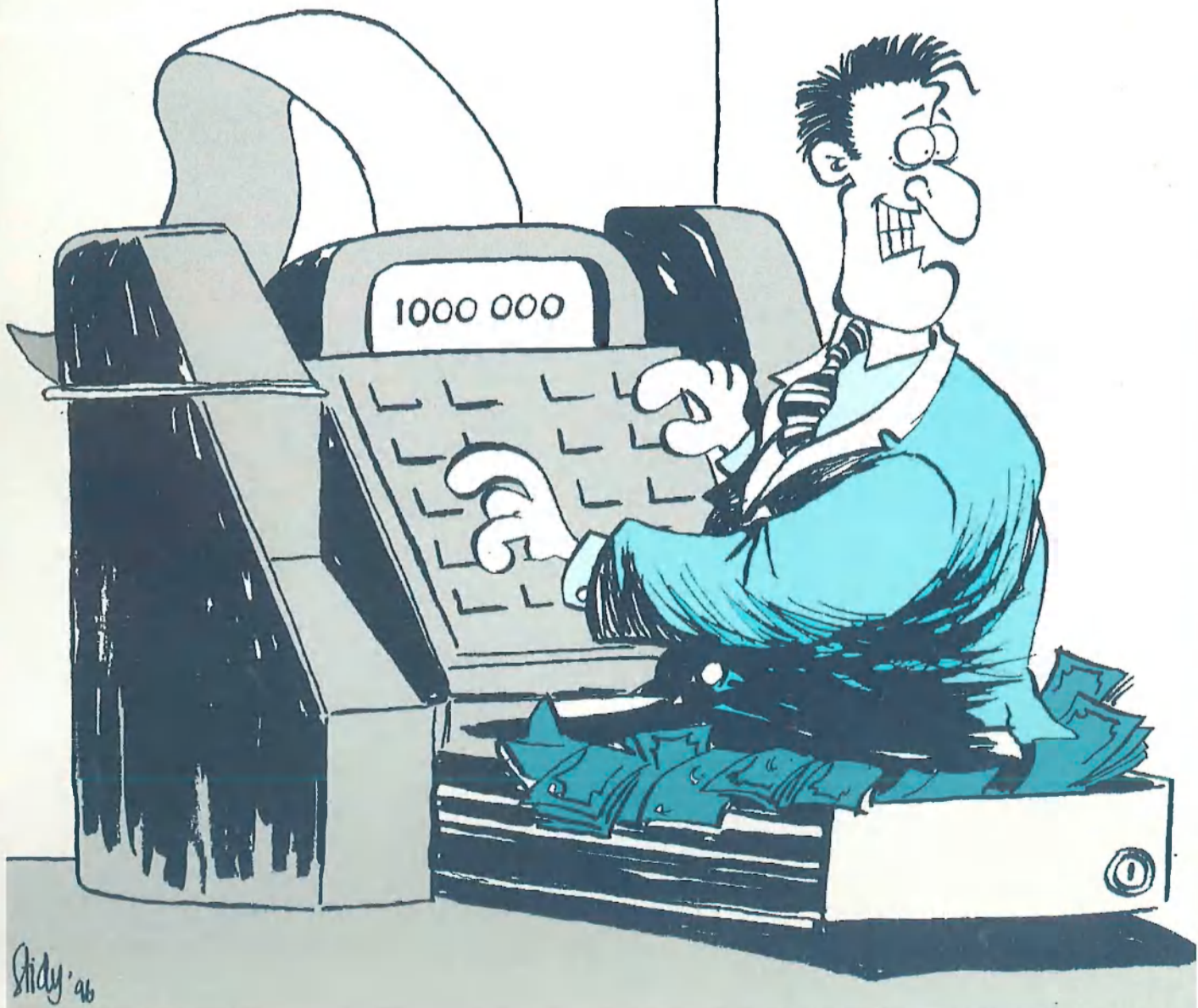


**INDICATOR**  
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# CRIME AND Conflict

## White Collar Crime



## EDITORIAL

The Truth and Reconciliation Commission recently began its long-awaited task. Some reactions to the hearings are worth considering, since they reflect the status quo of South Africa's criminal justice system.

Aimed at victims of violence, the Truth Commission's focus has important lessons for those who must address weaknesses in our criminal justice process. Victims of violence, whether political or criminal, have received too little attention in the past from the security forces, the courts and social support services. In a climate when crime is rampant and resources scarce, the police and courts may be expected to concentrate their energies on apprehending and convicting perpetrators.

But, as Naudé points out in this issue, mobilising around victims may prove one of the most effective ways of combating crime. Victims' participation in the court process not only gives them the opportunity to be heard, but assists in meting out more appropriate sentences. The criminal justice process also gains credibility and thereby greater effectiveness, if victims have faith in the system. Although the Truth Commission is not about justice, the focus on victims is important in the current context.

Witness protection programmes also create an environment in which victims and others, feel secure enough to testify in court. Newham and Van Zyl discuss why these programmes will be central for the Truth Commission. The massacre in KwaZulu-Natal on Christmas Day last year, analysed by Minnaar and Pretorius in this issue, precipitated the creation of a long overdue witness protection programme in this troubled region.

The question of justice has also been raised since the Truth Commission started. The families of some victims reject the process and the granting of amnesty to the guilty, demanding instead that justice be allowed to run its course. The sad and often gruesome testimonies of victims make it hard to imagine that some are willing to forgive their torturers at all.

This reminds how urgently the justice system needs addressing, like the shockingly low conviction rates, which Glanz analyses in this issue. In his article, Cowling unravels problems with bail, while Powell tackles the parole system which allows sentences handed down by judges and magistrates to be overruled by the Commissioner of Correctional Services.

Antoinette Louw  
Crime and Conflict editor

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# Suite vs Street

## Combating white-collar crime

**Lala Camerer**  
**Crime Policy Project**  
**Institute for Defence Policy**

*In one of the most comprehensive accounts of white-collar crime and associated problems of policing and prosecution, Camerer recommends increasing the visibility of fraud, enhancing inter-agency cooperation, and improving the capacity of policing agencies and the courts.*

**V**iolent crime in South Africa has reached unprecedented levels, but the business community agree that white-collar crime has also increased. This concern is evidenced by a number of recent conferences on commercial crime facilitated by organised business and the South African Police Service (SAPS).

Police Commissioner Fivaz's declaration of 'serious economic offences' as a priority crime is also significant since the seriousness (or not) with which certain crimes are regarded is reflected in the resources which the state allocates to policing them.

Understandably, more attention is focused on street crimes than on suite crimes, since the former are more visible. However, by failing to focus resources on hidden areas of criminality, corrupt characters of all kinds are flourishing.

These crimes must be addressed since they may cause more harm in moral terms to a society's social fabric than the financial or physical costs of these and other crimes. It is partly through ignorance of white-collar crimes that mobilisation around these issues has not occurred. Also, until

recently, local social movements were directed at opposing Apartheid.

Through research and the media, the public can become aware of these hidden forms of criminality.

### Defining white-collar crime

Very real definitional problems exist with regards to white-collar crime. These crimes can take the form of consumer frauds, tax swindles, insider trading, securities violations, bribery and kickback schemes in government contracts, computer fraud, or corporate crimes such as health and safety at work offences.

Edwin Sutherland, an American sociologist, first coined the phrase 'white-collar crime' in 1939. He defined this crime as one committed by a person of respectability and high social status in the course of his occupation (Sutherland 1940).

Sutherland highlighted the fact that explanatory theories citing poverty and unemployment as primary causes of crime failed to account for the white-collar crimes committed daily within business and government.

He called for equal attention to be given to crimes of the powerful as that given to the common offender.

Sutherland's definition was criticised for not devoting more attention to violent white-collar crimes and for failing to distinguish between corporate and individual offenders.

This distinction is important for it emphasises that not only individuals defraud a company for personal gain, but that the business itself may be the perpetrator of a crime. White-collar crimes may be committed both against and by, among or within institutions.

White-collar crime can tentatively be defined as a violation – violent or non-violent – of the law, for financial gain, committed by means of deception and concealment, by a person or group of persons irrespective of occupational status, by utilising special skills and opportunities.

### Motives and opportunities

It is useful to examine how white-collar crime differs from traditional offences. In terms of their impact and *modus operandi*, it has been argued that white-collar crimes are costlier and affect more individuals. They also rely on concealment rather than force and violence.

All criminal behaviour requires both a motive and opportunity which must coincide before a crime can occur.

Regarding motive, it is difficult to understand why trusted and well paid employees would jeopardise their position by stealing from their employers.

While primary motivations may include the desire for financial gain, others are greed, financial difficulties, low loyalty, revenge and boredom (KPMG 1995). In South Africa the desire to protect what one already has, bodes ill for the future of such crimes.

Unlike mugging, white-collar crimes such as commercial fraud are not equal opportunity crimes. Rather, the opportunity to commit various types of white-collar crimes is unevenly distributed according to the occupational structure.

Pilferage for example, may be common among certain employees, whereas price-fixing and insider trading may occur at different levels in a company. These crimes are related to the degree of trust placed in those holding different positions.

Therefore, to the extent that there is class, gender, ethnic or religious discrimination in certain roles, the opportunities for certain crimes are correspondingly restricted (Levi 1987). It is not by their innately superior morality that there are so few female or black management fraudsters in Britain, the United States, or South Africa.

Added to motives and opportunity, 'techniques of neutralisation' enable individuals to violate important ethical standards, while neutralising any definition of themselves as criminal (Sykes and Matza 1989). Theft may thus be justified as 'borrowing', or criminal activities defined so as to make them appear routine and necessary.

Offenders justify their criminal behaviour claiming that the law itself is unjust, or that it does not harm anyone and is not therefore criminal. Another common claim is that 'everyone is doing it', for example, cheating on tax returns.

### **South African problems**

In South Africa motives and opportunities have been exacerbated by historical circumstance. The 'sanctions busting mentality' stimulated

legitimate businesses to seek alternative – albeit illegal systems – for achieving profits. These habits, shrouded in secrecy, die hard and resulted in a lack of transparency advantageous to criminality.

Also, the recently scrapped dual financial system encouraged roundtripping – sending funds out of South Africa in commercial Rand, bringing them back through the financial unit, and making a profit on the discount between the two (*Financial Mail*, 17 December 1993). This practice lost the country billions.

Tax evasion is another example – on average R17 000 billion is lost a year – where this proved a rational response towards a government which the majority of citizens regarded as illegitimate (Kluever 1995).

This background, combined with increased opportunities, a 'get rich quick' social ethos, tolerance of expenses fiddles and observation of large scale malpractice escaping unpunished, has contributed to the expansion of fraudulent activities in the economy (Levi 1987).

### **Problems recording fraud**

Recording fraud and forgery often requires difficult judgements as to what constitutes one offence, since cases may involve many instances of deception and forgery, with several offenders acting together or in groups on different occasions.

Records are therefore sensitive to variations in recording practice (Levi 1987). In South Africa commercial crime statistics are recorded in a register, based on the amounts originally reported. Since investigations are often lengthy, the actual number of charges and amounts involved tend to fluctuate during the investigation.

Currently however, the system does not differentiate between potential and actual loss, which could be substantial (CAICI 1995). Arguments that an additional dark figure – representing crimes unknown to the victim and the

police at the reporting stage – should not be ignored.

### **Costs of white-collar crime**

Nationally, a total of 25 855 cases involving R7,3 billion was being handled by the Commercial Branch on 31 August 1995. Approximately 80% of these cases involved fraud and the other 20% theft – from employers – as well as transgressions of over 50 Statutes which the Branch polices (CAICI 1995).

These figures reflect the situation on a certain date and indicate the workload – on average, detectives handle 20 dockets each. In addition, the Office for Serious Economic Offences (OSEO) was investigating 31 matters involving approximately R9,500 million on 31 May 1995.

The majority of white-collar crimes are not reported to the police and thus are never recorded. A recent study among top businesses to gauge the 'dark figure' of these crimes concluded that 80% of detected fraudulent activity went unrecorded (KPMG 1994).

Reasons why businesses do not report fraud may include the fear of possible damage to a company's reputation. The most likely reason is management's decision that the expense of dealing with prosecutors and the time spent in court is not worth it (Edelhart and Overast 1982).

Also, as calls for partnership between the police and the private sector are raised, police admit that the criminal justice system is simply not equipped to handle such cases, even should they be reported.

However, it has been found that companies are willing to invest the management time and effort required to obtain a successful prosecution where the evidence sustains it.

International calls that all financial institutions be legally bound to report irregularities have met with numerous problems locally. There is strong opposition by management

and it is questionable whether the current system, which fails to handle 20% of cases effectively, would cope should all cases be reported.

### **Financial vs social costs**

The financial costs of white-collar crime far exceed the collective value of all street crimes, but these costs need to be understood more broadly. Many white-collar crimes can cause great harm, such as the diversion of funds from an aid agency which may result in the death of thousands from malnutrition (Levi 1987).

Indirect, far-reaching effects of these crimes include insurance premiums rising significantly due to false claims made against the insurer. A conservative estimate indicates that 30% of South Africa's R5 billion annual insurance claims are fraudulent (*Business Day*, 24 October 1994).

Tax evasion also, has major public policy implications. If nations cannot raise the revenue to meet their needs, the programmes that have been geared for their citizenry must either falter or be supported by a smaller tax base (Bequai 1978).

Most importantly, white-collar crimes cause erosion of trust and integrity – the glue holding our social fabric together – thereby harming our society in immeasurable ways.

### **The criminal justice system**

Although there may be ample proof of a crime, the overload of complex evidence and the demands on the justice system's resources and time, makes it a Herculean task to convict white-collar criminals. Unfortunately, potential perpetrators are well aware of this.

The stigma associated with violating a law is only effective as a deterrent if the law is actively enforced. The issue is how to prevent potential criminals from committing crimes, since the

likelihood is small that these offences will be effectively policed and prosecuted once they have occurred.

### **Policing the crisis**

For various reasons white-collar crime is not a key priority in the police, although this is changing. It is widely accepted that the SAPS Commercial Branch, which polices all frauds, certain thefts, certain regulations and almost 60 Acts of Parliament, is unable to effectively police white-collar crimes.

Numbers of trained staff and equipment are wholly inadequate: over the last 25 years there have been only five training courses for the commercial unit of the SAPS and it is generally agreed that learning takes place on the job.

Comparative research confirms that South Africa is not alone with these problems: minimal resources are committed to fraud units as emphasis is placed on policing the more traditional crime sector (Bequai 1978).

Problems also exist with ill-trained investigators, poorly equipped for the task at hand.

Since the police cannot be relied on for effective action, policing partnerships appear to be the answer in the current crisis. This means that the state relies on several enforcement agencies and professional bodies to regulate violations.

Consumers, business people – in their role as victims – and professionals such as accountants and corporate lawyers can play a primary role as initiators of action via their decisions to report fraud or not, as well as to initiate the investigation process.

There is something paradoxical about companies reporting fraud worth millions, being told that because of work pressures on the Fraud Squad, the case cannot be investigated for 12 months and their best option is to do their own investigation and come back later.

In South Africa organised business has committed itself to combating white-collar crime by funding teams to investigate and aid with prosecutions. But should businesses pay taxes if the State cannot do its job properly? If business is prepared to assist with investigations, should they not benefit from a tax rebate?

