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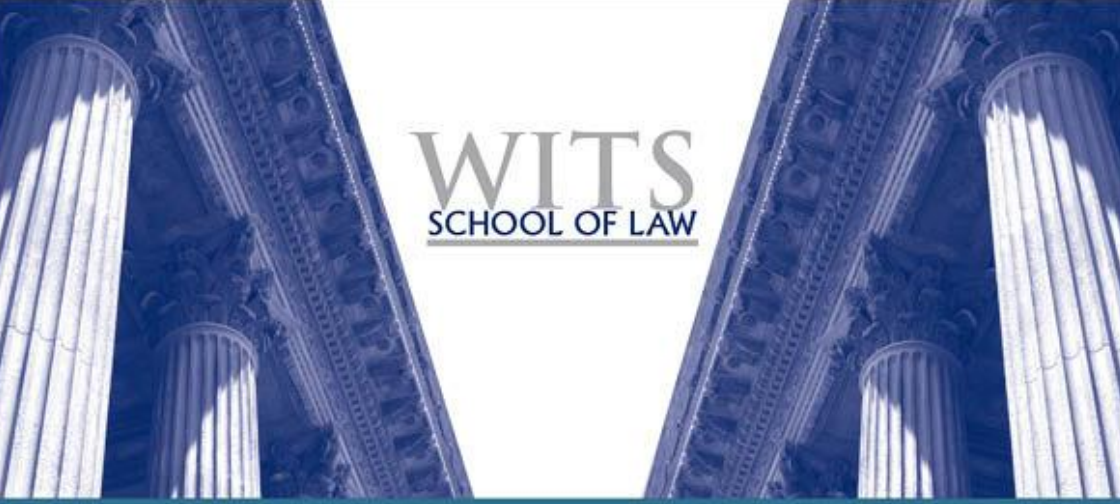

Working Paper Number 25

CRIME AND HUMAN RIGHTS

by

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The Paper was originally published by the
Centre for Applied Legal Studies as Occasional Paper 26
(1996)





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CRIME AND HUMAN RIGHTS

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PEP04 Received on :06/06/1997

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OCCASIONAL PAPER 26

ISBN 1-86838-225-7

1996 Centre for Applied Legal Studies

Typeset &
Layout by: Tahera Timol
Centre for Applied Legal Studies
403-6918

Printed by: Printed Matter,
482-3443

CRIME AND HUMAN RIGHTS

FOREWORD

This working paper represents a provisional response to the increasingly strident "law and order" discourse which has not only bedevilled the debate about crime but threatens the very constitutional enterprise which was launched in April 1994.

The daily diet of irrational comment served up on our radio stations only emphasises the desperate need for rational debate about this critical social problem.

D M DAVIS

CRIME AND HUMAN RIGHTS

D M DAVIS

'One cannot say this is just and even less I am just without immediately betraying justice'

Jacques Derrida

The classic conceptual framework within which to deal with the relationship between crime and human rights was outlined almost 30 years ago by Herbert Packer. Packer introduced two abstract models of criminal justice, namely the due process and crime control models. The crime control model is based on assumption that the repression of criminal activities is by far the most important function to be performed by the criminal justice system. It thus demands a high rate of conviction and a major reliance on policing and punishment. (W Packer The Limits of the Criminal Sanction (1968)).

The due process model is perhaps best summarised by the old adage that it is better to acquit ten guilty people than let one innocent person be convicted. It cherishes a principle of equality before the law and places considerable importance on the role of civil liberties in a democratic society. The due process model promotes the integrity of the constitutional system. For example, if evidence is collected illegally it must be rendered inadmissible, notwithstanding that such a finding could set a guilty person free.

Packer never considered these models to be a reflection of reality, but rather intended that they represent conceptual polarities in terms of which the reality of a criminal justice system can be analysed, assessed and evaluated. Allan Dershowitz (Reasonable Doubts (1996) at 199) articulates the conventional due process approach when he writes "I have no doubt, for example, that recent changes in the prosecution of rape cases - the elimination of the requirement that the accused account be corroborated, an introduction of rape shield laws - have resulted in the conviction of many rapists who would earlier have gone free. But at the same time, I have no doubt that these benevolent changes have also resulted in the conviction of some innocent defendants who plead if they would have been acquitted. The difficult question is about the ratios. I

believe that the number of increased convictions of the guilty is considerably greater than the number of increased convictions of the innocent. If it is, than the trade off was worth it, but it was a trade off. There are no free lunches when it comes to making it easier to convict the guilty. The cost is almost always in larger numbers of convictions of the innocent, or the increased violation of individual rights."

