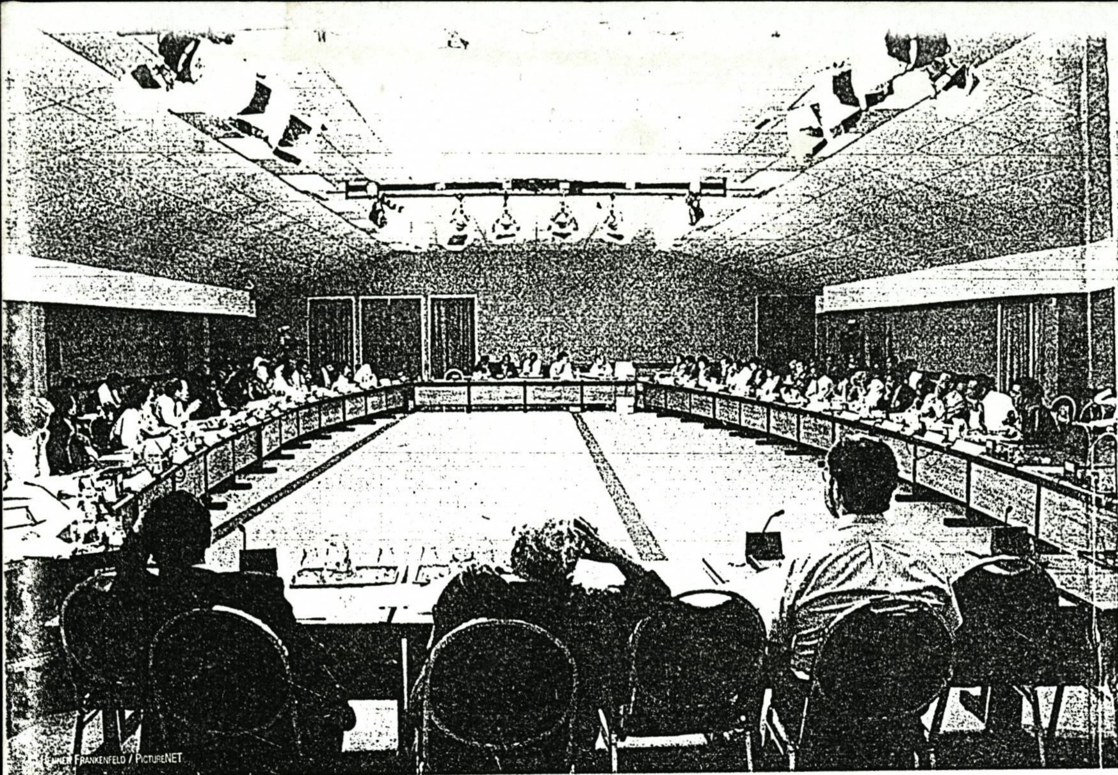

Sitting of the Conference for a Democratic South Africa (CODESA) to negotiate the formation of the Government of National Unity (GNU) at the World Trade Centre, Kempton Park east of Johannesburg.

About the Centre for Conflict Resolution

The Centre for Conflict Resolution (formerly known as the Centre for Intergroup Studies) was founded by the University of Cape Town in 1968 as an independent non-profit organisation. It is based in the Western Cape and works nationally and elsewhere in Africa to fulfil its mission.

MISSION
To contribute towards a just and sustainable peace in South Africa and other African countries by promoting constructive, creative and co-operative approaches to the resolution of conflict and the reduction of violence.

GOALS
- To contribute towards an understanding of conflict and violence.
- To promote public awareness of the value and practice of constructive conflict resolution.
- To provide third-party assistance in the resolution of community and political conflict.
- To equip and empower individuals and groups with the skills to manage conflict.
- To participate in national and regional peace initiatives.
- To contribute to the transformation of South African society and its institutions by promoting democratic values.
- To promote disarmament and demilitarisation in South and Southern Africa.

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Albie Sachs

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track two

Affiliated to the University of Cape Town

CONSTRUCTIVE APPROACHES TO COMMUNITY AND POLITICAL CONFLICT

Negotiating the Political Settlement in South Africa

important background

Are there lessons for other countries?

by Nicholas Haysom

MCA91-142-1-2

Occasional paper

About Track Two

TRACK TWO is a quarterly publication of the Centre for Conflict Resolution, which aims to promote innovative and constructive approaches to community and political conflict as an alternative to traditional adversarial tactics.

The term 'track two' refers to informal, unofficial interaction outside the formal governmental power structure, providing the means for historically conflicting groups to improve communication and gain a better understanding of each other's point of view. In so doing, it reduces anger, fear or tension, and facilitates the resolution of substantive conflicts.

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Negotiating the Political Settlement in South Africa

Are there lessons for other countries?

by Nicholas Haysom

The Editor gratefully acknowledges the assistance of Andries Odendaal and Laurie Nathan in putting together this edition.

Front cover: South African President, Nelson Ma[illegible] applauds as African National Congress Chief Negotiator, Cyril Ramaph[illegible] holds up South Africa's new constitution, which Mandela had just signed. On the left of Ramaphosa is Frene Ginwala, the Speaker in the house of Parliament. The signing ceremony took place on 10 December 1996 at Sharpeville township (east of Johannesburg), where in 1960 more than 70 peaceful demonstrators were shot dead by the South African police.

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Inside Track

The South African experience with negotiations for a political settlement to its conflict has wider resonance for political activists in other contexts. Of especial interest is the strategic thinking that informed both the successes and failures of the South African experience. The South African experience provides opportunities for other activists to consider the relevance of the strategic options that advanced the cause of democratic nation-building in South Africa and those that set it back. It is hoped that through exposure to new perspectives, readers will be able to identify the strengths and weaknesses in their own situations. The differences in context and circumstances between South Africa and other countries going through political transition are clearly recognized, and there is no attempt to glibly prescribe South African solutions to other situations.

Rather, this publication is presented as a tool to encourage people going through political transitions to fully appreciate the complexities and uncertainties of the process, and to focus on the strategic options that may emerge as the defining milestones in their own peace processes.

Since its establishment in 1995 by states from different parts of the world, International IDEA (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. This is a complex and long-term endeavour and practitioners learn from and are stimulated by past experiences. In the course of its work in different parts of the world, IDEA has facilitated workshops and dialogue fora in which the experiences of South Africa have been discussed and lessons learned from that unique experience. There has never been an attempt or desire to apply South Africa's experiences as a blueprint. Rather there have been initiatives to foster dialogue, drawing on this experience and culling from the successes and set-backs of that process while identifying some generic principles and lessons-learned that may assist in developing creative solutions to other political transitions.

The Centre for Conflict Resolution (CCR) was founded by the University of Cape Town in 1968 as an independent non-profit organisation. Its mission is to contribute towards a just and sustainable peace in South Africa and other African countries by promoting constructive, creative and co-operative approaches to the resolution of conflict and the reduction of violence. CCR's main activities are mediation, conflict resolution skills training and research. Specialised training is conducted for police, military and prisons personnel; teachers and youth; local authorities; human rights actors; and senior government officials. Research areas include defence policy, regional security and demilitarisation; international mediation; civil wars; and human rights and conflict management.

CCR contributes to peacemaking and peacebuilding in South Africa, Burundi, Lesotho, Malawi, Zimbabwe and Somalia. It seeks to empower local actors through long-term programmes designed to meet their expressed needs. It has partnerships with a number of international bodies, including Amnesty International, Human Rights Watch, the UN Department of Social and Economic Affairs, the UN Economic Commission for Africa, the UN Institute for Disarmament Research, the UN High Commissioner for Refugees, the UN Staff College, the UN Institute for Training and Research and the World Bank.

International IDEA and the Centre for Conflict Resolution present 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 transitions and anchor peace by building sustainable democratic institutions and processes.

Bengt Säve Söderbergh
Secretary General
International IDEA

Laurie Nathan
Director
Centre for Conflict Resolution

About International IDEA

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 relationships of trust and investments in time, patience and commitment.

Workshops on the South African Experience

International IDEA introduced Mr Nicholas (Fink) Haysom as a facilitator at two workshops held in Chiangmai, Thailand and New Delhi, India, which were attended by ethnic nationalities of Burma, participating in a National Reconciliation programme. 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 transitions.

Acknowledgement
International IDEA would like to take this opportunity to thank the International Development and Research Centre (IDRC) Canada for its generous support towards a series of workshops on conflict management in Burma from which this paper emerged.

About the Author

Nicholas (Fink) Haysom was a partner at Cheadle Thompson and Haysom Attorneys, and an Associate Professor of Law at the Centre for Applied Legal Studies at Wits University until May 1994 when he was appointed Legal Advisor to the President in the President's Office. He served as chief legal advisor throughout Mr. Mandela's presidency and continues to work with Mr. Mandela on his private initiatives.

Haysom has written on constitutional and related matters in various academic publications and is the co-author of *Fundamental Rights in the Constitution: Commentary and Cases* (see below). He has also litigated in human rights trials and has acted as an IMSSA registered mediator in labour and community conflicts.

Haysom was closely involved in constitutional negotiations leading up to the interim and final constitutions. He was a member of the African National Congress's constitutional commission and participated in CODESA, the Multi-Party Negotiations Process and the Constitutional Assembly deliberations as a technical expert, legal advisor and negotiator. At the Transitional Executive Council (TEC), he participated in the activities of the committees of the Defence and Intelligence sub-councils. Haysom was also involved in the negotiation of the National Peace Accord and participated in its initiatives, notably as a member of the National Police Board between 1992 and 1994.

In the President's Office, Haysom participated in various legislative drafting or policy task teams, especially in the areas of defence and security, finance, and executive ethics. He also chaired the panel to short-list the commissioners for the Truth and Reconciliation Commission.

Since leaving the office of the President upon Mr. Mandela's retirement in 1999, Haysom has been involved in the Burundi Peace Talks as chairman of the committee negotiating constitutional issues. He currently serves, or has served, as a consultant on projects on constitutional reform, electoral reform, conflict resolution, good governance, federalism and democracy strengthening in Lebanon, Nigeria, Burundi, Indonesia, East Timor, Sudan, Somalia, Sri Lanka, Burma, Lesotho, Colombia and Congo.

In South Africa, Haysom is advisor to the Speaker of Parliament. He is also an advisor on litigation strategies to the Commissioner of Revenue Services and on tender processes to the Ministers of Trade and Industry and Home Affairs. He is a member of various panels of experts in international conflict resolution including the UN Panel of Experts on Conflict Resolution. He is currently a visiting professor at the University of the Wiwatersrand.

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List of Abbreviations

ANC	African National Congress
AZAPO	Azanian People's Organization
CODESA	Convention for a Democratic South Africa
CP	Conservative Paty
DP	Democratic Party
FF	Freedom Front
IFP	Inkatha Freedom Party
MPNP	Multi-Party Negotiating Process
NCOP	The National Council of Provinces
NP	National Party (the ruling party in South Africa during apartheid)
OAU	Organisation for African Unity
PAC	Pan African Congress
RENAMO	Mozambique National Resistance (*Resistencia Nacional Moçambicana*)
SADF	South African Defence Force
TEC	Transitional Executive Council
TNI	*Tentara Nasional Indonesia* (Indonesian Armed Forces)
TRC	Truth and Reconciliation Commission
UDF	United Democratic Front
UNITA	National Union for the Total Independence of Angola (*União Nacional para a Independência Total de Angola*)

1. The South African experience

In late 1989 Mme Mitterand hosted a seminar in Paris that brought together various elements of the internal and external resistance to apartheid rule in South Africa. During the seminar a speaker intimated that the then government was considering unbanning the African National Congress (ANC) and other liberation movements and embarking on a path to seek a negotiated settlement to South Africa's racial conflict. This suggestion was greeted with derision. In the course of the decade South Africa had undergone a period of unprecedented violence, mass action 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 in the world. 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 or was about to be repealed. South Africans of all kinds became involved in six years of negotiations that culminated in a successful transition to a peaceful democracy. Even though the process was by no means smooth, often accompanied by periods of stand-off, sporadic violence, and a continual war of political manoeuvre, it was a process that has been called a political miracle.

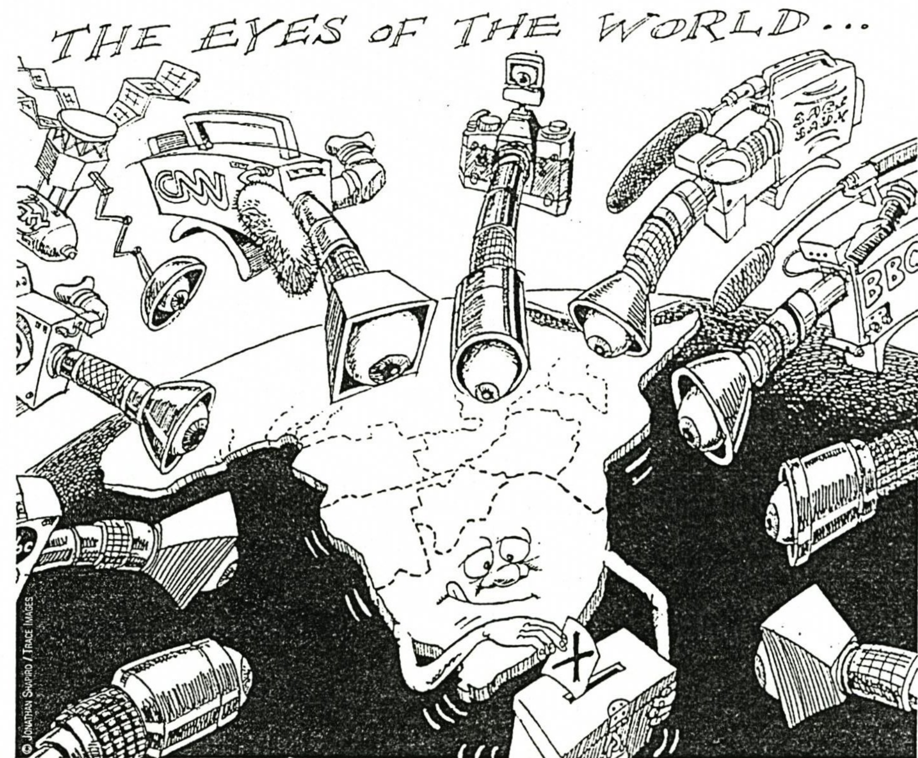
Thus one of the first lessons of the South African experience is that even in a period when solutions appear improbable or impossible, the situation may change dramatically and without warning. Other recent examples of such rapid shifts in the balance of political forces in countries that have endured decades of rule by apparently invincible military dictatorships are Nigeria, Indonesia and East Timor. This highlights the importance of being intellectually and politically prepared to take advantage of rapidly changing circumstances.

Being prepared to make the most of new opportunities requires not merely developing a constitutional blueprint to have in your back pocket, but also the capacity to deal with the challenges that such changed circumstances bring to alliances, leadership and, particularly the militant grassroots. A rigid position (an asset during times of repression and militant resistance) may now become a barrier to the strategic flexibility that is required for engagement in political negotiations. This publication suggests that parties to civil conflict should use emerging opportunities not only to seek short-term gains, but also to consolidate the process of transition, sustain its momentum and make the reform process irreversible in order to prevent the restoration of the *status quo ante*.

United Democratic Front supporters protest against apartheid (Oudtshoorn, Eastern Cape, 1989).

2. Distinguishing between South Africa and other conflicts and liberation struggles

It is necessary to stress from the outset the different circumstances and contexts with regard to conflict and political settlement between South Africa and other countries. It would be exceedingly presumptuous to insist that a solution appropriate for one country is also the right one 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 insoluble. Hence it is appropriate that the lessons of the South African experience be similarly passed to other democratic movements. Those movements are free to reject the logic, experience and strategic thinking not pertinent to their own contexts. This is why a brief overview of the demographic, economic and political features of South Africa and its history is provided, highlighting the specificity of its situation.



Popular cartoon capturing the international media's interest in South Africa's first democratic elections, 27 April 1994.

3. The South African context

In apartheid South Africa the majority of people experienced repression at the hands of a minority elite. They experienced that repression primarily at the hands of an all-encompassing security apparatus, but its political form was the denial of democratic rights to the black population by a minority white government.

Three important conditions shaped the character of conflict and resistance in South Africa. Firstly, apartheid as a strategem was predicated on the enforced compartmentalization of South Africa's majority black population into nine ethnic geographic units. It is not surprising that resistance to apartheid therefore focused on uniting democrats of all ethnic and racial components, and that accordingly the resistance movement was overwhelmingly national in character and purpose. Secondly, (although not always the case) an increasingly important method of resistance took place through the exploitation of the legal space within the country. The 1980s in particular saw the growth of a mass democratic movement comprised of a powerful trade union movement and popular civic organizations. Thirdly, there were also important considerations with regard to South Africa's reliance on world trade, the vulnerability of its developed economic infrastructure and accordingly its susceptibility to international pressure.

