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**COMBATING CRIME AND RESPECTING HUMAN RIGHTS:
AN ILLUSIVE BALANCE OR THE SEARCH FOR A DURABLE SOLUTION**

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1. The transition from a minority regime characterised by a policy of racial superiority described as a 'crime against humanity' by the United Nations, to a democratic state was ushered in by the 1993 Constitution and historic elections in April 1994. South Africa, constitutionally and formally, put in place a system of democratic governance based on universal suffrage and underpinned by a Bill of Rights. This system is widely regarded as one of the most comprehensive and visionary Charters of Rights.
2. The vision of a society that respected and promoted human rights carried with it the onerous task of realigning laws and institutions. The laws and institutions that were in place were designed to uphold and maintain the apartheid state. They were inconsistent to the demands of the new legal and social order. A sweeping and radical legal and institutional transformation was required in the main to ensure that the laws and institutions were able to support and advance the values enshrined in the Constitution, namely equality, human dignity and the advancement of human rights.

GENERAL DEVELOPMENTS AFTER 1994

3. The era of constitutionalism and human rights had arrived and no sector of society or area of governance could avoid the spotlight of Constitutional scrutiny and post 1994 era saw a flurry of legislative and institutional reform in the pursuit of building a new society and new institutions and transforming old ones.
4. The criminal justice system was an essential clog in the maintenance of the apartheid juggernaut and there was little argument about the need and extent of the reform required. Millions of South Africans and many of those in government and civil society had first hand experience of the injustices perpetrated through the criminal justice system. Detention without trial, confessions extracted violently, a judiciary that was obsessed with advancing the interests of the apartheid

state and a penal system that brutalised and offered no prospect of rehabilitation were some of the characteristics of that system. Accordingly, broad consensus existed on the need, both politically and constitutionally, for reform.

5. A dynamic and industrious Parliament, a Constitutional Court that was demonstrably independent, a host of Chapter Nine Institutions¹ and a vibrant civil society sector ensured the promulgation of new laws and the amendment of existing ones. A new Correctional Services Act² sought to ensure that the regulation of the penal system and the conditions of detention were consistent with international standards, various amendments to the Criminal Procedure Act relevant to arrest, use of force were effected. The Constitutional Court in striking down unconstitutional relics in the law including the death penalty,³ corporal punishment,⁴ and various presumptions that made inroads into the presumption of innocence,⁵ gave notice that it would exercise vigilance in ensuring that state institutions complied with the letter and the spirit of the Constitution.
6. While there was broad support, both at government and civil society level, for these developments, their impact was far-reaching. On the positive side, it ensured fidelity to the requirements of the constitution, reaffirming its supremacy, and brought South Africa into the international human rights arena. On the negative side, it threw the criminal justice system into considerable turmoil and confusion. In the main, an unprepared criminal justice system, not anticipating the need to initiate and push reform internally and deeply steeped in the practices of the past was often caught off-guard. Old methods of investigations deeply ingrained and entrenched in police culture continued were left intact. The situation was compounded by a resistance to change by some officers and this, had a predictable outcome in a number of high profile criminal trials where the courts were compelled, often on technical grounds, to return a verdict of not guilty. These verdicts could be attributed to police ineptitude and substantial non-compliance with constitutional requirements. In other cases public anger and the need for visible intervention by the police saw a miscarriage of justice.
7. Some of those cases include:
 - *The Phoenix cash heist*. A R35million cash heist led to the arrest of an organised gang. Notwithstanding powerful evidence implicating the accused, the attempt by the police to use illegally obtained evidence in the form of an unauthorised bugging of a telephone conversation between alleged conspirators to the crime, led the Court to acquit the accused gang.
 - *State vs. Sifiso Nkabinde*. In a murder trial of a notorious warlord in a strife-torn part of the country, the Court was again presented with the attempt to admit evidence illegally obtained. The acquittal of the accused led to considerable public outcry.⁶

¹ See the Constitution of the Republic of South Africa, 1996, Act 108 of 1996, Chapter 9, p 99. Chapter 9 institutions have been established to support and strengthen the new democratic order.

² Correctional Services Act, 1998 (Act no 111 of 1998).

³ See *S. vs. Makwanyane*, 1995(6), BCLR 665 (CC), 1995(2), FACR, (CC), 1995(3), SA, 391 (CC). The court declared the death penalty to be in conflict with various provisions of the Bill of Rights, including the right to life, equality and the prohibition and on cruel, inhuman and degrading treatment.

⁴ See *S. vs. Williams*, 2000(2), SACR, 396, (C). The court found that the use of corporal punishment and a sentencing option was unconstitutional, in that it violated the guarantee that prohibited cruel, inhumane and degrading treatment.

⁵ *S. vs. Zuma*, 1995(4), BCLR, 401 (CC), 1995(1), SACR, 568 (CC), 1995(2), SA, 642 (CC). The court set aside provisions in the criminal procedure act that placed the onus of proof on an accused person to prove that a confession was not voluntarily given.

⁶ See: <http://www.hsf.org.za/Briefing-11/Nkabinde/Nkabinde.htm>.