In apartheid South Africa these trade offs were never evaluated or considered. Policing was brutal, repressive and never bothered to consider any of the ramifications of a due process model. In a society with an absence of a social practice of rights, considerations of a trade off were simply never brought into the public domain. The introduction of a Bill of Rights as part of the Republic of South Africa Constitution Act 200 of 1993, however heralded a legal revolution. The legal system was based on an entirely different grundnorm such that all state activity was required to be tested against fundamental constitutional values. No longer could the due process model be ignored and no longer could the issue of a trade off be relegated to the realm of academic debate.

The repressive policing of the past notwithstanding, it would be mistaken to conclude that crime was not a considerable problem in apartheid South Africa. The following table of selected crimes reported in South Africa between 1987 and 1994 is illustrative. Crime has been escalating steadily over the past decade and it is likely that there was even greater under-policing of crime in Black areas where the police were considered as an illegitimate force.

The present wave of crime should thus not be viewed in isolation nor can present proposals to deal with crime be analysed adequately on the basis of a social amnesia, which omits careful consideration and analysis of the significant extent of crime during Apartheid South Africa.

A Selection of Crimes Reported in South Africa: 1987-94

Crime	1987	1988	1989	1990	1991	1992	1993	1994
Arson	4 466	4 882	5 563	7 171	23 920	6 389	6 854	7 056
Assault	120 779	125 571	128 887	124 030	129 626	136 322	144 504	157 315
Contravention of the explosives act	305	280	208	327	378	448	507	532
Theft of motor vehicles	59 936	57 851	58 298	68 649	71 120	71 532	77 906	94 710
Theft out of or from motor vehicles	N/A	116 813	122 385	149 606	160 179	154 247	166 295	177 734
Housebreaking	235 693	182 754	187 946	225 158	260 661	254 941	259 645	276 050
Illegal possession of arms & ammunition	5 409	4 696	5 059	7 322	9 706	10 580	9 542	8 838
Murder	9 800	10 631	11 750	15 109	14 693	16 067	19 583	18 213
Public violence	1 973	1 368	3 173	4 756	2 402	2 250	5 695	961
Rape	18 145	19 368	20 458	20 321	22 761	24 360	27 037	32 107
Robbery	46 288	45 847	50 636	61 132	68 936	78 644	87 102	95 763
Shoplifting	40 833	40 477	41 601	48 935	51 658	58 371	62 166	63 274

Source: 1995/6 Survey of the South African Institute of Race Relations at 66.

See also Appendix A.

In examining these figures, account should be taken of the likelihood of greater reporting of crime in traditional black areas since 1994. Given the nature of the legitimacy of the police, reporting would have been very low prior to 1994, which supports a conclusion that the growth in crime rates after 1994 might be overstated.

The law and order arguments: Strict adherence to the crime control model.

Within this context it is possible to examine the demands for law and order in contemporary South Africa. Advocates of the crime control model are not restricted to South Africa. Indeed law and order lobby articulated similar sentiments throughout the world. Illustrative thereof is the following argument by Barbara Amiel a columnist for the English Sunday Times as follows:

"From the 1960s on the family was seen as too restrictive. We whittled away at its authority, made a two-parent family with a stay-at-home mother a fiscal liability through tax policies, created the conditions for children to parent children by removing taboos on teenage sex, and made it a civil if not criminal offence to describe such loose morality pejoratively. In effect, we subsidised and financed an enlarged underclass, pooh-poohed the bootstrap mentality of the poor as Uncle Tom-ish, described the bettering of oneself as yuppie behaviour or greed, and promoted envy as the common currency. Together with the indiscriminate immigration policies from Asian and African countries at levels too high to allow assimilation, we allowed the nightmares of Enoch Powell to come true (though without the blood in the street).

In summary: we cannot deport people who are now here. But we can segregate the underclass and forget about egalitarian principles. We should try to reintroduce the best of our values while getting rid of the worst. We must stop ruining our free society by enacting rules appropriate for a zoo. Just because some of the rooms in our house have been taken over by pigs and donkeys does not mean we should turn the entire kingdom into a place appropriate for the housing of animals."

On occasion there have been understandable nods in the direction of the crime control model. Thus Deputy Minister of Home Affairs, Ms Lindiwe Sisulu-Guma , responding to yet another rape this time on Robben Island

said that women must join the campaign for minimum sentence for rape and denial of bail to rape accused.