It was within this context of conflict that the conditions for a negotiated political settlement needed to be created.

Popular cartoon showing the dilemma over negotiations felt by many white South Africans at the time of Mandela's release. Had F.W. de Klerk released a force he could not reckon with?

4. PHASE ONE Pre-negotiations: Creating the conditions for a negotiated settlement

What follows is an outline of the South African transition from an undemocratic and oppressive state predicated on legalised racial discrimination to a non-racial democracy. The paper is necessarily thematically presented and outlined in broad brush strokes. It is not, and does not purport to be, a detailed history of the transition. Thus, for example, it concentrates on, and perhaps reduces, the history of the negotiations to the interaction and strategic positioning of the two principal players — the ANC and the incumbent National Party (NP) government of South Africa. In fact, there were many other players of influence, including the parties of the former homeland leaders, the most significant of which was the Inkatha Freedom Party (IFP). There were other opposition parties from the white National Assembly, including the Democratic Party (DP) to the left of the government (which had close links with the business sector) and the parties to the right of the government which had some resonance amongst elements of the security forces. In addition, there was another significant liberation movement, the Pan African Congress (PAC), and smaller parties allied to it, such as the Azanian People's Organization (AZAPO). A full history would record and analyse how and why the parties behaved as they did. At the end of the day, however, the transition was driven and determined by the two major players, whose leading status was recognised by the others. (See to the Selected Chronology of Events in the South African Peace Process appended to this paper on pp. 46–50.)

4.1 Subjective and objective factors

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. Its stated rationale for refusing to negotiate was based on its belief that the major liberation movement, the ANC, backed by support from the former Soviet Union, was communist and had intentions to install a communist state in South Africa. More fundamentally, however, the refusal was informed by a desire to maintain white privilege; refusal was a way to avoid countenancing any form of government in which white power would be compromised. 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 with 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 need to be a measure of confidence in the negotiating process and a section of leadership that is willing to take the risks associated with negotiating with the enemy; these are the subjective factors. 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 there had been an accumulation of objective factors exerting pressure on both the apartheid government and democratic liberation movements to negotiate a political settlement to the South African conflict, which was threatening to engulf the country in violence, bitterness and division. These pressures included:

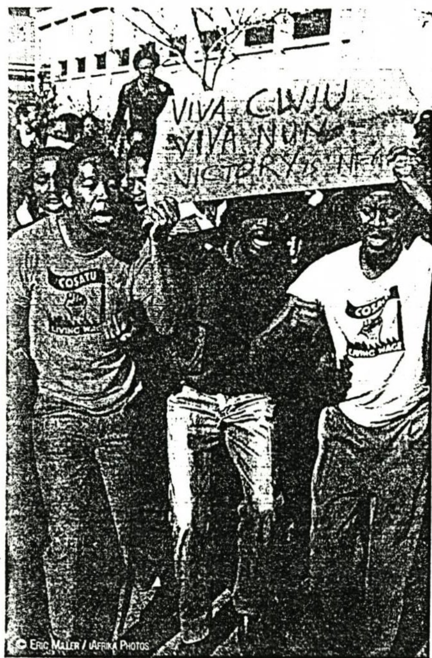
4.2.1 International pressure

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

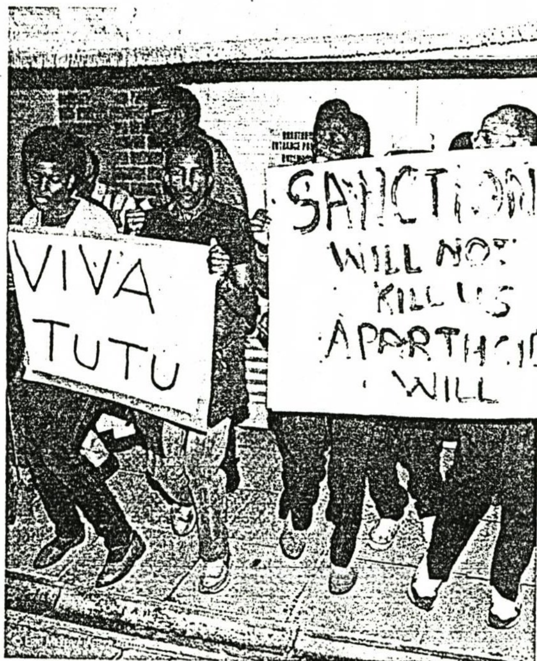
- Economic sanctions;
- Trade sanctions, including an arms boycott;
- Cultural isolation;
- Sports isolation; and
- Political isolation.

Cumulatively, these pressures were beginning to make their impact both psychologically and economically on South African society. In addition, the end of the Cold War and the disintegration of the Soviet Union on the one hand, allowed Western nations, previously lukewarm to the ANC, to view the liberation movement more favourably. On the other hand, the ANC lost a major benefactor and source of military and financial support when the Cold War ended and the Soviet Union collapsed. The disappearance of a bi-polar world order undermined the rationale behind the apartheid regime's reluctance to negotiate with the ANC. When it proffered the opportunity for negotiations, the ANC was without its previous support; more importantly it was increasingly financially and diplomatically reliant on pro-negotiations supporters from the West .

Police arrest anti-apartheid demonstrators (Lenasia, Johannesburg, 1984).



A trade union strike by the Congress of South African Trade Unions and the National Union of Mineworkers (1987).



A demonstration supporting international sanctions against South Africa (Cape Town, 1988).

4.2.2 Economic pressures

By the late 1980s South Africa had begun to feel the economic pressures arising from sanctions. The country was experiencing economic pressure in many ways: difficulties in obtaining loans on the international money markets, falling currency, high inflation and negative growth. There was a realization that business confidence, especially in the form of foreign and domestic investment, was unlikely to return in the absence of political stability.

The pressures of an increasingly militant work force were vastly undermining business confidence. Businesses were not re-investing and capital flight was evident. Foreign corporations doing business with South Africa in defiance of the sanctions movement were subject to "codes of conduct", which for them proved to be a double-edged sword. On the one hand, the "codes of conduct" justified the breach of international sanctions by corporations doing business in South Africa. On the other hand, however, these corporations were required to act in accordance with the "codes of conduct", which required the recognition of trade unions and other organizations representing black workers at the workplace and in their communities.

As well, South Africa, like all relatively developed economies at the time, had begun to confront the effects of globalization. Government and business realized that it needed to trade in world markets for the economy to survive and prosper. It was realized that an economic downturn as a result of continuous political instability would encourage the flight of both capital and white skills from the country, thereby further compounding the depressed state of the economy. In addition, the country was dealing with a declining currency which it was seeking to regulate by means of foreign exchange controls — both of which discouraged investment.

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 (SADF), the war was having a debilitating effect on South African society — psychologically, politically and economically. In particular, the ever-increasing cost of the pervasive militarization of society affected the economy in many ways, not least the emigration of white military conscripts, the expense and difficulty of breaching the arms boycott and the growing insecurity of the white community as internal mass militancy to apartheid grew.

4.2.4 Internal mass opposition

Continuous mass protests and resistance became an increasing political and economic threat to the regime's viability. As thousands upon thousands of people took to the streets, the cost of containing this militancy was overshadowed by the cost to the regime of international media coverage of its brutal suppression. Indeed, internal resistance and mass campaigns served to increase international pressure on the regime to change to democratic rule.

South Africa had significant access to international news and information. It was hence difficult for the government to cast democracy activists as "backward" or "unpatriotic". 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. Opening up the country to information and news should be a component of this strategy. It is to prevent this access that regimes often take extreme measures, such as censorship, to control print and electronic communication. South Africa was no exception.

The South African democratic movement adopted a number of strategies to create and use legal space to operate internally, including resort to the courts. South Africa was thirsting for international interaction, both for psychological (in the sporting and cultural sphere) and economic reasons. The country 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 into a less repressive stance and to allow legitimate protest. Under the protection of international scrutiny, trade unions were able to develop organizational muscle and expand their presence throughout the mining and manufacturing industries. Trade unions came to play a vital role both in expanding legal space and using them in strikes, stay-aways and demonstrations. The democratic movement used international leverage from institutions such as universities and banks to put pressure on the government 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 the applications to court or defences conducted in court were successful; even when they were not, they provided a forum and an opportunity to expose abuse and to inform the public.

4.2.5 The sustainability of minority rule

It is clear that the factors outlined above were inter-related and reinforced each other. Each factor 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 social reconstruction if the economy is debilitated, its infrastructure is in collapse or beyond repair and its citizens are

vengeful and deeply divided. It was this realization that gave rise to 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 came 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 Southern African region.[1]

4.3 Subjective factors

4.3.1 The liberation movements

The mere existence of crisis is not sufficient to prompt the parties to a political conflict to undertake negotiations. Indeed, crisis can harden attitudes and produce a "siege mentality". Elements of a "siege mentality" did in fact exist in South Africa. It was therefore critical that both the ANC and the government recognize 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 be 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 first hand the consequences of inheriting a dilapidated economy lacking skills, capital, infrastructure and human goodwill in countries where it had been based in exile. 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 South African people and could afford to take risks in achieving its goals.[2]
- In many conflict-ridden societies, the proliferation of competing and mutually antagonistic movements can make peace negotiations difficult, if not impossible. There is always the possibility of a lack of co-ordination between the different elements of the struggle for democracy, particularly between the international and internal sections. (In South Africa these different elements constituted the international anti-apartheid movement, the armed struggle and internal mass-based resistance.) The ANC had managed to establish itself internationally and domestically as the leading element of the democratic movement and was accordingly able to rally the many groupings and parties involved in the broad struggle against apartheid. Apart from direct invitations to meet with it and other liberation movements, the ANC sought to promote alliances with such groups even prior to its unbanning, to give direction to them and to solicit their backing for a comprehensive political settlement. Had this not been the case, it is likely that what appeared a coherent opposition movement in South Africa might well have degenerated into factions, contradictory demands and leadership squabbles. The democratic opposition in South Africa was also fortunate to have a world-recognized leader in the form of Nelson Mandela around whom it could unite. It is in comparison with other countries where the democratic opposition has no such unifying leading forces that the importance can be appreciated of a unifying leader such as Nelson Mandela.

It would be wrong though 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, not only was Mandela persuaded of the need to negotiate a settlement and to create a united and inclusive political order, but he also had the strength of personality to take the opening steps by initiating confidential discussions between himself and some of the leaders of the apartheid government. Mandela was able to straddle the divisions in society, become a national symbol and undertake the important task of building confidence in negotiations and the future.

Mandela's approach was characterized by:

- a willingness to engage anybody and everybody in discussions on the necessity for a negotiated solution;
- offering prospective amelioration of international pressure on South Africa on sports, cultural and economic fronts, provided that the negotiating process proceeded and certain benchmarks were achieved; and
- an ability to establish a "larger-than-life" stature, transcending the racial and ethnic divisions in South Africa.

Mandela was so successful in his approach that he informally acquired the stature of state president long before he was actually elected president. However, it needs to be stressed that it was not only Mandela that sought to allay 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 that ensured the safety, security and prosperity of all communities.

4.3.2 The apartheid regime

With regard to the government and the NP, the transition was made possible partly by F.W. de Klerk, the newly-elected state president at the time. 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 placed him in stark contrast to his predecessors who did "too little, too late". He exceeded all expectations when he moved decisively and rapidly to release Nelson Mandela and unban the liberation movements. Although he was to move more cautiously later on, F.W. de Klerk's early, fundamental shift in policy in 1990 (legalizing *all* underground liberation movements and repealing repressive legislation) brought him stature, and more critically, gained him the initiative in the negotiations process. The liberation movements struggled individually to catch up and find an appropriate response to his initiative. The reason for his shift in policy can be attributed to his recognition that the crisis in South Africa was real and that the regime's increasingly dirty war was not sustainable.[3] He was supported on this by a number of influential thinkers in the national security establishment.

The realization that a military solution would not work in South Africa was made possible in turn 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" eventually realize that the conflict cannot be won through military means and that a political solution is required. Of course, such change in attitude only comes with the acceptance of the hard truth that the prevailing method of government is not sustainable. In South Africa, the government's recognition of its "non sustainability" had to be accompanied by a belief or confidence in a negotiations strategy or process as a means of restructuring the political framework, one that would not be suicidal.

The role and response of the security establishment *vis-à-vis* F.W. de Klerk's strategy of reform was critical in this regard. It is not unusual for the military or security establishment to play a leading role in strategizing processes of reform. 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. South Africa was no different. A group of reformers, some of whom were associated with the national security establishment, were close to F.W. de Klerk. They did not represent the military as a single coherent institution, but rather a reforming section within it.

Just as the ANC needed to have the confidence to negotiate, especially the confidence that comes from being recognised as the pre-eminent voice of black South Africans, the government equally needed to have the confidence of being the voice of the *status quo*, especially the security establishment and the white community generally. The second risk that F.W. de Klerk took, which in hindsight contributed to the success of the negotiations, was to call for a referendum amongst whites at the outset, a referendum which would give him a broad mandate to negotiate with the ANC. He won the referendum conclusively. While privately the democratic forces recognized the need for such a mandate, they could not publicly accept that whites should have the right to veto the transition. As it happened, the gamble paid off because of De Klerk's personal popularity and a broader desire for peace and prosperity. The effect of such a broad mandate was to allow for a bold risk-taking approach to the negotiations, rather than a cautious looking-over-one's-shoulder approach.

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* the circumstances for them to occur. 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 liberation movement face problems persuading their supporters and functionaries that the very same adversary who has been demonized can ever be a negotiating partner. Even while the government and the ANC rallied their constituencies that negotiation was an activity to be engaged in with enemies, they both had 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" and "freedom or death", appeared incompatible with the decision to start negotiating.

It was important to educate supporters — and the public at large — that negotiations did not constitute capitulation. It was critical for the longer-term success of the negotiations that a higher level of strategic understanding of political goals be achieved. The respective constituencies had to be prepared for possible compromises, on which a negotiated settlement is predicated. However, just as it is important to address one's own supporters, it is equally important to "address" the adversary's supporters in a manner that builds 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 that builds confidence in their own leaders. They may have to "talk down" the risks of the negotiating strategy, while simultaneously "talking up" the process by portraying the negotiations as the continuation of war by other means (to turn von Clausewitz's dictum on its head).

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

- The ANC's programme and policies were realistic, 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;
- Conducting a series of direct face-to-face engagements with a panoply of civil society, political and business groupings in the country; and

• Holding centre stage in international fora and organisations.

When the ANC released its constitutional blueprint in 1989 before the commencement of the negotiations proper, it was important to stress that the document was not a statement of non-negotiable constitutional demands. Instead, 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 in order to demonstrate its democratic credentials and its commitment to the Rule of Law. Its constitutional blueprint served this purpose. Through this document, the ANC was able to project an alternative of a prosperous, just, stable and secure South Africa. Furthermore, the blueprint allowed the democratic movement a strategic opportunity to engage the regime on constitutional issues and to advance counter proposals. The document thus became a method of raising hitherto prohibited political discourse. The blueprint addressed questions regarding:

- The Rule of Law;
- An equitable property regime; and
- Attitudes towards religious and cultural diversity.

Hence the ANC was able to commence the process of de-demonization, while at the same time injecting important questions into the national political discourse. Indeed, the ANC began to look increasingly like a government-in-waiting as sports, student and business groups made regular pilgrimages to Lusaka in Zambia in the 1980s to meet and consult with its patently reasonable leadership in exile there. At the same time, Nelson Mandela was engaging government leaders and "securocrats" from his prison quarters, impressing upon them both the feasibility and necessity of normalizing South Africa's fraught inter-group relations.

4.4 Making the negotiations an attractive option

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

- The existence of an economic and political crisis sufficient for the ruling elite to lose confidence in its capacity to continue to rule in its 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, parties will only begin negotiating if negotiations offer the possibility that they may both achieve their own very different, even mutually destructive, ambitions. At the outset it is not necessary for adversaries to have identical expectations with regard to the outcome of negotiations. Parties enter into negotiations, each with its own view of what will be achieved and what are "non-negotiables" and "bottom lines". In truth, however, negotiations produce a result determined by a range of factors, not least of which are the dynamics of the negotiating process itself. What is important initially is to get the parties to the table so that direct exchanges can commence, the concerns of both sides can begin to be addressed and a jointly-owned process can be initiated. This itself will generate local and international expectations, which in turn places pressure on the parties to behave and to make compromises.

F.W. de Klerk addresses the media in his first joint public appearance with Nelson Mandela, soon after the latter's release in February 1990.