### **Policing fraud privately**

Fraud is now being treated by companies as a problem for private policing. Once a company has done a thorough internal investigation and has enough evidence to establish a *prima facie* case, it might – depending on corporate policy and the suspect's position in the company – call in the police.

Internal company investigators do not replace police or make arrests, but rather assist the investigation. Many commercial branch detectives are being drawn into the private sector as organisations are forced to appoint internal fraud teams.

This disadvantages the police who are unable to compete with private sector salaries. Yet the advantage is that experienced detectives handling internal investigations are able to compile a complete docket for prosecution (*Business Day*, 2 July 1995).

The complexity of many white-collar offences and the shortage of resources for their investigation and prosecution requires difficult decisions about which cases to pursue and which to ignore.

In South Africa priority is given to cases which are considered likely to result in a prosecution. The Office for Serious Economic Offences (OSEO) uses multi-disciplinary investigation teams, prioritising cases according to the amounts involved, complexity of the offence, public interest as well as urgency.

### **Courting the criminals**

White-collar criminals have largely escaped punishment because of the antiquated legal apparatus brought

to bear against them – a system which has traditionally addressed itself to the more visible criminal element.

White-collar criminals have mostly been segregated from traditional offenders, their crimes adjudicated by regulatory agencies and their offences handled administratively (Bequai 1978). Criminal referrals are rare and prosecutions almost non-existent since their wealth and influence allows them to avoid the full weight of the law.

In terms of access to justice, the influence of many offenders, who have vast financial resources and are able to employ the best legal talent, enables them to effectively conceal their crimes – often a complex web of economic interactions – requiring a great deal of investigative work to reconstruct.

Criminal justice agencies simply cannot match salaries and retain the services of experts to fight complicated cases. This means that cases against some of the nation's best lawyers are being fought, ineffectively, by a team of young and inexperienced lawyers.

It has been suggested that complainant companies be allowed to appoint and pay for their own prosecutions. This would relieve the state of a massive financial burden, while making available the investigatory and courtroom expertise the state lacks at senior level. Current policing partnerships bode well for such initiatives.

### **Rich man's justice**

In terms of sentencing, judges have been accused of favouritism towards offenders of high socio-economic status who may share a common cultural background (Conklin 1977).

However, in some cases, such defendants are more likely to receive longer jail sentences if the judge feels that crimes of greed by the wealthy are worse than crimes of need by others (Coleman 1989). This view has recently been expressed in South Africa (Cachalia 1995).

Mostly however, fines are imposed by the courts. Often the criminal penalties for white-collar crimes are much less severe than the civil liabilities such crimes create: corporate fines seldom equal the profit made from the illegal actions.

In effect, these fines may constitute nothing more than the cost of doing business. In the case of General Electric for example, the half a million dollar loss imposed was comparatively no more unsettling than a \$3 parking fine would be to a man with an income of \$175 000 (Ermann and Lundman 1992).

Since financial penalties are not a sufficient deterrent, suggestions have been made that convicted corporate offenders should automatically pay a penalty equal to their illegal activities, with violent offences getting even stiffer penalties.

The justice system's inefficiency in dealing with these criminals has resulted in the perception that a dual system of justice now exists – one for the masses who commit traditional offences and the other for a small select group of white-collar felons.

When the majority of citizens come to view the legal system in this light, democracy itself could be threatened: a segregated system of justice is no less divisive and damaging than a society segregated on the basis of race (Bequai 1978).

### **Prevention strategies**

Proactive prevention, rather than attempting to address the aftermath of white-collar crimes, is the answer. However, this may be difficult, time consuming and require certain changes to organisational structure.

### **Professional regulation**

The best protection for business and government is to set their own house in order through effective codes, controls and self regulation. The concern with professional self regulation is that often agencies charged with controlling

misconduct deflect criminal complaints away from the justice system to protect fellow professionals from prosecution (Coleman 1989).

Research suggests that the organisational environment of a company plays a large part in creating opportunities for crime. The corrupting institution thesis correctly argues:

*"Of course there may be corrupt men in sound institutions, but when institutions are corrupting, many men who live and work in them are necessarily corrupted." (Wright Mills 1983)*

Organisations exert powerful pressure on employees to conform to their expectations. Any effort to deal with the problem of white-collar crime on this level must therefore be aimed at changing the ethical climate within corporations and government.

Interviews conducted with 68 retired middle-management executives of the Fortune 500 corporations revealed that corporate crimes were determined by top managers who pushed too hard and made demands that could only be met by breaking the law (Ermann and Lundman 1992).

The issue is whether it is possible to create a business ethic favouring honesty at the expense of profit? The desire to achieve profit margins drives companies to break the law. When it comes to crime prevention, cooperative ventures and sharing of resources is the order of the day.

### **Business code of ethics**

Developing a code of ethics and a commitment to exposing fraud is a rational safeguard. The establishment of bodies such as the parliamentary ethics committee and the Office of the Public Protector, is indicative of the seriousness with which crime and corruption are regarded by government.

The King Commission's report on corporate governance – based on the UK's Cadbury Proposals – sets

out to ensure greater accountability by recommending prompt action on the discovery of fraud, and has been met with critical enthusiasm by organised business.

This strategy suggests that well established systems be created which respond once a crime is reported, and monitor complaints against members of professions. It may include a company policy of dismissal and prosecution of fraud, backed up by a police presence.

For such a policy to be effective, it is important that it be communicated to all levels of the organisation. The degree to which such a code has been formally instituted in South African companies remains unclear.

For instance, the high incidence of secondary victimisation is evidence of a widespread absence of fraud prevention strategies in companies. The fact that multiple victimisation occurs may mean that in practice, companies do not learn from the incidents they suffer.

Proposals such as the King Commission are not uncontroversial. Research shows there to be 'no difference' between those corporations with codes and penalties and those without. Common sense crime prevention strategies are essential, but alone, even these controls may be inadequate.

It is argued that the focus of surveillance ought to shift to monitoring the conduct of people while they are transacting business, and in their domestic lifestyles. Whether we want this sort of control is a separate ethical question, but without it levels of fraud will certainly not abate.

### Public opinion

It is necessary to create a general public awareness of white-collar crime and possible preventive steps. The public, and anyone with money or able to borrow it, could be victimised by at least one white-collar crime, namely fraud.

Many citizens do not realise they are being victimised by price-fixing, or restraint of trade and can hardly be expected to react to such behaviour. But the more people know about these crimes and their consequences, the more they are condemned. Opinion polls abroad indicate a great deal of resentment about crimes committed by those in positions of trust and responsibility.

Although they may be used selectively – for instance in the case of the death penalty – appeals to public opinion are an important aspect of criminal policy. Such opinion is used to justify policing strategies, including manpower distributions, prosecution policies and sentencing levels.

There can be little doubt that the media plays a role in defining and thereby shaping the crime problem. Some believe that since the media is owned by big business, white-collar crimes receive little or no attention.

In general, the relative media neglect of business crime compared with other forms of crime is explicable more by the invisible nature of the crime and the difficulty in presenting it, than by any elite conspiracy to suppress it.

Hence the media is challenged to play an important role in raising public awareness of these issues by pointing out, for instance, the increasing costs due to white-collar crimes, which remain hidden in the higher prices of goods and services passed onto the consumer.

### Conclusion

The way to address crime in South Africa is through socio-economic upliftment, but those committing white-collar crimes are generally not unemployed. As such, the problem will increase as more people are employed and motives to commit crime in a transitional climate of distrust, flourish.

If the criminal justice system is not bolstered significantly, burdening it

with further cases through increasing public concern of these issues, may not be to the Government's political advantage. If these cases are not handled speedily and effectively, they may further undermine the justice system's credibility.

Internationally, attacking such crimes through forfeiture of assets – removing the profits of crime – is attaining high priority. The driving force behind economic crime internationally has been identified as drug money and the laundering thereof.

South Africa's Money Laundering Act which will come into effect in 1996 is thus eagerly awaited. It is however, doubtful that the criminal justice system can enforce this legislation effectively, highlighting the point that only if legislation is enforceable, is it effective.

Future control trends for white-collar crime thus point towards increasing the visibility of fraud to those who are not directly party to it, enhancing inter-agency cooperation both domestically and abroad, and improving the capacity of policing agencies and the courts to cope with investigation and trials. **IPQA**

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# Business Against Crime

**Andre Fourie and Victor Mhangwana**  
**The National Business Initiative**

*Business Against Crime is a three year initiative which aims to play a role in reversing the crime wave in South Africa. Following a partnership approach, the private sector will assist government in the search for the best practice in the prevention of crime.*

**I**n spite of the Reconstruction and Development Programme's commitment to creating a secure environment for all, a growing number of South Africans fall victim to crime daily. Without the whole-hearted application of resources against crime, South Africa cannot lay a foundation on which to build a prosperous future.

The RDP aims to raise the quality of life for South Africans by mobilising human and financial resources to meet basic needs, to acquire income-generating skills, to increase democratic participation and to generate wealth. Left unchecked, crime will steadily erode existing and potential resources, arrest development, drive skills and investment out of the country and scare away potential foreign investment. Over time, crime could strangle the development of communities and the entire nation.

**Without the whole-hearted application of resources against crime, South Africa cannot build a prosperous future**

## **Budgetary allocations**

Government is under pressure to raise the budgets of the Departments of Safety and Security, Justice and Correctional Services. Current budgetary allocations to departments within the criminal justice system are not sufficient to address existing crime

levels. It is imperative that departments prioritise jointly to maximise their impact on crime prevention, rather than solely insisting on automatic budget increases.

The rising crime wave in South Africa, with its peculiarly violent nature, threatens to erode the potential for economic growth and democracy in the country. Recognising this threat, the business community had to position itself to play a meaningful role in reversing this trend.

## **Why business got involved**

It was felt that the time had come to rise to the invitation by President Mandela to the business community to join hands with the government in the fight against crime.

The legacy of apartheid and the problems of transition renders our criminal justice system less effective in addressing crime. Public mistrust of the police, job insecurity caused by the internal transformation of the police service, the challenge of working under the new constitution with its Bill of Rights and a lack of rapid retrieval information systems contribute to a less powerful police presence.

Backlogs and a brain drain in the Department of Justice among other things makes for less efficient courts. Periodic clampdowns on criminals by the police lead to further congestion of courts and

prisons. This often leads to the release of prisoners before serving their full sentences. Lack of coordination among the criminal justice departments is perhaps one of the greatest challenges facing the criminal justice system.

## **Business Against Crime**

Business Against Crime grew out of the well attended business conference convened by Business South Africa (BSA) and Cosab at the World Trade Centre on 15 August 1995. The conference recognised that the responsibility of ensuring a secure and safe environment rests with government.

However, business sentiment was that crime had reached such levels that it would take more than the usual crime combating agencies using the same old tactics to bring it down to acceptable levels.

The conference recommendations were submitted to the President and to a number of cabinet ministers. Among the priorities highlighted by the conference were the following:

- Formulation of a national crime prevention strategy
- Addressing white collar crime
- Coordination of existing partnerships and initiatives
- Citizens against Crime Campaigns
- Legislative changes to address priority one crimes

## **Driving the process**

In order to facilitate the implementation of these recommendations, Business South Africa established Business Against Crime (BAC) and requested the National Business Initiative (NBI)



to manage it. BAC is a three year initiative which aims to enhance the contribution of the business community to the combating and prevention of crime in South Africa. This entails assisting government in the search for best practice in the prevention of crime, access to the latest technology and also to persuade government to adopt a coordinated approach among departments concerned.

**Early Business Against Crime results include successful lobbying for tougher conditions on bail and the detention of juveniles**

The major strategic focus areas of the initiative are:

- A strategy and policy fund
- White collar crime
- Information management within the criminal justice system
- A communication strategy
- A focus on the judicial system and legislation
- A series of special projects

Sceptics ask for reasons why this particular initiative should succeed where others failed. BAC takes a sober approach to the problem of crime and there is an acute awareness that there are no quick fixes. There is a sense of urgency as crime is an immediate threat.

The initiative enjoys legitimacy with government and within the business community. These are important building blocks on which it will be possible to mobilise business resources for the fight against crime.

### **Key objectives**

The objective of Business Against Crime is to empower state agents and to strengthen existing initiatives.

Business Against Crime is structured to address the

recommendations of the conference under the guidance of a Board of Directors and through the work of its working groups.

### **National Crime Prevention Strategy Task Team**

Business Against Crime representatives participate in the work of the National Crime Prevention Strategy Task Team. This is also an important forum for introducing or strengthening policy issues raised in other Business Against Crime working groups and forums.

### **International crime prevention**

In order to expose Government to international best practice regarding crime prevention, Business Against Crime is organising a visit to South Africa by the Secretary General of the International Centre for the Prevention of Crime based in Canada.

Special working sessions will be conducted with the national strategy team, provincial and metropolitan crime prevention practitioners, the South African Police Service (SAPS) and the Department of Correctional Services and the Department of Justice. A comprehensive national crime prevention strategy report will be compiled and distributed after the visit.

### **Selected policy areas**

Exploratory work is being done in a number of selected policy areas with a view to formulating policy proposals and lobbying for their implementation in areas such as metropolitan policing, vehicle pound management systems and SAPS fleet management systems.

### **Guidelines for companies**

Business Against Crime plans to develop a comprehensive set of guidelines for companies, to assist each company to consider securing itself and its employees, introducing crime prevention measures and actively assisting the most important criminal justice agencies.

### **Information management**

This issue is listed as priority number one in the draft crime prevention strategy approved by cabinet. Business Against Crime is exploring the development of a comprehensive proposal to Government on the management of information within the criminal justice system.

### **White collar crime**

A white collar crime working group consisting of private sector experts and the heads of Anti-Corruption and Commercial Crime Units of the SAPS will provide guidelines on the prevention of white collar crime.

### **Communication strategy**

A comprehensive communication strategy will include initiatives aimed at promoting the Business Against Crime projects, motivating companies to become involved, and a strategic communication programme aimed at building trust in the SAPS.

Another angle is to mobilise the broader community against crime by pointing out the implication of receiving stolen goods, not paying tax, etc.

**The objective of Business Against Crime is to empower state agents and to strengthen existing initiatives**

### **Early success**

Early Business Against Crime results include successful lobbying for tougher conditions on bail and the detention of juveniles.

Business Against Crime has been requested to coordinate the activities of the business community in engaging government within the following arenas:

- On a multi-sectoral basis (e.g. SA Chamber of Business)
- Vehicle related crime. For instance: the implementation of the national transport

information system, vehicle ownership legislation, the development of appropriate technology, investigating trading practices promoting or enhancing criminality, toughening of border and customs systems, etc.

**BAC is organising a visit to South Africa by the Secretary General of the International Centre for the Prevention of Crime**

- Computer and electronic component industries aimed at enhancing the investigation capacity of the SAPS, eradicating trading practices promoting or enhancing criminality, toughening of border and customs systems, etc.
- The banking sector, including task forces on bank robberies and ATM tampering.
- Provincial business forums have requested support on the formation of provincial Business Against Crime (e.g. Pretoria Afrikaanse Sakekamer).

### **Special projects**

#### **Highway Patrol Unit**

A special anti-hijacking highway patrol unit was established in Gauteng through the provision of 100 BMW's to Gauteng SAPS. A working group is being constituted to monitor the implementation, maintenance and effectiveness of the unit on an ongoing basis. We are providing an ongoing facilitation service regarding the deployment, implementation and tax dimensions of the project.