In essence, the law and order lobby demand the complete adherence to the crime control model. The argument turns on the following:

1. The barbarians are at the gate. Unlike John Coetzee's novel Waiting for the Barbarians. South Africans no longer have to wait for they are in our midst.

2. To deal with the barbarians more prisons are required to ensure a greater incarceration.

3. The Bill of Rights has provided a generosity to the accused far beyond that which is acceptable in the context of South Africa. In particular, the bail provisions contained in Chapter 3 of the Interim Constitution have become a Bill of Rights for criminals.

4. Tough minimum sentences are required for all crimes to ensure the reduction of judicial discretion and guard against the possibility of lenience and lack of coherence and uniformity in sentencing.

5. The death penalty should be reintroduced immediately for a range of violent crimes.

Law and Order Arguments - A Critique

As has been illustrated by the table of crime from 1987 to 1994, criminal conduct has been a major problem in South Africa long before 1994. Many of the strategies which are now advocated were indeed in place during much of this period including the death penalty, restrictive bail conditions, and tough but irrational sentencing.

The strategy leaves unresolved the poor resources of the offices of the attorney general and prosecuting services. That these agencies have to be transformed to reflect the demographic composition of the country is a commendable objective but such a process is no excuse for less resources to be provided by the state.

Even more significant, it ignores the abmysal policing of a force which was trained for a brutal authoritarian environment but which is ill-suited to a society which wishes to build a constitutional state. The police lack the resources or the expertise to apprehend criminals in sufficient numbers to provide meaningful deterrence. It also ignores endemic corruption in the police force. According to the Deputy Minister for Safety and Security, as at 16 October 1996, there were 983 cases where the Police Service was investigating cases of alleged corruption in the Service (Hansard, 1966 Col 2462). This alarming figure surely represents a tip of the iceberg in that it is unlikely that the SAPS is aware of the extent of the corruption, much of which would logically be expected to remain undetected.

The Nedcor Project on Crime, Violence and Investment (1996) provides clear support this conclusion. In terms of a sample of 1000 crimes, 450 are reported, 230 crimes are solved, 100 prosecutions and 77 convictions are obtained, of which 36 people are imprisoned and only 8 persons serve 2 years or longer as a term of imprisonment. The Nedcor study also estimates that South Africa has a 94% recidivism rate, that is 94% of all persons released after serving a sentence immediately become involved in crime again. Only 1 out of 8 actually gave up criminal activity. According to the figures provided to the author, the conviction rate for murder at present is approximately 4%. Deterrence cannot be achieved by punishment when a criminal has only a 1 in 25 chance of being convicted and sentenced.

These difficulties were acknowledged by Chaskalson P in his judgment in S v Makanyane & Others 1995 (6) BCLR 665 (CC) (the 'death penalty case'). As he stated "it is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected" (at para 88). This is a clear commitment to the due process model which is inextricably linked with the constitutional enterprise contained in the 1993 Constitution (and now the 1996 model). Nonetheless, the President of the Constitutional Court was well aware of the balance between the due process and crime control which is required to be strict, for "the greatest deterrent to crime is the likelihood that offenders will be aprehended, convicted and punished. It is that which is presently lacking in our criminal justice system and it isat this level and through addressing the causes of crime that the state must seek to combat lawlessness" (at para 122).

He also emphasised that "we would be deluding ourselves if we were to believe that the execution of a few persons sentenced to death during this period will provide the solution to the unacceptably high level of crime" (at para 121).

In this passage lies the key to the crisis of crime, namely a rapid implementation of a reconstruction and development programme by which social infrastructure can be delivered to the most impoverished communities and a radical overhaul of our entire system of policing. In addition, increased salaries, training and professionalism of the South African Police are an urgent priority as are a greater amount of competent viable policing and greater efforts through internal investigation units to limit corruption. The government must show tangible commitment that programmes will be implemented to increase the complement of staff in the prosecuting service, it should engage in comprehensive and practical research insofar as sentencing options are concerned, provide crash course training for magistrates and other judicial officers and if need be, use professionals on contract to alleviate staff shortages in the prosecuting services.