5. PHASE TWO Establishing and sustaining the negotiations process

5.1 Dealing with pre-conditions: "Levelling the playing fields"

The negotiations and transition in South Africa underwent a number of phases. The first phase of the negotiations proper could be called "the phase of establishing the pre-conditions for political settlement talks". After the release of Nelson Mandela in February 1990 and the unbanning of the liberation movements, the subject of the talks between the government and the ANC concerned not the political settlement of South Africa's conflict *per se*, but the pre-conditions for such settlement talks to occur. Discussion on the pre-conditions took place between 1990 and 1993 and proved to be amongst the most difficult. These discussions could 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 negotiation process from the violence taking place around it; and
- Agreeing on the process of constitution-making, which is 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 a country. An argument exists that negotiations should not be subject to pre-conditions. These burden the process with demands that 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 in the eyes of its supporters legitimately engage with the government. Issues to be addressed included, for example, the fact that many ANC cadres were in exile or in jail, and that the organization and the majority of 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 and fruits of negotiation.

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

- The release of political prisoners;
- The granting of temporary amnesty for its cadres and leaders returning from exile;
- The repeal of politically repressive legislation; and
- The 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;
- Make provision for the handing over of weapons or "decommissioning"; and
- Support the lifting of economic and other sanctions.

The ANC rejected the demand for the decommissioning of its cadres, pointing out that it would be vulnerable to a change of heart by the government and that the process had not yet become "irreversible". It did, however, recognise the equivalent need for the government to demonstrate to its supporters a peace dividend as a consequence of negotiating with the ANC. It therefore agreed to a temporary suspension of hostilities, with an agreement to commence decommissioning once the talks were completed and the process had become irreversible. It is notable here that the PAC did not follow suit and declare a unilateral temporary cease-fire. That its decision made little difference to the negotiations underscores the fact that most militants, most of the significant trade unions and civic groups and most prisoners and detainees were aligned to the ANC or groups aligned to the ANC such as the United Democratic Front (UDF). The PAC's non-participation in the process would not derail it.

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 exact obligations with regard to the bearers 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, as it has done, for example, in Northern Ireland.

The ANC, for its part, sought to reward its main negotiating partner by progressively supporting the normalization of South Africa's economic, sporting and cultural life. While it agreed to the lifting of sports and cultural sanctions, it did not agree to immediate lifting of economic sanctions until later. 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. It was only at this point that the ANC argued in support of lifting the most effective of the sanctions — economic sanctions.

A peace monitor watches as both ANC and NP supporters celebrate their parties respective victories in the first democratic elections (Cape Town, April 1994).

ANC leader, Chris Hani (centre), was assassinated on 10 April 1993, an act which threatened to plunge the country into violence and damage the peace process.

IFP supporters at a pre-election rally (Durban, 1994).

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 attempting 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 element was referred to as "the third force". Between 1990 and 1993 negotiations were suspended on more than one occasion because of violence caused by the third force. The country was brought to the very edge of destruction by the assassination of a prominent ANC leader, Chris Hani in April 1993. Additionally, much violence occurred between supporters of the IFP (the third largest of the political parties) and ANC supporters during the negotiations.

5.2.2 The role of ethnic considerations in the process of transformation

The origins and the nature of the conflict between the IFP and the ANC can be traced to the specific history and the personalities dominating South Africa in the 1980s. Although formally a non-ethnic party, the IFP's political base is overwhelmingly comprised of Zulu-speaking South Africans. The IFP presented itself as the most ethnic of the parties at the South African negotiations and argued for the strongest form of federalism in its constitutional demands. It became the flag-bearer for regional autonomy and the retention of power by traditional leaders opposing local democratic structures. This attitude can partly be attributed to the apprehensions that IFP leaders had of retribution by a nationally-dominant ANC for the violence that had bedevilled the KwaZulu-Natal province during the period of ANC opposition to the IFP in the 1980s. The IFP did not represent Zulus as a whole (approximately fifty 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's strategy of participating in apartheid structures (such as the homeland government system) and former opposition to the militant organisations within the areas under its authority.

Between 1985 and 1995 over 10 000 people were killed and an estimated 30 000 left homeless in acts of violence and reprisals in KwaZulu-Natal and on the Witwatersrand (the country's industrial heartland in the former Transvaal province). It was alleged (and later established) that elements of the apartheid government's security forces were perpetrating the violence in collusion with some members of the IFP. It advantaged the government for this violence to be seen as "black-on-black" violence — internecine warfare not involving 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. Once the cycle of violence started, a pattern of revenge attacks would follow as both sides were drawn into the conflict. There were few, if any, prosecutions of the perpetrators. Victim communities repeatedly appealed to Mandela to arm them or at least stop the violence. After a massacre in Boipatong, an East Rand township in the former Transvaal province, all further talks were called off. It was only after the assassination of Chris Hani in April 1993, when the country was teetering on the verge of civil war, that the leaders on both sides recognized the urgency to expedite 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 democracy.

5.2.3 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 in the country. The strategic thinking informing this mechanism was the recognition that agreements and negotiations between just 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 create the appearance that they supported the peace initiative.

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

- Forcing the negotiating parties into the initiative;
- Forcing the antagonistic police into a role that required them to maintain law and order, and protect communities; and
- Compelling the parties to adhere to their obligations, if only to appease civil society expectations and avoid broader public condemnation.

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 the pieces of a jigsaw puzzle. 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 or town affected by the violence. They acted as early-warning mechanisms, mediators and peace marshals. Most importantly, these peace committees 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 providing experience to many ordinary South Africans in managing political and racial diversity. The peace committees prepared South Africans for a future non-racial democracy.

5.3 Agreement 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 on the process of constitution-making, which they did in a memorandum of understanding in late 1993 (see the appended document, The Record of Understanding on pp. 59–60).

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 all the diverse elements of a society, including its minorities.

The objection raised with regard to a democratic constitution-making 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 or an equal 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 for it would fail to express the aspirations of the majority. The majority would be held hostage by minority concerns and fears and minority claims to special entitlements and status. This conflict over the process to be followed fuelled further violence in 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 "sacred principles". Namibia had 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 National Assembly drafted the final constitution.

The multi-party forum would agree on the principles and interim constitution, as well as the legislation required for the holding of democratic elections. This included important legislation such 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 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. Such principles would codify the essential protections and goals of a democratic society respecting individual rights and those of culture, language and religion.

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 on the constitutional principles and an Interim Constitution. The first attempt at a multi-party process Convention for a Democratic South Africa (CODESA) collapsed, partly as a result of violence occurring at the time, but also because of the inappropriate structure of the negotiations. The principle problems during this first experience of multi-party negotiations at CODESA can be traced to:

- The failure of face-to-face talks, which had involved too many parties;
- The absence of a decision-making formula for the forum, combined with a lack of will to compromise on important questions; and
- The inappropriateness of a television monitored debating chamber as the means by which parties were expected to publicly compromise with each other. (In such a setting the parties could, and did, use the opportunity to talk to their constituencies outside the chamber rather than with their negotiating partners in the room.)

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

- Relying on informal 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" does not require unanimity, but it does require significant consensus and consensus at least between the major players. Such a formula requires a politically literate and intelligent handling of the floor by the chairpersons. "Sufficient consensus" allows a process that 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 (see 8.41 on p. 44). Thus, a single insignificant party cannot hold the process to ransom.

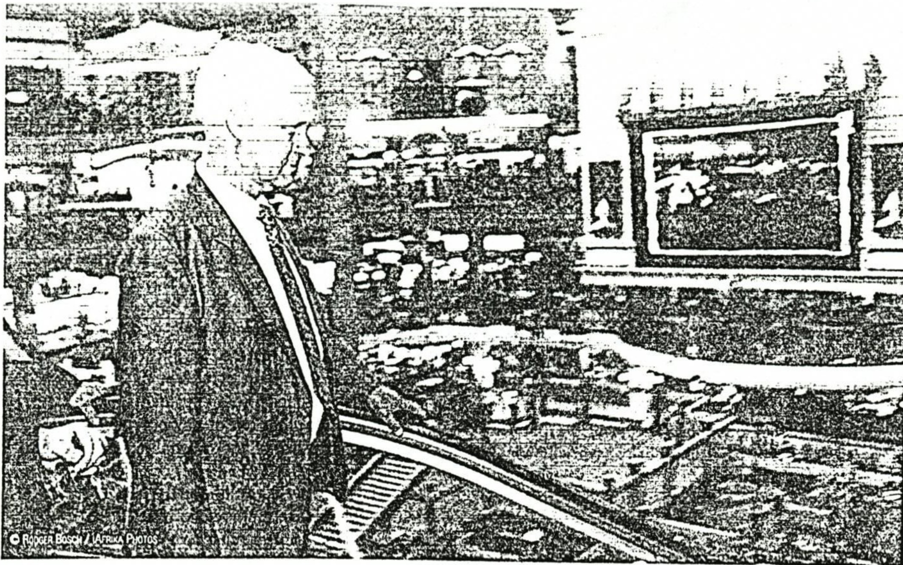
The multi-party process and its executive committee became in a real sense the guardians and promoters of the negotiation process in South Africa. The delegates were required to defend the process from attacks by their own parties and criticism from sectors of the public. During the run-up to the elections an executive committee of the process became the Transitional Executive Council (TEC). The TEC was responsible for supervising the government administration of the country and the electoral process, ensuring not only fairness of the elections, but also that the result would be accepted by winners and losers alike. It should be mentioned that the TEC did not assume executive control over the government. It felt that if it did it would be assuming responsibility for an apparatus it did not really control. It preferred the role of a monitor with "teeth".

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 because it failed 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 ninety eight 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 that all the role-players and stakeholders 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 even those who were a small minority but potentially disruptive if they positioned themselves outside the final constitutional dispensation.
- 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 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. Each party was required to compromise on some features of its text, but also to see its influence on other features. Nelson Mandela was able to say on the adoption of the Constitution that the constitution belonged to no one party; it belonged to them all, even if, or especially because, no one party had



Gen. Constand Viljoen, leader of the Freedom Front, at an election campaign in the Tygerberg Valley Shopping Centre, Cape Town, 1994.

A COSATU strike in protest against the lockout and property clauses in the draft Constitution, May 1996. These were two of the intractable issues that were resolved in the final hours of the deadline for a draft via package bargaining in which all the parties had to share losses and gains.

had all its demands met. It is this perspective, which, in the author's view, was absent in the approach of the largest party in East Timor during that country's constitution-making process in 2001.

- It is 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 that 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 was invested in popularizing the constitutional debates by disseminating information through the mass media, particularly the radio, as South Africa has a high illiteracy rate.

6.2 Popular participation

Members of Parliament were required to travel throughout the country on a bi-partisan basis, 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 and civil society organisations. It was hoped that over one hundred thousand submissions would be elicited, but as it turned out a staggering two million submissions were received. Many of these did not address the constitutional debates but raised problems experienced by ordinary people in their daily lives, such as domestic abuse, livestock theft, unemployment, and so forth. In reality, though, these issues are intrinsically connected to constitutional questions, such as the Rule of Law, gender equality, effective government services and 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 made 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, to see their constitution as one which they had 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 about how the past deeds of either one or both sides to the conflict are to 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 the parties. Many negotiators are tempted to ignore questions of past human rights abuses, past embezzlement of public funds and so forth in the interests of peace. However, this may be short sighted in the long-term. In the first place, there will be some pressure to provide certainty with regard to the following issues:

- Victims and relatives will want to know the facts of who did what to whom, and the fate or whereabouts of those who are unaccounted for; and
- Combatants on both sides will want to know whether they risk punishment or imprisonment if they return from exile or the bush or hand over power.

Lack of clarity on these issues may lead to last-minute resistance to a changeover. In South Africa, at the eleventh hour, representatives of the security forces, in particular the security police, raised this issue informally together with the suggestion that they might not be able to guarantee the loyalty of their men if this issue was not dealt with. As it happens, their loyalty was needed both for conducting the election and to nip in the bud a right wing bombing campaign led by white right wingers. In the longer-term, the past will cast a shadow over the future if it is not dealt with in some meaningful way. Lingering resentment, suspicions, accusations and 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 a recurrence of the abuses of the past. There are numerous examples of countries where attempts were made to sweep the ugly past under the carpet only to have it emerge in the form of intra-community violence at a later stage. What is also unacceptable is the unilateral promulgation of legislation dealing with amnesty and related issues by the regime in power. Such unilateral acts of "self-forgiving" are seldom respected after the transition, as has been observed in Chile and Argentine.

In South Africa the issue of past atrocities 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 it could be proved that their crimes had been 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 South Africa's Truth and Reconciliation Commission (TRC) 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, look forward or 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 that their past actions would be considered with fairness and in the context of a civil war.

6.4 Including other role-players in the constitution-making process

6.4.1 The role of women

Women played a significant role in South Africa's constitution-making process. A principle was established at the multi-party negotiating forum that fifty per cent of each party's voting delegates would comprise women. Many parties were initially resistant to what they viewed as an imposition on their right to choose their delegates to the negotiations. Others were sceptical about the capacity of women to participate in negotiations at this level. However, by the end of the process all parties came to accept the equal participation of women.

Women were able to bring shared experiences and perspectives across party lines. More importantly, women united and despite race, class and regional differences were able to find common ground on a number of gender-related issues (for example, the treatment of rural women under customary law). These issues were eventually resolved in favour of gender equality as part of the planned social transformation. This resulted from 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 very quality of the negotiations. The absence of women engenders a raw ethnic presentation of interests and a gender biased perspective on national issues.

How can women be promoted to a prominent role in the negotiation process? It has been said that women are invisible in political negotiations. When 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 quite common. It does, however, emphasize the need to actively promote the participation of women at all levels of the political process, including that 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 also training men so that they accept and support this need.

6.4.2 Religious groups

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 TRC.

Leaders from all religions proved to be important agents of political mobilization. They were, in general, opposed to the policies of racial discrimination, but were also perceived as being independent of political parties. Accordingly, religious leaders were able to act as peacemakers with regard to issues that divided communities or political parties. Some religious leaders ran for political office in the first elections, whilst others, such as Archbishop Desmond 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 TRC, which was an independent but very political function.

6.4.3 Civil society

In general any peace process or negotiation process is strengthened by the support of civil society. However, civil society is unlikely to buttress a peace process or constitutional negotiations if it is not consulted, informed or allowed to engage in the process in some way. While it is not suggested that civil society groups should necessarily have a place at the negotiating table, there are, however, numerous ways in which their participation and support can be allowed constructive expression. For example, members of civil society can play important roles in civic education, as monitors, as adjudicators, as suppliers of information, and so forth.

6.4.4 Boycotting the talks

The issue may arise generally as to whether to boycott the negotiations, or whether to continue with such negotiations when an important player is boycotting the talks. It was apparent during the South African transition that there could be no real "talks" if either the government or ANC chose not to participate. But what of the other parties? There were three types of parties that at different stages chose not to participate — all to their disadvantage. Initially the PAC opted not to enter the process of talks about talks if this entailed a temporary cessation of hostilities. Later on, it chose to boycott the process of registering as a non-statutory army (that is, engaging in the preliminary process of integration of the armed force). In both cases it cost them influence over critical processes to the detriment of their cadres. Secondly, the IFP withdrew from both the Multi-Party Negotiating Process (MPNP) (the first stage of the constitution-making process) and the Constitutional Assembly (the secondary stage). It did so in both cases because a negotiating demand was not accepted by the forum or assembly. As a result both parties lost influence over the detail of the constitutional text — and the devil is in the detail. They did manage to wring some last minute concessions, in both cases as a price for their participation in the election or endorsement of the constitutional text, but it is submitted, nothing of the kind they would have procured had they participated with the daily engagements which were taking place during the constitutional negotiations. During the short period of their participation in the MPNP they exerted significant influence over textual formulations. Thirdly, the white right wing was divided with regard to its participation in the negotiations. Although this tendency was represented at both stages by one or other of the parties, arguing for, *inter alia*, an Afrikaner homeland within a federal South Africa, some of the factions refused to participate in any of the processes, including the first democratic elections. The result for those who stayed out was political oblivion (for example, the Conservative Party (CP)). The question remains whether those who stayed in managed to exercise any influence over the text of the final product? The major achievement of the Freedom Front (FF) was to prevent the final constitution compact from precluding the possibility of a homeland or other forms by which they might exercise a right to self-determination. They were unlikely to ever gain the support — even amongst whites for the substantive realization of that demand. Nonetheless the Constitutional Assembly allowed for a constitutionally mandated process to investigate the feasibility of the notion and also adopted Section Z35 which states that the constitution does not preclude "recognition of the right to self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic in any other way determined by national legislation". This clause was adopted to reward the Freedom Front for their participation in the process, and to secure their endorsement of the final product, which as it happened, they chose not to do at the last minute, although they did not oppose it.