#### **City Centre TV**

Business Against Crime introduced the concept of CCTV as a comprehensive urban security management system in South Africa. In partnership with the SAPS discussions were initiated between the private sectors and the local police in these major metropolitan cities.

#### **POL TV**

The Pol TV initiative is fully operational providing the SAPS direct satellite communication access to 100 priority police stations across the country.

#### **Community policing award**

A company has made R100 000 available for the most successful community police forum in each province as well as a national winning forum. Business Against Crime aims to utilise this mechanism to promote the idea of the community policing forums as well as motivate existing forums

**It is imperative to recognise the primary responsibility to ensure a crime-free environment rests with the state**

#### **Impetus and direction**

The business initiative could provide valuable support for the fight against crime.

However it is imperative to recognise the primary responsibility to ensure a crime-free environment rests with the state, and particularly the Ministry of Safety and Security.

The interdependence of the interests of this ministry and the SAPS with

**If this initiative does not get continuous encouragement from the President, it will be unable to overcome inter-departmental rivalry**

those of the broader criminal justice system (Correctional Services and Justice) and other role players (such as Defence, RDP etc.) at national, provincial and local levels, necessitate the formation of an integrated strategy.

There are, of course, a number of other stakeholders whose interests are also intimately linked to those of the above strategy, such as local communities, employee groups, NGO's, and the business sector.

Moreover, if this initiative does not get continuous encouragement from the President himself, it will be unable to overcome inter-departmental rivalry.

Business Against Crime is a partnership approach into crime prevention. Its success will be measured not only in terms of declining crime figures, but also in the empowerment of the state agents and other sections of society to deal with the problem effectively. Crime prevention is a long term activity. BAC believes that the first steps must be taken now rather than later. ~~WPA~~

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# The Not So Long Arm of the Law

**Lorraine Glanz**  
**Human Sciences Research Council**

*Analysing the country's poor conviction rate, Glanz warns that improved policing and other crime prevention efforts will be negligible if police and courts do not improve the sentencing rates.*

**W**hile South Africans grapple with crime there are weaknesses in the criminal justice system that most of us are unaware of. The average citizen can be forgiven for believing that combating crime simply requires a more effective police force responding quickly to calls for assistance so that more criminals can be arrested and jailed.

Indeed, the South African Police Service (SAPS) receives the brunt of the criticism levelled at the government's inability to deal with crime. However, no matter how efficient the police become, the criminal courts are presently unable to deal adequately with the cases brought before them.

The functioning of the courts will undoubtedly be adversely affected by the current high rate of resignations of magistrates and prosecutors. The Minister of Justice, Dullar Omar, is facing increasing criticism from the legal fraternity regarding the Department of Justice's affirmative action policies and the blocking of promotions of white males.

Critics believe these policies have led to wide-scale resignations, without suitably experienced replacement personnel being available. According to Frank Kahn, the Attorney General of the Western Cape, a number of the magistrates' courts in his jurisdiction have practically collapsed (SABC3, 13 February 1996).

The problem of poor court functioning starts with detectives' case loads being so great that cases cannot be adequately investigated. This leads to poor arrest rates, inadequate gathering of evidence and shoddy preparation of cases for court.

Once a case proceeds to court, poor evidence or the lack of it may mean that a case is dropped. Even when cases proceed, young and inexperienced prosecutors are not always able to obtain convictions, particularly when the accused has legal representation.

The facts speak for themselves: the number of crimes reported to the police in South Africa continues to increase while the number of convictions obtained in our courts continues to decrease.

However, it would be a gross misrepresentation to suggest that the problem is a recent one, or one created by the Government of National Unity. The conviction rate has been declining steadily over the past 40 years, as this discussion will show.

The declining conviction rate is no doubt linked to the fact that the proportion of cases being solved by the police has dropped substantially over the years. The Commissioner of Police reported that for 1974/75, 71% of cases were solved. This proportion dropped to 64% in 1979/80; 58% in 1984/85; 57% in 1989 and 51% in 1993. Naturally, the fewer cases that are solved, the fewer proceed to court.

## The funnel effect

The 'funnel effect' (Jeffery 1990:135) describes the drastic difference in the number of crimes that are committed in a particular country and the number of cases that are processed through its criminal justice system. Figure 1 illustrates the funnel effect in South Africa.

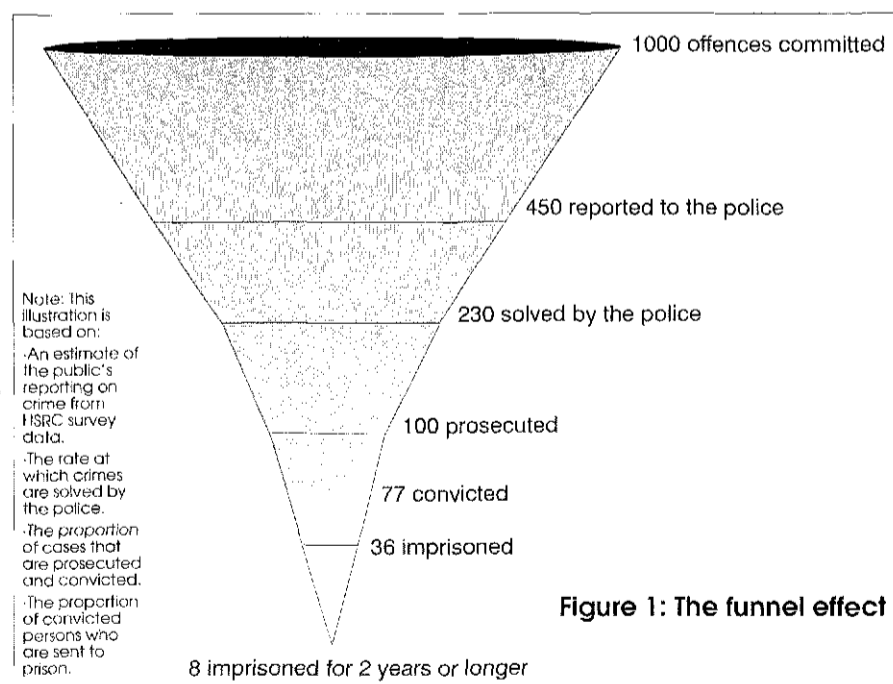
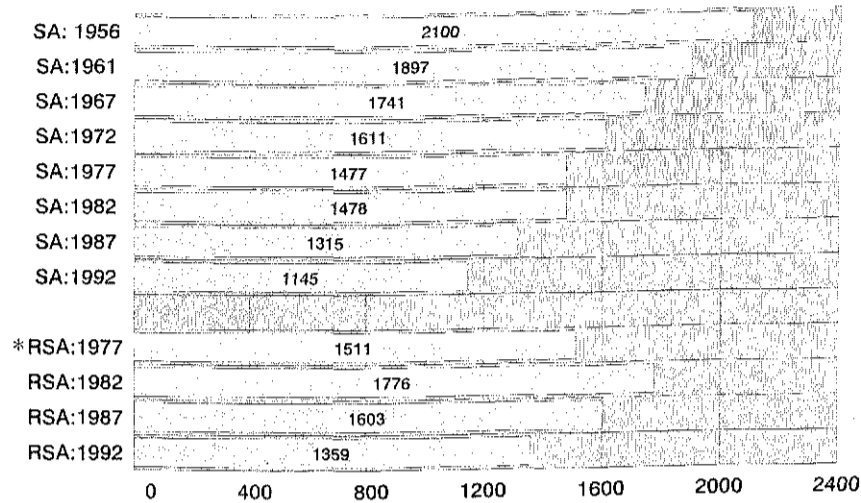


Figure 2: Forty-year trend in the conviction rate



\* See notes on page 14

A fraction of the crimes committed in society proceed to court and an even smaller fraction are resolved by an offender being incarcerated. Incarceration is not necessary or desirable in the case of less serious offences. However, the number of serious violent offences is steadily increasing while the number of offenders sentenced to imprisonment is decreasing.

Despite the funnel effect illustrated above, the courts are not able to adequately deal with the present case load. The average duration for a criminal case to be finalised is unacceptably long, which means that those denied bail or who are unable to meet bail, spend lengthy periods in prison awaiting trial.

The continuously increasing crime rate in South Africa suggests that greater numbers of offenders should be brought before the courts. However, serious attention needs to be focused on the functioning of courts before the system can deal with an increased caseload.

Jeffery (1990:140) states that the '[American] criminal court system operates on the number of beds available in the prison system rather than on major legal and philosophical principles'. One wonders to what extent this is true of South Africa, considering that despite increasing crime, the daily average prison population has remained relatively constant.

### Conviction vs crime trends

The conviction rate has steadily declined over the past 40 years. The rate dropped from 2 100 per 100 000 of the population in 1956 to 1 145 in 1992 – a drop of 46% in 40 years (Figure 2). This does not match the general crime trend, measured by the number of crimes reported to the police.

Crime rate trends over the past 20 years are illustrated in Figure 3. The crime rate increased from 4 246 in 1975 to 5 747 in 1993 – an increase of 35% in 20 years. It remained more or less steady around 4 400 between 1975 and 1982, but started to increase again from 1983, rising dramatically from the beginning of the 1990s.

### Recent conviction statistics

Table 1 shows the number of prosecutions and convictions from July 1993 to June 1994, along with the conviction success rate and changing trends in convictions between 1991/92 and 1993/94. For comparative purposes, crimes reported to the police between 1991 and 1993 are also included.

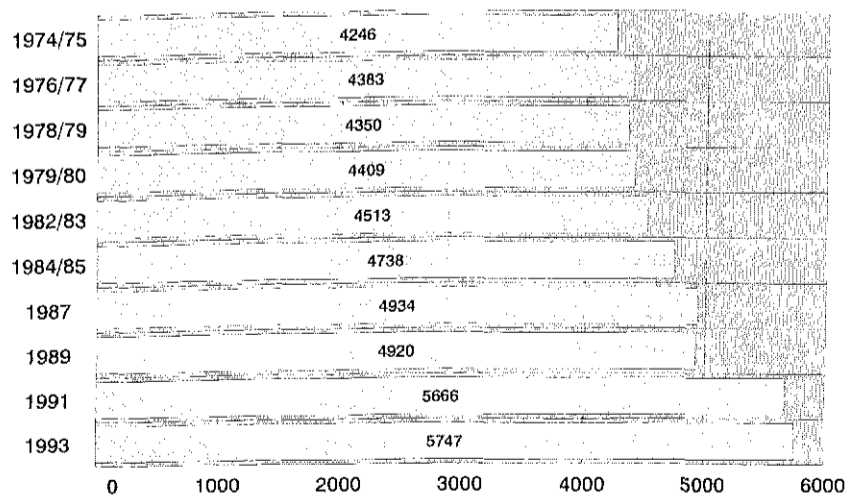
#### The conviction success rate

A total of 413 472 cases were prosecuted during 1993/94, which represents 22,3% of the 1 852 223 crimes reported to the police during 1993. It would appear that the police have somewhat greater success – in terms of solving and preparing for court – with cases involving violent crime than with those relating to property crime.

Twenty seven percent of the 443 802 reported violent crimes were prosecuted as compared to 130 694 or 17,1% of the 763 811 property crimes. On the other hand, the conviction rate is somewhat greater in the case of property offences (81%) compared to violent offences (69,5%).

The conviction success rate varies considerably by type of offence, with arson, attempted murder and rape having the lowest rate of conviction success – 44,7%, 47,4% and 50,4% respectively – and drinking-and-driving, shoplifting, fraud and drug related cases having

Figure 3: Twenty-year trend in the crime rate



**Table 1: Prosecutions and convictions for 1993/94, conviction success rate and conviction trends between 1991/92 and 1993/94**

Type of offence	1993/94		% convict success for 1993/94(%)	% change convictions 91/92 & 93/94
	prosecutions	convictions		
<b>TOTAL: All types of offences</b>	<b>413 472</b>	<b>318 068</b>	<b>76,9</b>	<b>-14,9</b>
Property offences	130 694	105 831	81,0	-7,0
Violent offences	121 449	84 421	69,5	-8,3
The big six	127 411	88 352	69,3	-11,9
<b>A selection of offences</b>				
Illegal possession of firearms	5 564	4 041	72,6	-8,4
Rape	8 553	4 311	50,4	-11,0
Drugs & dependence producing substances	39 967	34 932	87,4	-24,8
Assault: common	35 572	29 185	82,1	-15,9
aggravated	54 739	38 263	69,9	-12,1
Murder	6 440	3 512	54,5	-6,2
Attempted murder	2 770	1 321	47,7	+32,2
Burglary: business	13 014	10 154	78,0	-8,0
residential	28 358	22 151	78,1	-15,4
Bagsnatching	825	549	66,6	-34,6
Robbery: aggravated	8 113	4 802	59,2	-8,4
other	5 262	3 027	57,5	-12,0
Theft of livestock (excluding poultry)	6 855	5 093	74,3	-15,1
Shoplifting	43 453	39 905	91,8	+6,5
Theft of firearms	548	406	74,1	+6,0
Theft of motor vehicle/cycle	5 424	3 838	70,8	-17,6
Theft out of vehicle	7 858	6 002	76,4	-5,5
Fraud	8 384	6 897	82,3	-18,6
Arson	1 070	478	44,7	-20,2
Malicious damage to property	14 905	10 358	69,5	-11,0
Driving under the influence	17 244	16 099	93,4	-19,3
All other offences not already mentioned	98 554	72 744	73,8	-24,9

case of arson was the decrease matched by a decrease in the number of reported arson cases.

**Crime increases, convictions drop**

Court statistics reflect all individuals who are prosecuted, so that if more than one person is arrested for the same offence, it is recorded per person. Similarly, if one person is charged with more than one offence during a particular case, the information for up to four offences is recorded.

This should actually inflate the court statistics as compared to the police figures, since the latter are in respect of crimes reported to the police. This difference in recording procedure in fact worsens the picture in terms of the gap between police and court statistics.

The 14,9% decrease in convictions between 1991/92 and 1993/94 followed a 5,5% increase in the number of police reported cases of the same offences between 1991 and 1993.

Although the court cases in 1991/92 and 1993/94 were not necessarily the same cases that were reported to the police during 1991 and 1993, this type of comparison is extremely useful and gives a reasonable idea of the shrinkage in case numbers from the time cases are reported, until they reach court. This shrinkage produces the funnel effect described earlier.

Specific examples of decreases in convictions and increases in police reported crime are:

	Decreases in convictions between 1991/92 and 1993/94	Increases in police-reported crime between 1991 and 1993
Rape	-11,0%	+18,9%
Aggravated robbery	-8,4%	+33,2%
Murder	-6,2%	+18,9%
Aggravated assault	-12,1%	+11,6%
Motor vehicle theft	-17,6%	+9,5%
Malicious damage to property	-11,0%	+11,6%

However, police reported cases of arson decreased by 71,3% in the two year period and this was matched by a 20,2% decrease in

the highest conviction success rate – between 82,3% and 93,4%.

Variation in the rate of convictions in all likelihood relates to the strength of evidence, with evidence in rape cases, for example, being notoriously vulnerable to attack in court by defence attorneys. Evidence in cases such as drunken driving, by contrast, are considerably more concrete and difficult to dispute.

The rather low conviction success rate for the most serious crimes, as measured by the *big six*, is noteworthy. In the case of murder and attempted murder, for example, the conviction rate is 54,5% and 47,7% respectively.