Punishment

Much is required to be done in the area of punishment. Prison alone is not a solution. Without detection, arrest and successful conviction, no system of punishment will have much value. The role of recidivism confirms that which has become the accepted wisdom in criminology. Incarceration for first time offenders only guarantees further crime. The present system of punishment is deeply flawed. In particular, the process of sentencing is based on the presumption that there is a right sentence for each offence and offender and that if there were sufficient training and guidelines sentences would be approximate and consistent. But sentences have to weigh up in their scale so many different factors that there is no possibility of such consistency. Whilst training can only improve the quality of sentencing and educate judicial officers with regard to the variety of options available. Consistency of sentencing for imprisonment will be an illusionary aim. Minimum sentences without some flexibility for individual circumstances will not only be arbitrary, but are likely to result in constitutional challenges to the system as being cruel and unusual punishment. See R v Smith (1989) 1 SCC 1045 (SC) and *Cachalia et at* Fundamental Rights in the New Constitution at 38-40.

As Heinz Messmer and Hans-Uwe Otto Restorative in Justice on Trial (1992) observe at 526 "people who have committed crimes try to avoid the punishment sometimes by extreme methods. Punishment turns their attention to the consequences for themselves not for their victims. Its extreme form . . . imprisonment . . . has been described with not too much exaggeration as an expensive way of making bad people worse." Accordingly a serious debate is required in order to change the philosophy which underpins punishment.

Messmer and Otto (at 528) set out a framework for restorative justice which should be given careful consideration in South Africa. Its fundamental propositions include the following:

1. Punishment should have a single primary aim, that is to restore the condition of the victim as far as possible. This will be done by the community through victim support, by the offender, through reparation and by the state through a system of criminal injury compensation for crimes of violence.

2. Where offenders are known sanctions would take the form of reparation to the victim or the community.

3. Offenders could also make reparations, partly, by accepting a rehabilitative programme to help him or her to avoid future offences such as a drug or alcholic rehabiliation programme.

4. Victims would have the right to an opportunity to meet offenders for mediation if both wished it; a system which has been tried in other jurisdictions.

5. When the offence was serious enough to cause fear or danger amongst members of the public any reparation agreement between the victim and the offender could be supplemented or sanctioned by court.

In short, not only should there be an attempt to restore the *status quo ante* within the community, but victims must be brought into the process so that they feel their interests are taken into account and that the community effected by crime is also involved in both the process of punishment and the arguable reintegration of the offender into the community.

Alternative methods of punishment alone are not sufficient. A major effort is required to solve the crisis in prisons. The Minister of Correctional Services highlighted the extent of the problem when he told Parliament recently that the Department of Correctional Services had sufficient funds for 97 000 inmates but were handling a prison population of 117 000 in addition to 24 000 convicted persons on probation (Hansard 1996, Col 1131).

CONCLUSION

Arguably, as a result of a press which still continues to over represent white opinions and fears as well as a similar approach from some radio and television stations crime is presented in terms of themes of white fear, the need for private policing as a substitute for official policing in the affluents suburbs and the necessity for emigration.

The solution to the crime problem in South Africa should not be sought in the diminution of our constitutional enterprise. That our criminal law and procedure should be harmonised with the spirit and values of the Constitution does not necessarily mean an inevitable adherence to a pristine due process model. In the area of rape, for example, sexist baggage relating to the cautionary rule could well be altered to change rules which reflect a male centred views of the world in which the woman is not to be trusted if she is the complainant in a rape case.

The increasing violence against women serves to reinforce the point that the crime control and due process models not only represent conceptual polarities but are also contested concepts. Conventionally expressed, crime control is about tough policing, due process about the rights of the accused. But due process should not exclude concern for the victim.

A comparative precedent is illustrative.

Canada has recently introduced a new rape law. The preamble states that "the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society, in particular, the prevalence of sexual assault against women and children'. Parliament "recognises the unique character of the offence of sexual assault and how sexual assault and, more particularly, the fear of sexual assault affects the lives of the people of Canada." The preamble then declares

Parliament's wish "to encourage the reporting of incidents of sexual violence or abuse and to provide for the prosecution of offenders within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons".

As Jennifer Nedelsky notes the preamble is partly an attempt to recognise the constitutional rights of the accused 'but it is also broadly important in its assertion that standards of fairness must be applied to the complainant as well as the accused." (Violence Against Women: Challenges to the Liberal State and Relational Feminism, unpublished paper, 1996).

The Act then deals with the vexed problem of consent and provides that no consent is obtained where the complainant having consented in sexual activity, expresses by words or conduct a lack of agreement to continue to engage in the activity.