- *The rape of a nine-month old baby Tsbepang* in a rural part of the country led to understandable public anger and a demand for swift action. Six suspects were arrested and held without bail in custody for about six months until the charges against all of them were withdrawn.⁷ DNA evidence was unable to link any of them to the crime and since then the proper suspect was arrested and indeed convicted.
8. Commenting on this general phenomena, Amnesty International noted:

There is widespread evidence of poor investigative and interview skills and an over-reliance on extracting confessions from suspects, requiring both human rights training and high quality skills training to raise levels of professionalism.⁸
 9. The general-secretary of the Police and Prisons Civil Rights Union (POPCRU) argues that the perceptions that crime has increased and police are unable to deal with crime are a result of the transition period. He argues that when the new Minister of the Police was appointed shortly after the 1994 elections, he imposed a moratorium on the employment of new police officers. This meant that police employed for many years in the apartheid police force continued their employment in the new police service. There was an imperative to acquaint such members of the police service with the requirements of the constitution and the bill of rights. However, such training as was necessary did not take place in an organised and sustained manner. As a result, there was much ignorance as to what the practical requirements of the new constitution were. There was also an element of resistance from some officers. For example, police complained that being forbidden to torture criminals in order to extract a confession was a soft approach to dealing with the hard issue of crime.⁹
 10. The cumulative effect of both what was happening in the Courts as well as the inability of the police services to formulate an adequate response to the challenge presented by the Bill of Rights, saw the rapid mobilisation of public opinion that suggested that the constitution and the Bill of Rights appeared to have become obstacles rather than allies in the fight against crime.¹⁰ Media reporting, with some notable exceptions, often lacked analysis or an understanding of the operation of the Constitution and Bill of Rights. There was glaring lack of balanced and analytical coverage of the phenomena of rising crime and the institutional response to it; the media fuelled public anger and outrage by questioning, often without any proper basis, the role of the Constitution and the Bill of Rights as an obstacle in the battle against crime. Trial by and in the media became a common phenomenon. Public demonstrations outside courthouses and within the community visibly displayed the anger of the populace and their demands for drastic action.

THE RESPONSE OF HUMAN RIGHTS ORGANISATIONS

11. The response of human rights non-governmental organisations (NGO) was both disorganised and ineffective. The usual response was that the constitution represented ideals worth striving for and going back to a harsh and tough legal regime within the criminal justice system would undermine those ideals.¹¹ While such responses were, as a matter of principle, correct, they did not address the fundamental concern being expressed namely; that there was the perception that the criminal justice system was being rendered ineffective under the new constitutional order.

⁷ *Sowetan*, January 24, 2002.

⁸ Amnesty International, *Policing to protect human rights: A survey of police practice in countries of the Southern African Development Community, 1997-2002*, London: 2002, p 77.

⁹ Interview with Abbey Witbooi, POPCRU general-secretary, POPCRU House, 97-99 Simmonds street, Braamfontein, July 25, 2002

¹⁰ Interview with Vinodh Jaichand, Director of the Lawyers for Human Rights, Pretoria, August 2002 and Interview with David Bruce, Researcher, Center for the Study of Violence and Reconciliation, Braamfontein, July 31, 2002.

¹¹ Interview with Vinodh Jaichand, Director of the Lawyers for Human Rights, Pretoria, August 2002.

“Difficulties arise with civil society which seems to be unwavering in its perception that the criminals’ rights are favoured as against those of victims”.¹²

12. “The fear of crime of the general public has increased and so has the moral panic around such crime. There is a perception that criminals get away with murder and are not getting their just desserts. In addition, there is a perception that the agencies of the criminal justice system are ill equipped to deal with such crime effectively that satisfies victims of crime. Therefore, in some instances members of the community have taken the law into their own hands. The prevalence of vigilantism is primarily in response to the frustration that people have with the perceived ineffectiveness of the agencies in the criminal justice system.”¹³
13. There was no real attempt to focus on the shortcomings of the criminal justice system relative to resources, poor training, institutional failure, a lack of co-ordination between the various arms of the criminal justice system and the high levels of corruption within that system. Such an approach that located the heart of the debate in the adequacy or otherwise of the law suited the police since it avoided any spotlight on their shortcomings within the justice system — something that the police were not too keen to concede.
14. Part of the difficulty faced by NGOs is when communities themselves support harsher measures and demand that government take a tough stance. During 1999, the Institute for Security Studies conducted a survey in the Eastern Cape to measure attitudes to punishment. Of the overall survey, just over three-quarters of respondents thought that sentences handed down by the courts have an effect on criminals’ propensity to commit crime. Sixty per cent of the respondents thought that the courts are much too lenient. Only ten per cent felt that the sentences are about right. A small minority (four per cent) stated that the sentences were too tough. Four-fifths of the respondents said that, compared to 1994, there was much more crime in South Africa. A similar number thought that lenient sentences have played a major role in the increase in crime. An overwhelming majority, eighty per cent, thought that the introduction of harsher sentences would bring crime down.¹⁴

VIGILANTE AND SELF-HELP GROUPS

15. The criminal justice system found itself in a deep crisis — a government seemingly unable to respond effectively and decisively and human rights organisations unable to provide effective leadership on the matter resulted in what for many was inevitable — the birth and growth of self help groups, vigilantism.¹⁵ One of the more notorious groups is known as Mapogo-a-Mathamaga¹⁶ and its founder said the following at a public event in Pretoria: “I am providing a service because the government has failed in its duty to protect. I will continue doing what I do as long as the government remains in breach of its duty to protect the community against crime and criminals.”¹⁷ There were few who would take issue with the general purport of those

¹² Interview with M.C. Moodliar, Head Legal Services, South African Human Rights Commission, Johannesburg, August 2002.