One must assume that given the very serious nature of the crime and the heavy sentence that it carries, the fact that the accused in murder

cases are very often represented in court, has a bearing on the conviction success rate.

**Two year conviction trends**

The number of persons convicted during 1991/92 and during 1993/94 decreased by 14,9%. The decrease in convictions was greatest for less serious offences – represented by the category 'All other offences not already mentioned' at the bottom of the table – and least for property offences.

However, particular types of serious crime showed decreases in convictions of more than 15% in the two year period: drug related offences (-24,8%); residential burglary (-15,4%); motor vehicle theft (-17,6%); fraud (-18,6%); arson (-20,2%); driving under the influence (-19,3%). Only in the

convictions for arson. In respect of a few other less serious crimes such as shoplifting, on the other hand, reported increases were matched by increases in convictions.

#### Area trends

Conviction trends for the two year period 1991/92 to 1993/94 are given for six metropolitan areas in Table 2.

A comparison of the conviction trend with the crime trend also appears in the table. Bearing in mind the national decrease in total convictions of 14,9% (Table 1), the

decrease in total convictions in some of the metropolitan areas was enormous:

Decreases in total convictions between 1991/92 and 1993/94	
Cape Peninsula	-28,0%
Durban and Pinetown	-29,8%
Johannesburg	-25,1%
Pretoria	-19,8%

Only Port Elizabeth, Uitenhage and Bloemfontein had decreases in total convictions that were below the national total (-6,8% and -10,1% respectively).

In the Durban/Pinetown metropolitan area, convictions for

most types of crime in Table 2 decreased between 1991/92 and 1993/94 – some by as much as 52,2% (aggravated robbery) and 49,2% (attempted murder). On the other hand, all types of crime except drug-related offences increased – some by as much as 51,7% (attempted murder) and 49,3% (aggravated robbery).

Another example is Johannesburg: convictions for motor vehicle theft – a crime of great concern to the Johannesburg public – decreased by 28,2%, whereas the number of cases reported to the police increased by 40%. Similarly,

**Table 2: Conviction trends between 1991/92 and 1993/94 and crime trends between 1991 and 1993 by metropolitan area**

Type of offence	Cape Peninsula			Port Elizabeth and Uitenhage			Bloemfontein		
	Convictions for 1993/94	Conviction trends between 1991/92 & 1993/94 (% change)	Crime trends between 1992 and 1994 (% change)	Convictions for 1993/94	Conviction trends between 1991/92 & 1993/94 (% change)	Crime trends between 1992 and 1994 (% change)	Convictions for 1993/94	Conviction trends between 1991/92 & 1993/94 (% change)	Crime trends between 1992 & 1994 (% change)
Property offences	9 406	-16,9	+1,0	4 473	+7,7	+9,5	2 172	-11,3	+17,4
Violent offences	5 357	-19,4	+15,1	3 241	+0,3	+13,5	958	-17,4	+25,7
The big six	6 044	-27,1	+4,8	3 868	-6,5	+8,6	1 244	+0,1	23,6
<b>A section of offences:</b>									
Drug-related offences	3 717	-44,3	-29,2	1 077	-47,0	-2,3	521	-27,2	-29,1
Rape	335	-12,1	+24,1	138	-26,2	+30,6	71	-6,6	+51,1
Aggravated assault	2 179	-23,1	+14,6	1 889	-5,6	+8,2	407	-3,8	+19,1
Murder	276	-6,8	+3,4	193	-4,3	+8,1	73	-11,0	+21,1
Attempted murder	117	+112,7	+96,1	42	+13,5	+165,3	17	+21,4	+52,8
Burglary: business	707	-17,4	-3,5	327	-28,9	-8,1	198	+17,9	+2,0
residential	1 491	-35,4	-1,9	856	-0,5	+1,5	372	-9,9	+17,9
Aggravated robbery	597	-31,9	-4,6	209	+12,4	+32,3	43	-35,8	+53,9
Theft of motor vehicle	523	-23,7	-4,4	214	-7,8	-1,0	63	-6,0	+95,8
Theft out of vehicle	906	-27,5	+14,8	369	+17,5	+19,2	168	+43,6	+24,1
<b>Durban &amp; Pinetown</b>									
Property offences*	5 644	-8,3	+13,9	3 974	-5,6	+6,5	4 737	-23,2	+7,8
Violent offences	1 174	-35,5	+21,6	1 877	-4,2	+26,9	4 111	-29,6	+11,7
The big six	1 909	-29,6	+30,8	2 020	-8,1	+17,0	4 447	-24,2	+17,9
<b>A selection of offences:</b>									
Drug related offences	2 233	-39,2	-42,0	1 611	-41,3	-36,8	1 348	-38,1	-21,8
Rape	69	-22,5	+40,5	134	-13,0	+31,9	343	-3,9	+22,8
Aggravated assault	236	-36,7	+29,2	588	-12,6	+24,9	1 749	-16,6	+20,2
Murder	72	+1,4	+12,6	89	+48,3	+8,5	200	-11,5	-25,7
Attempted murder	30	-49,2	+51,7	86	+126,3	+77,0	96	-11,1	-5,1
Burglary: business	394	-5,3	+39,4	192	-19,7	-0,9	295	-21,1	+2,0
residential	493	-35,9	+7,3	601	-8,7	+11,8	778	-19,3	+7,0
Aggravated robbery	199	-52,2	+49,3	111	-17,2	+43,8	547	+2,8	+27,9
Theft of motor vehicle	416	-19,5	+48,0	219	-9,5	+15,4	439	-28,2	+40,0
Theft out of vehicle	575	+13,0	+5,9	301	+33,2	+13,9	457	-12,0	+0,7
<b>Pretoria</b>									
<b>Johannesburg</b>									

Table 3: Number and rate of convictions for 1993/94, given by age and gender

Type of offence	Persons aged 7-17yrs		Persons aged 18-20yrs		Persons aged >21yrs		Total: Persons 7 yrs & older		
	Number	Rate	Number	Rate	Number	Rate	Males	Females	M/FRatio
<b>TOTAL: All types of offences</b>	32 863	418,5	44 394	2 181,1	240 811	1 371,7	275 835	42 233	6,5:1
Property offences	18 581	236,6	18 106	889,6	69 144	393,9	86 293	19 538	4,4:1
Violent offences	6 124	78,0	12 377	608,1	65 971	375,5	74 347	10 074	7,4:1
The big six	12 626	160,3	15 628	767,8	60 098	342,3	80 914	7 438	10,9:1
<b>A selection of offences</b>									
Illegal possession of firearms	341	4,3	602	29,6	3 098	17,7	3 932	109	36,1:1
Rape	774	9,9	912	44,8	2 625	15,0	4 311	-	-
Drugs and dependence producing substances	1 576	20,1	3 891	191,2	29 465	167,8	32 055	2 877	11,1:1
Assault: Common	1 194	15,2	3 389	166,5	24 602	140,1	25 603	3 582	7,2:1
Aggravated	2 610	33,2	5 454	268,0	30 199	172,0	32 293	5 971	5,4:1
Murder	219	2,8	498	24,5	2 795	15,9	3 216	296	10,9:1
Attempted murder	100	1,3	161	7,9	1 060	6,0	1 270	51	24,9:1
Burglary: business	2 613	33,3	1 967	96,6	5 574	31,8	9 989	165	60,5:1
residential	5 036	64,1	4 605	226,3	12 510	71,3	21 314	837	25,5:1
Bagsnatching	137	1,7	103	5,1	309	1,8	529	20	26,5:1
Robbery: Aggravated	687	8,8	1 206	59,3	2 909	16,6	4 725	77	61,4:1
Other	540	6,9	757	37,2	1 781	9,9	2 929	98	29,9:1
Theft of livestock (excl poultry)	404	5,1	604	29,7	4 085	23,3	4 971	122	40,8:1
Shoplifting	7 282	92,7	6 489	318,8	26 134	148,9	24 566	15 339	1,6:1
Theft of firearms	44	0,6	60	3,0	302	1,7	376	30	12,5:1
Theft of motor vehicle/cycle	587	7,5	825	40,5	2 426	13,8	3 796	42	90,4:1
Theft out of vehicle	1 429	18,2	1 417	69,6	3 156	18,0	5 923	79	75,0:1
Fraud	111	1,4	328	16,1	6 458	36,8	5 333	1 564	3,4:1
Arson	31	0,4	68	3,3	379	2,2	412	66	6,2:1
Malicious damage to property	907	11,6	1 640	80,6	7 811	44,5	9 084	1 274	7,1:1
Driving whilst under the influence	51	0,7	518	25,5	15 530	88,5	15 591	508	30,7:1
All other offences not already mentioned	6 190	78,8	8 900	437,3	57 603	328,1	63 617	9 127	7,0:1

convictions for aggravated assault dropped by 16,6% while police reported aggravated assault rose by 20,2%.

The problems of the police in solving crimes and preparing cases for court, and those experienced by the criminal courts in obtaining a satisfactory number of convictions, are much greater in metropolitan than in other areas of the country. The functioning of the criminal justice system in metropolitan areas clearly requires urgent attention.

**Gender differences in conviction patterns**

Gender differences in convictions for the 12 month period in 1993/94 appear in Table 3. The overall male/female ratio is 6,5:1, which matches trends elsewhere in the world. The ratio varies considerably by offence type: in general, the difference between the sexes in

conviction patterns is less for property crime and greater with respect to violent crime.

In addition, females tend not to be involved in crimes of a serious nature, as can be seen from the male/female ratio of 10,9:1 for the big six – a measure of very serious crime. The difference between the sexes is not very great for crimes such as shoplifting and fraud.

On the other hand, the ratio is very much greater for crimes such as motor vehicle theft, theft out of vehicles, aggravated robbery and burglary of business premises. These are the types of crimes that are committed mainly by males.

**Age differences in conviction patterns**

In addition to the overall age category of seven years and older, Central Statistical Service (CSS)

also report convictions for persons aged between seven and 17 years and between 18 and 20 years. It is then possible to calculate convictions for persons aged 21 years and older.

The number of convictions for each of these age categories for 1993/94 are given in Table 3. The table also gives the conviction rate per 100 000 of the respective population. The rate is useful to compare the criminal involvement of different age groups.

It is quite clear from the table that young people between the ages of 18 and 20 are involved in crime to a greater extent than persons from any other age group. Ideally one should compare the criminal involvement of the 18 to 20 year old age group with that of the 21 to 25 year old group, since offending behaviour is most prevalent among older adolescents and young adults. However, conviction statistics for

young adults are not published by CSS.

As one would expect, the overall involvement in crime of young people between the ages of seven and 17 years is very much lower than that of older adolescents. Young adolescents are convicted more often for property than violent offences, with the rate of 236,6 for property crime for this age group being three times greater than the rate of 78,0 for violent crime.

On the other hand, the rate of conviction for violent crime among older adolescents is almost as great as that for property crime. In addition, the rate of both property and violent crime among older adolescents is nearly twice that of adults.

Of particular concern is the extremely high rate of conviction among older adolescents for *big six* offences – the measure of the most serious crimes. Older adolescents are particularly involved in crimes such as burglary, aggravated robbery, motor vehicle theft and theft out of vehicles.

The only two offences shown in Table 3 for which they are convicted less often than adults are fraud and driving under the influence. The 18 to 20 year old group is undoubtedly responsible for a large proportion of crimes committed, and very serious crimes at that. Crime prevention efforts should therefore target this group.

### Conclusion

Much has been written about the transformation of the SAPS from a reactive to a proactive force. Community policing, problem solving and serving as negotiators

in instances of conflict are presently considered to be crucial functions of a new police force.

Gains have been made in terms of improved community/police relations and a greater public willingness to cooperate with the police. But with the concomitant increase in the number of cases being reported, these will be lost if the police do not have the capacity and resources to effectively deal with these cases.

Providing sufficient resources to improve the efficiency and capability of the SAPS's investigative arm should be as great a priority as funding the transformation of the police from a reactive to a proactive force.

**Crime prevention efforts will not show tangible results in the form of a reduced crime rate if more offenders are not arrested and convicted.**

Furthermore, urgent attention needs to be focused on the functioning of South Africa's criminal courts. The Department of Justice should take the initiative and call all roleplayers – court personnel at all levels, the SAPS, non-governmental organisations working with offenders and victims, and defence attorneys – together to list the many problems surrounding the criminal court system.

Current crime prevention efforts at various levels – such as the National Business Initiative, the Nedcor Project and the many grassroots programmes – as well as the crime prevention programmes of NICRO and Neighbourhood Watch – will certainly not show tangible results in the form of a reduced crime rate if more

offenders are not arrested and convicted.

For South Africa to address its crime problem, it is imperative that all roleplayers work toward:

- Increasing the conviction rate, including the rate at which cases are solved, the rate at which cases go to court, and the rate at which a conviction is obtained.
- Concentrating efforts on high risk groups such as young males. There is irrefutable evidence that a relatively small group of youthful offenders commit the majority of offences. If large proportions of this group remain free, crime will continue to increase. **ICPA**

### Notes on Figures 2 and 3:

Conviction rates are based on the population aged seven years and older, since only persons in that age category can be convicted of an offence. On the other hand, crime rates are based on the total population, since a person of any age can be the victim of crime. The different population bases used to calculate rates only make a difference to the absolute level of the two sets of rates and do not affect the trend in the rates, since the same sector of the population is used across time periods in both cases.

The conviction rates in Figure 2 are presented in two formats: for the first part of the chart, the total South African population was used to calculate the rates – the population of the RSA and the former independent states. For the second part, the population of only the RSA was used. It was considered advisable to reflect both trends since the time period covered by the chart is nearly 40 years, with the independence of the states taking place approximately in the middle.

However, since the time period covered in Figure 3 is approximately 20 years, beginning just before the independence of the states, the population of only the RSA was used to calculate the rates. In recent years the SAPS have used the population of only the former four provinces of the RSA – excluding the self-governing territories as well as the independent states – to calculate crime rates. Since the chart covers a 20 year period, it would be impossible to do this.

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# Bail and the Art of Law Enforcement

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*Reports abound of suspects out on bail committing serious offences like rape and murder. Much criticism has been directed at the bail procedure. Not only have constitutional changes been questioned, but also the very notion of granting bail. This often misunderstood concept is discussed here.*

**B**ail is not a popular concept with ordinary law abiding citizens. This is particularly the case in South Africa where crime rates are soaring and it is clear that law enforcement agencies are unable to deal effectively with the problem.

Thus, it is of little comfort to the average citizen that – notwithstanding an extremely low arrest rate for crimes investigated – the small minority of criminals who are indeed arrested are likely to be released on nominal bail amounts.

Of course, the picture is totally different when law abiding citizens suddenly find themselves on the wrong side of the law. Then complaints about the tardiness of the criminal justice system are loudest: the taking of fingerprints and other details often prompt a few hours delay in custody before a prominent businessman or dignitary, arrested on charges of drunken driving or fraud, is released on bail.

## **Opposing values of bail**

Bail has become not only a popular, but also a very necessary aspect of the criminal process. This is important to stress since bail rests on two separate and opposing pillars.

The first is the crime control aspect of strict and effective law enforcement. It is difficult to deny that maintaining law and order

requires that bail be limited to certain trivial offences. But even in these cases, the bail amount should be set sufficiently high to ensure the accused attends subsequent trials. Failure to attend would result in forfeiture of the bail amount.

