

BETWEEN THE DEVIL AND THE DEEP BLUE SEA – THE SPECTRE OF CRIME AND PRISON OVERCROWDING IN POST-APARTHEID SOUTH AFRICA

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SUMMARY

Chronic overcrowding has plagued the South African penal system since the advent of democracy in 1994. This has resulted in the large-scale gross violation of the basic human rights of large numbers of prisoners. After examining certain historical examples of overcrowding in the prisons of Africa generally, the article focuses on the history of chronic overcrowding in the prisons of South Africa during the post-apartheid period. The hard choices facing the South African people and government in relation to this issue are then examined.

1 INTRODUCTION

More than ten years since the advent of democracy, the ever-present reality of violent crime continues to threaten the hopes and dreams of South Africans, both rich and poor. Dinner table talk, particularly in the homes of South Africa's affluent middle class, is dominated by discussions of crime and corruption, while the media are filled with countless horror stories detailing tragedies caused by criminal violence. South Africans are in no mood to deal gently with the folk devils (to coin Stanley Cohen's term)¹ who threaten the prosperity promised by the reintegration of South Africa into the world economy following the demise of apartheid.

But there is another more muted theme which has emerged in post-apartheid South Africa, which regularly forms the basis for reports and editorials in both the visual and print media. This theme concerns the chronic overcrowding which has plagued the South African penal system since the

¹ Cohen *Folk Devils and Moral Panics – The Creation of the Mods and the Rockers* (1973).

advent of democracy. After ten years of consistent reporting on the subject in the mass media, as well as many official reports and numerous scholarly articles in academic journals, the vast majority of informed South Africans are well aware of the fact that the majority of the prisons in the country are grossly overcrowded, and have been in this condition for many years. Furthermore they know (or at the very least ought to know) that this gross overcrowding results in the wide scale violation of the basic human rights of large numbers of prisoners.

Prison overcrowding in South Africa has reached such serious proportions that the country as a whole, and the government in particular, faces a stark choice. On the one hand, the government can take the difficult and drastic steps required to deal decisively with the problem of prison overcrowding, and thereby risk a massive political backlash caused by a perception that it is soft on crime. On the other hand, it can continue to tinker with the system without really addressing the problem, knowing full well that, without drastic and decisive steps being taken, chronic overcrowding in South African prisons will continue, as will the violation of the basic human rights of those confined within the prisons. On the one hand are the folk devils responsible for the nightmare threatening South Africa's dream of building a prosperous "rainbow nation". On the other hand is the deep blue sea – allowing the systematic and widespread violation of the basic human rights of prisoners caused by chronic overcrowding to continue unchecked, thereby compromising the founding principles of the "rainbow nation".

The purpose of this article is to examine the problem of prison overcrowding in post-apartheid South Africa, and to discuss the hard choices facing the South African people and government in relation to this issue.

2 THE HISTORICAL CONTEXT

Prison overcrowding is not simply a phenomenon which characterises the penal system of post-apartheid South Africa. Indeed, many prisons in Africa were chronically overcrowded from the time they were built, and continue to be so today. It is probably true to say that if there is a single theme which characterises the punishment of imprisonment in the African context, from the time this form of punishment spread across the continent to the present day, it is ongoing chronic overcrowding. One reason for this is the particular way in which prisons in Africa were employed to establish control over indigenous populations. Administrative sentences, which entailed short arbitrary periods of detention, were widely used. Bernault points out that the purpose of administrative imprisonment was to act "as an economic incentive to enforce tax collection, forced labor, or cultivation, and to provide colonial companies with a constant influx of cheap labor".² The extensive use of imprisonment as a method of social control is clear from the following:

² Bernault "The Politics of Enclosure in Colonial and Post-Colonial Africa" in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 1 12.

"In the Upper Volta in 1932, during the peak of the farming season, the administrators pronounced at least 1,900 monthly disciplinary sentences of imprisonment – an average of one imprisonment for every 140 persons annually ... In Tanganyika, one decade later, the state enforced regulations on soil erosion by imprisoning recalcitrant peasants on a large scale. In Kenya, the thirty prisons ... received approximately 28,000 detainees in 1931 – 36,000 in 1941 and 55,000 in 1951, or one detainee for 146, 136 and 109 Africans, respectively. The highest figures come from the Belgian Congo, where, in the late 1930s, the administration evaluated the number of annual detainees at 10 percent of the male population. In 1954, in the province of Kivu, almost 7 percent of the adult males spent some time in prison."³

As a result of such policies, penal systems were constantly and chronically overcrowded. In French West Africa, for example, official inspectors operating in the early 1900s denounced chronic overcrowding in the prisons.⁴ This position did not improve with time. During the period 1958 to 1960, for example, Laurant Fourchard describes the general state of affairs within the penal system of Upper Volta as follows:

"Administrative reports (*process-verbal*) regarding prison inspections document the unsanitary conditions and dilapidated state of the prisons at the time of independence. At Fada-N'Gourma (an eastern town of the Upper Volta), 'Conditions of hygiene are extremely bad, the building is totally decrepit. The cells are very poorly ventilated; prisoners sleep on the bare floor at about three per cell on rotting mats. There is no separate area for toilets in the prison; there are just latrines under the open sky in the middle of the tiny courtyard. During the rainy season, the gutters inundate the cells; the timberwork is on the verge of collapsing ...'"⁵