To the accusation that this provision dilutes the rights of the accused and hence undermines due process, Nedelsky writes "Once we are confronted by the inevitability of the legal systems favouring one perspective over another, and thus of protecting one of the parties rather than the other then an analysis in terms of how the law affects the relations of power gives us a reasoned means of deciding what to do. Assuming a recognition of the systematic subordination of women and a commitment to equality, it is clear that a commitment to the traditional meaning of *mens rea* is a commitment to inequality." Viewed within this perspective due process is not a neutral term; the challenge is to protect rights of the accused without undermining the other constitutional commitments such as gender equality. Due process does not mean that criminals go free or that victims have no rights!

However, unbrided crime within the context of the inadequacies of the policing, prisons and prosecuting services in South Africa will give criminals the ultimate victory namely, a weaker constitutional state and a restricted development of a social practice of rights. Whatever the dominant political ideology, it remains a fundamental task of government to protect the life, liberty and property of each citizen. To date government has failed in this task. As argued, the solution is not to view crime control and due process as an irreconcilable dichotomy. But if police detection remains poor, resources are not made available to the relevant agencies and punishment is not rendered coherent, sustainable

and legitimate, the quick fix law and order solutions will be implemented with the only certainty being an erosion of human rights.

There is a need to shift the discourse about crime from it being viewed predominantly as an affluent persons problem and towards the realisation that it is still the poor and the disempowered who suffer disproportionately from the crime wave which is a cancer within our midst. The following table of reported crime within Gauteng confirms this conclusion.

Police Station	Murder	Culpable Homicide	Assault G.B.H.	Assault Common	Rape	Robbery	M/V Theft	Damage to Property	House-breaking	Drug Traffic
Rosebank	1	10	32	114	6	160	587	292	277	2
Yeoville	10	7	68	276	19	398	573	581	824	18
Lenasia South	21	26	227	215	67	176	126	286	496	5
Hillbrow	212	28	1 130	2 229	418	4 910	4 173	1 945	2 085	90
Nor-,vood	13	7	71	216	13	458	888	586	1 387	3

Source: Hansard, 9 May 1996, at 316.

1995

Police Station	Murder	Culpable Homicide	Assault G.B.H.	Assault Common	Rape	Robbery	M/V Theft	Damage to Property	House-breaking	Drug Traffic
Orlando	129	31	771	399	291	745	235	330	526	12
Diepkloof	129	29	518	211	247	568	348	309	333	1
Lenasia	42	18	372	467	107	410	449	332	489	23
Eldorado Park	57	52	619	688	104	331	167	216	360	2
Jabulani	135	32	814	403	371	815	257	365	412	2
Kliptown	84	27	804	412	171	478	192	320	332	2
Moroka	234	71	1 832	664	624	1 347	519	829	868	8
Dobsonville	88	15	702	425	218	598	226	300	438	1
Meadowland	183	26	647	361	287	45	138	282	274	4
Lombardy East	13	16	42	68	11	349	237	199	494	0
Naledi	30	8	319	59	101	209	76	144	93	2
Protea Glen	5	3	96	29	22	36	29	38	39	0
Alexandra	231	14	1 050	414	254	860	173	318	353	5
Randburg	38	50	213	566	71	663	1 156	552	2721	6
Sandton	31	35	158	439	42	769	1 427	904	1 872	4
Parkview	80	3	47	128	13	208	736	284	907	3

In comparing, for example, Dobsonville and Alexandra to Sandton and Parkview, the figures indicate that affluent suburbs suffer disproportionately from crimes of housebreaking and motor vehicle theft but traditional black residential areas suffer far more from crimes of violence. Sadly these areas appear to be even more dangerous since 1994, although account must be taken of the influence of under-reporting as noted already.

The government needs to be tested against a few, ascertainable and implementable objectives. These should include:

(a) intensive policing in a targeted group of "trouble spots" for a six month period during which time clear statistics of crime in the areas is made public;

(b) a pilot programme to implement the principles of restorative justice should take place within the next six months in at least two divisions of the High Court (which of course includes the Magistrates Courts in those areas);

(c) consider should be given to a state reparation scheme and if it is impractical the public should be informed within six months;

(d) an immediate initiative should be commenced (which can be linked with (b)) to ensure that all judicial officers and prosecuting authorities have a comprehensive grasp of a full menu of sentencing alternatives. Where the Department of Correctional Services is unable to implement the full menu, immediate steps need to be taken so as to ascertain the reasons therefore.

These are but a few of the tangible initiatives which can be taken and which will allow the public to test whether the Departments' responsible are doing "all that they can" or whether a change of personnel or more efficiently directed resources can assist in solving the problem.