6.4.5 Ethnic considerations

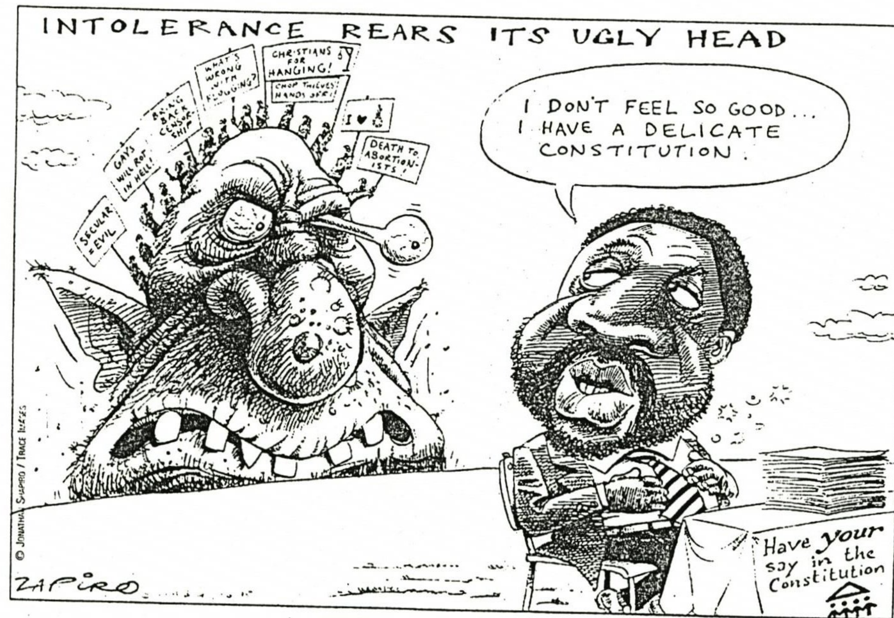
There may well be questions of ethnic identity that South Africa has still to confront. Issues of ethnic identity did not surface sharply at the talks because, as in the moment of decolonisation in other countries, the talks are pre-eminently about national sovereignty and national identity.

"Ethnic" considerations in contemporary constitutional discourse have come to embrace any of the identity considerations that distinguish one community from another and include language, culture and religion. Best practice today is to ensure that the constitution embraces all its citizens, and while proclaiming equality in the value of each citizen, recognises and even heralds their differences. Thus, the South African Constitution accords equal status to all eleven languages and proclaims the state's religious neutrality while guaranteeing freedom of choice of religion, language and cultural practice. It does this both in terms of the individual's rights as well as the additional more contemporary and collective form of the right — which recognises the need not only to have this freedom but also to exercise it with others, that is, collectively. (See sections 30 and 31 of the Constitution of South Africa, Act 108 of 1996.) However, as pointed out earlier in this paragraph, no major party stridently asserted the need for ethnic self-determination. The IFP, whose conflict with the ANC had often manifested ethnic undertones, became a flag bearer for a (ethnically neutral) region-based federalism and for the retention and protection of all traditional leaders. It did not explicitly raise ethnic considerations though. Only the Afrikaner right wing parties raised this issue, but they were too small and too fragmented to insist on a serious debate on an unfeasible white homeland. The former homeland leaders and their parties fell in either behind the ANC (in a loose alliance known as the Patriotic Front) or the government.

For these reasons the South African transition might not yield the most fruitful example of modalities to be pursued in resolving deep-rooted conflict when that conflict is essentially about identity considerations. However, it needs to be stated that both sides, indeed all parties, to every stage of the negotiations emphasised and hence promoted a discourse of patriotism and national identity, which allowed for a constitutional discourse to establish common values and to find a framework to fashion a common destiny. In situations where ethnicity is primary, where it overwhelms national identity, such a discourse is difficult to create (for example, in the Sudan, Sri Lanka and Burundi to name a few countries thus characterized). There is no "we". There are only mutually exclusive "others".

Furthermore, as the revolutionary Garibaldi noted, national identity cannot be proclaimed, and certainly not by suppressing or denying group identities. (Garibaldi, having succeeded in creating the modern state of Italy at the end of the 19th Century proclaimed: "We have made Italy, now let's make Italians". How much more difficult is this task in heterogeneous African and Asian countries riven by religious, cultural and ethnic fault lines?) What is to be noted, however, is that a simple "winner-takes-all" democracy can even exacerbate ethnic distinctions and ethnic marginalizations, and could even be a catalyst for violence. This is so when there are no solid institutions to uphold the Rule of Law (thus no protections against ethnic discrimination or other violations of fundamental rights), where there is no private sector or civil society (and thus he who captures the polity also captures the economy) and where political party membership corresponds with the ethnic cleavages in the society (and thus there is no interest-

based politics only group-based politics, for example, where one behaves politically according to one's ethnic group belonging and not one's material or other interests). In a winner-takes-all political system where the political elite employ ethnic mobilization, the stakes are high and minority ethnic groups that lose national elections are consigned to be perpetually and economically excluded. In such situations creative constitutional solutions are required, which accord to all the requisite personal security and which allow the notion of national identity to embrace — not reject — other sub-national identities. Such measures will affirm equal treatment of all citizens, which render the state apparatus an inclusive one, and which allow losers in the national political contest to nonetheless have a stake in the system (for example, at the local and/or provincial level). This, however, is the subject of another paper. It is sufficient merely to conclude here that identity considerations are important (94% of all armed conflicts in the world during the early 1990s were classified as identity-based conflicts). If such considerations were not pre-eminent in the South African negotiations, it is not an indication that in resolving other conflicts, they should not be taken seriously. The ways in which a constitutional or peace settlement are to embrace all the disparate elements and identities in a society —including those of professional, gender, urban/rural and ethnic identities — are specific to each society. South Africa was able to deal comfortably with ethnic considerations within a liberal democratic framework; other divided societies may not have that luxury.



A cartoon promoting popular participation in the constitution-making process.

7. Substantive choices in the South African constitution-making process

The substantive choices in the South African constitutional design may not be suitable for other countries. For this reason, when canvassing the substantive choices made by South Africa's constitution-makers, it is not the choices that are relevant to other countries, but rather the underlying motivation which informed them.

There were six considerations in the approach to the making of constitutional choices:

1. The constitution should be an enduring and binding contract between all the peoples of a country. The constitution is a most significant document because it sets the rules by which a 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 should therefore not be regarded as a technical document to be crafted by experts — whether local or foreign.
2. While the substantive choices made in the South African 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 could capture the specific nature of the contract among its people.
3. A constitution must reflect its society's concerns and 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 had to reflect an enduring commitment to justice, reconciliation, human rights, liberty in place of oppression and, above all, a commitment to the equality of all its citizens regardless of gender, race or ethnicity.
4. 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*.
5. The same considerations that inform the design of the constitution-making process should inform 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 against the 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.
6. Finally, the constitution-making process and the constitutional choices made in that process are designed to foster nation-building. Nation-building is not a simple matter of creating a central state structure or imposing a single uniform identity on citizens, but rather it allows for the appropriate expression of the multiple identities of people within a national boundary. 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 express its nationhood while at the same time manifesting its respect for identity difference.

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

7.1 The constitutional state

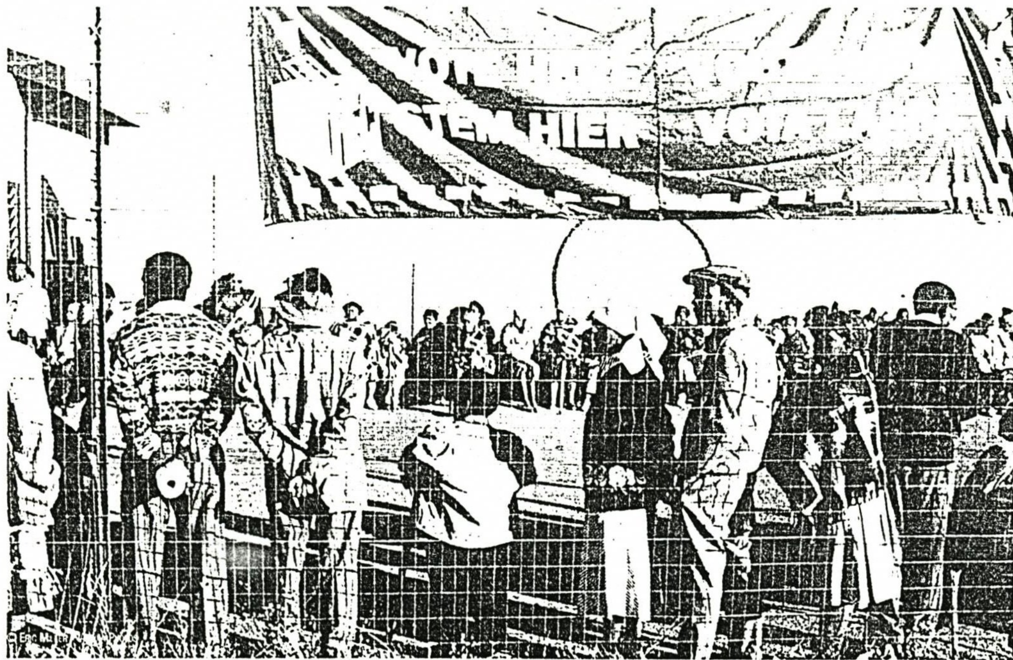
South Africa abandoned the model of Westminster-style parliamentary sovereignty, which is its colonial legacy, and adopted the model of a constitutional state. In a constitutional state, government and parliament are governed by a fundamental law — the constitution. The constitution imposes limits on 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, not frustrate it.

7.2 The government of national unity

The South African Constitution provided for a period of five years in which opposition parties would participate in the government. This period was intended to serve as a stabilizing period of nation-building, in which both the majority party and opposition parties would share responsibility for managing the transition.

7.3 The Bill of Rights

South Africa's Constitution sought to enshrine an extensive and progressive charter of fundamental rights. These rights



Voters at a polling station during South Africa's first democratic election in 1994. The Independent Electoral Commission (IEC) was established to oversee the holding of free and fair elections in the country.

Former MK soldiers are integrated into the SANDF (1996).

The ANC makes its submission to the TRC in 1998.

may not be abridged or violated by govern-ment or 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 Certain socio-economic rights are enshrined

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

7.3.2 More recent concerns are included

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

7.3.3 The need to redress past inequalities is accommodated

The Bill of Rights elevates the equality of citizens to a higher principle but accommodates the need to redress the inequalities of the past. 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 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 has had to do so within the context of, and the discipline arising from globalization. One cannot expect of the Constitution, or any other settlement, that it should magically solve all actual problems of social life in a country. Its function is to provide a framework within which these issues can be effectively addressed by political actors. It is wrong therefore to attribute social ills (such as crime, unemployment, and so forth.) to the constitution itself.

Unfortunately, many South Africans equate rising crime in the country with the new Constitution and clamour for the return of the death penalty and harsher punishment in the mistaken belief that this will diminish criminal behaviour. It is not civil liberties that have led to a rise in crime but ineffective policing. Until there is more effective policing, the question of harsher punishments will not cure inadequacies in the criminal justice system.

7.3.4 The liberty of individuals is prioritised

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 Certain contemporary civic rights of citizens are enshrined

The Bill of Rights enshrines certain more contemporary rights of citizenship, these are the right to information and the right to administrative justice. These rights are important for a vigorous civil society (during the struggle South Africa witnessed the development of robust civil society organizations and institutions that were able to influence the contents of the Bill of 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. Another reason for this emphasis is that the imposition of duties rather than rights has sometimes been the hallmark of undemocratic constitutions.

7.4 A strong parliament

In dealing with the structures of government, the South African Constitution gives pre-eminence to the Legislature rather than the Executive. The constitution-makers were anxious to avoid a monarchical style of executive government that has blighted many developing countries. For this reason, the Executive is accountable to the Legislature, which indirectly elects the state president. A state president may not remain in office for more than two terms. The Legislature is given a strong oversight role over the actions of the Executive, including such issues as military deployment.

7.5 Institutions supporting democracy

The South African Constitution creates numerous institutions independent of the Executive's interference to ensure that its constitutional promises are kept, to monitor the government and civil service and thus prevent corruption. These include:

- An Auditor General to ensure that public monies are spent in accordance with the laws, proper procedure and the budget;
- A Public Service Commission to monitor service by public servants;
- A Human Rights Commission to monitor respect for human rights;
- A Gender Equality Commission to monitor respect for gender equality and rights;
- A Public Protector to investigate Executive behaviour and corruption;
- An Independent Police Complaints Directorate to investigate offences committed by the police;
- Civilian oversight of the military, the police and intelligence services;
- An independent judiciary; and
- An Independent Electoral Commission to ensure impartial and fair elections.

7.6 The electoral system

The Constitution enshrines the principle of proportional representation. This is a departure from the Anglo-American "first-past-the-post" (single member constituency) system previously applied in South Africa. The reason for choosing proportional representation (proposed by the ANC, even though it would have obtained greater representation under the "first-past-the-post system") related to the need to ensure that the greatest number of significant minority parties and interests as existed in society could find some representation in the Legislature. The example of Lesotho demonstrates the disadvantage of the "first-past-the-post" system. In 1998 opposition parties in Lesotho obtained forty per cent of the vote but less than two per cent of the seats. This became a source of political instability in the country. In choosing proportional representation, the South African constitution-makers embraced the philosophy of L.B. Johnson: "It's better to have that 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 excluding a significant minority from the political system.

7.7 Language and culture

South Africa's 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 is protected in the South African Constitution. This means that the right to belong to and to practise different cultures and religions and to speak one's language is protected. Amongst other consequences, the state is secular and neutral with regard to religious preference and enshrines the equality of all eleven official languages. Although it allows regional preferences in language usage, national government is compelled to recognize the equality of all eleven languages. Regrettably, the impracticality of functioning with eleven languages has seen the prominent use of English as the unofficial common language of government.

While South Africa's Constitution guarantees language, cultural and religious rights to all individuals, it also grants groups the right to practise their culture and religion and speak their language "in community with others". This goes further than an individual right and recognizes a collective dimension to identity rights. 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.

7.8 Federal or regional decentralisation

South Africa's constitution-makers opted for a form of federalism that is relatively unitary, or subject to the concern of building national consensus. An explanation of both its federal characteristics and its concern with national unity is required.

The impulse towards federalism in South Africa arose not from the existence of 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, there should be an accountable Legislature and Executive. A government closer to the people is more responsive to their needs. 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 during apartheid had been of artificially imposed ethnic fragmentation (ethnic homelands) with the long-term purpose of disenfranchising blacks and justifying the denial of their political rights in "white" South Africa. The artificially imposed ethnic governments of the homelands 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. It was also a response to avert ethnic divisions but without denying ethnicity. National unity can never be built on the suppression of ethnic or other identities. A quasi-federal arrangement thus accommodates ethnic difference without constitutionally enshrining it.

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 levels. In case of conflict between the contradictory provisions of state and national laws, the question is resolved by recourse to a formula which determines that the provincial law will be pre-eminent, unless the national government can prove that one of a specified number of national interests applies. In practice, the provinces have preponderant responsibility for public service functions, although the national level sets much of the legislation establishing norms and standards. In case of collapse or failure in a provincial government, the national government may intervene. What this formula purports to recognise 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; for example, to decide which side of the road vehicles must drive on. Education, typically, is a social function which, depending on the aspect, requires input or influence from one or more levels — local government, regional authority, national government and even supra national organisations.
- The South African 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 a form of veto) over national legislation as a means of increasing the power of the provincial level of government collectively.
- The National Council of Provinces (NCOP) 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 NCOP a true institution of provincial interests and not merely a senate. The NCOP ensures that the interests of the provinces are represented in parliament. Through this house, 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 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 province deciding on issues, for example, water supply, in isolation from its neighbouring provinces down-river, they have to, through the mechanism of the NCOP, discuss the need to share clean water with all the affected provinces.
- Within this provincial framework, the Constitution recognizes and entrenches local government powers against encroachment from 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 Decentralisation and financial matters

The South African Constitution devotes a chapter to financial matters, which is known as 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 also of fiscal and financial powers. 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 province in accordance with its needs, contribution, demographic profile and so forth. This is to protect individual provinces from being victimized or starved of resources without which a province'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 political matter and involves the question of a province's entitlement to raise taxes of a particular kind. Whether a country opts to place tax-raising powers within a macro-economic framework or accords greater fiscal autonomy to provinces, the issue should be dealt with by the constitutional text, as should the question of the provinces' rights in respect of natural resources in their territories.

The South African Constitution does not envisage that the provinces would have a right to secede and therefore makes no provision for this. In many negotiations this issue would be considered one of the most difficult. The Ethiopian constitution-drafting process dealt with this issue first and is instructive in this regard. By conceding at the outset that provinces would have a right to secede, the emotive content of this issue was removed from the constitution-making process, hence facilitating the speedy negotiation of the constitutional text as a whole. Had the right to secession not been agreed early on, it would have formed an unspoken consideration behind the resolution of all other issues. 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 about the South African Constitution

Three aspects of the Constitution merit critical observation:
- The detail in which it was written;
- The cost of its structures; and
- The impracticality of some of its provisions, with regard to the realistic capacity of the public service and national resources.