In the British colonies, prisons were often similarly dilapidated and chronically overcrowded. For example, Killingray notes that by 1919 the Owerri prison in southeastern Nigeria, which was designed to accommodate 100 inmates, was forced to accommodate 900 prisoners. According to the reports of prison medical officers, many prisoners confined in this prison fell sick and died due to unsanitary conditions and a shortage of food.⁶ In Ghana, overcrowding was a problem from the time of the establishment of the penal system. In 1899 Acting Governor Low described the Accra Prison as follows:

"The present place used as a prison in Accra is in every way unfitted for this purpose. It is an old Fort, formerly used by the Merchants for trade purposes. Within its walls prisoners are crammed into unsuitable rooms, sometimes as many as 15 in one room. There is no accommodation for the various grades of prisoners. Debtors, political prisoners, prisoners awaiting trial, are all huddled into one room at night and penned like sheep during the day within a small concreted yard under a galvanized iron roof ..."

³ *Ibid.*

⁴ In December 1907 the prison at Kindia in Guinea, which consisted of two small rooms measuring 5 by 6 metres, contained twenty-nine prisoners. See Bernault 12.

⁵ Fourchard "Between Conservatism and Transgression – Everyday Life in the Prisons of Upper Volta, 1920-1960" in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 135 141.

⁶ Killingray "Punishment to Fit the Crime? Penal Policy and Practice in British Colonial Africa" in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 97 101.

⁷ Quoted in Seidman "The Ghana Prison System: An Historical Perspective" in Milner (ed) *African Penal Systems* (1969) 431 440.

By 1949 the overcrowding in Ghanaian prisons had reached crisis proportions, and this situation became worse as time went on. The prison population of Ghana increased from 1 500 before the Second World War to 3 600 by 1951, and the chronic overcrowding within the Ghanaian prison system continued into the post-colonial period.⁸

The prisons of South Africa were similarly overcrowded during the colonial period. The prisons of colonial Natal provide a good example of this continuing phenomenon. From the time of their establishment in 1842, the prisons of the colony were overcrowded. Colonial legislation aimed at the social control of the indigenous population, enforced by the punishment of imprisonment, resulted in large numbers of persons being imprisoned. For example, in 1872 the Durban Gaol was overcrowded to such an extent that only 176 cubic feet of space was available for each prisoner, as opposed to the 900 cubic feet required in terms of official policy.⁹ On 5 November 1872 the Durban Gaol Board noted that “in some cases it is to be feared that life has been sacrificed for want of proper accommodation for the sick”.¹⁰ In May 1877 the Lieutenant-Governor of the Colony concluded that the state of accommodation at the Pietermaritzburg Gaol was “wholly inadequate to the demands upon it, the daily number of prisoners being far greater than the prison can properly accommodate, whilst sometimes there is excessive overcrowding”.¹¹ With the outbreak of the Anglo-Zulu War in 1879 the Pietermaritzburg Gaol became even more overcrowded. In 1880 the Superintendent of the Gaol stated that it was “almost impossible to crowd more prisoners into the cells where the prisoners have not 200 cubic feet each”.¹² Health problems arose as a result of the overcrowding, and the District Surgeon pointed out that serious forms of dysentery and diarrhoea were a frequent occurrence in the Pietermaritzburg Gaol.¹³ Eventually, in order to relieve the overcrowding, the prison authorities were ordered to pitch tents for African prisoners. The Resident Magistrate of Pietermaritzburg complied with the order but complained that “it involves crowding and it is impossible to put men under long sentence in tents”.¹⁴

In 1886, a mere three years after additional accommodation had been constructed at the Durban Gaol, the District Surgeon noted that, in the cells reserved for “Coloured” prisoners: “As many as from 5 to 8 adults are placed

⁸ Seidman 448.

⁹ This was set out in the *Digest and Summary of Information Respecting Colonial Prisons of 1867* in Chapter XVI 84. The figure of 900 cubic feet of space per prisoner was applicable to prisoners in England and it was generally accepted that even more space was necessary for prisoners in tropical climates such as that of colonial Natal.

¹⁰ Colonial Secretary's Office, Natal 424/2228 Meeting of Durban Gaol Board on 5 November 1872.

¹¹ Colonial Office, London 179/126 Bulwer to Hicks Beach 9 January 1878: Enclosure Number 1 – Minute of Lieutenant Governor 31 May 1877.

¹² Colonial Secretary's Office, Natal 778/4359 Superintendent Pietermaritzburg Gaol 10 November 1880.

¹³ Colonial Secretary's Office, Natal 778/4359 District Surgeon Pietermaritzburg.