There should be no illusions that a social phenomenon which has grown over a period of more than 50 years cannot be solved overnight, even with the most efficient government blessed with unlimited resources. However, our new Constitution calls for open and accountable

government and the least the public can demand is sufficient information to render their representatives accountable for clear failure. In the area of crime, the realistic demand should be to see tangible, incremental improvement. There is no immediate panacea for the ills of a society, the causes of which lie at the root of our history.

If the first task of government is to protect its citizens, this government to date has failed, particularly those who would have expected major improvement to their communities after the installation of a democratic government. The solution lies in institutional change, not an erosion of human rights, in rational policing not populist hysteria.

APPENDIX

CRIMES TO PROPERTY: 1974 -1995

YEAR	Theft of Motor Vehicle	Theft out of or from motor vehicle	House-breaking	Shoplifting
1974/75	26 092	N/A	90 842	N/A
1975/76	31 534	N/A	97 747	N/A
1976177	36 900	N/A	110 733	N/A
1977/78	38 323	N/A	124 307	N/A
1978/79	38 716	N/A	132 966	N/A
1979180	39 854	N/A	135 074	N/A
1980181	36 558	N/A	120 194	N/A
1981182	44 483	N/A	139 273	N/A
1982/83	44 771	N/A	148 766	26 224
1983/84	44 372	N/A	153 440	27 245
1984/85	48 584	N/A	166 812	31 450
1986	67 008	N/A	212 922	38 053
1987	59 936	N/A	235 693	40 833
1988	57 851	116 813	182 754	40 477
1989	58 298	122 385	187 946	41 601
1990	68 649	149 606	225 158	48 935
1991	71 120	160 179	260 661	51 658
1992	71 532	154 247	254 941	58 371
1993	77 906	166 295	259 645	62 166
1994	94 710	177 734	276 050	63 274
1995	97 947	189 692	293 204	59 109

Source: Fast Facts No 10/96, October 1996
South African Institute of Race Relations

CRIMES TO THE PERSON: 1974 - 1995

YEAR	Assault	Murder	Rape	Robbery
1974/75	138 586	8 662	14 815	37 896
1975/76	135 705	6 000	15 394	38 981
1976/77	135 397	7 560	15 109	44 141
1977/78	127 735	5 959	15 175	43 884
1978/79	127 659	6 913	15 263	42 686
1979/80	134 682	8 356	16 149	45 442
1980/81	123 310	7 434	15 318	39 816
1981/82	119 898	8 084	15 535	38 626
1982/83	121 716	8 573	15 342	38 229
1983/84	125 002	9 462	15 785	37 755
1984/85	123 100	8 959	16 085	39 302
1986	109 755	9 913	15 816	48 533
1987	120 779	9 800	18 145	46 288
1988	125 571	10 631	19 368	45 847
1989	128 887	11 750	20458	50636
1990	124 030	15 109	20 321	61 132
1991	129 626	14 693	22 761	68 936
1992	136 322	16 067	24 360	78 644
1993	144 504	19 583	27 037	87 102
1994	157 315	18 312	32 107	95 763
1995	171 656	18 983	36 888	102 809

Source: Fast Facts No 10/96, October 1996
South African Institute of Race Relations

OTHER CRIMES REPORTED: 1974 - 1995

YEAR	Arson	Contravention of the Explosives Act	Illegal possession of arms and ammunition	Public Violence
1974/75	N/A	N/A	1 498	375
1975/76	N/A	N/A	1 651	191
1976/77	N/A	N/A	5 045	1 074
1977/78	N/A	N/A	31 364	884
1978/79	N/A	N/A	4 751	172
1979/80	N/A	N/A	5 389	600
1980/81	N/A	N/A	N/A	N/A
1981 /82	N/A	N/A	N/A	N/A
1982/83	N/A	803	3 852	317
1983/84	N/A	168	3 871	N/A
1984/85	4 724	206	3 650	4 408
1986	5 576	424	5 192	8 156
1987	4 466	305	5 409	1 973
1988	4 882	280	4 696	1 368
1989	5 563	208	5 059	3 173
1990	7 171	327	7 322	4 756
1991	23 920	378	9 706	2 402
1992	6 389	448	10 580	2 250
1993	6 854	507	9 542	5 695
1994	7 056	532	8 838	961
1995	6 562	304	8 344	750

The high increases in these crimes occurred as a result of (I) people failing to relicense firearms and (ii) people giving false information when applying for a firearm.

Source: Fast Facts No 10/96, October 1996. South African Institute of Race Relations