7.10.1 Detailed drafting

The context in which the South African Constitution was written, that is, as an outcome of negotiations between parties that 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. The more usual tendency is to draft constitutions in the form of more general statements 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

South Africa's negotiators, particularly the constitutional lawyers, were left to find compromise formulations that did not take into account the overall costs of government. Because of the high premium placed on establishing a system of democratic government at the time the Constitution was being drafted, 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 become available from the dissolution of the apartheid security apparatus have partly been absorbed by new structures of government. Even then, many of the so-called independent constitutional institutions complain 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 thus been better funded. The problem is that 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 itself is a kind of social compact, to introduce very idealistic and detailed prescriptions for government. The reasons for this are distrust of government and the more laudable aspiration of preventing the recurrence of past excesses. However, one of the first imperatives facing the new order in South Africa was (and remains) to 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 tends to judicialize many potential political points of conflict and make opaque the division of government responsibilities between levels and agencies of government. In a situation where the democratic opposition had no experience in government there was an overly optimistic understanding of what was possible. Notably, provincial governments experienced problems in assuming responsibility for discharging their functions, especially as many came into being for the first time or were constituted by amalgamating several administrations.

7.11 Other significant issues regarding South Africa's Constitution

7.11.1 Dealing with land issues

Dealing with land issues is important in post-conflict settlements. The legacy of removing black South Africans from land demarcated for whites and the historical process of dispossessing the peasantry made the question of land redistribution a hot issue in South Africa. The matter was resolved by establishing a process to investigate land claims and providing for special consideration of land restitution by a Land Claims Court. This is constitutionally mandated. Separately in the Constitution, a carefully crafted property clause allows the state some latitude in establishing an equitable land ownership regime (see Section 25 of the Constitution of the Republic of South Africa, Act 108 of 1996). 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 and not only its market value. In practice, however, the legal nature of the mechanism, that is the Land Claims Court, has meant that the resolution of such issues has been slow and expensive.

7.11.2 The role of the Constitutional Court

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 no experience of an independent judiciary. In South Africa the political settlement relies on the 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 its courts do allow for lay assessors to sit with judges and magistrates in criminal cases.

7.11.3 The concept of self-determination

In international human rights law, there has been increasing emphasis on 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 expressly left open. Self-determination may mean rights with respect to 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 should form the central element of negotiation between those ethnic nationalities demanding an appropriate expression of their right to self-determination and the democratic movement. In South Africa, the Constitution allows this question to be developed in the future by stating that the constitutional framework cannot be construed as exhausting this question or pre-empting further development of the right. This clause was deliberately adopted to provide some hope for political tendencies which had felt that the final compact did not reflect their aspirations (see section 6.4.5 on p. 25).

7.11.4 The emphasis on gender equality

South Africa's Constitution places considerable emphasis on the issue of gender equality. The Constitution does not allow gender equality to be sacrificed for the benefit of cultural or religious rights. This is a response to the triple oppression experienced by black women, that is, past discrimination against them in terms of race, class and gender and the determination of women to raise gender oppression to the same level as racial oppression. The best guarantee of gender equality is adequate representation of women in parliament, but 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. However, the high representation of women remains subject to the individual parties benevolent attitudes with regard to this issue. The Constitution itself does not require such quotas. The fact that the electoral list system tends to yield higher percentages of participation by women in parliament was a consideration in its adoption, even though no law prescribes a quota. A commission to monitor gender equality was established by the Constitution.

Women in traditional dress gather to promote women's rights at a cultural festival in Langa township, Cape Town, 1989.

From back left: Cyril Ramaphosa, the ANC chief negotiator, Roelf Meyer, the NP chief negotiator, F.W. de Klerk and Nelson Mandela.

Nelson Mandela and Mangosuthu Buthelezi (IFP leader) meet in 1994 to end the violence between ANC and IFP supporters in KwaZulu-Natal and to bring the IFP back into the elections.

F.W. de Klerk gained overwhelming support to proceed with negotiations with the ANC in an all white referendum held in March 1992.

8. Forty-one lessons from the South African negotiations

Having reviewed the six years of negotiations in South Africa, it is possible to draw a number of lessons that may have some broader application. Some of these are techniques or approaches that were used successfully to build consensus, while others 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 these lessons is to emphasize that negotiations are an important political tool. Most protagonists in an intense political conflict would not consider sending poorly-trained or poorly-armed militants into battle, yet they might treat negotiations in a cavalier manner, without proper consideration of the techniques and strategies required to achieve the desired political result.

8.1 Do not enter negotiations if the principal parties have no intention of negotiating in good faith

At the outset it needs to be stated that where the negotiations are to be conducted as a charade and where neither party has any intention of negotiating in good faith, such negotiations are to be avoided until circumstances for negotiations are ripe. Premature negotiations will lead to frustrations, mutual vilification, increased levels of distrust and could even undermine any prospect of a successful negotiated settlement in the future when the circumstances have ripened. This is not to suggest that the negotiations are ripe only when both parties are near agreement. On the contrary, it is for the negotiations to effect a narrowing of ever wide differences. However, if the exercise is a sham undertaken by parties who harbour a military solution, and who undertake the negotiations in form only so as to appease donors, international opinion or investors, the end result will be to set back real negotiations.

8.2 Include all parties

In general it is important to be inclusive with regard to the process, particularly where the objective is to create a framework for binding a variety of agreements. An inclusive process provides a better platform for stability, acceptance of the new 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.

8.3 Promote joint ownership of the process

Before parties participating in the process commit themselves to meeting their obligations, they must believe that they have joint ownership of the process. Bear in mind that frequently opponents, or their chief negotiators, need to be able to sell the agreement to their principals and their party's constituency. In South Africa, the NP's chief negotiators were perhaps the ANC's most crucial allies. Their task of convincing the government or cabinet to accept agreements reached that would diminish their power was frequently more difficult than that faced by the ANC's negotiators. This type of confidence-building in the process is possible only when opponents are committed to the success of the process because they see themselves as joint owners of it.

8.4 Promote joint ownership of the product

It is important for an agreement to reflect the shared concerns of the parties. An agreement should not be viewed as an opportunity for meeting the demands of one party only. Of course, parties that 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. This can be done by allowing the other side's formulation of a provision if the formulation reflects a common or shared view. It can be done by addressing issues of symbolic importance to the other side but of no moment to your side. It can be done by ensuring that every agreement addresses issues raised by every party. It can be done by insisting on joint drafting of the product.

8.5 Build trust among the negotiators

There are a numerous ways of building both personal and professional relationships of trust in a negotiation process. What is poisonous to relationships, is if one party fails to keep to or honour its commitments or its side of the bargain. This applies particularly to agreements regarding the 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.

8.6 Avoid negotiating with messengers

It is relatively common for leaders to send representatives who have no mandate to truly negotiate. Messengers, in effect, simply relay 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. Confidence in the process is thus compromised and makes joint ownership of it and the product more difficult to attain. In South Africa a division could be detected between insiders (from all parties) and those who were not part of the negotiation process, particularly members of the government and cabinet. Where such outsiders have the power to veto the product of the negotiations, it is preferable to find methods of involving them more directly in the process.

8.7 Parties should avoid accepting responsibility for meeting or keeping to conditions they cannot meet, keep or enforce

This applies particularly to accepting responsibility for the conduct of parties or armed wings of parties not under the authority of the negotiating party. Failure to meet commitments undermines the process and reduces the status (domestically and internationally) of the erring party. It also casts doubt on the negotiators' capacity to negotiate in the negotiations and to speak for their constituency.

8.8 Principles and details: "technicians" and "diplomats"

The importance of having negotiators who can negotiate both general principles and detailed implementation cannot be emphasized enough. Negotiating teams should be made up of both "technicians" and "diplomats". "Diplomats" are negotiators who have a special capacity to secure broad agreement on matters of principle. The problem with "diplomats", though, is that they are often not the appropriate people to hold the ground won in negotiations on matters of principle. Ultimately, it is details that ground an agreement and secure its implementation, and the "diplomats" find themselves blown backwards. "Technicians", on the other hand, hold the ground by battening down the details of the agreement. Negotiating teams frequently require both "diplomats" and "technicians" 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 its implementation, as the principals neglected to negotiate definitions, timeframes and similar details.

8.9 Agree to the rules of the process at the outset, in particular the eligibility of parties

Because the leadership and nature of parties can change, the process should take into account in advance *who* should be able to participate in the negotiations. This is especially important when one or other side tries to swamp the process with surrogate parties or additional representatives.

If there is a misunderstanding about 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 at the outset (before disputes arise), it may be difficult, even impossible, to re-negotiate the rules of the process once a dispute has burst out into the open. Re-negotiating rules is particularly difficult if a new rule appears to favour one side over the other with regard to a particular issue under discussion or in dispute. It is far better to agree on the rules of procedure and the obligations of the parties with cool heads at the outset, rather than in the heat of debate when the process is well under way. In particular, it is worth considering which body or person can authorise or nominate the particular negotiating team. (The author has experience of two or more teams arriving to represent one party.)

8.10 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 refers to significant consensus amongst all the parties, as well as on an agreement by the major players. It did not, however, require unanimity. Sufficient consensus effectively prevented small players, who carried little weight in society, from using a veto to block the negotiating process (see section 8. 41 on p. 44 for more details on the principle of sufficient consensus). Significant problems can arise further down the line if there is no clarity on the decision-making formula and the decision-making powers of the negotiating forum itself. In this regard, the Irish peace process has subsequently adopted the "sufficient consensus" modality of reaching agreement.

8.11 "Setting" 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, around a table and with what type of hierarchy, for example, will parties sit in a 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.

8.12 Treat both your opponents and allies with respect

It is important to avoid triumphalism at the conclusion of an agreement. Triumphalism can make your opponents suspicious about the agreement or agitate their supporters. In any event, claiming victory 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.

8.13 Develop an awareness of the multiple audiences that need to be addressed about 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 also applies to your adversary. Accordingly, do not be offended if your opponent "talks up" their performance at the negotiations when reporting to their constituency. For these reasons, clear lines of communication between adversaries are needed to prevent misunderstandings about what in reality may merely be a public relations exercise. Similarly, if you "talk up" your performance at the negotiations (for example, claiming you have defeated your opponent), it may place unbearable pressure on your opponent from his or her constituency to leave the negotiations.

8.14 Maintain constant communication with your grassroots or constituency

It is important to build in both time and opportunity to obtain the views or consent of your support base. This is critical if your agreement is to be supported by your constituency. Communication not only keeps your support base informed and prevents suspicion building over the negotiations, but it also offers an important opportunity to introduce them to strategic considerations and thinking, which in turn enables them to appreciate the nature of the negotiations and the agreement. It is important for grassroots and leadership alike to appreciate that negotiating with an adversary does not constitute capitulation or "selling out" to a cause. In any event, agreements usually require that members of your organisation will be obliged to behave or conduct themselves in a particular way. They are more likely to do so if they have been consulted. Indeed, it may be wise to insist that your adversary does likewise for the same reasons.

8.15 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 public-relations exercises. Parties to the negotiations use their enhanced visibility to talk not to parties in the negotiations, but to their own constituencies. When this occurs, negotiators 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. Negotiations can often be separated into two processes — one invisible and informal where real negotiations and trade-offs take place and a second where an agreement is "publicly" recorded.

8.16 Be creative and flexible in the use of negotiating forms

Where there are two major contending forces, negotiations may best be conducted bi-laterally. Where the objective is to reach an inclusive agreement with the diverse parties, multi-lateral negotiations are suggested. In the case of the National Peace Accord (see appended document) in South Africa, multi-lateralism and inclusivity were used 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 of the NP and Cyril Ramaphosa of the ANC; and
- *The summit* involving the two main leaders, Nelson Mandela and F.W. de Klerk.

The role of leadership by means of their indirect participation in the negotiating process is crucial. It was considered important to have a mechanism at a level higher than the negotiators to resolve deadlocks or breakdowns in the negotiations. Had Mandela and De Klerk participated directly in the on-going constitutional negotiations, there would have been no such higher authority. Furthermore, Mandela and De Klerk were spared any damage to their stature and personality, which could have followed direct engagement in acrimonious exchanges.

8.17 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 comprise women, they should therefore be well represented in negotiating teams across the political spectrum. However, this is seldom the case. Often women are regarded as a silent and invisible component of political organizations. Yet women bring a capacity to find common ground to the table, because they often share similar experiences in violent conflict (mostly as casualties) and common perspectives on the effects of war, (such as loss of children and injury to and break up of the family). These experiences and perspectives cut across political positions. In South Africa, the establishment of a multi-party women's coalition played an important role in bridging race, class and political differences. The presence of women at the negotiations also increases the likelihood that the outcome of the negotiations and the emerging political culture will be gender sensitive and address gender issues. All too often, women have found that once political negotiations have been concluded (most often in their absence), the task of establishing a gender equity agenda is difficult.

8.18 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 the context of 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. (The Burundi and Congo dialogues displayed these features.) 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 twenty four 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. In contrast, the Burundi peace talks, amongst others, were a shambolic process, because of the inability of the various participants to recognize the key players.

8.19 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 to consolidate proposals into an appropriate text at an appropriate moment, even if the text itself allows for options and contending solutions. A single text allows all the parties to concentrate on the same text that is before them. Where there is a proliferation of texts, parties talk only about their own proposals and hence past each other. In addition, they become entrenched in the formulations they originally proposed and the text they know and are comfortable with; movement to a compromise position becomes ever more difficult. In South Africa, third parties or experts were used to generate common texts, which allowed for parties to accept compromises without losing face (see section 8. 20 below on the role of third parties).

8.20 Using third parties or experts to mediate or to make independent proposals

Whether and when to use third parties (that is, experts, foreigners or international organizations) is a matter of judgement. However, the following considerations may assist in deciding this:

- Agreements forged between parties without any external assistance are likely to result in parties having greater pride, a sense of achievement and ownership in them. It is easier to walk away from an agreement or a process if it is owned or managed by an international agency or foreign power (for example, the Tanzanian process, the Norwegian agreement and United Nations mediation);
- 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 (for example, who will chair the talks, deciding the venue or the agenda of the talks, etc.), it may then 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. However, even where there is such third party facilitation or mediation it is still possible to insist that the process belongs to the parties (for example, the Anglo-Irish talks chaired by Senator Mitchell) rather than the mediator.

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 the 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 are face saving.

8.21 Learn negotiating skills: prepare for negotiations and analyse your adversary

Key political actors regard political and military engagement as a professional activity, yet see negotiations as an intuitive or amateur activity. However, negotiations will often be the most important determinate in the outcome of any struggle for democracy and liberty. Indeed, almost all political engagements or military conflicts are finally concluded with "end-game" negotiations. Victories won on this terrain can be lost in the details of a negotiated agreement.

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;
- Consulting one's constituency or membership;
- Formulating ways to accommodate your adversary's anxieties while meeting your own objectives; and
- Learning negotiating skills (see, for example, section 8.30 on p. 41).

8.22 Avoid negotiating with opponents who are unskilled negotiators

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 of negotiating with such opponents is that they tend not to follow the rules of negotiations. 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 who were 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 little 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, which was disadvantageous to the process. The process improved as they became more experienced. During peace negotiations in the Horn of Africa and the Great Lakes region in the late 1990s, it was recognized that parties to the conflict needed basic training in negotiations for effective peace talks to occur. In other contexts (South East Asia and South America to the author's knowledge) it is military insurgency movements whose approach to and understanding of negotiations that constitute barriers to effective peace processes.

8.23 Use time-frames to avoid an endless negotiating process

All negotiating processes need to be approached with a measure of flexibility, both with regard to time-periods and 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 or stall the negotiations. In any negotiation there is normally a party that is seeking to negotiate change and a party seeking to resist it. In such circumstances, the party resisting change always has a vested interest in drawing out the negotiations, while the

party seeking change is under pressure to make compromises simply to obtain the changes sought. Some of the most important issues to establish in a negotiating process, and with regard to any substantive constitutional reform being negotiated, are the questions of time-frames and deadlock-breaking mechanisms (see 8.24 below).

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. Parties that enter into a process without time-frames may find themselves trapped in an unending process, where they are obliged to continue negotiating in a context where there is no serious intention to affect a real transition or peace.

8.24 Consider 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 (for example, in the Arusha Peace and Reconciliation Agreement for Burundi, third-party intervention is considered as a deadlock-breaking mechanism); and
- Bringing into play some means of disadvantaging an intransigent party (for example, in South Africa a referendum was to be used to resolve deadlocks in the Constitutional Assembly).