¹⁴ Colonial Secretary's Office, Natal 778/4359 Resident Magistrate Pietermaritzburg to Colonial Secretary 17 November 1880.

frequently in a small cell of say 577 feet cubic space.”¹⁵ Despite further additions to the Durban and Pietermaritzburg Gaols in 1889 and 1890 respectively, overcrowding remained a problem. In October 1892 overcrowding in the Durban Gaol was so severe that 50 short-sentenced prisoners were forced to sleep in the corridors at night.¹⁶ In December 1893 the Superintendent of the Durban Gaol advised the government that 73 prisoners were forced to sleep in the corridors at night.¹⁷ In 1903, the Governor of the Durban Gaol stated:

“[T]hough the new block ... has been completed and occupied during the year, the cell accommodation is still insufficient for the requirements, and the Gaol is practically always much overcrowded ... The great majority of cells, each intended for only one convict, are occupied by three, and even then a considerable number of convicts have to be accommodated to sleep in corridors of Blocks.”¹⁸

Chronic overcrowding in the prisons of Africa continued into the post-colonial period. For example, during the period 1953 to 1964, the prisons of Ghana were overcrowded by between 125 and 164 percent.¹⁹ Seidman notes that: “Complaints about the seriousness of overcrowding permeate the reports since 1949, as they had perennially before that.”²⁰ Seidman goes on to point out that the average Ghanaian prisoner in the late 1960s was confronted by “conditions of almost animal overcrowding” and states that: “[t]he impact upon the convict admitted to the prisons must be the same as it was in 1876.”²¹ Writing in 1972, Tanner points out in relation to the penal systems of Africa as a whole that “overcrowding of prison buildings is widespread” and, referring specifically to prisons in Ghana, states that “it has been officially admitted that many have held double the authorised number”.²² In relation to the prisons of Kenya at the start of the 21st century, Dissel describes conditions as follows:

“Kenya’s prisons, described as ‘death chambers’, are overcrowded and unhygienic. For instance, in Nakuru prison, 450 convicted inmates and 780 remand prisoners were held in 14 cells. Prisoners sleep on dirty and damp cement floors. The communal cells are often poorly ventilated and badly lit, and lack adequate washing facilities. Overflowing buckets in one corner of the cell usually serve as the only toilets. Acute water shortages in some prisons have exacerbated the unsanitary conditions.”²³

¹⁵ Colonial Secretary’s Office, Natal 1066/684 Report of District Surgeon Durban 15 February 1886.

¹⁶ Colonial Secretary’s Office, Natal 1345/4668 Report in *Natal Witness* of 11 October 1842.

¹⁷ Colonial Secretary’s Office, Natal 1382/5780 Superintendent Durban Gaol 13 December 1883.

¹⁸ Natal Blue Book 1903 Volume II Departmental Reports – Report of Chief Commissioner of Police 9.

¹⁹ Seidman 449.

²⁰ Seidman 458.

²¹ Seidman 451.

²² Tanner “Penal Practice in Africa – Some Restrictions on the Possibility of Reform” 1972 10 *The Journal of Modern African Studies* 447 453.

²³ *Ibid.*

Conditions in the prisons of Uganda during this period seem similarly bleak, with Dissel reporting as follows:

“Due to overcrowding, facilities were overused. Toilets, often in the form of buckets, were filthy and overflowing. The cells were generally unclean and prisoners complained of lice, bedbugs and fleas. Proper bedding was not available and prisoners had to sleep on the bare floor. Poor conditions in these prisons inform severe health risks and had led to a number of deaths from malnutrition, dehydration, dysentery and pneumonia ...”²⁴

Turning to South Africa during the apartheid period, it is no surprise to note that most prisons were chronically overcrowded, due to the fact that the criminal justice system was used to enforce apartheid policies.²⁵ The report of the Truth and Reconciliation Commission set up after the demise of the apartheid system, notes that pass-law offenders constituted as many as one in four inmates confined in South African prisons during the 1960s and 1970s.²⁶ The report states that prisoners of all races experienced “overcrowding and harsh conditions” but notes that conditions were “particularly brutal” for black prisoners.²⁷

It should be clear from the above that chronic overcrowding is not a problem which is new to the prisons of Africa in general, or South Africa in particular. In fact, it has characterised imprisonment in Africa from the time this form of punishment became widespread on the continent to the present day. What is surprising in the South African context, however, is that the demise of apartheid and the birth of democracy in 1994, followed by the adoption of the final democratic constitution in 1996, has served not to alleviate the problems of overcrowding in South Africa’s prisons, but to exacerbate them.

3 OVERCROWDING IN SOUTH AFRICAN PRISONS FOLLOWING THE FIRST DEMOCRATIC ELECTION

South Africa’s first democratic election in 1994 did not bring with it a reduction in the overall prison population. In fact the opposite was true, and imprisonment in South Africa during the post-election period was characterised by chronic overcrowding which prevailed in prisons throughout

²⁴ *Ibid.*

²⁵ Dissel and Ellis note, *eg*, that: “Between 1975 and 1984, 1.9 million people, almost all of them black, were arrested for failing to carry their documents or for being in an unauthorised location. Pass-law offences, together with offences against the Immorality Act, and various forms of opposition to apartheid, were responsible for a large proportion of people sent to prison.” See Dissel and Ellis “Reform and Stasis: Transformation in South African Prisons” Paper for the Centre for the Study of Violence and Reconciliation, first published in “Ambitions réformatrices et inertie du social dans les prisons sud-africaines” July 2002 16 *Critique Internationale*.

²⁶ Truth and Reconciliation Commission of South Africa Report Vol 4 Chapter 7 “Institutional Hearing: Prisons” 1998 200 par 8.