¹³ Interview with Duxita Maistry, Institute for Human Rights and Criminal Justice, Technikon South Africa, Johannesburg, August 5, 2002. See also M Schonteich, *Tough Choices: Prioritising Criminal Justice Policies*, Institute for Security Studies, ISS Paper 56, Pretoria, May 2002.

¹⁴ M Schonteich, *Sentencing in South Africa: Public perception and Judicial Process*, Occasional Paper 43 – ISS Pretoria, November 1999, p 1.

¹⁵ Ibid.

¹⁶ See definition in M Sekhonyane and A Louw, *Violent Justice, Vigilantism and the State’s Response*, ISS Monograph Series No 72, Pretoria, April 2002, p. 35.

¹⁷ Presentation by J Magolego at an ISS Seminar on Vigilantism in South Africa, Pretoria, June 8, 2001, see also M Sekhonyane and A Louw, *op. cit.*

sentiments and some would even countenance the taking of measures outside of the law if these proved effective.¹⁸

16. The growing public support for such vigilante groups was clear evidence that they were filling a void within the criminal justice system and that in the main there was not too much concern with the strategy and methods they used to fill that void. Thus, arbitrary arrests, assaults and third degree methods to get 'suspects' to confess were regarded by the public as an appropriate response in the face of brutal and relentless crime.¹⁹
17. The government in general and the police in particular publicly distanced themselves from such groups that conducted themselves criminally but no action by way of successful criminal prosecutions ensued. This was seen by many, as an indirect concession by government that they were not in control of the crime situation in the country. Crime statistics and victims surveys appeared to lend credence to this proposition.

CRIME PATTERNS AND THE POLITICAL RESPONSE

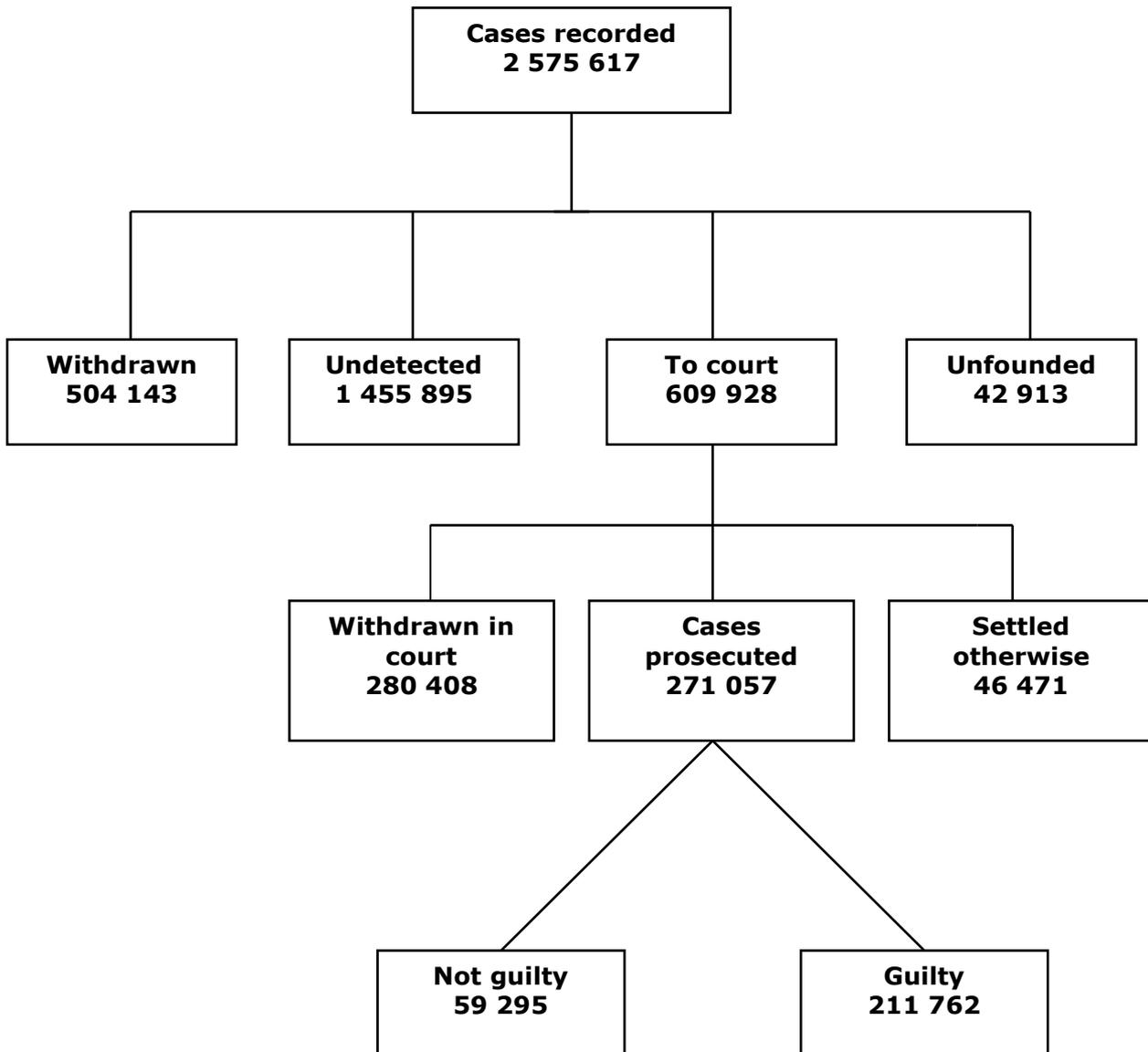
18. During 2000, some 2, 575,617 crimes were recorded by the police in South Africa. About a 1.9 million cases were either withdrawn or undetected. Of the balance about approximately just over a half-a-million cases were referred to the court. Of the latter, (just over a half) 271,057 resulted in prosecutions. From these, 211,762 ended up in convictions.²⁰ What this means is that when cases are prosecuted the possibility of a conviction is high. However, it also demonstrates that the proportion of cases prosecuted (in relation to recorded crime) is quite low — approximately 10%.