8.25 Managing carrots and sticks

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

The ANC for its part, sought to reward its negotiating partners by progressively supporting the normalization of South Africa's economic, sports and cultural life. The softer sanctions (such as the sports boycott) were lifted early as a distinct carrot — a reward for steps taken by the government to normalize its practices and policies in the country — even though the process was not yet deemed irreversible. It was only when the process became irreversible, that the ANC argued in favour of lifting the most effective of the sanctions — economic sanctions.

8.26 Develop mechanisms for dealing with internal division and anticipate problems

The negotiating process places stress on political organizations. Aside 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 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 differences without compromising the negotiations themselves. The problems may include issues relating to converting broad resistance movements or family parties into political parties.

8.27 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 differences. Therefore, the parties should from the outset 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, the repeal of racist legislation and the cessation of hostilities. In the absence of visible benefits from the negotiating strategy, critics will increasingly spread scepticism concerning the benefits of the negotiations. In South Africa, the upsurge in violence and assassinations by the "third force" nearly derailed the negotiations (see Section 5.2.1 on p. 19).

8.28 The questionable benefit of undermining your adversary's support-base

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 both major players retain the confidence of their supporters. It is therefore 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, and later supported the lifting of certain categories of sanctions (that is, sports and cultural sanctions).

It is also 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; and
- The opposition merely participating in the negotiations as a hollow shell, without its constituency (for example, the armed forces).

A fragmented and disintegrating adversary is not always optimal. You may find that your opponent's forces coalesce behind a more extreme party which is then outside the discipline and reach of the negotiations process, or that the opposition's authority has been weakened to the point that it cannot sell, and hence cannot sign, the agreement.

8.29 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 begets progress in negotiations. One agreement induces another. As some parties go on to successfully participate in the negotiations, 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 on an escalator; if you stand still, you move backwards. The personal chemistry between the negotiators is eroded and the parties dig deeper trenches around their positions. Off-the-table developments may subject the already fragile and possibly discredited process 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 in the country deteriorated sharply.[4]

8.30 Distinguish between "interests" and "positions"

The cardinal rule for effective negotiations is to distinguish between:

- *Interests* — the objectives you seek to protect or achieve; and
- *Positions* — 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 interests and positions. Parties frequently lose sight of the interests and objectives informing their positions. They become obsessed with defending the proposals (positions), which are in fact only the means. The problem frequently arises because campaign or struggle slogans often attach to the position or tactic rather than the long-term interests and principles. Positional bargaining occurs when parties become obsessed with their position and find it difficult to shift from that position.

Effective negotiations require the parties to:

- Look behind their respective positions;
- Identify the true interests or underlying objectives;
- Identify compromises that, as far as possible, allow both parties to have their real interests addressed;
- Identify the technical aspects to be negotiated and do the necessary comparative research;
- Learn the technical skills of negotiations; and
- Do the necessary groundwork within your own movement or party so that you can negotiate with the appropriate mandate and with the necessary tactical flexibility.

8.31 Creative or dangerous ambiguity

How precise should an agreement be? Should there be exactly 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 this relates to the process or the product). On the other hand there are various situations that make it impossible for the parties to have precisely the same understanding of a matter. In the Burundi 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 to satisfy both sides, either because of the generality or the ambiguity.

However, there are issues to which reference must be made in a peace agreement but which are not ripe for finalization. There are also issues that are not central, with solutions acceptable to one side, but not the other. 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, with each side being aware of but ignoring the different interpretations yielded by the formulation.

"Creative ambiguity" is thus a label used to describe an agreement in such general terms that it embraces the different understandings and demands of various parties.

For example, an agreement stated as "the provinces shall have all the necessary legislative executive and financial powers to perform their functions" allows both parties to have very different conceptions of what the appropriate powers of the provinces might be. Yet it is possible to proceed to negotiate the next item on the agenda, the concrete specification of the powers of provinces having being deferred to a later stage in the process when there is greater clarity on the federal structures and a greater degree of consensus on the shape of the future state.

8.32 By-pass problems

Because of the imperative of making progress in the negotiations, negotiators can and should look to areas where they are likely to obtain agreement, rather than commencing with an initial item which they are unlikely to find agreement on, at least, until greater common purpose has been found. For this reason, negotiators should pass over areas where no consensus can be reached, rather than imposing a rigid sequence or order of matters to be agreed. It can be problematic if the agenda for negotiations requires matters to be dealt with sequentially (and separately). This precludes the parties from by-passing the issue.

Reaching agreement on a significant issue may 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 sought (see Section 8.33 below).

8.33 Finding a process solution to a substantive impasse

Certain issues will not yield a solution that is shared by all the parties. For example, one party may demand the release of political prisoners, which may give rise to debate about the definition and identification of political crimes and political prisoners. However, not all problems or issues require final resolution at the negotiations.

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

Intractable matters can be:

- Deferred by agreement to a later stage of the negotiations;
- Deferred to another process or body;
- Resolved by means of establishing a joint committee, mechanism or body to resolve the dispute either concurrently or in the future;
- Resolved by identifying an international organization to facilitate resolution; or
- Resolved by formulating a procedure that 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.

In South Africa, process solutions were used to deal with issues or aspects of issues, including the Land Claims Court with regard to land claims and the Truth and Reconciliation Commission (TRC) with regard to amnesty.

8.34 Conditional bargaining

In negotiations many parties, quite understandably, will not offer compromises for fear that these might weaken or diminish their negotiating position without extracting corresponding concessions from the adversary. In such cases both parties should be encouraged to offer conditional 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 are encouraged to enter the bargaining process without losing any ground.

8.35 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, matching trade-offs or 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 useful to break the issue into component parts and present it as a set of issues (for example, cease-fire negotiations, amnesty, etc). Similarly, negotiations should not be conducted in an ordered or fixed sequence where 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, including mother tongue education and the property clause, 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 been 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.

8.36 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 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 talks and developing a negotiating strategy.

8.37 Pre-conditions, and "opening" and "fall-back" positions

The question of whether a party should insist on pre-conditions being met before it negotiates will depend on the context and circumstances of the negotiations. In general, pre-conditions can be unhelpful to the party advancing them, especially if they are rejected and the negotiations do not get underway. There is no opportunity to develop reformulated pre-conditions. Parties that insist on pre-conditions are frequently left with no option but to capitulate and abandon them, if only to allow negotiations to get under way. It is only in face-to-face negotiations that so-called pre-conditions 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. In any event, strategically, an adversary may be most prepared to accept your proposal if it is the outcome of some give-and-take. An opening and fall-back position anticipates this.

8.38 "Sunset" and "sunrise" provisions

In negotiations there are frequently issues of fundamental importance to one party, but unacceptable to the other, at least in the short-term. In South Africa some intractable issues were resolved with the help of *sunset* and *unrise* conditions:

8.38.1 The sunset clause

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.

In South Africa the political settlement provided for a government of national unity which was subject to a sunset clause. A sunset clause can also be used to provide for a phased reduction of the role of the military in a 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 (the Indonesian armed forces) have a right to representation in all legislative structures. This clause would have allowed for the immediate acceptance of the principle of demilitarizing the legislature, but is likely to engender only limited opposition to the measure in view of its deferred implementation. Such clauses are suggested where it is necessary to achieve a phased disengagement of the military. (In Indonesia, this question was still being debated at the time of writing.)

8.38.2 The sunrise clause

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.

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.

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

Many political or peace negotiations involve contending belligerent parties. Although this paper has concerned itself with methodological rather than substantive issues, a word of caution is warranted with regard to the question of agreeing on a cessation of hostilities and a comprehensive cease-fire. In most, if not all negotiations, one of the recurring themes in the sustainability of peace agreements concerns the inadequacy of the text dealing with aspects of cease-fire. 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, that is, 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?
- How are breaches of agreements and defaulters to be dealt with?
- Which body will monitor or adjudicate the observance of the cease-fire?

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.

8.40 Give considered attention to the mechanisms, details and funding of implementation

There are a variety of modalities of implementation. A recent survey of peace agreements concluded in Africa reveals that it is often at the beginning of the implementation stage that agreements break down 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 (for example, 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.

8.41 Sufficient consensus

In multi-party negotiations in the absence of any agreement on decision-making, it is not unusual for the decision-making to be determined 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 out-voted.

"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.

ENDNOTES

1. During the 1980s, and in response to failure of legal repression to contain widespread dissent, the South African regime had come to rely on "low" intensity conflict stratagems inside and outside the country. This entailed the use of extra legal violence by surrogate forces such as RENAMO in Mozambique, UNITA in Angola and vigilante groups inside South Africa.
2. Both the ANC and the PAC had been officially recognised by the Organization for African Unity (OAU) in the 1980s.
3. This refers to the regime's use of excessive methods against anti-apartheid resistors, such as covert assassinations, and the effects of internecine community violence in the form of civilian casualties.
4. The CODESA talks broke down as a result of the impasse in the talks, which was compounded by the massacre of residents in Boipatong, a township on the East Rand in the former province of Transvaal.

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A Selected Chronology of Events in the South African Peace Process

[Adapted from Ebrahim, H. 1998. "Chronology of Events" *Soul of a Nation: Constitution-making in South Africa*. Cape Town: Oxford University Press.]

November 1985
Nelson Mandela writes to his prison warden and requests a meeting with the government, which is positively received.

5 July 1989
In a meeting with P.W. Botha, Mandela states in a prepared document: "I now consider it necessary in the national interest for the African National Congress and the government to meet urgently to negotiate an effective political settlement."

21 August 1989
The OAU adopts the ANC's Harare Declaration.

15 October 1989
Several ANC leaders are released from prison.

5 December 1989
6 000 representatives of the Mass Democratic Movement meet at the Conference for a Democratic Future and pass a resolution in favour of negotiations

12 December 1989
After meeting with Minister Kobie Coetsee and Gerrit Viljoen, Mandela writes t o F.W. de Klerk and again warns of the urgent need for negotiations to occur. The ANC's National Executive Committee meets in Lusaka and resolves to consider the option of a negotiated settlement.

2 February 1990
F.W. de Klerk delivers a speech at the opening of Parliament in which he announces the unbanning of the liberation movements.

11 February 1990
Nelson Mandela is released from prison.

27 April 1990
The first group of ANC leaders returns to South Africa from exile.

2–4 May 1990
The Groote Schuur Accord is adopted, in which the government and the ANC agree on a common commitment to resolve the climate of violence and intimidation and on pursuing a process of negotiations. Temporary immunity is granted to members of the ANC's National Executive Committee and others in the party. The government undertakes to review security legislation, to work towards lifting the state of emergency and to establish channels of communication between itself and the ANC.

6 August 1990
The Pretoria Minute is adopted, in which the government and the ANC agree that further releases of political prisoners will begin on 1 September 1990 and that indemnity will be granted to persons from 1 October 1990. The ANC unilaterally agrees to suspend all armed actions "in the interest of moving as speedily as possible towards a negotiated peaceful political settlement". The two parties agree that the "the way is now open to proceed towards negotiations on a new constitution".

12 February 1991
The D.F. Malan Accord is adopted in which the ANC's undertaking to suspend all armed action is further defined

to mean that there will be no armed attacks, or threats of attacks, infiltration of personnel and material, creation of underground structures, statements inciting violence and training inside South Africa. It is further agreed that membership to Umkhonto we Sizwe (MK), the ANC's military wing, will not be unlawful; individual weapons will be licensed in terms of existing legislation; and the right to peaceful demonstrations will be maintained.

June 1991
The "Inkathagate Scandal" and revelations about SADF involvement in death squads and the ongoing violence emerge. The ANC suspends all bilateral meetings with the regime in response.

31 July 1991
An ANC National Executive Committee meeting demands the installation of an Interim Government. The ANC's National Working Committee is instructed to begin laying the basis for the convening of an All Party Congress.

14 September 1991
The National Peace Accord is signed to bring an end to the violence. This is the first multi-party agreement.

October 1991
The ANC initiates bilateral discussions with, inter alia, the NP, the Labour Party, the IFP, parties operating in the homelands and the governments of Venda and the Transkei. Bilateral meetings take place between the ANC and NP government on 17, 24 and 31 October.

25-27 October
The Patriotic Front (PF), a loose alliance of parties holding an anti-apartheid position, is launched. The PF Conference agrees on a joint programme for the negotiated transfer of power. It is agreed that: only a constituent assembly elected on the basis of one-person-one-vote in a united South Africa could draft and adopt a democratic constitution; a sovereign interim government will be established, which should at the very least control security forces and related matters, the electoral process, state media and defined areas of budget and finance, as well as secure international participation; and that an All Party Congress should be held as soon as possible.

2–12 November 1991
The ANC prepares for the first All Party Congress and consults with the PAC, AZAPO, the DP, homeland leaders, Mass Democratic movement organisations, religious leaders and the NP government. Broad agreement is reached. The first All Party Congress meeting is scheduled for 29 and 30 November 1991. Its agenda includes: a climate for free political participation; general constitutional principles; a constitution making body; an interim government; the future of the Transkei, Bophuthatswana, Venda and Ciskei (TVBC) states; the role of the international community, if any, and time-frames.

29–30 November 1991
The All Party Preparatory Meeting takes place, with twenty organisations and parties attending. It is decided that the name of the All Party Convention be the Convention for Democratic South Africa (CODESA). It is agreed that the first meeting of CODESA take place on 20–21 December 1991. For instances in which consensus fails to emerge, the principle of "sufficient consensus" as a decision-making mechanism is agreed to. The PAC accuses the ANC of "selling out" and walks out of CODESA ten minutes before the end of the meeting.

20–21 December 1991
The first meeting of CODESA takes place. The meeting adopts a "Declaration of Intent", which all parties, except for the IFP and the Bophuthatswana government, sign. The NP government apologises officially for the policy of apartheid and confirms for the first time that it is prepared to accept an elected constituent assembly provided that it also acts as an interim government. Nelson Mandela launches a fierce public attack on F.W. de Klerk.

February 1992
The regime accepts the ANC's demand for an interim government and the principle that a new South Africa be non-racial, non-sexist and democratic. An initial agreement on general constitutional principles is produced. The regime remains insistent that MK be actually disbanded, but the ANC's position is that only an interim government can decide MK's fate.

17 March 1992
An all-white referendum is held, in which the regime receives overwhelming support for reform.

23 March 1992
The ANC tables proposals for an "Interim Media Structure", which argue that the media has a central role to play in levelling the political playing field. The establishment of an Independent Media Commission is proposed.

7 April 1992
Initial agreements emerge. Negotiations produce initial agreement that an interim government should take place in two stages: the first stage would consist of the formation of a Transitional Executive Council (TEC); the second stage would commence after the elections and consist of the interim government and constituent assembly. The TEC would be multi-party in form and would function alongside the existing tri-cameral parliament. Multi-party sub-committees of the TEC with executive powers would be established for key areas of government.

15–16 May 1992
CODESA II deadlocks on the question of a constitution-

making body. Technically, the deadlock manifests itself around the question of the special majorities required to adopt a final constitution.

17 June 1992
A massacre of more than forty people takes place in Boipatong, a township on the East Rand (former Transvaal province).

23 June 1992
Bilateral and multilateral negotiations are broken off. The ANC's National Executive Committee holds an emergency meeting to discuss the implications of the Boipatong massacre. While it reaffirms its commitment to a negotiated settlement, it also resolves to break off all negotiations (both bilateral with the regime and multilateral), makes 14 demands and accuses the regime of complicity in the violence.

2 July 1992
De Klerk responds to the ANC's memorandum, denying government complicity in the violence and refusing to commit to the principle of majority rule. Nevertheless, the government disbands Battalions 31 and 32 and Koevoet; refers the future of hostels to the Goldstone Commission; issues a proclamation banning dangerous weapons and agrees to international monitoring of violence.

15–16 July 1992
In the announcement of an unprecedented mass action campaign, the Tripartite Alliance (the ANC, SACP and COSATU) commits itself to a month of rolling mass action in support of its demands.

August 1992
A United Nations Monitoring Committee arrives in South Africa to monitor the ANC's rolling mass action campaign. They attend various marches and demonstrations. Cyrus Vance, the leader of the delegation, [Check?] meets Pik Botha, Minister of Foreign Affairs, where he voices concern over political prisoners and asks for their release. Botha responds by linking the issue to the question of a general amnesty, the abandonment of armed struggle, MK's arms caches and ANC underground units.

31 August–2 September 1992
The ANC's National Working Committee chooses its Secretary General as a channel of communication between itself and the regime. This "channel" of communication replaces the official bilateral meetings and is meant to enable the continuance of necessary communication between the ANC and the regime.

26 September 1992
A "Record of Understanding" is agreed to at a summit between the regime and the ANC. This Record of Understanding deals with agreements relating to the constitutional assembly, interim government, political prisoners, problematic hostels, dangerous weapons and mass action.