On the other hand, bail is also about due process and respect for individual liberty. This is realised by the presumption of innocence which treats all suspects as innocent until proven guilty in a court of law.

In terms of this approach, most suspects should qualify for bail. It is only in the most serious cases where there is convincing evidence that the accused is not going to stand trial, that bail should be denied.

The ideal is to strike a balance between these two approaches. From the criminal control perspective, releasing a suspect on bail presents the risk that he or she will abscond and not stand subsequent trial. This applies particularly in the case of gangsters who can disappear into the underworld of organised crime.

The risk is also high in the case of white collar criminals on serious fraud charges. Such individuals can usually flee overseas to places where they cannot be traced, or where they will not be returned to face trial in this country.

Naturally, large scale abscondments will seriously undermine the maintenance of law and order as

well as drastically push up the crime rate.

## **Control vs individual liberty**

On the other hand, the due process emphasis on the rights of the individual tends to focus on the fact that all citizens are innocent until proved guilty. In this context, bail becomes extremely important – especially considering the lengthy delays between arrest and conviction.

These delays are a disturbing phenomena that have become the scourge of most modern criminal procedure systems. In South Africa, arrested suspects can consider themselves lucky if they are brought to trial within six months of arrest. It is not uncommon for cases to be dragged out over years.

The implications for the individual are drastic, and incarceration for a lengthy period pending trial makes a mockery of the presumption of innocence. This will be greatly exacerbated where an accused is acquitted at the subsequent trial.

How is it possible to compensate someone for the loss of freedom that turns out to be totally unjustified? Such incarceration also undermines the individual's rights of liberty. In this respect, bail is a very important check on the powers of the state concerning the arbitrary detention of individuals pending trial.

Certain logistical considerations also need to be taken into account. It must be accepted that incarceration pending trial will tend to severely disrupt the private life of most accused persons. They are cut off from their families and also risk losing their employment.

They thus cease to be ordinary members of society and become prey to the influences of criminal

elements with whom they are forced to associate while in jail.

It is also extremely difficult to arrange and prepare a defence to the charges under these circumstances. This in turn undermines the right of an accused to secure legal representation and the opportunity to prepare an adequate defence.

### **Bail in the old SA**

Before examining the impact of the Constitution it is necessary to analyse the situation prior to the Constitution's enactment in 1994. At that stage the position was confused. On the one hand, applying for bail took the form of any ordinary civil court application.

The basic rules of civil procedure required that the applicant – that is the accused – had to initiate the action as well as bear responsibility for making a case which would have to justify the individual's release on bail. Failure to make such a case meant the application would not be granted.

The process is simple and there can be no complaints – in general at any rate – within the context of a civil application. However transferring this civil procedure to the criminal process amounts to an absurdity.

This is especially so when the accused is under-educated and ignorant of his or her rights and is not legally represented. It is no secret that this group makes up the overwhelming proportion of those appearing before criminal courts throughout the country.

Expecting someone in this position to successfully move and initiate a bail application – all the while bearing the onus to justify such relief – amounts to a person without dental skills extracting his own teeth.

Particularly problematic in this regard is the fact that if an accused failed to raise the question of bail at the first court appearance, it was conveniently assumed that he or she had no interest in being released.

This is, of course, an absurd assumption.

As a result, courts have tended to merely rubber-stamp investigating officers' decisions about bail. Thus, if the investigating officer informed the public prosecutor that bail should be denied or set at a certain sum, this was simply relayed to the magistrate who usually confirmed and ordered the motion.

In this way, the presiding judicial officers were relieved of having to apply their minds to the matter and of exercising proper discretion. As a result, thousands of people languished unnecessarily in prisons on a daily basis at great cost to themselves and the state.

### **Constitutional changes**

The enactment of the Constitution will have a significant impact on the entire legal process in South Africa. Since the Constitution contains a bill of rights, these rights are supreme and cannot be changed – even by Parliament.

The courts are charged with ensuring that the rights enumerated in the Constitution are not encroached upon by government. The right to bail is no exception.

Interestingly, the South African Constitution is one of the few in the world that expressly recognises a right to bail. In most other constitutions, such a right is fashioned from general principles of due process and liberty.

The specific provision in our Constitution expressly recognises the right 'to be released from detention with or without bail, unless the interests of justice require otherwise.'

What are the implications of this? At the outset it is clear that this provision will have a marked effect on the bail process because it entrenches the right to bail. This means that, from a procedural perspective, an accused is *prima facie* entitled to be released on bail unless the state can show that this

would not be in the interests of justice.

### **Shifting the burden**

This is significant because it is now incumbent upon the state to initiate bail proceedings by attempting to establish that the accused should not be released. If the state fails to do this, the accused is entitled to be set free. Thus the burden has shifted from the accused to the state.

Within the context of effective law enforcement, this can be regarded as an extreme measure. This is particularly so since it was not accompanied by any clear guidelines as to how the new approach should be applied.

As a result, presiding judicial officers may have been tempted to adopt a high release approach by simply granting bail in most cases. This could well have been exacerbated by the fact that, in the past, investigating officers did not have to investigate factors that justified a denial of bail. Instead they simply opposed the granting of bail and it was then up to the accused to convince the court that he or she should be released.

But now that the state bears the burden, the situation has altered. Currently, the state can no longer merely oppose bail, unless this motion is backed up by supporting evidence. Such evidence has not been forthcoming in many cases due to inadequate investigations by the police.

On the other hand, these high release approaches by the courts could well have created the public perception that there are insufficient safeguards to ensure that dangerous criminals were kept in custody pending trial.

### **Recent amendments**

The Government responded with the Criminal Procedure Second Amendment Act which provides *inter alia* that, in the case of certain serious offences, the burden of

proving that an accused should be released on bail rests with the individual.

Although arguably this presumption contradicts the notion of an entrenched right to bail, it is important to note that every constitutional right is limited by the legitimate demands of society in general.

In this case, placing the burden on the accused in respect of serious offences is a justifiable limitation, and restores some form of balance to the process.

The Act alters the entire procedural basis by stipulating that a bail application should no longer be treated as a traditional civil application.

The Act moves away from the traditional accusatorial approach where the judge is merely a passive arbiter whose duty it is to hear the arguments and evidence of both sides and then to render a decision.

Instead, the Act contains many examples where presiding officers are obliged to adopt an active inquisitorial approach. This is particularly in regard to initiating the bail application – which is now overseen by the courts rather than being left to the initiative of the accused.

Another important difference in this respect is that the Act confers on judicial officers the function of gathering sufficient evidence to justify deciding a bail application. Thus, courts are no longer able to sit back and rely exclusively on the evidence that both sides present.

Instead, presiding officers must now play a proactive role in ensuring that all relevant evidence is before the court. This is an important break from the traditional position in which the accused – irrespective of lack of knowledge or skills – bore the burden of initiating and justifying a bail application.

This approach is welcomed since it recognises that bail applications are by their very nature *sui generis* and cannot be fitted into the ordinary

procedural framework of other forms of litigation. As has been pointed out, in certain judgments a court is not being called upon to assess an existing set of facts and thereafter make a finding.

Instead, the court must predict the future conduct of an accused regarding their release on bail, based on the following concerns:

- Will an accused released on bail stand subsequent trial?
- Will the release of the accused in any way jeopardise state security, the safety of individuals or the public at large?
- Will the release of the accused threaten subsequent investigation of the particular case?
- Is the accused likely to commit other offences while out on bail?

It can be argued that any decision as to the existence of these concerns will be based on a considerable amount of speculation. However, the imposition of bail conditions is an integral part of the bail process, and there are a wide variety of conditions that can be imposed on any accused when released on bail.

#### Conditions of bail

The first and most obvious condition is the amount of bail. The higher the amount the more likely the accused is to appear at the subsequent trial. Bearing in mind that the accused runs the risk of forfeiting bail on non-compliance with any condition, such non-compliance is less likely where the amount is high.

However, bail should not be fixed at an amount beyond the means of a particular accused. This is tantamount to a refusal of bail. Examples of other conditions are the stipulation that an accused should not communicate with state witnesses. This should address any fears of intimidation of such witnesses.

A condition can also be imposed whereby an accused must report to

a police station on certain regular occasions or surrender his or her passport. This is likely to reduce the risk of abscondment.

An accused can also be released on condition that he or she does not communicate with certain witnesses or frequent certain places. These conditions can go a long way towards ensuring that the accused will not commit similar offences or hamper the investigation.

#### Bail balancing act

Bail proceedings must therefore be conducted in a flexible manner which allows for effective information gathering that will enable a court to determine whether the interests of justice will be served by a particular decision.

This decision includes the question of whether the imposition of certain conditions would facilitate the accused's release, while at the same time reducing the risks associated with the release of the accused.

Bail is an essential part of the criminal process. Any restrictions on its availability will result in injustice by causing severe hardship for the individual accused. Proper and effective law enforcement does not require that thousands of awaiting-trial prisoners languish unnecessarily in jail.

This makes a mockery of any claim to protecting the presumption of innocence. Further, bearing in mind the daily cost of detaining someone in prison, this can pose a considerable financial burden on the state – money that could well be spent on something else.

On the other hand, bail should not be granted too easily, since this will adversely impact on the maintenance of law and order. It further creates a negative perception in the eyes of the public and law enforcement agencies.

It is important to strike the right balance between crime control and due process. It is only at this stage that true justice is achieved – and it is generally on a case-by-case basis. <sup>100A</sup>

# Reworking Parole

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*The early release of countless offenders from prison is very worrying, especially for victims, their families and those responsible for arrests, convictions and sentencing. This article condemns the Draconian power of the Commissioner of Correctional Services which enables the drastic reduction of sentences despite judgments handed down by the courts.*

If crime is considered to be 'public enemy number one', then the manner in which the Department of Correctional Services is able to slash the prison sentences of convicted criminals by way of parole must surely be 'public enemy number two'.

This might sound ominous, but few people are aware that in terms of existing legislation, the Commissioner of Correctional Services enjoys an extra-judicial discretion, enabling him to cut prison sentences by as much as three quarters of the original term.

## The present system

Since March 1994 the Department of Correctional Services has been empowered to order the conditional release of convicted prisoners after they have served a mere fraction of custodial sentences imposed by courts of law.

Parole boards consider the cases of those eligible for placement on parole and make recommendations to the Commissioner of Correctional Services. The Commissioner is, however, not bound to adhere to the Board's recommendations and enjoys an absolute, if not autocratic, discretion as to whether or not to parole a prisoner.

In terms of Section 65 of the Correctional Services Act No 8 of 1959, as amended, a prisoner may not be considered for placement on parole until he has served half of the period of imprisonment to which he or she was sentenced.

Unfortunately, however, the Commissioner's discretion is not limited to a reduction of 50% of the sentence. This date of consideration may be brought forward by the number of credits earned by the prisoner.

## Credits for prisoners

Credits are granted at the discretion of Institutional Committees based at each prison. They are awarded to prisoners who observe the prison rules and actively participate in the programmes which are aimed at their treatment, training and rehabilitation.

**Currently prison sentences can be cut by as much as three quarters of the original term**

In other words, a convicted prisoner can facilitate his early release on parole by merely behaving in a manner in which the average law abiding citizen would expect him to behave.

## Automatic remission

This system of early conditional release and merits for good behaviour was devised after the abolition of the system of automatic remission which prevailed prior to March 1994. In terms of that system, sentences were generally automatically reduced by one third.

This practice, however, drew criticism from all quarters. Professor Van Zyl Smit of the University of Cape Town condemned the practice:

*"If all sentences of imprisonment are reduced more or less automatically, according to a fixed scale, or even worse, by a largely arbitrary administrative process in the prisons, then the very basis of the sentencing court's jurisdiction may be undermined." (Van Zyl Smit 1994)*

The Judge President of the Cape, the Honourable Mr Justice Gerald Friedman, commented:

*"Judges give careful consideration to the sentences they impose and although prison authorities have the right to release prisoners on parole in appropriate circumstances, this has never been done on such a large scale as we witness recently. My remarks do not relate to the State's action with regard to the release of political prisoners - that is a political issue. I am referring to common law prisoners who have been convicted of serious crime unconnected to politics." (Sunday Times, 26 January 1992)*

Instead of improving the situation, it is argued that the recent amendments merely exacerbate the problem, since provision is now

made for the even earlier, albeit conditional, release of prisoners.

The Department of Correctional Services has sought to defuse criticism of its parole policy. It maintains that the entire sentence is still effective, the distinction being that a portion thereof is served in gaol and the balance within the community.

### **Commissioner a super judge?**

This theoretical charade, whereby the sentencing autonomy of the courts is ostensibly maintained, is less than convincing. The effect of the present dispensation is that the Commissioner of Correctional Services is even more powerful than a judge or a Court of Appeal.

The Attorney General of the Cape, Frank Kahn, a vigorous campaigner against early parole, has stated on record that:

*"The power of the Commissioner to reduce by more than half any custodial sentence imposed by a court of law makes a mockery of our entire judicial system."*

Sentencing is generally a well considered judicial process exercised by a court of law with due regard to all of the relevant factors. It is often said that a court must consider what is known as the 'triad', namely the crime, the offender as well as the interests of society (Rumpff 1969).

There is limited scope even for judicial interference with punishment. Where a prisoner appeals against his sentence, the court hearing the appeal will only alter such a sentence where the sentencing discretion has not been judicially exercised.

The requisite test is whether or not the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. It is shocking to note that under the present parole regime, even a sentence which has been confirmed by the Appellate Division can be undermined by the Commissioner.

### **Judiciary vs prisons**

There will always be a dichotomy of interests between the judiciary and the penal bureaucracy. The former is concerned with the traditional aims of punishment such as retribution, rehabilitation and deterrence, while the latter focuses on the rehabilitation of the offender, often to the detriment of the other aims of punishment.

**The Commissioner of Correctional Services is even more powerful than a judge or a Court of Appeal**

It is argued that in a country where rampant crime is placing a stranglehold on our communities, the element of retribution must be acknowledged:

*"The desire for revenge, the belief that retributive punishment is just and the feeling that examples be made of those guilty of shocking crimes are to a considerable degree entrenched in the general population." (Michael and Wechsler in Rabie and Strauss 1985: 47)*

But the component of retribution is nullified by early parole.

It should also be noted that when the decision is made to incarcerate an offender, the sentencing authority has already considered, and specifically excluded non-custodial options such as correctional supervision.

Notwithstanding, the Commissioner can override the express wishes of the court by early placement on parole which is, essentially, the same as correctional supervision.

In fact, a judicial officer can give a sentence of direct imprisonment in terms of Section 276 of the Criminal Procedure Act Number 51 of 1977 if he believes that a brief period of imprisonment is justified. Such a sentence can thereafter be converted to correctional supervision.

Should a prisoner rehabilitate himself after a brief period of incarceration, the Commissioner may, in terms of Section 276 of the Criminal Procedure Act, apply to the court on behalf of the prisoner to have the outstanding portion of the sentence converted into correctional supervision.

The beauty of this provision is that control over the punishment remains with the judiciary where, it is argued, it belongs.

The anomaly, however, is that the Commissioner can sidestep this procedure merely by placing the prisoner on early parole.

### **The United States experience**

The mechanism employed by the American judiciary to overcome the danger of sentences being undermined by penal authorities has been simply to impose severe prison sentences in those cases where they believe the offender should not be paroled. Serial murderers have received sentences amounting to more than 400 years in prison.