²⁷ Truth and Reconciliation Commission of South Africa Report Vol 4 Chapter 7 par 9.

the country.²⁸ The extent of the problem was pointed out time and again by those responsible for oversight of the correctional system. In April 1995, for example, following an inspection of Cape Town's Pollsmoor prison, the chairman of the Parliamentary Portfolio Committee on Correctional Services, Carl Niehaus, was reported to be concerned that overcrowding in the prison was so extreme that prisoners "could take the government to the constitutional court and would probably win".²⁹ In July 1995 Niehaus stated in an interview that he had seen "massive overcrowding" at Pollsmoor, Diepkloof in Johannesburg, and at Pretoria Central, while in Butterworth awaiting trial prisoners were "so overcrowded that they cannot all lie down to sleep at the same time".³⁰ By March 1996 overcrowding in South African prisons had reached levels which were sufficiently disturbing so as to trigger alarming statements from a range of officials:

"Commissioner of Correctional Services, Henk Bruyn, warned that the situation in prisons had 'reached crisis proportions' ... There is cell space available for 95 000 prisoners but the prison population of about 113 000 is expected to grow to 130 000 by the end of the year. Two or three toilets, and one or two showers, are shared between every 60 convicts in urban prisons throughout the country. Correctional Services spokesman Chris Olckers said overcrowding quotas of more than 200 percent had been recorded in some prisons ... African National Congress MP Carl Niehaus said ... 'We are faced with a time bomb which poses serious risk to the public at large. I don't want to sound alarmist, but if the proper steps aren't taken as soon as possible, piecemeal crisis management may be looked at,' he said."³¹

4 OVERCROWDING IN SOUTH AFRICAN PRISONS LEADING UP TO THE SECOND DEMOCRATIC ELECTION

The period leading up to South Africa's second democratic election on 2 June 1999 saw the problem of overcrowding in the country's prisons becoming progressively worse.³² For example, by the end of January 1997 there were 93 055 sentenced and 33 864 awaiting trial prisoners in South African jails, which had been designed to accommodate a maximum of 94 352 inmates. This meant that the average occupancy rate was 137%, but some prisons were more overcrowded than others. For example, the occupancy rate of Pollsmoor prison in the Western Cape was 208%, whereas that of Lusikisiki prison in the Eastern Cape was 290%.³³ In February 1997 it was reported that, in Empangeni prison in northern KwaZulu-Natal, more than 400 prisoners were confined in cells designed to

²⁸ See Peté "The Politics of Imprisonment in the Aftermath of South Africa's First Democratic Election" 1998 11 *South African Journal of Criminal Justice* 51 53.

²⁹ 1995-04-20 *Business Day*.

³⁰ Quoted in 1995-07-26 *Cape Times* 5.

³¹ 1996-03-31 *Weekend Argus* 1; and 1996-03-30 *The Saturday Paper* 6.

³² For a detailed discussion of the South African penal system during this period see Peté "The Good, the Bad and the Warehoused': The Politics of Imprisonment During the Run-up to South Africa's Second Democratic Election" 2000 13 *South African Journal of Criminal Justice* 1-56.

³³ 1997-02-23 *The Sunday Independent* 5.

accommodate 246 inmates. Members of the South African Human Rights Commission reported that prisoners were forced to sleep on the floor because of a lack of space for beds.³⁴ In April 1997, during a parliamentary debate on his budget, the Minister of Correctional Services pointed to the astronomical increase in the prison population, and stated that it was only a matter of time before inmates took the government to court because of inhumane prison conditions.³⁵ During October 1997 a reporter from *The Star* newspaper visited Leeukop prison and reported as follows:

"None of the cells visited had hot water, few had working showers and most of the toilets did not flush. There was an average of between 30 and 33 prisoners in a cell, toilets and urinals were within a few metres of prisoners' beds, and double bunk beds were about 20 cm apart. Most of the cells had illegal electric wiring hanging out of neon light fittings in the cells. Prisoner Abe Kele said the shower in his cell had not worked for two years. He said the toilet had to be flushed with a bucket of water; and because it was so close to the beds, the stench bothered them at night."³⁶

During the same month, the Minister of Correctional Services himself admitted that chronic overcrowding had resulted in the majority of South African prisoners being confined in inhumane conditions:

"In the majority of our prisons conditions are inhumane because of overcrowding. We have cells which were built to house 18 inmates and they contain 65, where every spare inch is taken and people spill over to sleep in the toilets because there is absolutely no space ... that is inhumane. It is cruel. Single cells at Pollsmoor were built to house one person, but they have six each. At Durban's Westville Prison it is overcrowded by 200 per cent. People have no room and absolutely no privacy. This brings other problems like murder and constant sodomy, which stem from overcrowding. Those are conditions which offend the very constitution we are trying to uphold."³⁷

In November 1997 the Minister's opinion was echoed by the Commissioner for Correctional Services, who told the parliamentary portfolio committee on correctional services that overcrowding in South Africa's prisons was so bad that it constituted a possible violation of prisoners' constitutional rights. He told the committee that some cells which had been designed to house 16 prisoners were forced to hold 62, and that often toiletries such as toothbrushes and separate bars of soap could not be provided for all inmates.³⁸ By 31 December 1997, according to official statistics, South African prisons were overcrowded by a massive 43,3%.³⁹ In the preface to the Department of Correctional Services Annual Report for 1997, the Commissioner of Correctional Services, Dr K Sitole, clearly acknowledged the problem of overcrowding. He stated that "exploratory investigations" had been initiated, which involved "more unconventional methods of relieving overcrowding of our prisons, such as using prison ships

³⁴ 1997-02-21 *The Citizen* 13.