¹⁸ Ibid., pp 40-44.

¹⁹ M Sekhonyane and A Louw, *Violent Justice*, ibid., p 40.

²⁰ Crime Information Analysis Center, *South African Police Services*, Pretoria, July 2001, See Also M Schonteich, *Lawyers for the People: The South African Prosecution Service*, ISS Monograph Series no 53, Pretoria, March 2002, pp. 91-92.

Table 1: Number of Criminal Cases Processed during 2000



19. It is statistics such as these that make people feel that crime and criminals are holding the country to ransom. These figures can also in part explain why people are calling for harsher measures. At another level, they strengthened the government's hand in calling for tougher legislative measures in dealing with crime. At another level, in the Western Cape (one of the nine provinces of South Africa), the phenomena of urban terrorism was presenting a new set of challenges to the administration of justice, the security services as well as the legal and constitutional framework.
20. On the first day of 1999, a car bomb exploded outside the well-known shopping and tourist destination, the V&A Waterfront in Cape Town, injuring two people. A few weeks after the Waterfront blast another car bomb exploded just metres from the entrance to the Caledon Square police station in central Cape Town, injuring eleven people.²¹ In November of the same year, a bomb placed inside a popular beachfront restaurant in the city injured forty-eight people. A few days before the end of that year — on Christmas Eve — a police vehicle was ambushed.

²¹ Dispatch on Line, January 4, 1999.

Seven police officers who were responding to a telephonic bomb threat were injured as a bomb exploded outside of a restaurant. As a result of these bomb blasts, and strong public pressure to act against the perpetrators of acts of terror, governmental policy makers announced their intention to promulgate tough anti-terrorism legislation for South Africa.

21. The acting premier of the Western Cape, Peter Marais, called for constitutional amendments, in particular, to provisions that give terror suspects the right to remain silent and that require for them to be released within forty-eight hours or be charged.²² “The police could not be expected to build watertight cases against terrorists in such a short period”, and “you cannot tell me that a terrorist who has killed one hundred people with a bomb deserves the right to silence after being arrested”, Marais declared. Furthermore, the Minister for Safety and Security, Steve Tshwete, also called on parliament to amend the constitution to extend the forty-eight hours rule, and to restrict suspected terrorists’ access to legal representation during this period.²³ The National Director of Public Prosecutions (NDPP) and the Minister of Justice and Constitutional Development also supported the calls for tougher measures.
22. All of these factors operating individually and cumulatively (growing crime levels, a criminal justice system that was under-resourced, uncoordinated and ineffective in dealing with crime and a crime weary and frustrated populace) created the space for government to start getting tough.
23. “One of the most striking elements of the post-1994 South Africa is the way in which crime quickly emerged as a key governance issue. The hopes of the government and the South African public that the legitimacy of the first democratically elected government would serve to reduce crime rates soon floundered...”²⁴
24. A national survey conducted by the Human Science Research Council since 1995 asked people’s opinion about the extent to which government had control over the crime situation. Less than one in ten people in South Africa (nine per cent) believed that government has “full control”. Nearly half (forty-nine per cent) said government had some control and (thirty-five per cent) thought government was “not in control”. The remaining (seven per cent) of the sample said they did not know.²⁵

POLICY AND LEGISLATIVE INTERVENTIONS

25. The mounting pressure from communities for government to be tough on crime and criminals did not go unnoticed. The government realised that if it was to restore the confidence of the public, they had to be seen to win in the fight against crime. Rising incidents of vigilantism, notably in the Western Cape and the Northern Province, exerted further pressure on the government. In its attempt to demonstrate its commitment to reducing crime, the government developed new “tough” policies. These included the promulgation of the minimum sentencing, which effectively removed the court’s discretion in the sentencing process providing for minimum sentences in respect of serious offences. They also included amendments to the Criminal Procedure Act to provide more powers to the courts in refusing bail and allowing them to consider ambiguous criteria such as the sense of ‘community outrage’ in deciding on bail and

²² See <http://www.suntimes.co.za/2000/01/02/news/news02.htm>, Also A Paper delivered by M Schonteich, at the ISS, Seminar, “Laws as Weapons: Legislation Against Terrorism”, Pretoria, September 25, 2001, H Boshoff, A Botha and M Schonteich, *Fear in the City, Urban Terrorism in South Africa*, ISS Monograph Series No 63, Pretoria, September 2001, pp 127-128.

