I would suggest either accepting them as they are (overwhelmingly though not totally in our favour) or else leaving it to the other side to propose amendments and then adding the following:

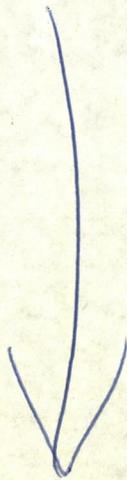
" ---- just compensation, taking into account all relevant factors

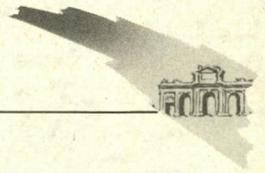
" One of the aims of state policy



as recognised by the constitution  
will be to take remedial action  
to remove the inequalities created  
by past ~~policies~~ of racial discrimination.  
laws and practices whereby

I think that we could agree to a  
statement guaranteeing religious,  
cultural and linguistic rights, provided  
that these are recognised as such  
and not as the basis of the electoral  
law or the constitution of Parliament.





## 2. The Process of Transition.

None of the analogies serve us very well - the departing colonial power preparing us for self-government and independence will not be departing but transforming itself, while there is no third party (like the UN) holding the ring. South Africans have to work this thing out with South Africans. Nevertheless, certain principles can be carried over to our situation:

### (1) Co-responsibility

Pending the creation of new institutions, there has to be co-responsibility for ensuring that the process takes place peacefully, smoothly and



fairly.

This implies a joint political commitment with appropriate institutional forms.

(ii). A phased and irreversible transition.

This connotes the establishing of clearly defined time-periods and a ~~the~~ sequence of events involving the progressive transfer of authority.

(ii'). Democratic involvement

The idea of sovereignty includes not only the removal of foreign or minority domination, but the expression of the will of the people, establishing accountability from the start.



(iv). Neutrality of the state

Maybe some of our thinkers would prefer the term neutralisation of the state. Nevertheless, when the state is manifestly partial to one side of the conflict (dispute, contention), the theme of neutrality can be one with far-reaching and positive implications <sup>(for us)</sup>. It also fits in with non-racism, and favours the integration of our forces and those of Pretoria into new structures, rather than 'ours' into 'theirs'.

(v). Structures of transition.

These depend on the combined operation of the above principles.



(9.)

One of the rationales is that we have to 'be prepared' for government! So if we have Attorney-Generals-in-Waiting, this would be their chance. In the case of Mozambique, the Lusaka Accords provided for the setting-up of a Govt. of Transition nominated by the Portuguese Head of State, consisting of  $\frac{2}{3}$  Frelimo nominees, including the P.M., and  $\frac{1}{3}$  Portuguese. The date of Independence was fixed, the withdrawal of the Portuguese Army arranged and the idea of the transfer of authority to FRELIMO acknowledged. FRELIMO



did not negotiate the constitution,  
but drafted one itself (~~which~~<sup>it</sup> is at  
present being drastically revised).  
If it is possible to meet with  
Oscar Monteiro to get the full  
story, I would strongly recommend  
it. He is bright, objective and  
speaks good English!

Albie

Lisbon 18/7/90.





### ③ A Few Scattered Points:

#### (i) A Bonstet Assembly

a). <sup>accustoms</sup> ~~Habituates~~ the people to democracy;

b). Shows the respective strengths of the diff't. groups;

<1. If there is P.Rep, ensures that all parties are represented.

(ii) 1. The question of the future of the Tricameral Parls, a white referendum etc. is de Klerk's problem, not ours. These are his internal procedural questions. They are not a source of legitimacy for the new; simply means of



dismantling the old. We don't want to go out of our way to make life more difficult for de Klerk, but we cannot accept that the whole future depends on a white veto not being exercised. We should encourage the whites to think in terms of commonly arrived at, fair and just solutions, rather than in terms of monopoly privileges.

Discussion with Albie Sachs -- Nov. 5, 1986

1. Under what various circumstances might a new constitution be drafted? Under what possible balance of forces?

2. Process. What kinds of bodies might draft, discuss, and propose a constitution? How chosen? How would a constitution be ratified?

3. What consensus would underlie a new constitution? What would lie outside the consensus?

4. What is non-negotiable? Negotiable?

- # Franchise. Electoral system
- # Individual and group representation
- # A bill of rights and review.
- # An undivided South African state: federal or ... ?
- # Executive and legislative powers
- # Political party representation

Breakfast  
with members  
of US Council  
for Foreign  
Relations - New York  
agenda.

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4. What is non-negotiable? Negotiable?

# Franchise. Electoral system.

# Individual and group rights.

A bill of rights. Judicial independence and review.

# An undivided South Africa but unitary or federal or ... ?

# Executive and legislature.

# Political party system.

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