³⁵ 1997-04-23 *The Star* 7.

³⁶ 1997-10-2 *The Star* 6.

³⁷ 1997-10-19 *Sunday Tribune* 10.

³⁸ 1997-11-2 *City Press* 4.

³⁹ Department of Correctional Services Annual Report for the period 1 January 1997 to 31 December 1997 – Safe Custody of Prisoners 5.

and the conversion of inner city buildings into prisons".⁴⁰ The fact that the Department of Correctional Services was even considering these "unconventional methods" indicates that the problem of overcrowding had reached crisis proportions. Early the following year conditions within the admission centre of Pollsmoor Prison were described as follows:

"Shane Ismail, a dentist who is on hunger strike after awaiting trial for five months, said in a telephone interview he was covered in a lice rash. Between 40 and 50 prisoners were crammed into cells which were intended for 20 people, he said. 'The conditions are horrific. This place is condemned and leaking and full of cockroaches and lice. I have a lice rash over my whole body,' he said."⁴¹

In May 1998 the Minister of Correctional Services again conceded that the human rights of prisoners might be infringed due to overcrowding, and stated that deficient infrastructure and serious overcrowding made it difficult to ensure that all inmates were detained in accordance with the constitution.⁴² During the same month, two Human Rights Commissioners visited the Pretoria Prison and found it to be 220% overcrowded. A spokesman for the Human Rights Commission stated as follows:

"It is clear to us from the visit ... that the situation in the prison is totally unsatisfactory and that no prisoner should be held under the type of conditions we observed ... It is highly likely that the criminal justice system will generate more custodial awaiting-trialists in the coming months. This scenario will simply exacerbate an already hopeless situation and the consequences could be catastrophic."⁴³

By the middle of 1998 overcrowding in South African prisons had reached such serious proportions that the release of 9 000 prisoners as part of Nelson Mandela's 80th birthday celebrations in July of that year had little impact on the problem.⁴⁴ In his annual report for that year, the Commissioner of Correctional Services referred explicitly to a "crisis of overcrowding" within South African prisons:

"The biggest single challenge to Correctional Services is the ever-increasing prison population and the reality of overcrowding. Together with our colleagues in the National Crime Prevention Strategy we are exploring a number of creative and pro-active options to relieve the crisis of overcrowding, such as the Integrated Justice System. The pilot project on electronic monitoring has proved to be highly successful and all indications are that it will be extended to other parts of the country."⁴⁵

⁴⁰ Preface to the Department of Correctional Services Annual Report for the period 1 January 1997 to 31 December 1997 by the Commissioner of Correctional Services, Dr K Sitole.

⁴¹ 1998-01-02 *Cape Argus* 1.

⁴² 1998-03-13 *Cape Argus* 6.

⁴³ 1998-05-15 *Sowetan* 4.

⁴⁴ 1998-08-11 *The Star* 12; and 1998-07-29 *Die Burger* 2.

⁴⁵ Preface to the Department of Correctional Services Annual Report for the period 1 January 1998 to 31 December 1998 by the Commissioner of Correctional Services, Dr Sitole.

5 OVERCROWDING IN SOUTH AFRICAN PRISONS FOLLOWING THE SECOND DEMOCRATIC ELECTION

The period following South Africa's second democratic election on 2 June 1999 did not bring with it a reduction in the chronic overcrowding being experienced in the prisons of the country. For example, towards the end of 1999 the head of the Boksburg Prison, Modisadife, allegedly told a Sunday newspaper that, due to chronic overcrowding of around 200%, the prison had been operating in "crisis management mode" for the past three years. In a graphic description of the overcrowding, Modisadife told the newspaper that: "It's like opening the gates of hell when more than 4000 inmates – many of them hardened criminals – push and shove their way into the mess hall."⁴⁶ The *Sunday Independent* confirmed Modisadife's assessment of the situation, and described the conditions within the cells of the Boksburg Prison as follows:

"Conditions are unhygienic and there is a desperate shortage of beds and blankets. Thin foam mattresses blackened by filth and grime are rolled up to save space during the day. At night, they must suffice for beds."⁴⁷

The newspaper pointed out that the Department of Correctional Services was short of 4 495 staff members nationally, and that the warder-to-inmate ratio in South Africa was 5-to-1, whereas it was only 3-to-1 in Botswana and 1,5-to-1 in Germany and Australia. On 14 December 1999 the Minister of Correctional Services, Skosana, warned at a press conference that South Africa would face a national disaster if the serious problems in the country's prisons were not resolved soon. The Minister pointed to the chronic overcrowding in the prisons, which was then at a level of 159%, and stated that his department could not house many more prisoners. He also pointed to a disturbing 100% increase in the number of offenders serving terms of more than 20 years, and attributed this to the constant "corrosion of the fabric of society". If this trend continued it would force the department to reclassify prisons and inmates, retrain staff, beef up security, and upgrade programmes.⁴⁸ During the same month that the Minister of Correctional Services made these comments, the Provincial Commissioner of Correctional Services for the Northern Province, Ramashala, revealed that prisons in his province were 200% overcrowded. This meant that the prisons in the Northern Province were the most overcrowded in South Africa.⁴⁹

There is extensive reference to the consequences of overcrowding in the Department of Correctional Services Annual Report for 1999. For example, in the preface to the report, the Acting Commissioner of Correctional Services, Nxumalo, states as follows:

⁴⁶ 1999-12-12 *The Sunday Independent* 6.