**The United States' solution has been simply to impose severe prison sentences - serial murderers have received 400 years**

This solution is, however, not available in our law:

*"All judicial officers are familiar with the parole and remission procedures and I see no harm in the imposition of a heavy sentence with the knowledge that the accused may serve all of it, but to thwart deliberately what is a salutary practice by increasing the sentence so as to negate the benefits of those procedures is irregular." (Stewart 1991)*

Our Appellate Division has argued that the fact that parole may be granted is not a factor which ought to influence a judicial officer in determining the length of a prison sentence.

Should prison authorities persist with their policy of early release of criminals and in particular, the perpetrators of violent crime, I have no doubt that our judiciary will have to become more pragmatic in its approach.

There are indications that this has already begun. In June 1995 the late Justice D M Williamson imposed an effective 70 years direct imprisonment on a triple murderer. He stated that he hoped the sentence would keep the accused where he belongs, namely permanently out of the community.

Despite the late Judge's comments, the prognosis is that the Department of Correctional Services will probably still consider paroling the accused after approximately 20 years.

### The Minnesota response

#### *Abolition of parole*

It is precisely these types of problems which led to the abolition of parole in certain American states such as Minnesota. Instead of the parole system, sentencing guidelines are used.

The factor found to have the most important bearing on the decision to imprison was the criminal record of the accused. The second most important factor was the gravity of the offence.

These two correlates are factored into a sentence grid as a horizontal and vertical axis respectively. Using this grid it is easy for the sentencing officer to determine whether he should imprison and what the permissible range of imprisonment would be.

The vertical axis consists of 10 categories of crime, ranked according to seriousness. The central idea of this 'just desserts' criterion is that punishment should be heavier for more serious crimes. The aim of retribution seems to be uppermost on this axis.

The horizontal axis on the other hand, represents the criminal

history of the accused and is usually shaped by previous convictions. The aim of incapacitation seems to be uppermost here.

The accused gathers points for previous convictions. A felony conviction would count for one point, whereas a conviction for a misdemeanour and gross misdemeanour only counts a quarter and a half point respectively.

A point is also added if the offence was committed while the accused was released on probation or parole, or if the offence occurred in prison. The more points he has, the further he moves along the severity scale. This deals with the previous history of the accused in an effort to predict how great a danger he is likely to pose to the community.

The cut-off line on the grid indicates that a custodial sentence should only be imposed below the line. Above the line a term of imprisonment is mentioned, but this should be suspended, preferably on a condition of community service.

**Parole induces prisoners to obey prison rules and facilitates rehabilitation**

The sentencing officer is bound to these norms unless there are substantial and compelling reasons to depart from it (Van Der Merwe 1991).

### The German approach

#### *Judicial participation*

In Germany a special court is responsible for implementing the sentence. In terms of the Criminal Procedure Ordinance, this *Strafvollstreckungskammer* determines whether prisoners should be released on probation before the completion of their sentences.

It remains responsible for such prisoners until they have completed their probation and therefore is involved in decisions relating to changes in their parole conditions and their possible recall to prison.

The intention of combining in a single chamber the competence relating to release with that of the supervisory function, was explicitly to create a court which would develop expertise of all aspects of implementing punishment.

**In France a specialised judge operates in the prison system, determining penal treatment**

However, there are weaknesses in the way this court operates. Because so many of its decisions are taken on documentary evidence alone, the chamber remains removed from the reality of the actual implementation of punishment (van Zyl Smit 1994).

### The French experience

#### *Judicial intervention*

At a glance, the French system of having a specialised judge responsible for implementing punishment appears to avoid these weaknesses. Since its enactment in 1958, the French Code of Criminal Procedure has provided for a judge who operates as a judicial officer within the prison system and is formally responsible for determining the 'principal modalities of penal treatment'.

These now include decisions relating to semi-liberty, reductions of sentence, authorisation for leave under escort, parole and, except in emergencies, the transfer of prisoners from one institution to another.

The judge is therefore actively involved in the implementation process and presides over a local commission of punishment which includes the head of the prison and the prosecuting attorney.

### Judicial control the answer

It is the function of the judiciary to determine the punishment imposed on offenders. It is thus improper for the Department of Correctional Services, which is merely supposed

to implement and administer the punishment, to be able to substantially reduce prison sentences.

Abolition of parole, as in Minnesota, is not the solution. Our judiciary has always recognised the value of parole as firstly, a tool to induce prisoners to obey prison rules and secondly, to facilitate rehabilitation.

In a nutshell, the problem with parole in South Africa is that the Commissioner's discretionary powers are too Draconian.

The Commissioner is a bureaucrat and is unlikely to be perceived as objective by either the prisoner or the public. For these reasons, some form of judicial control over the parole process is particularly attractive.

Due to a potential administrative burden, judicial scrutiny of parole

**Judicial control over the punishment discretion should remain in the hands of the judiciary where it rightfully belongs**

should be limited to apply only to sentences of imprisonment of two years or more.

It is further recommended that no sentence be reduced by more than 50%. This is imperative if respect for our judicial process is to be maintained. The Commissioner should have an absolute discretion to implement a reduction by up to one third of any sentence.

Should he, however – in extreme cases – be of the opinion that a greater reduction is merited, the Commissioner should be obliged to refer the matter back to the trial court or a court of similar jurisdiction, which can then decide the matter.

In this way, judicial control over the punishment discretion should remain in the hands of the judiciary where it rightfully belongs.

The National Advisory Council on Correctional Services is currently reassessing the entire parole system. While a limitation on the maximum reduction of sentence permitted must be a foregone conclusion, this article will hopefully persuade the Council to consider the merits of judicial control. *PPA*

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# Taking Victims to Court

## A call for victim impact statements in South African courts

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*Victims of crime are largely excluded from the court process when their attackers are tried. This article argues that allowing a victim to submit into proceedings details of how the violent crime affected his or her life, will help deliver more appropriate sentences and promote credibility for the criminal justice process.*

The evolution of the penal system from private vengeance to state vengeance since the 19th century created a criminal justice system which excluded victims from the legal system. In modern adversarial legal systems the victim only plays a passive role as a witness and observer.

Courts are far more responsive to the rights and needs of offenders – consider the following rights: to remain silent, to a fair trial, to bail, to competent legal counsel, free legal counsel in the case of serious charges, to present mitigating evidence for sentencing purposes and the right to parole.

The main purpose of the criminal justice system is seen as the promoting of justice by balancing the interests of the state against the interests of the accused while the victim is largely ignored.

It is regarded as fair that when the court hears from the offender, the offender's lawyers, family and friends for sentencing purposes, that the victim also be allowed to make representations for sentencing purposes (Erez 1994).

During the last two decades greater attention has been paid to the needs and rights of crime victims mainly as a result of public concern with

rising crime rates and the various victims' movements which propagated more rights for victims in the criminal justice process.

The United Nations also played a crucial role in this regard since the publication of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985 – to which South Africa is a signatory – resulting in many countries now focusing on the rights of crime victims.

### Research objectives

This article reports on an explorative descriptive study undertaken between January and August 1995, focusing on the United States, Canada, Australia, New Zealand, Europe and the United Kingdom. The aim was to investigate:

- Legal provision for victim impact statements and victim participation in criminal proceedings.
- The compilation, contents, presentation and purposes of victim impact statements.
- The effect of victim impact statements on the criminal justice system and specific problems encountered.

- Rights and services to victims of crime.
- To propose a victim's rights and participation model for South Africa.

### Definitions

A victim impact statement is a document that is intended to provide information to the court concerning the physical, financial, emotional and psychological effects on a crime victim and, where relevant, his or her family.

The purpose of victim impact statements is to reintegrate the victim into the court process and to improve the quality of sentencing by balancing the rights of the accused and the victim. A victim impact statement can be prepared and presented in a variety of ways.

### International perspectives

The most consistent findings of victim research in many countries is the universality of their trauma and negative reactions to crime, their frustration with and alienation from the criminal justice system and their lack of involvement in relevant decision making processes (Tontodonato & Erez 1994).

This resulted in a number of countries improving the victim's position in the criminal justice process through a victims' charter dealing with specific rights. Some of these rights include:

- The right to be heard concerning the impact of the crime on victims' lives.
- The opportunity to submit their wishes and desires to the court



which are then taken into account during sentencing.

- The right to restitution, protection and separate waiting areas at court.

Since the 1980s Canada, New Zealand and 48 US states have passed legislation permitting the submission of victim impact statements at the time of sentencing. In Australia, only South Australia and New South Wales have to date legislated the submission of victim information to the court.

The majority of US states also provide for victim input at parole hearings (Erez 1994). Some legislation is not specific regarding who must prepare and submit the victim impact statement to court or what the contents of the statement should be. Most victim impact statements are prepared by probation officers or the police.

These statements provide information about:

- The circumstances surrounding the crime and how it was committed.
- The identity and character of the victim.
- The effects of the crime on the victim and the victim's family – financially, physically, psychologically and emotionally.
- The victim or the victim's family's opinion of the defendant and of an appropriate sentence, where relevant.

#### **US leads other countries**

In many states the submission of victim impact statements is limited to specific crimes, mostly violent crimes against the person. The US is the leading country as regards victim impact statements.

The submission of victim impact statements vary, although most countries require a written submission. Some US states require

a victim impact statement as part of the presentence report provided the victim is willing to cooperate. Others allow the victim impact statement only under certain conditions or if ordered by the court.

The victim's opinion on an appropriate sentence is a controversial issue and few states actually allow it. The general feeling is that it can prejudice the criminal justice system's ability to maintain equality and proportionality in punishment.

Research indicates that victims are not excessively punitive or vengeful and most studies found that victims in general do not desire heavy sentences. Victim participation was found not to cause delays or additional expenses for the criminal justice process.

**Victims have constitutional rights which must be recognised and respected by the criminal justice system**

In addition, while prosecutors and judges support victim impact statements in theory, when these impact statements are presented, they are frequently resisted in various ways.

#### **European case**

Victim impact statements are not used in Europe, but in theory the victim has a legal right to participate in various ways. For example, the victim has the right to prosecute for most offences, the right to private prosecution in the case of certain petty offences, the right to secondary prosecution if the prosecutor does not bring charges and the right to assist the prosecutor during the trial.

These rights are, however, seldom used and victims are generally not informed of their rights. Since 1995 Britain provides for presentence reports to also include information on the impact the crime had on the victim. However, no formal guidelines as to what should be

included in the report have yet been formulated.

The Council of Europe to which 32 countries are affiliated serves as a unifying influence on criminal and victim policy. Many countries have drafted victim charters setting out specific rights and services to victims of crime.

Legal systems in Europe are currently being reviewed and major reform is underway and it is conceded that victims should also be allowed the option to submit a victim impact statement to the court.

#### **Problems with the process**

The major objections are that rights gained by the victim are rights lost to the defendant and that bringing the victim back into the process means a reversion of the retributive, repressive and vengeful punishment of earlier days.

The victim's anguish may also be exploited to support conservative ideology and harsher punishment. There is furthermore a fear that allowing the victim more input will make the courts vulnerable to unacceptable public pressures and that victim impact statements will be detrimental to the victim's psychological well-being.

The wishes of the public and victims in particular, however, cannot be ignored in a democratic society. In the interests of a credible criminal justice system these wishes must be taken into account. Victims also have constitutional rights which must be recognised and respected by the criminal justice system.

Research indicates that most citizens – approximately 80%-90% – and victims are in favour of victim impact statements and other rights for victims of crime. In South Africa, 72% of respondents would like to make an input for sentencing purposes (Pitfield 1995).

Research nevertheless indicates that victim input in the sentencing process remains limited in countries where it is allowed.

### Proposal for South Africa

South Africa is a signatory to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, but due to a lack of funds only limited services are provided to crime victims and very few rights are accorded them.

Yet precolonial African societies mostly focused on the victim of crime rather than the offender. Reconciliation and restitution were regarded as important to restore the harm caused by crime as tribal laws emphasised the protection of the community.

Colonisation, however, repressed the customary laws of the indigenous people and currently victims of crime are largely neglected and alienated from the criminal justice process. Most Africans view the criminal justice system with suspicion and see it as a colonial legacy with few benefits for the individual, in particular the victim of crime.

#### Precolonial African societies mostly focused on the victim of crime rather than the offender

If the rights of victims can be restored to some extent this will go a long way towards making the criminal justice system more credible. The following model is proposed for South Africa:

- That the victim's rights also be entrenched in the constitution.
- A state compensation fund be created to compensate victims – or their family – suffering violent crimes against their person for injuries suffered and loss of income during the recovery period. State funds must be supplemented by a levy payable by all convicted criminals.
- That compensation and restitution be made an

independent sanction option which has priority over a fine if the offender cannot pay the fine, and that reasons be supplied by the court if it decides against this.

- A victims' charter be drafted setting out the rights and services to victims of crime and that all roleplayers in the criminal justice system receive training to give effect to the victims' charter.

Legislation needs to be enacted and regulations and guidelines drafted to make provision for the following:

- That victims – or their families – be accorded the right to bring to the court's attention the harm they suffered as a result of violent crimes against the person. This may include physical, emotional and psychological injury and financial losses. Such a submission must be taken into account by the courts for sentencing purposes after the conviction of the offender.

Details of the victim's career and employment status, age, gender, handicaps, and personal character must also be included in the statement as this may have made the victim particularly vulnerable.

- That victims be able to choose whether or not they wish to make such a submission to the court.
- That victim impact statements also be submitted in the case of serious crimes if the court so desires.
- That such a submission be presented as a written victim impact statement taken by a probation officer or a trained victimologist/criminologist. Where relevant, such a statement should be accompanied by documentary evidence such as medical or psychological reports,

statements of expenses incurred, etc.

- That all presentence reports include a separate victim impact statement unless the victim has decided not to make a submission in which case it must be so stated.

#### Tribal laws emphasise the protection of the community

- That victim impact statements be disclosed to the defence.
- That disputed victim impact statements be handled in the same manner as other disputed evidence.
- That probation officers, prosecutors, magistrates and judges be informed and trained as to the rights of the victim and the use of victim impact statements and that future legal training also include these aspects.
- That police officers be trained to include details of the harm suffered by the victims of crime in all police statements and that this information be included in the victim impact statement.
- That the public be educated and informed as to their rights in the criminal justice process.
- That continuous research be undertaken to monitor the effectiveness of this model. **IPWA**

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# Speaking Out in Safety

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*A witness protection programme proved essential for the Goldstone Commission and will be for the Truth Commission. Although these complex programmes take time to perfect, they can have vital implications for the success of the criminal justice process.*

**W**itness protection will undoubtedly become an important tool in the Truth and Reconciliation Commission's (TRC) investigations. And significantly, considering the historical absence of effective witness protection in South Africa, the development of such a mechanism could have vital implications for the criminal justice system as a whole.

Although South Africa has statutory provisions for protecting those who may face danger as a result of testifying, these provisions fall far short of what is required if witness protection is to function as an effective tool.

Current statutory provisions are rooted in legislation enacted to give the Goldstone Commission the legal capacity to protect witnesses testifying before it. The centrality of this to the Goldstone Commission did not go unnoticed by those drafting the Promotion of National Unity and Reconciliation Act. As a result, provision has been made for the TRC to establish a 'limited' witness protection programme of its own.