²³ *Sunday Times*, January 2, 2002, paper delivered by M Schonteich, *ibid*.

²⁴ M Schonteich, ‘Crime and confidence: Voters’ perceptions of crime, *Nedbank ISS Crime Index* 4, 2, 2000.

²⁵ M Sekhonyane and A Louw, *op cit*, p. 14.

closed prisons²⁶ — a measure modelled very closely on the maximum security prisons of the United States, and which provided for effective solitary confinement.

26. Human rights organisations cautioned government on the dangers of such “tough” policies, which they argued watered down constitutional guarantees, and threatened a return to the old order. The government, buoyed by public opinion persisted with its ‘get tough’ stance. Tough talk by senior government officials was further evidence that government was prepared to take the risk of interfering with the constitution to curb crime.²⁷
27. Following a referral by government, the South African Law Commission (an independent statutory law reform and research vehicle) produced a discussion document on the need for Anti-terror legislation which included detention without trial, a wide and sweeping definition of terrorism that would cover even legitimate public protests, the exclusion of the oversight of the Courts in pronouncing on the validity of detention. A significant public debate followed and while there was considerable objection from human rights organisations, government maintained its stance that it needed tough measures if it were to combat terrorism. The September 11, 2001 events have given greater impetus to the process and the Law Commission is currently considering all the public and institutional responses to the Draft Bill.²⁸

VICTIMS GROUPS

28. Victims groups, often well-resourced and vocal, begun in an organised way to make their views known and in particular to advocate a better deal for victims of crime. They argued, often correctly, that the victim was marginalised in the criminal justice system and there was the need for the greater credibility and the efficacy of the system to ensure that victims were able to play a more substantive role in that system.²⁹
29. Such groups often clashed with human rights groups and a fierce contestation ensued around important matters such as bail, the presumption of innocence, sentencing and prison conditions. This contestation was more about seeking to displace each other from the constitutional landscape rather than trying to find space within the same constitutional design. The debate was cast as Victims Rights vs. Offenders Rights.³⁰ It was destined to yield only one possible result — namely strong public and government support for the better protection of victims rights ‘at the expense of offender’s rights.’³¹ This way debate succeeded in polarising human rights groups.³²

STRATEGIES AND INTERVENTIONS

A changing approach?

30. In the early post-apartheid era, South African NGOs were still locked in the previous period’s mindset. When the country entered a period of transition, NGOs missed the mark completely. There was a need for visible measures from government, but many NGOs focused on policy framework. They failed to take people with them. They lost sense of what communities were

²⁶ Department of Correctional Services, *Annual Report*, Pretoria, 2001.

²⁷ Interview with Duxita Maistry, op cit.

²⁸ Review of security legislation (terrorism: section 54 of the Internal Security Act, 1982 (Act 74 of 1982), South African Law Commission, discussion paper 92, project 105, part 1, July 2000, Pretoria; *Sowetan*, August 27, 2002.

²⁹ Interview with Ann Skelton, Head of the Child Justice Unit, Department Justice and Constitutional Development, Pretoria, August 27, 2002.

³⁰ Interview with M.C. Moodliar, op cit.

³¹ Ann Skelton, op cit.

³² Ibid.

feeling — namely, fear and confidence. Instead, they were preoccupied with elaborate ideas.³³ The government was the enemy and the principal violator of human rights and any form of collaboration with government was as a matter of principle unacceptable. In addition, many NGOs lost essential personnel to government and there was a visible weakening of the sector both in terms of loss of key figures but also a drop in funding. For some NGOs, adopting an adversarial stance and treating government as the enemy was one way of securing their own future. However, the often hostile and adversarial nature of human rights work created tensions between government and NGOs. “Public perceptions regarding the need for substantial reform in the juvenile justice in South Africa was very positive at the time of South Africa’s first elections in 1994...However, things have changed over the past few years, and public opinion has become more conservative”.³⁴ Undoubtedly this change in perception was a result of increased crime levels.

31. The second democratic elections saw the government taking a different stance. Firstly, South Africa began to witness conservative policy initiatives that sought to pacify the public and victims of crime and violence. Secondly, physical access to parliament became limited and access to parliamentary committees became stricter. These limitations meant that NGOs were locked outside the policy and law-making process and had to reconsider their stance. It has become clear to many NGOs that a change in tone and attitude is necessary if one was to establish meaningful relationship with government. NGOs began reflecting on the discourse and strategies they adopted. There was the slow but growing realisation that one could, perhaps even needed to, have a dual relationship with the state — one that enabled NGOs to support human rights and transformational programmes while at the same time retaining the capacity to oversee, monitor and critique state action. This nuanced understanding and interpretation of independence, reflected a growing and new maturity on the part of many NGOs.
32. Some of the approaches and interventions that have been attempted are set out in the following section.