29 September 1992
A number of protesters opposing the government of the Ciskei are massacred when soldiers open fire at Bisho.

23, 25 November 1992
The ANC and the regime come to an agreement to resume bilateral negotiations. In this regard, the ANC embarks on a series of meetings with various parties — the Tripartite Alliance, the Patriotic Front, the DP and the Afrikaner Volksunie (AVU). The ANC's National Executive Committee adopts a position paper on strategic perspectives, which signals the party's willingness to make compromises.

5 December 1992
The parties hold "bosberaads" (secluded meetings). The first of a two-part bilateral is held between the ANC and the regime. The first part deals with matters relating to security and violence, and the second part with those relating to elections, media, regional and local governments, the TBVC states and the transitional constitution. The second part of the bilateral with the regime takes place between 20 January and 4 February 1993. The discussions are divided into two parts. It is agreed to propose to the principals that a multi-party negotiation planning conference be held in March, aimed at planning the resumption of multilateral negotiations.

4–5 March 1993
The Negotiations Planning Conference is held, in which twenty six parties, administrations, organisations and traditional leaders attend. A resolution calling for the resumption of the negotiations is adopted. It is agreed that a multi-party negotiating forum will take place on 1 and 2 April 1993, aimed at charting the path of the multi-party negotiations.

1 April 1993
The multi-party negotiating forum, comprising twenty six participants, including the PAC, the CP and AVU, meet to define the issues to be dealt with at the Multi-Party Negotiations Process. Its success is reflected in the fact that it is able to complete two days of scheduled work in one.

10 April 1993
Chris Hani, an ANC leader, is assassinated, which creates tensions nation-wide.

22 April 1993
The Tripartite Alliance meets and resolves to make the following demands: that there be an immediate announcement of an election date; that the Transitional Executive Council (TEC) be installed as a matter of urgency; and that all armed formations be placed under immediate joined multiparty control. The ANC also calls for the negotiations to be speeded up.

30 April 1993
Technical Committees are formed: the report of the Planning Committee contains proposals on violence, the Independent Electoral Commission, state and statutorily controlled media, repressive and discriminatory legislation and the TEC and its sub-councils. The Negotiating Council resolves to establish six Technical Committees to consider the various issues. The Technical Committees are composed of six people each, none of whom are representative of any political organisations or parties. This marks a change from the style of negotiations at CODESA.

May 1993
The IFP walks out of the Multi-Party Negotiations Process after challenging the principle of sufficient consensus.

1 June 1993
The Negotiating Council agrees that sufficient progress has been made to enable it to agree to 27 April 1994 as the date for South Africa's first non-racial elections. It instructs the Technical Committee on Constitutional Matters to draft a transitional constitution that will lead to the drafting and adoption of a final, democratic constitution by an elected Democratic Assembly.

23 June 1993
A Summit between Mandela and Buthelezi takes place after several months of preparation. A joint undertaking to pave the way for free political activity, joint rallies, agreement on the strengthening of the National Peace Accord, and greater liaison between the ANC and the IFP in negotiations arises from this meeting.

2 July 1993
The Negotiating Forum meets at last, vindicating the calls made in the Harare Declaration. Agreement is reached at this meeting on the following steps towards a new constitution: (1) the Multi-Party Negotiating Process (MPNP) shall adopt constitutional principles providing for both strong regional government; (2) these constitutional principles shall be binding on the constituent assembly and shall be justifiable by a constitutional court; (3) a commission on Delimitation/Demarcation will make recommendations on regional boundaries for the purposes of elections and regional government during the transitional period; (4) the MPNP shall agree on legislation to make provision for the levelling of the playing field and promoting conditions conducive to the holding free and fair elections; (5) the MPNP shall agree on details of discriminatory legislation to be repealed; (6) the MPNP shall agree on a transitional constitution (i.e. a Transition to Democracy Act).

26 July 1993
The Technical Committee on Constitutional Matters produces its draft outline of a transitional constitution for discussion by the Negotiating Council.

31 July 1993
The Commission for Delimitation of Regions tables its report for forthcoming discussion in the Negotiating Council in August. This report contains various criteria on the basis of which it recommends nine regions for South Africa.

25 August 1993
The Technical Committee dealing with the TEC Draft Bill tables its eleventh working draft for discussion in the Negotiating Council.

25–28 October 1993
In a bilateral between the ANC and the regime to finalize agreements on the interim constitution, agreement is reached on a Government of National Unity, a provision agreeing to the two deputy presidents, the required percentage to elect a deputy president, and the right of opposition parties to membership in the cabinet. The regime abandons its claim to a veto over decisions of cabinet.

16 November 1993
Agreement is reached on the final issues required to complete the interim constitution in a last minute bilateral between Mandela and De Klerk. (The agreements reached come to be known as the "six pack" agreement.)

18 November 1993
The ratification of the Interim Constitution by the plenary of the MPNP comes in the early hours of the morning of 18 November 1993.

January 1994
The Transitional Executive Council (TEC) is established.

1 March 1994
The ANC agrees to international mediation with the IFP. This agreement is reached with Mandela and Buthelezi on condition that the latter agrees to provisionally register the IFP for the elections. However, before the international mediation can begin, disagreement wrecks the initiative.

March 1994
Ciskei and Bophuthatswana collapse under the pressure of internal discontent and are reincorporated into South Africa.

April 1994
The IFP returns to participate in national elections. A trilateral between the government, the ANC and Afrikaner right wing parties is held to address the latter's demands for Afrikaner self-determination.

27–18 April 1994
South Africa's first non-racial democratic election takes place.

9 May 1994
The Constitutional Assembly, made up of 490 elected members, is established.

June 1994
The Constitutional Committee, which becomes the premier multi-party negotiating body in the Constitutional Assembly, is established.

September 1994
Six theme committees are established to receive and collate the views of all parties on the substance of the constitution.

January 1995
An advertising campaign inviting public views on the constitution is launched.

November 1995
The first refined working draft of the constitution is published, which provides the public with a first glimpse of what the complete text will look like.

15 February 1996
Sixty eight outstanding issues require settlement before the constitution is completed.

20 March 1996
Concern about completing the constitution on time mounts. The fourth edition of the working draft is produced, and many issues remain unresolved. It is uncertain whether the Constitutional Assembly will be able to complete its work by 8 May 1996, its deadline.

1–3 April 1996
The Arniston Multilateral is held, which turns out to be vital in ensuring that parties resolve their differ-ences without the glare of the media, and is extremely successful.

16 April 1996
The Channel Bilateral is held between Cyril Ramaphosa and Roelf Meyer reinstated to find solutions to differences between the ANC and NP.

22 April 1996
Several issues remain deadlocked and require agreement: the death penalty, the lockout clause, the property clause, the appointment of judges and the Attorney General, language, local government, the question of proportional representation, and the bar against members of parliament crossing the floor.

23 April 1996
The Draft Constitution is tabled. The plenary debate to finalise the constitution begins without key outstanding issues being resolved.

25 April 1996
Negotiators table 298 amendments to the final draft text. However, most amendments are of a technical rather than substantial nature.

8 May 1996
The final text of the constitution is adopted.

1 July
The Constitutional Court's hearing on certification of the constitution begins.

6 September 1996
The Constitutional Court refuses to certify the text, finding that the text does not comply with the required constitutional principles in eight respects.

11 October 1996
The amended text of the constitution is adopted by the Constitutional Assembly and tabled with the Constitutional Court.

18 November 1996
The Constitutional Court's second hearing on certification begins.

4 December 1996
The Constitutional Court certifies the final text of the constitution.

10 December 1996
The state president, Nelson Mandela, signs the final Constitution into law in Sharpeville, Vereeniging. This day also marks International Human Rights Day. The Constitution is to come into effect on 4 February 1997.

17-21 March 1997
This week is named National Constitution week. More than seven million copies of the Constitution are distributed in all eleven languages in a national campaign, which culminates in activities on 21 March 1997, South Africa's National Human Rights Day.

30 April 1997
The Constitutional Assembly closes its administration after accounting for all monies spent.

The Constitutional Principles

[Schedule 4 amended by s. 13 of Act 2 of 1994 and by s. 2 of Act 3 of 1994.]

I
The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II
Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

III
The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV
The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

V
The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

VI
There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

VII
The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

VIII
There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

IX
Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

X
Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

XI
The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XII
Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII
1. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.
2. Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.
[Constitutional Principle XIII substituted by s. 2 of Act 3 of 1994.]

XIV
Provision shall be made for participation of minority

political parties in the legislative process in a manner consistent with democracy.

XV
Amendments to the Constitution shall require special procedures involving special majorities.

XVI
Government shall be structured at national, provincial and local levels.

XVII
At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

XVIII
1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.
2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.
3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.
4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.
5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.
[Constitutional Principle XVIII substituted by s. 13 (a) of Act 2 of 1994.]

XIX
The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX
Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI
The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:
1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.
2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.
3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity — in particular in relation to other states — powers should be allocated to the national government.
4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.
5. The determination of national economic policies, and the power to promote inter-provincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.
6. Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia —
a. for the purposes of provincial planning and development and the rendering of services; and
b. in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.
7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.
8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII
The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII
In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

XXIV
A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

XXV
The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI
Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.

XXVII
A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

XXVIII
Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.

XXIX
The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

XXX
1. There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members or the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.
2. Every member of the public service shall be entitled to a fair pension.

XXXI
Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXXII
The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII
The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.

XXXIV
1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.
2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.
3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.

The DF Malan Accord

[illegible]

[Constitutional Principle XXXIV added by s. 13 (b) of Act 2 of 1994.]

1. The Working Group was established under paragraph 3 of the Pretoria Minute, which reads as follows:

"In the interest of moving as speedily as possible towards a negotiated peaceful political settlement and in the context of the agreements reached, the ANC announced that it was now suspending all armed actions with immediate effect. As a result of this, nor further armed actions and related activities by the ANC and its military wing, Umkhonto weSizwe will take place. It was agreed that a Working Group will be established to resolve all outstanding questions arising out of this decision to report by 15 September 1990. Both sides once more committed themselves to do everything in their power to bring about a peaceful solution as quickly as possible."

2. Having decided that it would not have been possible to submit a final report by the 15th September 1990, an interim report was brought out on 13 September 1990.

3. Since then a number of meetings have taken place. This report was finalised at a meeting on the 12th of February 1991.

4. With reference to the work "suspending" as used in paragraph 3 of the Pretoria Minute, the Working Group what was said in paragraph 4 of its Interim Report, namely that suspension occurred as a step in the process of finding peaceful solutions, with the presumption that the process would lead to the situation where there would be no return to armed action.

5. (a) Under the terms of suspension of "armed action" and "related activities" by the ANC, with specific reference also to Umkhonto weSizwe and its organised military groups and armed cadres, it was agreed that the following will not take place:

i. attacks by means of armaments, firearms, explosive or incendiary devices.
ii. infiltration of men and material
iii. creation of underground structures
iv. statements inciting violence
v. threats of armed action
vi. training inside South Africa

(b) The Working Group:

i. agreed that the democratic process implies and obliges all political parties and movements to participate in this process peacefully and without resort to the use of force; ii. therefore accepted the principle that in a democratic society no political party or movement should have a private army;
iii. noted that the ANC had, in good faith and as a contribution to the process of arriving at a peaceful settlement announced the suspension all armed actions and related activities, with the presumption that the process would lead to the situation where there would be no return to armed action;
iv. noted that by virtue of the fact that Umkhonto weSizwe is no longer an unlawful organisation, membership thereof is not in violation of any of the provisions of paragraph of the Pretoria Minute and the letter and spirit of the Pretoria Minute as a whole;
v. noted the historical fact that the ANC and Umkhonto weSizwe had placed arms and cadres within the country;
vi. agreed that in the context of paragraph 5(b) (ii), (iii) and (iv) above, it was vital that control over such cadres and arms be exercised to ensure that no armed actions or related activities occur;
vii. further agreed that in the context of paragraph 59b(ii), (iii) and (iv) above, a phased process be initiated in order to enable these cadres of the ANC to resume their normal lives and also facilitate and legalise control over the arms and the process to ensure such legality will immediately be taken further by the Working Group;
viii. agreed that where applicable, individual weapons shall be licenced in terms of existing legislation;
ix. further agreed that the security forces take cognisance of the suspension of armed action and related activities and that the parties hereto will remain in close liaison with one another according to the procedure prescribed in 6 (a) of this document with a view to ensuring prompt and efficient reporting, investigation and redressing, where applicable, of all allegations of unlawful activities or activities contrary to the spirit of this agreement, by the security forces.

(c) The Working Group:

i. agreed that the population at large has a right to express its views through peaceful demonstrations;
ii. further agreed that it is urgent and imperative that violence and intimidation from whatever quarter accompanying mass action should be eliminated;
iii. further agreed that peaceful political activities and stability must be promoted;
iv. further agreed that it this end joint efforts should be made to implement the intentions contained in paragraphs 5 of the Groote Schuur and the Pretoria Minutes to ensure that grievances and conflict-creating situations are timeously addressed.

6. (a) The Working Group agreed that designated members of the ANC would work with government representatives in a Liaison Committee to implement this agreement, and that the existing nominated SAP and ANC liaison officials appointed in accordance with paragraph 5 of the Groote Schuur Minute shall serve as supporting structure of the Liaison Committee.

(b) It is agreed that this agreement will be implemented forthwith and its objectives attained as speedily as possible.

(c) It is further agreed that in view of the above the process of attaining the objectives contained in paragraph 2 of the Pretoria Minute will be realised according to the procedures contained in that minute.

7. It is understood that nothing in or omitted from the agreement will be construed as invalidating or suspending the provisions of any law applicable in South Africa.

8. It is recommended that this Working Group be continued to supervise the implementation of this agreement relating to paragraph 3 and the activities of the Liaison Committee and to give attention to further matters that may arise from the implementation of this agreement, such as proposed defence units.

The National Peace Accord

[Note: Only Chapters 1 and 2 are reproduced here]

To signify our common purpose to bring an end to political violence in our country and to set out the codes of conduct, procedures and mechanisms to achieve this goal
We, participants in the political process in South Africa, representing the political parties and organisations and governments indicated beneath our signatures, condemn the scourge of political violence which has afflicted our country and all such practices as have contributed to such violence in the past, and commit ourselves and the parties, organisations and governments we represent to this National Peace Accord.

The current prevalence of political violence in the country has already caused untold hardship, disruption and loss of life and property in our country. It now jeopardises the very process of peaceful political transformation and threatens to leave a legacy of insurmountable division and deep bitterness in our country. Many, probably millions, of citizens live in continuous fear as a result of the climate of violence. This dehumanising factor must be eliminated from our society.

In order to achieve some measure of stability and to consolidate the peace process, a priority shall be the introduction of reconstruction actions aimed at addressing the worst effects of political violence at a local level. This would achieve a measure of stability based on common effort thereby facilitating a base for broader socio-economic development.

Reconstruction and developmental actions of the communities as referred to above, shall be conducted within the wider context of socio-economic development.

In order to effectively eradicate intimidation and violence, mechanisms need to be created which shall on the one hand deal with the investigation of incidents and the causes of violence and intimidation and on the other hand actively combat the occurrence of violence and intimidation.

The police force, which by definition shall include the police forces of all self-governing territories, has a central role to play in terminating the violence and in preventing the future perpetration of such violence. However, the perception of the past role of the police has engendered suspicion and distrust between the police and many of the affected communities. In recognition of the need to promote more effective policing, a commitment to sound policing practices and a co-operative relationship between the police and the communities are necessary.

This Accord is intended to promote peace and prosperity in violence-stricken communities. The right of all people to live in peace and harmony will be promoted by the implementation of this Accord.

The Accord is of such a nature that every peace-loving person can support it. The Accord reflects the values of all key players in the arena of negotiation and reconciliation.

The implementation and monitoring of the Peace Accord represents a crucial phase in the process to restore peace and prosperity to all the people of South Africa.

Noting that the majority of South Africans are God-fearing citizens, we ask for His blessing, care and protection upon our Nation to fulfil the trust placed upon us to ensure freedom and security for all.

Bearing in mind the values which we hold, be these religious or humanitarian, we pledge ourselves with integrity of purpose to make this land a prosperous one where we can all live, work and play together in peace and harmony.

The signatories have agreed upon;

- a Code of Conduct for political parties and organisations to be followed by all the political parties and organisations that are signatories to this Accord;
- a Code of Conduct to be adhered to by every police official
- to the best of his or her ability, as well as a detailed agreement on the security forces;
- the guidelines for the reconstruction and development of the communities;
- the establishment of mechanisms to implement the provisions of this Accord.

The signatories acknowledge that the provisions of this Peace Accord are subject to existing laws, rules and procedures and budgetary constraints. New structures should not be created where appropriate existing structures can be used.

This Accord will not be construed so as to detract from the validity of bilateral agreements between any of the signatories.