⁴⁷ *Ibid.*

⁴⁸ 1999-12-15 *Pretoria News* 2.

⁴⁹ 1999-12-16 *Beeld* 6.

“One of the main obstacles in our endeavour to make educational and training programmes more readily accessible to all prisoners has been severe overcrowding of our prisons. At an average occupation rate of 163% the sheer numbers of the people in prison are placing tremendous pressure on the available facilities and resources - not only in terms of education and training, but also with regard to psychological and social services and most other prison activities. Only once the warder/prisoner ratio is established at levels that are internationally acceptable in terms of correctional practice, together with the increased availability of space in prison, will we really be able to make treatment and developmental programmes available to all prisoners on a sustained basis. Overcrowding of prison, in my opinion, remains the single most important challenge facing the Department. We simply have too many prisoners in our system. Correctional Services is in the unenviable position that it has to take responsibility for the care and safe custody of all prisoners who are referred to prison, yet it has no control over the influx of prisoners. The number of awaiting-trial prisoners in prison has escalated to an all-time high, but what is even more disturbing is the fact that the number of awaiting-trial prisoners, as a percentage of the entire prison population, is unacceptably high at almost 36%. This particular phenomenon is being addressed at various forums within the Criminal Justice Cluster, but to say that the problem is being overcome would be an overstatement. While the building of new prisons and the upgrading of existing prisons are an ongoing process, one can never regard the erection of more prisons as the solution to the problem of overcrowding. The simple truth is that the prison population has to decrease.”⁵⁰

The following year marked the turn of the century, but did not witness improved conditions for those confined in South African prisons, which continued to be characterised by chronic overcrowding. By June 2000 the overcrowding in prisons in the Western Cape had become so serious that the Commissioner of Correctional Services for the province, Korabie, threatened to stop any new admissions to the province's prisons from the end of that month. Furthermore, Pan Africanist Congress Member of Parliament De Lille threatened to apply for an interdict from the Cape High Court to prevent the Department of Justice from referring children to Cape Town's Pollsmoor Prison for petty offences.⁵¹ The newly appointed Commissioner of Correctional Services, Reverend Mbete, pointed out to the Parliamentary Select Committee on Security and Constitutional Affairs that, although the penal system was designed to accommodate a maximum of 100 384 prisoners, the actual prison population at the time was 172 271 prisoners. Of that total, only 108 301 were sentenced, whereas 63 970 were awaiting trial.⁵² A member of the South African Human Rights Commission, Kollapen, pointed out at a workshop on overcrowding held at the University of South Africa, that in one of the holding cells in a Pretoria prison, there were more than 60 awaiting-trial prisoners who were forced to share a single toilet. He stated *inter alia* as follows:

“In the event of an outbreak of diarrhoea, some prisoners are forced to relieve themselves on a piece of paper then throw it out of the window ... [I]f we allow

⁵⁰ Preface to the Department of Correctional Services Annual Report for the period 1 January 1999 to 31 December 1999 by Acting Commissioner of Correctional Services, Nxumalo.

⁵¹ The juvenile section of Pollsmoor Prison was 180% overcrowded and the admissions centre 206% overcrowded at the time. See 2000-06-06 *Cape Argus* 6.

⁵² 2000-06-08 *Sowetan* 2.

this problem to continue, it will create a scenario where a breach of constitutional obligation is regarded as acceptable.⁵³

During July 2000 the Minister of Correctional Services, Skosana, visited Cape Town's Pollsmoor Prison. He commented on the case of Cupido, an eighteen-year-old awaiting-trial prisoner. Cupido had been granted bail of R100, but had been forced to remain in prison for more than eight months since he could not afford to pay this trifling amount. The *Cape Times* commented that the State had spent R18 480 in keeping Cupido in prison for this period. The newspaper pointed out that he was only one of hundreds of Pollsmoor prisoners arrested for minor offences, who had been forced to remain behind bars since they could not afford to pay bail amounts of less than R500. The longer such petty offenders remained in prison, the greater the risk they would end up as hardened criminals.⁵⁴