Working in support of and in ‘partnership’ with government

33. The Institute for Democracy in South Africa (IDASA) provides an excellent example of co-operation with public institutions. After the election in 1994, IDASA called for the community and the SAPS to work together and restore credibility to the policing system. IDASA asked communities to abandon their view of the SAPS as an enemy, and to begin to recognise the new beginning for law enforcement. IDASA also encouraged the formation of the Civil Police Force (CPF) so that community members could begin to play a part in upholding law and order. This was seen as a way to ease the transition from a previously hostile relationship between the communities and the SAPS, to a more co-operative and collaborative effort.
34. In 1998, IDASA played an integral part in outlining the National Crime Prevention Strategy. At a time when many individuals and organisations, advocated stricter policing and harsher consequences, IDASA took a different stance. IDASA called for reform of existing methods of policing and crime prevention, and stressed the need to design, create, and launch new initiatives so that the problem can be addressed without the use of unnecessary violence. IDASA discouraged arbitrary detaining and the use of brutality as effective measures in alleviating the crime. Great emphasis was placed on referring to the new constitution and abandonment of the harsh policing methods that were used during the apartheid Era.

³³ Interview with David Bruce, Researcher, Center for the Study of Violence and Reconciliation, Braamfontein, Johannesburg, 2002.

³⁴ Ann Skelton, extract from a document prepared for the office of the United Nations High Commissioner for Human Rights in preparation for a conference on “Public Perceptions and Juvenile Justice”.

35. In the same year as the National Crime Prevention Strategy, IDASA also played a key role as one of the architects of the White Paper on Safety and Strategy. IDASA argued for an effective combination of reform and law enforcement, stating that if crime prevention were to be effective, change would have to come from both directions. After the initial draft of the White Paper was completed, IDASA and the other participating organisations called for a public hearing to finalise the document. Prior to this hearing, IDASA ensured that there was the necessary distribution of the draft to the participating individuals and organisations.³⁵
36. At other levels, Community Police Fora, often facilitated by such NGOs as IDASA, the Center for the Study of Violence and Reconciliation (CSV) and U Managing Conflict (UMAC) ensured that police and communities were able to pool resources in combating crime and also served as a useful, though unintended structure by which police could be held accountable. The model of Community Police Fora yielded mixed results but in many instances its success ensured and visibly displayed to communities the advantages and benefits of working within the law. In Alexandra, an area North of Johannesburg, a community group known as Sector 4 actively assists victims of crime in reporting matters to the police, helps them in getting to Court and acts as intermediary with the Prosecutor where necessary. These measures ensured that relevant witnesses make contact with the police and testify in Court.³⁶
37. The approach of working within the law and supporting police and prosecutorial initiatives carried distinct advantages. Victims as complainants got to understand the system, became more realistic of their own expectations of the system, and generally felt more centrally involved in processes that affected them.

Training for police personnel

38. We have already alluded to the difficulties that transformation brought and one particular challenge was how to assist the police practically in ensuring that the requirements of the Constitution and the Bill of Rights became part of their day-to-day work and indeed in demonstrating to them that compliance with such norms represented a more efficient and professional approach in investigating crime.³⁷
39. One such programme is being conducted by the South African Human Rights Commission (SAHRC), the Lawyers for Human Rights (LHR) and the National Consortium for Refugee Affairs (NCRA) around the rights of refugees, asylum seekers and migrants. The object of the training is to assist the police in appropriately enforcing various pieces of legislation relevant to migrants, asylum-seekers and refugees while recognising constitutional and human rights norms.
40. Technikon South Africa, one of the largest tertiary institutions in the country, offers a course in Police Practise and Management, which attempts to provide practical guidance to police officers in the challenge of policing in a democracy.
41. The objective of such training is to demonstrate that compliance with the law does indeed lead to greater efficacy and advances the prospect of a conviction. It minimises the challenges to the admissibility of evidence and fairness of procedures. On the other hand, one is able to demonstrate that non-compliance heightens the prospect of successful defence challenges on

³⁵ Response from IDASA by Jared Cohen, Ivor Jenkins, Paul Graham and Samantha Fleming, August 8, 2002, Cape Town.

³⁶ Presentation by Bulldog Rathokolo, Chairperson of Sector 4 at an ISS Seminar on Vigilantism, August 2000.

³⁷ Interview with Abbey Witbooi, *op. cit.* and David Bruce, Researcher, Center for the Study of Violence and Reconciliation, Braamfontein, July 31, 2002

admissibility of evidence. The prospect of an acquittal, which in turn creates problems of credibility and trust for the law enforcement sector, are increased.