We, the signatories, accordingly solemnly bind ourselves to this accord and shall ensure as far as humanly possible that all our members and supporters will comply with the provisions of this accord and will respects its underlying rights and values and we, the government signatories, undertake to pursue the objectives of this accord and seek to give effect to its provisions by way of the legislative, executive and budgeting procedures to which we have access.

Chapter 1: Principles

1.1 The establishment of a multi-party democracy in South Africa is our common goal. Democracy is impossible in a climate of violence, intimidation and fear. In order to ensure democratic political activity all political participants must recognise and uphold certain fundamental rights described below and the corresponding responsibilities underlying those rights.

1.2 These fundamental rights include the right of every individual to:

- freedom of conscience and belief;
- freedom of speech and expression;
- freedom of association with others;
- peaceful assembly;
- freedom of movement;
- participate freely in peaceful political activity.

1.3 The fundamental rights and responsibilities derive from established democratic principles namely:

- democratic sovereignty derives from the people, whose right it is to elect their government and hold it accountable at the polls for its conduct of their affairs;
- the citizens must therefore be informed and aware that political parties and the media must be free to impart information and opinion;
- there should be an active civil
- society with different interest groups freely participating therein;
- political parties and organisations, as well as political leaders and other citizens, have an obligation to refrain from incitement to violence and hatred.

1.4 The process of reconstruction and socio-economic development aimed at addressing the causes of violent conflict, must be conducted in a non-partisan manner, that is, without being controlled by any political organisation or being to the advantage of any political group at the expense of another.

1.5 Reconstruction and developmental projects must actively involve the affected communities. Through a process of inclusive negotiations involving recipients, experts and donors, the community must be able to conceive; implement and take responsibility for projects in a co-ordinated way as close to the grassroots as possible. In addition, reconstruction and development must facilitate the development of the economic and human resources of the communities concerned.

1.6 The initiatives referred to in 1.4 and 1.5 above, should in no way abrogate the right and duty of governments to continue their normal developmental activity, except that in doing so they should be sensitive to the spirit and contents of any agreement that may be reached in terms of 1.5 above.

1.7 The parties to this process commit themselves to facilitating the rapid removal of political, legislative and administrative obstacles to development and economic growth.

1.8 The implementation of a system to combat violence and intimidation will only succeed if the parties involved have a sincere commitment to reach this objective. Only then will all the people of South Africa be able to fulfil their potential and create a better future.

1.9 It is clear that violence and intimidation declines when it is investigated and when the background and reasons for it is (sic) exposed and given media attention. There is, therefore, need for an effective instrument to do just that. It is agreed that the Commission established by the Prevention of Public Violence and Intimidation Act, 1991, be used as an instrument to investigate and expose the background and reasons for violence, thereby reducing the incidence of violence and intimidation.

1.10 Since insufficient instruments exist to actively prevent violence and intimidation and regional and local levels, it is agreed that committees be appointed at regional and local levels to assist in this regard. Peace bodies are therefore to be established at both regional and local levels to be styled "Regional Dispute Resolution Committees" (RDRC) and "Local Dispute Resolution Committees" (LDRC) respectively. These bodies will be guided and co-ordinated at a national level by a National Peace Secretariat. At the local level the bodies will be assisted by Justices of the Peace.

1.11 The Preparatory Committee has played a crucial role in the process of bringing the major actors together to negotiate a Peace Accord. There is still much to be done to implement the Accord and establish the institutions of peace. To assist in this regard, a National Peace Committee shall be established.

1.12 There should be simple and expeditious procedures for the resolution of disputes regarding transgressions of the Code for Political Parties and Organisation by political parties and organisations who are signatories to the National Peace Accord. These disputes should wherever possible, be settled at grassroots level, through participation of the parties themselves; and by using the proven methods

of mediation, arbitration and adjudication.

1.13 An effective and credible criminal judicial system requires the swift and just dispensation of justice. This in turn will promote the restoration of peace and prosperity to communities, freeing them of the ravages of violence and intimidation. Special attention should be given to unrest related cases by setting up Special Criminal Courts specifically for this purpose.

Chapter 2: Code of Conduct for political parties and organisations

The signatories to this Accord agree to the following Code of Conduct:

2.1 We recognise the essential role played by political parties and organisations as mediators in a democratic political process, permitting the expression, aggregation and reconciliation of different views and interests, and facilitating the translation of the outcome of this process into law and public policy, and respect the activities of political parties and organisations in organising their respective structures, canvassing for support, arranging and conducting public meetings, and encouraging voting.

2.2 All political parties and organisations shall actively contribute to the creation of a climate of democratic tolerance by:

- publicly and repeatedly condemning political violence and encouraging among their followers an understanding of the importance of democratic pluralism and a culture of political tolerance; and
- acting positively, also vis-a-vis all public authorities including local and traditional authorities, to support the right of all political parties and organisations to have reasonable freedom of access to their members, supporters and other persons in rural and urban areas, whether they be housed on public or private property.

2.3 No political party or organisation or any official or representative of any such party, shall:

- kill, injure, apply violence to, intimidate or threaten any other person in connection with that person's political beliefs, words, writings or actions;
- remove, disfigure, destroy, plagiarise or otherwise misrepresent any symbol or other material of any other political party or organisation;
- interfere with, obstruct or threaten any other person or group travelling to or from or intending to attend, any gathering for political purposes;
- seek to compel, by force or threat of force, any person to join any party or organisation, attend any meeting, make any contribution, resign from any
- post or office, boycott any occasion or commercial activity or withhold his or her labour or fail to perform a lawful obligation; or
- obstruct or interfere with any official or representative of any other political party or organisation's message to contact or address any group of people.

2.4 All political parties and organisations shall respect and give effect to the obligation to refrain from incitement to violence and hatred. In pursuit hereof no language calculated or likely to incite violence or hatred, including that directed against any political party or personality, nor any wilfully false allegation, shall be used at any political meeting, nor shall pamphlets, posters or other written material containing such language be prepared or circulated, either in the name of any party, or anonymously.

2.5 All political parties and organisations shall:

- ensure that the appropriate authorities are properly informed of the date, place, duration and where applicable, routing of each public meeting, rally, march or other event organised by the party or organisation;
- take into account local sentiment and foreseeable consequences, as well as any other meetings already arranged on the same date in close proximity to the planned event, provided that this shall not detract from the right of any political party or organisation freely to propagate its political views; and
- immediately and at all times, establish and keep current effective lines of communication between one another at national, regional and local levels, by ensuring a reciprocal exchange of the correct names, addresses and contact numbers of key leaders at each level, and by appointing liaison personnel in each location to deal with any problems which may arise.

2.6 All political parties and organisations shall provide full assistance and co-operation to the police in the investigation of violence and the apprehension of individuals involved. The signatories to this Accord specifically undertake not to protect or harbour their members and supporters to prevent them from being subjected to the processes of justice.

The Record of Understanding

Meeting Between the State President of the Republic of South Africa and the President of the African National Congress Held at the World Trade Centre on 26 September 1992

1. The attached Record of Understanding was agreed to

2. On the way forward —

- The two delegations agreed that this summit has laid a basis for the resumption of the negotiation process.
- To this end the ANC delegation advised the South African Government that it would recommend to its National Executive Committee that the process of negotiation be resumed, whereafter extensive bilateral discussions will be held.
- It was agreed that the practicalities with regard to bilateral discussions will be dealt with through the existing channel.

1. Since 21 August 1992 a series of meetings was held between Mr Roelf Meyer, Minister of Constitutional Development and Mr Cyril Ramaphosa, Secretary General of the African National Congress.

These meetings entailed discussions with a view to remove obstacles towards the resumption of negotiations and focused on the identification of steps to be taken to address issues raised in earlier memoranda. The discussions took note of various opposing viewpoints on the relevant issues and obstacles. It was decided that these issues should not be dealt with exhaustively in the understanding. This document reflects the understanding reached at the conclusion of the discussions regarding these obstacles and issues.

2. The understandings on issues and obstacles included the following, although it was observed that there are still other important matters that will receive attention during the process of negotiation:

(a) The Government and the ANC agreed that there is a need for a democratic constitution assembly/ constitution-making body and that for such a body to be democratic it must:

- be democratically elected;
- draft and adopt the new constitution, implying that it should sit as a single chamber;
- be bound only by agreed constitutional principles;
- have a fixed time frame;
- have adequate deadlock breaking mechanisms;
- function democratically i.e. arrive at its decisions democratically with certain agreed to majorities; and
- be elected within an agreed predetermined time period.

Within the framework of these principles, detail would have to be worked out in the negotiation process.

(b) The Government and the ANC agreed that during the interim/transitional period there shall be constitutional continuity and so constitutional hiatus. In consideration of this principle, it was further agreed that:

- the constitution-making body/constituent assembly shall also act as the interim / transitional Parliament;
- there shall be an interim/transitional government of national unity.
- the constitution-making body/constituent assembly cum interim/transitional Parliament and the interim/ transitional government of national unity shall function within a constitutional framework/transitional constitution which shall provide for national and regional government during the period of transition and shall incorporate guaranteed justiciable fundamental rights and freedoms. The interim/transitional Parliament may function as a one-or two-chambered body.

(c) The two parties are agreed that all prisoners whose imprisonment is related to political conflict of the past and whose release can make a contribution to reconciliation should be released.

The Government and the ANC agreed that the release of prisoners, namely, those who according to the ANC fall within the guidelines defining political offences, but according to the Government do not, and who have committed offences with a political motive on or before 8 October 1990 shall be carried out in stages *(as reflected in a separate document: IMPLEMENTATION PROGRAMME: RELEASE OF PRISONERS)* and be completed before 15 November 1992. To this end the parties have commenced a process of identification. It is the Government's position that all who have committed similar offences but who have not been charged and sentenced should be dealt with on the same basis. On this question no understanding could be reached as yet and it was agreed that the matter will receive further attention.

As the process of identification proceeds, releases shall be effected in the above-mentioned staged manner. Should it

be found that the current executive powers of the State do not enable it to give effect to specific releases arising from the above identification the necessary legislation shall be enacted.

(d) The Goldstone Commission has given further attention to hostels and brought out an urgent report on certain matters and developments on this regard. The commission indicated that the problem is one of criminality and that it will have to investigate which localities are affected.

In the meantime some problematic hostels have been identified and the Government has undertaken as a matter of urgency to address and deal with the problem in relation to those hostels that have been associated with violence. Further measures will be taken, including fencing and policing to prevent criminality by hostel dwellers and to protect hostel dwellers against external aggression. A separate document (Implementation Programme: Hostels) records the identification of such hostels and the security measures to be taken in these instances.

Progress will be reported to the Goldstone Commission and the National Peace Secretariat. United Nations observers may witness the progress in co-operation with the Goldstone Commission and the National Peace Secretariat.

(e) In the present volatile atmosphere of violence the public display and carrying of dangerous weapons provokes further tension and should be prohibited. The Government has informed the ANC that it will issue a proclamation within weeks to prohibit countrywide the carrying and display of dangerous weapons at all public occasions subject to exemptions base on guidelines being prepared by the Goldstone Commission. The granting of exemptions shall be entrusted to one or more retired judges. On this basis, the terms of the proclamation and mechanism for exemption shall be prepared with the assistance of the Goldstone Commission.

(f) The Government acknowledges the right of all parties and organisations to participate in peaceful mass action in accordance with the provisions of the National Peace Accord and the Goldstone Commission's recommendations. The ANC for its part reaffirms its commitment to the provisions of the Code of Conduct for Political Parties arrived at under the National Peace Accord and the agreement reached on 16 July 1992 under the auspices of the Goldstone Commission as important instruments to ensure democratic political activity in a climate of free political participation. The two parties also commit themselves to the strengthening of the Peace Accord process, to do everything in their power to calm down tensions and to finding ways and means of promoting reconciliation in South Africa. In view of the progress made in this summit and the progress we are likely to make when negotiations are resumed, the ANC expresses its intention to consult its constituency on a basis of urgency with a view to examine the current programme of mass action.

3. The two parties agreed to hold further meetings in order to address and finalise the following matters which were not completed at the summit:

- Climate of free political activity.
- Repressive/security legislation.
- Covert operations and special forces.
- Violence.

Agreed to at Johannesburg on 26 September 1992:

F. W. de Klerk State President	N. R. Mandela President: ANC

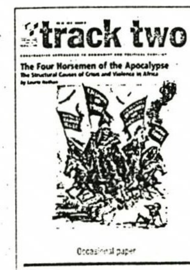
Funding for *Track Two*

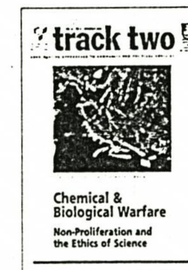
Feedback from our readers tell us that *Track Two* is a valuable resource for peacemakers, conflict resolution practitioners, students and various other individuals and organisations in Africa and elsewhere. CCR makes every attempt to keep the purchase price low for our subscribers and to distribute free to readers who cannot afford to pay as part of our public education goal.

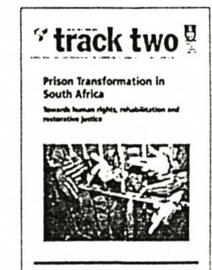
However, publication and distribution of *Track Two* is a costly undertaking. We are therefore appealing to our readers, organisations and funding institutes to contribute towards the publishing costs of *Track Two*.

We will acknowledge your contribution in *Track Two* and CCR's Annual Report.

Please contact the Editor should you wish to provide funding in this regard at: mail@[illegible]







Occasional Paper #3
July 1998

The Politics of Accommodation: Constitution-Making in South Africa

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A Lecture by Justice Albie Sachs

National Democratic Institute for International Affairs
Luanda, Angola

FOREWARD

The Politics of Accommodation: Constitution-Making in South Africa

" War is an enemy of Constitutionality." This was the opening statement of Professor Albie Sachs when he addressed a vast audience of over 200 parliamentarians, civil society leaders, human rights activists, and politicians of all political persuasions. July 8, 1998 in Luanda at the National Assembly was a day of hope.

"From the People's Power to People's Rights" Sachs' personal experience as a freedom fighter, human rights activist, and, as of late, a constitutional court justice in the New South Africa, offered the participants of the seminar a vibrant dialogue about the rocky road toward democracy and reconciliation.

In Angola, Sachs described the history of the Anti-Bill of Rights Commission and its evolution, the arduous negotiations which led to the birth of the 1996 Constitution, the advent of the Truth and Reconciliation Commission, and much more. Sachs presented the South African process as a successful but difficult example of democratisation and nation-building. His advice was that there are no recipes for political processes; Angola must pursue its own avenues to reach final and lasting consensus.

A consensus based upon a new Constitution crafted in the principles of respect for human rights and minorities; a legitimate Constitution capable of transforming the living conditions of the Angolans and making true the ideals of justice, equality, and freedom for which so many people have dedicated their lives.

As Sachs' message conveyed, just as life is too important to be left solely in the hands of the doctors, the future of a country, its hopes and expectations, is too important to be left in the hands of the politicians. Only through the active participation of the people, will the people have the opportunity to be the masters of their own destiny.

Professor Sachs shared with the audience a way to overcome decades of conflict. However, he noted that it should be an Angolan way. No one else but the Angolans will be able to find a solution to their problems.

Sachs' seminar was warmly received. His comments were enlightened, his criticism constructive. Despite all of the difficulties of the past, he remained, on-balance, optimistic about the future and the constitutional prospects of Angola.

The Angolan constitutional process is, once again, another opportunity to win the battle of civilisation versus barbarism, of compassion over violence; it is a fight to ensure that the rule-of-law prevails against brute force.

Yes, war is an enemy of the constitutionality, the ultimate negation of human rights, and an utter defeat of human kind's intelligence. Against these perils exist patience, tolerance, inclusiveness, transparency, optimism, even political naiveté.

Professor Sachs is an Ambassador of Peace and Human Dignity; a believer during a time of uncertainty. NDI is proud to have had a man of his ethical and professional stature in Luanda to support our democracy program in Angola.

Biography

Justice Albie Sachs has a legal background, working extensively in the civil rights sphere until he was himself twice detained without trial by the Security Police.

He went into exile in England where he pursued an academic career within various faculties of law around the country. After relocating to Maputo, Mozambique, he took up the post of Professor of Law at Eduardo Mondlane University and then served as Director of Research in the Ministry of Justice. After nearly being killed by a car bomb in 1988 he returned to England. Sachs then assumed the position of Professor of Law in the Department of International Affairs at Columbia University in New York.

He went on to become the founding Director of the South African Constitution Studies Centre at the University of London. In 1992 the Centre moved to the University of the Western Cape and he returned to South Africa.

He took an active part in the negotiations for a new Constitution as a member of the Constitutional Committee of the ANC and of the National Executive of that organization.

Justice Sachs currently serves as a Judge of the Constitutional Court of South Africa.