The month after the Minister's visit to Pollsmoor Prison, Niehaus, the chairperson of the National Institute for Crime Prevention and Rehabilitation of Offenders, pointed out that South African prisons were 84% overcrowded. He stated that things were getting worse on a daily basis, and that the entire system would collapse within a few years if action were not taken to remedy the situation.⁵⁵ During this period the Inspecting Judge of Prisons, Judge Fagan, told a conference on human rights and crime at the University of the Western Cape, that conditions in South African prisons were "ghastly" due to chronic overcrowding. While the sentenced prison population had increased from 93 000 to 110 000 over the previous five years, the number of unsentenced prisoners had increased from 24 000 to 64 000. The Inspecting Judge characterised the lengthy periods many prisoners spent awaiting a trial date as "detention without trial".⁵⁶ The Human Rights Commission, in the person of Kollapen, commented on the large numbers of prisoners awaiting trial at this time. In an article which appeared in the *Sowetan*, Kollapen pointed out that whereas the sentenced prison population had grown by 15% during the preceding five years, the number of unsentenced prisoners in South African prisons had increased by a phenomenal 163%.⁵⁷ This had resulted in chronic overcrowding, which in turn meant that the physical conditions in prisons were such that they were not consistent with prisoners' constitutionally guaranteed right to dignity. The problem, Kollapen pointed out, was that because of the high levels of crime and violence in the country, the South African public was in no mood to listen to arguments in favour of prisoners' rights. This meant that the issue of prison overcrowding was not one which lent itself "to reasonable and unemotional public debate."⁵⁸

⁵³ 2000-06-28 *Pretoria News* 4.

⁵⁴ 2000-07-06 *The Cape Times* 3.

⁵⁵ 2000-08-02 *Beeld* 2.

⁵⁶ 2000-08-04 to 2000-08-10 *Mail and Guardian* 14.

⁵⁷ In par 8.2 of his annual report for the year 2000, the Inspecting Judge of Prisons stated that the number of awaiting trial prisoners had almost tripled during the preceding five years, from 24 265 in January 1995 to 63 964 in April 2000, which amounted to an increase of 164%.

⁵⁸ 2000-08-10 *Sowetan* 12.

On 6 September 2000 the Cabinet endorsed a decision to release those awaiting-trial prisoners who had been granted bail of between R50 and R1 000, but were still in prison. It was expected that approximately 11 000 prisoners would qualify for release.⁵⁹ In addition to these 11 000 awaiting-trial prisoners, it was also announced that 7 000 convicted prisoners were to be released on parole nine months early.⁶⁰ As was to be expected, the reaction of many members of the South African public to the release of large numbers of offenders, was hostile to say the least. The public mood was not improved by the fact that the release of the awaiting-trial prisoners did not go as smoothly as planned. Approximately 160 “dangerous” prisoners, who had been charged with offences such as murder and hijacking, and who were not entitled to release in terms of the Cabinet decision, were freed together with the other awaiting-trial prisoners being released. Two Dundee prisoners who were mistakenly released in this way were re-arrested 24 hours later after allegedly hijacking a vehicle. On 19 September 2000 the Minister of Correctional Services stated that of the approximately 160 dangerous prisoners released in error, only 19 were still at large.⁶¹

The releases referred to above did not solve the problem of chronic overcrowding. During November 2000 the Minister of Correctional Services admitted that overcrowding resulted in offenders being confined in “appalling conditions”. He admitted further that correctional services staff were subjected to tremendous stress which could cause stress-related acts of violence, affecting the lives of officials, their families, and colleagues. According to the Minister, the situation gave him “sleepless nights”.⁶² Not surprisingly, the problem of chronic overcrowding came increasingly under the spotlight of South Africa’s newly appointed Inspecting Judge of Prisons. In the introduction to his very first annual report, the inspecting judge stated as follows:

“In executing its statutory mandate of monitoring the conditions in which prisoners are held, this office found that prisoners in certain prisons were being kept under the most awful conditions. The cause was overcrowding. Our 236 prisons were designed to accommodate 101 000 prisoners. In April 2000 they were holding 172 000 prisoners, of whom 64 000 were awaiting trial. The Department of Correctional Services was trying to cope as best it could but the crisis required drastic action. The Cabinet came to the relief by authorizing the release of some 8451 awaiting-trial prisoners who could not afford to pay their bail amounts.”⁶³

The inspecting judge further pointed out the impact of chronic overcrowding on the basic human rights of South African prisoners:

“Our prisons are severely overcrowded. Reports from Independent Prison Visitors described the awful treatment that some prisoners had to endure due to overcrowded prisons. Visits to prisons bore this out. Built to accommodate

⁵⁹ 2000-09-07 *Sowetan* 2.

⁶⁰ 2000-09-09 *Independent on Saturday* 1.

⁶¹ 2000-09-20 *Die Burger* 7; and 2000-09-20 *Cape Argus* 5.

⁶² 2000-11-06 *Daily News* 2.

⁶³ Par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000.