Victim empowerment

42. In the era immediately post-1994 there was little attention given to the role and place of victims in the justice process. In response to an increasingly organised and vocal victims lobby, there have been a number of developments, which in the main seek to ensure a more substantive and central role for victims in the various processes that affect them. Such developments include:
43. **A new sentencing framework** — Sentencing has traditionally been the exclusive domain of presiding officers in South Africa, which crafted sentences in terms of the state's interests against the offender's interests. There was little role, if any, for the views of victims of crime and no real attempt to sentence in a manner, which addressed the needs, both material and otherwise of the victims of crime. A new sentencing framework was developed by the South African Law Commission and is aimed at providing for greater victim involvement in both the sentencing process as well as in the consideration of parole without giving the victim and undue influence in the process. In addition, it directs a court to properly consider issues of reparation and restitution in the sentencing process.³⁸
44. **Victims charter** — There is often criticism that the South African Constitution and Bill of Rights is silent on the rights of victims, which have been recognised internationally. Varying or non-existent service standards for victims from service providers including the police, justice officials, social welfare agencies and health care facilities led to the development of a consensus for the need to have a Victims Charter. The Charter is essentially a set of service standards as opposed to a compendium of justiciable rights. The Charter is in the process of being finalised and once operational will become a tool to measure service standards and one by which various service providers can be held accountable. NGOs have participated in the deliberations leading to the finalisation of the Charter. They have also an important role to play in monitoring compliance with the Charter once it becomes operational. The Charter, it must be noted, does not make any inroads into the content of any rights that offenders have in terms of current law.³⁹
45. **Plea bargaining legislation** — The South African Parliament passed the first plea bargaining legislation during 2001. It sets the legislative framework for plea and sentence agreements and specifically provides for consultation with victims in appropriate cases before the conclusion of such agreements. Victims do not have the power to veto such agreements, but their views would certainly be part of the criteria that the state would consider in how such plea and sentence agreements are constructed.⁴⁰
46. **Victims compensation scheme** — The South African Law Commission has embarked on an investigation to assess the feasibility of introducing a Victims Compensation Fund in the form of a dedicated fund that will compensate either all or designated categories of crime victims. The Law Commission has embarked on a comprehensive public consultation process. It is expected that final report and recommendations will be released later this year.

³⁸ See 1997 Criminal Law Amendment Act, Also South African Law Commission, Discussion Paper 91, Project 82, *A New Sentencing Framework*, May 2000.

³⁹ The Victims Charter was developed by the Department of Justice and Constitutional Development in collaboration with the South African Law Commission, the South African Human Rights Commission and the office of the National Director of Public Prosecutions. The Department of Justice is in the process of finalising the Charter.

⁴⁰ Monica Laganparsad, First South Africa plea bargain, *The Star*, February 5, 2002; Zelda Venter, "Bargaining a better jail deal," *Pretoria News*, August 27, 2002. See also Section 105A Criminal Procedure Act 51 of 1977, as amended.

47. The cumulative effect of these victim empowerment developments has been to take an inclusive approach to victims of crime and as far as possible to bring them into the criminal justice processes. The result has been, to some extent, to moderate victims demands but much still needs to happen at this level.

THE ROLE OF THE COURTS

48. We have already dealt with how the Constitutional Court has exercised constitutional scrutiny over law and practise to ensure fidelity to the constitution substantially in the area of matters affecting the rights of offenders.⁴¹ In this regard, the Constitutional Court gave useful guidance on how public opinion as well as the high levels of crime would be dealt with in its deliberations. In the Makwanyane matter, the Court stated crisply that ‘while public opinion may have some relevance to the enquiry, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour.’⁴² In the matter of *S. vs. Dlamini and others* the Court cautioned that, while criminal activity was a relevant and important factor in the exercise of limiting rights, “one must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights.”⁴³ The approach adopted by the Constitutional Court (the highest court in the land) was significant in that it spelt out unambiguously how the Court would deal with and give weight to the issues of public opinion and the reality of high levels of crime. Such judgements, also become valuable tools of advocacy for NGOs.
49. However, the Court had to also deal with the concerns of victims and respond to their legitimate demands that the Constitution be seen to be operating for their benefit and interest. In a landmark ruling in 2002 in the matter of *Carmichele vs. the Minister of Safety and Security and others*, the court found that a victim of crime had the right to bring an action for damages against the Police and Prosecutorial Services for breaching a duty of care they owed to the applicant.⁴⁴ The applicant was the victim of a brutal attack perpetrated by an individual with a history of sexual violence. The applicant was able to show that had the police and prosecutor been diligent in their duties the attacker would have been in custody at the time of the attack on the applicant and not out on bail.

OTHER POSSIBLE INTERVENTIONS AND ISSUES

50. **Providing information** — It is important that government be provided with independent and credible information about the functioning of the entire criminal justice system over an extended period of time, the effectiveness of government strategies and public experiences of that system. This information will help government develop a balanced approach to criminal justice and avoid over-reactions that emanate from political pressure and high levels of public dissatisfaction. This will ensure that the strategies and interventions that are made are informed, advised and sustainable rather than simply, which is often the case, a reaction to public anger and outrage, which ironically fails to satisfy the public.⁴⁵

⁴¹ See *S. vs. Makwanyane* (Death penalty), *S. vs. Williams* (Corporal Punishment), *S. vs. Zuma* (onus of proof in admitting confession) *op. cit.*

⁴² *S. vs. Makwanyane*, *op. cit.*, p. 52, para 88.

⁴³ See *S. vs. Dlamini*, 1999(7) BCLR 771 (CC).

⁴⁴ *Carmichele vs. Minister of Safety and Security and another*, 2001(4), SA 938 (CC).