Until recently, very little research has been done on this issue in South Africa. Only during the end of 1995 was a task group established by Justice in Transition to examine the various issues and legislation pertaining to establishing a witness protection programme.

The task group came about as a result of a conference on witness protection in July 1995. The wide range of attendants from both the criminal justice system and civil society concluded that despite its expense and complexity, a well structured national witness protection programme is indispensable.

**Fear of reprisal is a powerful tool in preventing people from coming forward to testify**

## Protection from reprisal

South Africa's criminal justice system demands that a court of law establish beyond a reasonable doubt that an accused person is guilty of the offence with which s/he has been charged, before such a person can be convicted.

One of the most powerful vehicles to link a perpetrator to a crime is the testimony of a reliable witness, especially if other direct evidence is absent or inadequate. Most witnesses are called upon to testify in respect of crimes committed by individuals or a small group of individuals.

In other cases however, witnesses may have to testify against a large group of people such as a gang. If

the witness is a past member of such an organisation, it is likely that they will be regarded as a traitor by former colleagues and may be at risk of retributive actions.

Under such circumstances, protection for the 'whistle blower' is crucial. The dangers posed by such highly organised criminal elements – whether political in nature or not – are not however, exclusive to former insiders. Victims who testify, or mere third party witnesses to crimes, may equally be threatened.

Fear of reprisal is thus a powerful tool in preventing people from coming forward to testify. If a person is not offered any protection or support, it is unlikely that they will put their lives or well being at risk to incriminate a criminal suspect.

Indicators of the magnitude of this problem can be found around the country. In the Western Cape, the National Institute for Crime and the Rehabilitation of Offenders (NICRO), cites intimidation of witnesses as a primary problem in attempts to combat crime by gangs (Veriava 1995).

In KwaZulu-Natal, problems experienced by the prosecutors of the Attorney General's office in bringing forth witnesses of violence have resulted in the recent establishment of witness protection for the survivors of the Shobashobane Christmas Day massacre.

## Organised crime

Apart from criminal gang activity, the problems of syndicated crime have increased significantly since the end of South Africa's international isolation. The decriminalisation of political activity which accompanied the transition was ironically

accompanied by the deregulation of social control, which created greater space for the criminal groups to operate (Simpson and Rauch 1993).

There is evidence that international crime syndicates have targeted South Africa as a lucrative market and transit point to other parts of the world, particularly in the illegal drugs trade (*Sunday Independent*, 9 September 1995).

Sometimes the only way to successfully combat this problem is through police infiltration and the use of insiders who are willing to testify – often in exchange for their own indemnity from prosecution.

**The United States has a conviction rate of 89% as a direct result of testimony provided by protected witnesses**

A witness protection programme should therefore, not merely be seen as a mechanism for protecting people who are already in danger – it should be seen as an integral part of the criminal justice system and of crime prevention generally.

A message must be sent to the public that they will receive protection and support if they come forward and help combat crime through giving evidence in court. At present, this message is not being effectively conveyed and witnesses are not coming forward for fear of reprisals.

#### **International success stories**

In the United Kingdom excellent results have been obtained through an effective witness protection programme. Testimony to this success is that a witness has never been lost. The calibre of witnesses attracted to the programme has also resulted in a conviction rate of 88% where protected witnesses have given evidence in court (Lawyers for Human Rights 1993).

In the United States the results have been equally impressive, with an

overall conviction rate of 89% obtained as a direct result of testimony provided by protected witnesses (United States Marshals Service 1992).

The programme by the United States Marshals Service is 'widely recognised as providing a unique and valuable tool in the government's war against major criminal conspiracies and organised crime' (USA Congress Press Release 1992).

Through its potential to provide valuable witnesses with the confidence to testify, a well structured, nationally run witness protection programme in South Africa is therefore, essential as part of a comprehensive anti-crime strategy.

Furthermore, experience in the United States shows that protection programmes can also play an important rehabilitative function. Of those witnesses on the US Marshals programme who had extensive criminal records, the recidivism rate – the percentage of those who return to crime – was half that of criminals who were released from state penitentiaries (Morris 1988).

It is important to realise that in many instances those who need protection may have been involved in crime themselves. There is no guarantee that they will break their criminal habits if they agree to cooperate with the law in bringing others to book.

A further advantage of witness protection programmes is that they may be able to provide the necessary education, training and counselling services to enable a person to be successfully reintegrated into society.

#### **Past protection**

Until 1992, provision was made for witness protection under Section 185 of the Criminal Procedure Act. In accordance with the Act, witnesses deemed by the Attorney General to be in need of protective custody were kept in the same

conditions as prisoners awaiting trial.

The protection was not voluntary and the witness could be held incommunicado in a police or prison cell to which only state officials had access. The witness could only see a legal representative with the permission of the Attorney General and could be kept in detention until the relevant trial ended.

This 'protective custody' was usually involuntary and used mainly for state witnesses in political trials. The conditions were restrictive and repressive and not conducive to the voluntary cooperation of potential witnesses (Lawyers for Human Rights).

It took considerable lobbying and representation before new legislation was finally passed by the Minister of Justice in terms of the Prevention of Public Violence and Intimidation Act, under which the Goldstone Commission had been established.

**Experience in the United States shows that protection programmes can also play an important rehabilitative function**

The new legislation made some important changes allowing witnesses to voluntarily withdraw from the programme. Moreover, witnesses were also to be visited daily to have their psychological and physical needs attended to.

#### **Goldstone Commission**

The Commission's programme provides useful insights into the problems that such an initiative confronts under the auspices of a commission of inquiry. Initially, the Goldstone Commission did not plan for the establishment of its own protection programme for witnesses.

The programme only came into operation almost a year after the Commission, once it became absolutely obvious that there was an urgent need to protect witnesses who were willing to testify.

Initially there was considerable suspicion of the Goldstone Witness Protection Programme. The main reason being that in May 1992, the administrative structure of the Commission was transferred from the National Peace Accord to the Department of Justice.

**Doubts as to the Goldstone Witness Protection Programme's independence plagued its effective operation**

This undermined some of the credibility the Commission had sought through avoiding being part of a government department. The result was that the Goldstone Witness Protection Programme became highly dependent on the South African Police (SAP) and the Department of Correctional Services.

This suspicion and lack of credibility was highlighted by former security policemen who were willing to testify before the Commission, but who refused to be protected inside the country.

Ironically, it is unlikely that the Goldstone Commission could have sustained a very expensive witness protection programme without the resources of the Department of Justice.

Nonetheless, doubts as to the Programme's independence continued to plague its effective operation. The fact that no witness on the Goldstone Witness Protection Programme was killed, has been cited by some as a testimony to its success.

**Protection problems**

However, a brief examination of some incidents suggests that this was more by luck than by design. Paul Erasmus, a former security policeman and a key witness on 'third force' activities, was attacked in the 'safe' house where he and his family were staying while on the programme.

This is one of several examples where the security of protected

witnesses was severely compromised. In some cases, this was a result of the ill disciplined actions of witnesses themselves, but in others it was clearly due to the inexperience of those running the programme.

Formative as it may have been, the Goldstone Witness Protection Programme suffered from a lack of adequate planning and experience. The programme was managed and run by people who had little or no previous experience in directing such an endeavour.

Much of the time, those saddled with the responsibility of ensuring the witnesses' safety had to rely on common sense and quick thinking. It soon became clear that the staff of the Goldstone Programme were inadequately prepared for the taxing and often complex demands of this initiative.

**The Goldstone Witness Protection Programme suffered from a lack of adequate planning and experience**

The result was a programme that operated in a predominantly *ad hoc* fashion, primarily concerned with the narrow enterprise of short term physical safety. In addition, when the Goldstone Commission itself concluded its operations, little forethought was given to the future of some key witnesses who would potentially be involved in subsequent prosecutions.

Despite its limited innovations, the Goldstone Witness Protection Programme did not result in any substantial improvement in national witness protection.

**South Africa's social context**

A difficulty in establishing a witness protection programme relates to historical inequities of this country's population. Racial, economic and cultural disparities have plagued previous programmes in South Africa and limit the applicability of various comparative international experiences.

For example, the national coordinator for the Network of Independent Monitors (NIM) highlighted the severe problem confronted in removing witnesses from one community and relocating them in another.

In many cases this could be achieved without generating suspicion, but it was argued that the cohesive nature of local communities, coupled with broad national networks, sometimes means it takes only a couple of weeks before the whereabouts of witnesses becomes known to their original communities.

In terms of the size and mobility of the population, there is much that mitigates against the success of witness relocation. However, this should not be excluded as a possibility, as the Goldstone Witness Protection Programme did successfully relocate a number of witnesses.

More obviously, the differences in class and culture also present obstacles to using one system of protection for all witnesses. As has been asserted, the lifestyle of the witness must remain similar to that which s/he is accustomed.

Cases did arise on both the Goldstone and Lawyers for Human Rights programmes where witnesses moved out of their familiar social context, endured substantially increased stress. This compounds the problems experienced by already highly stressed witnesses.

**Differences in class and culture present obstacles to using one system of witness protection for all witnesses**

**Truth Commission protection**

One of the issues confronting witness protection programmes is the extent to which perpetrators are seen to be enriched or placed in luxurious surroundings while receiving protection.

This issue was raised by the defence counsel in the trial of former Vlakplaas commander Colonel Eugene de Kok, in an attempt to discredit a key state witness who was under witness protection. It was argued that the witness's cooperation and testimony had been 'bought'.

**Successes of initiatives in countries like the US have generally been achieved through trial and error**

This issue presents a slightly different dilemma for the TRC. Many people who testify before the Truth Commission may expose themselves to danger, thus requiring protection. In many instances, the most valuable information – that which leads to important breakthroughs – will be provided by perpetrators.

It will therefore be important for the TRC to offer perpetrators who apply for amnesty or simply provide information, with some form of protection. This is particularly so when a perpetrator breaks ranks and applies for amnesty in a context where members of hit squads or paramilitary units have been sworn to secrecy.

If the majority of witnesses who are offered protection are perpetrators,

this may result in quite justifiable, resentment on behalf of victims. Victims who are concerned about the granting of amnesty will certainly be offended by the idea that not only will offenders escape conviction, but will also be housed in comfortable surroundings and provided with protection and daily subsistence – all at the Commission's expense.

This may seem doubly cruel, given that the TRC will not be able to provide victims, many of whom live in poverty, with full reparation.

There is no easy answer to this dilemma. The reality is that protecting perpetrators is an indispensable part of the truth recovery process. But the anger of victims who feel the Commission has already gone too far in accommodating the needs of perpetrators is also legitimate.

Perhaps the only solution is for the TRC to openly acknowledge this tension and be particularly vigilant in preventing the abuse of witness protection by unscrupulous perpetrators seeking to merely improve their lifestyles.

**Success only with time**

The lessons from witness protection programmes in other countries do not readily provide mechanisms to

overcome the problems in South Africa. Few other developing countries boast effective programmes and the successes of initiatives in countries like the US have generally been achieved through trial and error.

Given South Africa's unique situation, it is likely that developing an effective witness protection programme will only be achieved over a substantial period of time, based on constant re-evaluation and regular improvements.

This incremental view poses problems for a 'limited' witness protection programme under the TRC, which has to be established rather hastily. However, it also implies that these witness protection strategies should not be seen in isolation, but as a vehicle for testing and developing a more enduring and nationally coordinated programme. *(PPA)*

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# Prelude to a Massacre

## Violence on KwaZulu-Natal's South Coast

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*The 1995 Christmas Day massacre at Shobashobane was a shocking reminder that well planned political violence still threatens this region. This thorough article explores the history and current dimensions of conflict in the area, illustrating the complexity of violence in KwaZulu-Natal.*

The Shobashobane massacre on the KwaZulu-Natal South Coast shocked South Africans and prompted President Mandela to set up a special team to investigate violence in the area.

This violence has been endemic for several years and the massacre was a startling expression of the dynamics in this region. From 1991 to 1995, nearly 1 500 people were killed and 809 injured in violence here, and current clashes are tied to local dynamics as well as regional and national political tensions.

The violence represents a complex web of conflicts which are not easy to explain or untangle, and which complicate efforts to resolve the violence. In the past numerous attempts to implement peace in the region have failed.

### **Youths vs tribal structures**

After the 1985 riots in Durban and the subsequent expulsion of United Democratic Front (UDF) activists from Umlazi and KwaMashu, many UDF aligned youths fled south seeking refuge in the rural areas.

These youths began organising political events in schools and undermining the traditional

authorities which still controlled these areas. They challenged the chiefs' traditional methods of taxation which often bordered on extortion. One South Coast chief, for example, levied his people to pay for his new car.

By mid-1989 the youth had established alternative structures such as Student Representative Councils (SRCs), civic associations and peoples' courts. Many chiefs were pressurised by these structures which accused them of corruption, nepotism and inefficient administration.

In the Murchison area, Chief Blose was seen as a symbol of oppression and a community meeting was called to discuss his corruption. He did not attend, but was hacked to death by a mob soon afterwards. The attack was led by the youth, but elders from the community also participated, marking the start of several revenge killings.

By 1990 the tribal structures were in a state of collapse as many chiefs had been driven away. After February 1990 when Nelson Mandela was released and the African National Congress (ANC) unbanned, ANC structures led by the youth openly controlled most of the South Coast.

An extremely explosive situation was developing with many ANC aligned youth leagues forming without any controlling structures or direction. By the end of April 1990, there was talk of 'total anarchy' in the peri-urban settlements around Port Shepstone.

### **Traditional leaders respond**

In response, the tribal authorities began to organise themselves, and in February 1990 a meeting of chiefs was called at Hibberdene, demanding that all ANC youths leave the area.

The chiefs openly went on the offensive, using the support of *impis* sent by Inkatha Freedom Party (IFP) aligned 'strongmen' from the informal townships around Durban. Significantly, after this meeting, violence inland from Hibberdene increased.

As tensions escalated, many youths fled to the nearest urban areas for protection. But without strong leadership they became uncontrollable and largely unaccountable to any organised structures. In April 1990, 15 ANC youths were killed in Umzumbe.

Retaliatory killings followed and during April and May 1990, 101 people died on the South Coast. Violence then increased steadily with reports of kombi loads of weapons being stockpiled by Inkatha supporters at a base in Mbotsha. From here, counter attacks were launched on the surrounding ANC controlled areas.

In addition, the former KwaZulu Government began supplying local chiefs with G3 rifles. By law, a chief may arm six tribal policeman.

The latter were originally supplied with shotguns to keep the peace in a chief's ward, but G3s gave them superior firepower over AK47-armed ANC comrades.

A cycle of largescale attacks followed, driving ANC supporters out of the rural areas. Between February and March 1991, more than 40 people were killed in fighting in an area covering no more than 30 kilometres.

### Refugee problems start

Violence spread to Izingolweni when two gunmen wearing balaclavas shot dead four schoolboys sitting at a bus stop, wounding one other. This new round of conflict displaced at least 2 000 people, many of whom sought refuge in Gamalakhe township near Port Shepstone or in the town itself.

The South Coast Refugee Crisis Committee helped organise relief supplies for these people. Many employees in Port Shepstone also allowed their employees and families to stay with them because of the danger in the outlying settlements.

The refugees blamed the attacks on IFP members, but Inkatha supporters claimed the attacks were in response to the stoning of minibuses which had passed ANC controlled areas. In another incident, an Inkatha sympathiser, Reverend Nswalane, was pulled from a taxi and killed.

Eventually, by July 1991 the Inkatha aligned chiefs had re-established their control. By November open violence on the South Coast began to decline and by the end of the year, the struggle had changed in nature: key leaders were now attacked or assassinated by professional gangs of hitmen.

Attacks on leadership continued throughout 1992 and 1993. Tensions were high before the elections in April 1994, particularly since the IFP had refused to participate. A number of crucial assassinations occurred which

fuelled antagonisms between the contending parties.

### Assassinations in KwaXolo

The KwaXolo/Murchison area is divided into ANC and IFP supporting strongholds which regularly engage in attacks and counter attacks. Taxis conveying commuters from Margate to these areas are frequently attacked by armed men from the opposing area.

From April 1994 to the end of 1995, up to 66 people were killed in KwaXolo. The area was consequently one of the nine KwaZulu-Natal flashpoints chosen by the Community Safety Plan for concentrated security force deployment.

In January 1994 the Xolo tribal chief, Alpheus Xolo, was shot and stabbed to death by five men. His nephew, *Inkosi* Everson Xolo – who at the time was a member of the KwaZulu Legislative Assembly – had himself survived an assassination attempt in December 1993.

Everson became chief, but rumours spread that he had defected to the ANC and was encouraging people to vote in the forthcoming elections. Fearing for his life, Everson fled to Durban. In the ensuing leadership vacuum there was much jockeying for power by local IFP chiefs.

One contender was Chief Ndwalane, a local IFP executive member, who in December 1993 had been sentenced to eight years imprisonment for possessing illegal firearms and arming IFP members in an attack which killed six ANC supporters. At the time, Ndwalane was out on bail. His conviction made him something of a political liability and rivals soon sidelined him.

Another Xolo nephew, Sgoloza Xolo, also contended the chieftainship. After Everson Xolo fled to Durban in April 1994, Sgoloza appointed himself chief and took over the tribal court. However, intense conflict and

jostling for power in the area persisted.

In other areas, the assassinations of political leaders continued. In February 1994 an IFP councillor in Izingolweni was assassinated, and later that month the ANC chairperson of the lower South Coast region, George Mbhele, was killed in his office by unknown gunmen.

### Pre-1994 election tension

In the lead up to these elections, local political leaders increased their efforts to assert control, especially in areas where hegemony had not been established by either political party. In some areas this led to a renewed flow of refugees.

Several massacres also occurred. On 2 April 1994, nine people were killed in Izingolweni by attackers calling themselves policemen. Later in April, five more people were killed ostensibly for harbouring ANC sympathisers. These attacks led to more than 2 000 people fleeing the area.

People fled several areas as a result of violence and many escaped to Gamalakhe near Port Shepstone, or to wards like Gcilima which were still under ANC control. The refugees in turn, often increased tensions in these areas and were pressurised to return home.

In May 1994 after the election, many refugees attempted to go home. In Mvutshini, their return was linked to the killing of an IFP councillor, Wilson Xolo. The following day, *Induna* Angel Mkhize was also killed, although renegade Umkhonto we Sizwe members were allegedly responsible for this killing.

### Changing role of SDUs

After the election new dynamics developed, such as those surrounding the continued existence of the self defence units (SDUs). In several cases where SDUs had received firearms and money from



local civic and political structures, this support was withdrawn.

Essentially, SDUs were politically disowned. Many of their members ignored official calls to hand in their firearms and refused to be accountable to anyone. Without financial support, some members sought other means of survival.

These more often than not, were of a criminal nature. Unlike the East Rand region in Gauteng, alternative employment programmes such as community police training, were not offered these ex-SDU members.

During 1994 and 1995 a series of intra-SDU clashes occurred as well as attacks by these criminal gangs on the more formal ANC structures in a number of townships on the South Coast.

These activities were particularly prominent in Gamalakhe. The S'gedleni community here consists of ANC refugees who fled violence between ANC youths who supported the official structures in the area, and renegade youths who had threatened the ANC leadership in Gamalakhe.

Residents in ANC controlled Bhuboyi had, as early as March 1994, complained about renegade SDU gangs who openly extorted protection levies from locals. Bhuboyi residents signed a petition asking for the removal of the Sinyora gang from their area.

#### **The police's role**

1994 also saw the return of attacks by unknown men wearing balaclavas, some in police uniform. Reports of police complicity in the violence again surfaced with specific allegations levelled against Lt-Col James Fourie.

He had allegedly been seen handing weapons to Sgoloza Xolo. Demands were also made for the removal of the Internal Stability Unit (ISU) and the South African National Defence Force (SANDF) from the area.

Local police have, for their part, become extremely wary of arresting

perpetrators from either the ANC or the IFP since they fear for their safety and that of their families. In some cases, after suspects were arrested, individual police members had received threats.

Threats were not confined to local police members. In February 1996 after the Special Investigation Police Task Team – set up by Mandela after the Shobashobane massacre – arrested suspects for the killings, IFP supporters held several protests against these arrests.

IFP supporters had blockaded roads in Margate and allegedly threatened bloodshed if these suspects were not released unconditionally. In addition, the head of the Investigation Team received a personal verbal death threat from a local IFP chief.

#### **AWB involvement**

There were also persistent claims that 'third force' and rightwing elements were destabilising the area and fanning violence. In March 1994 uniformed members of the Port Shepstone Afrikaanse Weerstandsbeweging (AWB) tried to join IFP supporters marching to a rally to demand a Zulu kingdom.

The AWB were prevented by the police from joining, since the march organisers had not stipulated that other organisations could participate. However, in a subsequent interview the regional AWB commander openly acknowledged that the organisation was involved in training IFP supporters on farms around Port Shepstone.

#### **The refugees return**

In June 1994 ANC refugees began returning to Mvutshini and Gcilinga, renewing old conflicts in the area. These returnees soon came under attack and in July 14 people were massacred in Gcilinga and up to 30 huts burnt down.

In an apparent retaliatory attack, Lotus Ngcobo, the local IFP leader, was killed and 13 houses were

destroyed. These attacks led to 400 people fleeing the area and taking refuge in Margate – where they were later attacked.

The refugees became a further point of conflict when the IFP branch chairperson in Izingolweni, Meshack Cele, was killed in August 1994. IFP supporters were suspected of his murder because he had favoured allowing the return of ANC refugees to his area even though a community meeting had decided against this.

#### **The Gcilinga massacres**

In the latter half of 1994 the attacks and counter attacks continued. In August five youths were killed in Gcilinga by attackers from an IFP supporting area. Sgoloza Xolo was identified as being among the attackers.

In October 1994, in an apparent revenge attack, 14 people were killed, 10 houses burnt and two cars set alight by an impi of over 100 armed men who were seen coming from the Mvutshini ward. In November five people were killed when buses returning from an IFP rally were attacked as they passed the ANC controlled Bhuboyi area.

In the wake of the heavy fighting, many homes were destroyed and over 600 people fled. Following the October Gcilinga massacre, the security force presence in the area was stepped up and detectives from Durban were brought in to investigate the violence.

In mid-December the Mvutshini IFP chairperson, Sgoloza Xolo, and three other IFP members were arrested and appeared in court in connection with these massacres. The local ANC also accused the ISU of complicity in the violence and of assisting Sgoloza.

#### **Dynamics in Izingolweni**

Similar dynamics occurred in Izingolweni during 1995. Izingolweni is an IFP stronghold and at the beginning of January 1995, eight people were killed at

the kraal of a family whose ANC supporting sons live in Durban. A few days later five people were killed at *Induna Celc's* kraal by a group of IFP youth looking for ANC supporters.

After these two incidents, a group of about 20 ANC youths, some refugees and others allegedly from Durban, moved into the area. The IFP supporting community had consistently refused to allow the return of ANC refugees who had fled during the pre-election violence.

The local IFP alleged that these youths had been planted in the area by the ANC to stir up trouble. The youths had hoisted an ANC flag at the local school and according to the IFP, were visiting houses in Shobashobane asking for ANC membership cards.

Soon these youth were living under virtual siege in Shobashobane, needing police protection to move around the area. Peace talks had been deadlocked for months over the issue of the return of refugees. The local Peace Committee predicted a major clash between the two sides.

Although the SANDF had been deployed in Izingolweni in January 1995 – a permanent platoon was stationed in Shobashobane – the SANDF had stopped house to house weapons searches because of the IFP's opposition and repeated calls for their removal from the area, alleging the SANDF was biased.

### **Christmas Day massacre**

Eventually all these attacks and counter attacks culminated in the Christmas Day massacre in Shobashobane. According to the police, at about eight o'clock in the morning a group of between 600 and 1 000 IFP supporters attacked homesteads from the surrounding IFP controlled wards.

Nineteen ANC supporters, including six women, a baby and the local ANC leader, Khipha Nyawose, were shot to death, while 21 others were injured and 80

homes were set alight. Many of the victims were mutilated.

Police believe the attack was in revenge for IFP supporters killed in surrounding wards in December. The Port Shepstone Peace Committee and survivors alleged it was a manifestation of tensions between the ANC and IFP which had been building all year. The ANC believed the attack was aimed at expelling them from the area.

The attack was well planned, executed in a classic halfmoon manoeuvre by two groups. One group was lead by a woman, and residents who fled these attackers in the direction of the local police station, collided with the second group coming from that direction.

The attackers apparently arrived in the area the night before, surrounded the ward and attacked in the morning, taking the residents by surprise. Prior to the massacre, transport to Izingolweni had been cut off, residents were not allowed to leave or enter the area, and shopping in Izingolweni required a police escort.

Taxis travelling into the ward were also attacked, bakery vans were prevented from entering, and a local trader who tried to open a Spaza shop was killed. A few days before the massacre, police conducted a weapons search in Shobashobane which survivors alleged left them defenceless.

### **Effects of the violence**

#### ***Displacement of refugees***

Since its inception in mid-1985, the conflict in KwaZulu-Natal has displaced hundreds of thousands of people living as refugees for days, months or even years.

The South Coast has experienced particularly high levels of conflict, and after every massacre a new flood of people seek refuge elsewhere. Whole communities are abandoned if violence becomes too intense and areas with as many as 10 000 inhabitants have become depopulated overnight.

These refugees leave because they fear retaliatory attacks – as happened in July 1994 at Gcilima near Port Shepstone when 600 people slept at the local clinic, returning to their homes and fields during the day to feed and look after their livestock and crops.

#### ***Vandalising of houses***

Some rural areas on the South Coast and hinterland have become almost completely depopulated. One of the most recent examples is the rural community of Mtengwane, south of Port Shepstone, where over a period of two months 10 000 people fled leaving almost 700 houses empty.

Some of the houses still have furniture in them since the owners were hoping to return, but many have been looted or vandalised. Some houses at Mtengwane were destroyed by the owners who did not want anybody else inhabiting them or taking the fittings to rebuild elsewhere.

Thousands of houses are burnt down in attacks. Such destruction is based on the assumption that if houses are destroyed, refugees have nothing to return to.

Also, traditional beliefs prevent the occupation of such houses since they are believed to be inhabited by ancestral spirits of the departed family. By burning down the house, the spirits are driven away and any memory of those who lived and died there is obliterated.

#### ***Impact of displacement***

When ANC and Inkatha protagonists try to gain control of an area, the inhabitants suffer. Those who are displaced often belong to an opposing faction and can never return for fear of being killed.

Those controlling an area believe it is a sign of weakness to let opponents return once they have been expelled.

Violence also forces out those people who could play a constructive role in restoring peace and rebuilding communities.

Professional older people flee and control is usually left in the hands of a few radical elements who only understand the rule of the gun.

Many schools also remain closed as a result of ongoing violence. When fighting starts, education is the first casualty and schools are often targeted because pupils are seen as comrades.

### **Failed peace efforts**

Although a number of efforts at national level – meetings between Mandela and Minister Buthelezi – and the call for an *Imbizo* have occurred, the violence in KwaZulu-Natal continues.

There have also been local efforts at establishing peace. Immediately after the Shobashobane Massacre, Mandela set up a National Task Committee to investigate the violence with specific reference to the South Coast.

Also, in agreement with KwaZulu-Natal premier, Frank Mdlalose, a SAPS Special Investigation Team for the South Coast was set up in addition to the existing KwaZulu-Natal Investigation Task Unit.

Even though a number of arrests were made by the Special Investigation Team, resentments surfaced in several quarters. Local police resented them 'interfering', accusing them of not understanding the dynamics on the South Coast.

When six suspects were arrested for the Mvutshini attacks, a local police official in Margate complained that the Special Investigation Team had broken a local agreement that chiefs would be informed of impending arrests before they occurred.

A multi-party peace initiative which might have prevented the Shobashobane Massacre had also failed. A Port Shepstone based Independent Commission of Inquiry, approved by both local IFP and ANC leaders in September 1995, suspended its operations in February 1996 after attempts to

gain acceptance from the regional authority failed.

The Commission was part of a peace initiative launched in August 1995 by the Southern KwaZulu-Natal Chamber of Business. Local chiefs had requested the Commission to obtain approval from the regional Minister of Traditional Affairs, Chief Nyanga Ngubane, and Minister of Safety and Security, Celani Mtetwa.

However, both failed to attend a meeting in November 1995. Subsequent attempts by the regional authority to arrange further meetings failed. This lack of commitment and support for peace exhibited by certain political leaders has been a constant underlying factor in the perpetuation of violence in the South Coast.

For violence to end and for any peace initiative to be successful, the whole region obviously needs far greater political will than currently exists.

### **Military solution not viable**

A military solution is also not very viable, even though there has been a SANDF presence on the South Coast for some time – a permanent platoon was stationed at Shobashobane at the time of the Christmas Day massacre but was unable to prevent it.

One suggestion has been for the blanket deployment of large numbers of military personnel. However, analysts maintain that at least 10 000 SANDF personnel would have to be deployed and even then there could be no guarantee that they would be effective.

This relates to the hilly terrain and lack of infrastructure and roads in the region. Such a deployment would also be very costly, requiring at least the maintenance of permanent roadblocks, regular house to house weapons searches and the strict confiscation of illegal

weapons – actions which remain politically sensitive.

Replacing local SAPS personnel with police officials from other areas would only be a short-term solution before they too come under pressure and receive threats. The difficulty of obtaining evidence suitable for court would still remain.

The Special Investigation Team has experienced growing resentment and lack of cooperation, while they themselves have had to be guarded and protected by a special task team from outside of the region.

### **Arrests and prosecutions**

To some observers, solutions to the South Coast problem seem non-existent and there is widespread pessimism about whether the violence can ever be ended.

Proposed solutions are mostly premised on making unpopular political decisions in terms of the arrest and prosecution of certain political leaders and on allowing open political activity.

Other political issues such as the position of traditional leaders and the Zulu king, the provincial constitution, land reform and the holding of local elections will also have to be resolved before an atmosphere of stability and peace can be instilled.

Currently the situation on the South Coast, like other areas in KwaZulu-Natal, remains a complex web of violent politicised conflict. The resulting political intolerance, 'no-go' areas and cycles of retaliation all impact negatively on development and the inculcation of a democratic culture. **IPWA**

This analysis is largely drawn from the *Conflict and Violence Trends in South Africa (1990- ) Infotext Database* at the Centre for Sociopolitical Analysis, HSRC; and monthly regional reports of the Human Rights Committee of SA.



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