⁴⁵ Interview with Martin Schonteich, Senior Researcher, Institute for Security Studies, Pretoria, August 20, 2002. See also interview with Vinodh Jaichand, *op. cit.*

51. **Facilitating access to justice** — Facilitating public access to criminal justice system is a role NGOs are well placed to play. The justice system and its processes can be very complex and in societies where there levels of functional literacy are low, NGOs have an important to role to play in ensuring that the public understand the system, know what their rights are in relation to that system and are assisted to enforce their rights. The Victims Charter creates a particular challenge for NGOs to ensure that the provisions of the Charter and its compliance become a reality.⁴⁶
52. **Informing public opinion** — Public education on policies, legislation and strategies and where and how communities can engage government to ensure equal access to justice is another role that NGOs can play. Providing information on the legal and human rights framework in their totality, showing the opportunities for engaging policy makers on important matters serves to contribute to greater and informed public participation in the relevant structures within the State that have ultimate responsibility for policy making.
53. **Legislation monitoring** — Proactive monitoring of legislation is crucial in preventing the promulgation of legislation that goes against the spirit and the letter of a democratic society. In this regard, NGOs need to build a capacity to effectively monitor the legislative process. One such mechanism would be to establish a parliamentary monitoring desk. This desk will track dates and venues for various debates, including budget speeches, media briefings and collect important documentation from parliament. It is important that submissions are made at the stage when the proposed legislation is being conceived as experience has shown that it is extremely difficult to reverse a policy decision taken at a senior level (e.g., at Cabinet level).
54. **Human rights training** — Training and knowledge in human rights should be part of the basic and ongoing training for all law enforcement personnel. Although some training has been provided for officers in South Africa, it needs to be extended to all within the criminal justice system.⁴⁷ Police officers viewed training as meant for punishment for “not so tough” police officers. Human rights training should not be a separate course but be infused with ‘relevant in-service courses, such as refresher courses in crime investigation skills and public order policing’.⁴⁸ Training should emphasise principles and values that will help improve service delivery rather than hinder it.⁴⁹ However, training must be accompanied by programmes to professionalise the police service. The provision of adequate resources and payment of commensurate salaries is important in maintaining confidence, image and morale of the police, prosecutors and correctional services.
55. **Principles of restorative justice** — There are various efforts within the criminal justice system to move away, in appropriate cases, from a purely adversarial stance to one that seeks through mediation to advance reconciliation between the victim, offender and the community. Victim-offender mediation, family group conferencing and programmes of diversion are some of the restorative justice initiatives proposed in a draft Child Justice Bill.⁵⁰ Currently it is confined to the Child Justice sector but it would be worth considering the application of these principles and measures within the entire criminal justice system. The Department of Correctional Services has recently embarked on a process of Restorative Justice but it is too early to assess the success or otherwise of the programmes that have been put into place.

⁴⁶ V. Jaichand, *ibid.*

⁴⁷ *Policing to Protect Human Rights, A Survey of police practice in countries of the Southern African Development Community*, Amnesty International Publications, United Kingdom, 2002, p. 67.

⁴⁸ *Ibid.*, Interview with Abbey Witbooi, *op. cit.* and interview with David Bruce, Researcher, *op. cit.*

⁴⁹ Interview with David Bruce, *ibid.* See also Amnesty International, *op. cit.*, p 67. and 78.

⁵⁰ Interview with Ann Skelton, *op. cit.*

56. **More effective networks amongst human rights NGOs** — There is the need to establish more effective lobbying and advocacy networks among human rights NGOs. Often groups and organisations sharing similar overall objectives work separately from each other and create the impression of a sector that is divided and unable to articulate a clear and common position. While such groups need to retain their independence and the features that make them unique, this should not prevent greater efficacy in working together.
57. **Media training** — Focused, structured training workshops have assisted the media in reporting accurately and responsibly on emotive crime matters.⁵¹ The training is aimed at assisting the media to avoid sensational and emotional reporting around crime and indeed to encourage them to use the media as a vehicle for informed public debate on matters of crime and violence.
58. **Parliamentary workshops** — Workshops with parliamentarians on the Bill of Rights in general and the approach to law making particularly when dealing with public pressure to pass laws that the public demand but whose constitutionality may be questionable. Parliamentarians have an obligation to uphold the Constitution and such workshops will assist in providing guidance to them on how they balance the competing demands that are made on them by reference to the Constitution.
59. **Monitoring and evaluation of training** — Often NGOs conduct training for members of the South African Police Service but there is very little follow up in terms of the impact of such training. NGOs have never gone back to request monitoring or evaluation of the programmes conducted. The danger is that in the absence of these two components, training programmes could be discarded in favour of old practices and habits.⁵²
60. The process of transformation, particularly in societies trying to overcome an oppressive past, sees major pendulum swings. In South Africa, the pendulum swung considerably in seeking to guarantee the basic civil liberties in the period just after 1994. It is now beginning to swing the other way and hopefully to a state of equilibrium. South Africa has reached a critical point — the need to hold and maintain the balance. Initiatives outlined above have assisted. Yet it is a delicate balance, one that can easily be upset by a number of factors including a surge in crime and violence. Such balance should not rest on a shaky foundation. Interventions that are sustainable and built on, at the very least, a common understanding of the Constitution — with full recognition of the needs of both offenders and victims to be able to rely on the protection of the Constitution — constitute the best guarantor of ensuring some stability and predictability in this area.

⁵¹ The Institute for the Advancement of Journalism provides regular training workshops for the media in areas, including crime, race and equality, children and gender.

⁵² Amnesty International op. cit., p. 76.