100 668 prisoners, the prisons housed 172 271 prisoners in April, which meant that approximately 72 000 prisoners were kept in prisons without the necessary infrastructure such as toilets, showers, beds, etc. being available to them. This was worsened by the uneven distribution of prisoners resulting from the need to separate different genders and categories. Whilst some prisons had an occupancy rate of 100%, many were over 200% with one reaching an astonishing 393%. There was gross overcrowding in numerous prisons, which led to detention under horrendous conditions, especially for awaiting-trial prisoners.⁶⁴

Referring to awaiting trial prisoners, the inspecting judge stated that: "The list of infringements of prisoners' basic human rights caused by overcrowding was endless."⁶⁵ He noted that the judicial inspectorate had recommended the urgent release of awaiting-trial prisoners for a number of reasons. Firstly, these prisoners were being detained under inhumane conditions and in flagrant disregard of the Bill of Rights, the Correctional Services Act of 1998 and the United Nations Standard Minimum Rules for the Treatment of Prisoners. Secondly, the spread of disease had to be curtailed while still manageable. Thirdly, enormous stress was being placed upon the personnel of the Department of Correctional Services in the prisons. Fourthly, the state could not afford the burden of paying for the accommodation of so many prisoners.⁶⁶

The following year did not witness any significant improvement in the problem of chronic overcrowding. For example, during October 2001 the implications for general health of the chronic overcrowding within South Africa's prisons was drawn to the attention of the Parliamentary Portfolio Committee on Correctional Services by one Dr Craven, an independent medical doctor who had been working in the maximum security section of Pollsmoor prison for 13 years. He told the committee that the chronic overcrowding and lack of amenities in the prison gave rise to serious health problems such as dysentery, meningitis, and tuberculosis. Sooner or later these health problems would find their way from the prison to the outside world and would impact upon the people of the Western Cape.⁶⁷

In his foreword to the Department of Correctional Services Annual Report for the period 1 April 2001 to 31 March 2002, the Minister of Correctional Services, Skosana, referred to overcrowding as the "major challenge" facing the Department. Introducing the report, the Commissioner of Correctional Services, Mti listed severe overcrowding in South African prisons as one of three major obstacles faced by the Department of Correctional Services. He stated explicitly that "the extent of overcrowding in the prisons ... violates the human rights of inmates, undermines secure incarceration and undermines

⁶⁴ Par 8.1 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000.

⁶⁵ Par 8.2 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000.

⁶⁶ Par 8.5 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000.

⁶⁷ 2001-10-03 *Die Burger* 11.

our efforts to create a rehabilitation friendly environment ...”⁶⁸ Mti went on to acknowledge that:

“The severe overcrowding of prisons, as illustrated by the statistics provided ... in Part 3 of this report, continued to be of major concern to the Department. Overcrowding not only results in violation of the human rights of offenders, but also in the over-extension of staff and the creation of conditions that undermine rehabilitation. The period under review reflected that a major cause of overcrowding is the fact that the Department currently has to accommodate awaiting-trial and pre-sentence prisoners (prisoners awaiting sentence), which figure stood at 55 500 at the end of March 2002.”

On a slightly more positive note, the Inspecting Judge of Prisons pointed out at the start of his annual report for this period that, for the first time in many years, the total prison population had remained stable, while more prison space had become available. This did not mean, however, that the problem of overcrowding had been solved, and the inspecting judge stated that: “Overcrowding caused by the excessive numbers of awaiting-trial prisoners remains a major problem.”⁶⁹ Later in his report he stated that: “Overcrowding in our prisons continues to seriously hamper the efforts of the Department of Correctional Services to give effect to its statutory responsibility, namely to detain all prisoners under humane conditions.”⁷⁰ As to the impact of chronic overcrowding on the human rights of South African prisoners, the inspecting judge stated that: “Overcrowding leads to major problems including restricted living space, poor conditions of sanitation and personal hygiene, spread of disease, little outdoor exercise, unsatisfactory food, inadequate health care, more tension and violence.”⁷¹ He explained the consequences for the basic health of prisoners as follows:

“Reports from Judges, Medical Practitioners who work in prisons and IPV’s indicate considerable discrepancy in the standards of health care from prison to prison. While prisons with manageable numbers of prisoners are coping, those with severe overcrowding and inadequate sanitary and ablution facilities have to do battle with infestations of fleas, lice and scabies and the spread of contagious diseases such as TB and HIV/AIDS. Overcrowding remains the root cause of the health problems and, as pointed out earlier, the root cause of the overcrowding in turn is the totally unacceptable number of awaiting-trial prisoners.”⁷²

⁶⁸ Introduction to the Department of Correctional Services Annual Report for the Period 1 April 2001 to 31 March 2002, by Mti.

⁶⁹ Par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

⁷⁰ Par 5 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

⁷¹ Par 7.1.3 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

⁷² Par 7.3.3 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

6 OVERCROWDING IN SOUTH AFRICAN PRISONS LEADING UP TO THE THIRD DEMOCRATIC ELECTION

The years leading up to South Africa's third democratic election in 2004 were marked by continued chronic overcrowding within the country's prisons. For example, on 31 March 2002, the Department of Correctional Services had cell accommodation for 109 106 prisoners as opposed to a total prison population of 178 998 prisoners, which meant an average national level of overcrowding of 64%.⁷³ In April 2002 it was reported that the Pietermaritzburg New Prison, which was designed to accommodate 1 185 prisoners, was holding 2 984 inmates. Four communal cells designed to hold 19 prisoners each, were each packed with between 40 and 50 prisoners.⁷⁴

In his report for the period 1 April 2002 to 31 March 2003, the Minister of Correctional Services acknowledged both the problem as well as the negative consequences of severe overcrowding within the prisons of South Africa by stating as follows:

"Overcrowding in our prisons remains one of the greatest challenges we continue to confront. It impacts negatively on staff morale, on the services rendered, on the health of offenders, on effective safe custody and on the ability of the Department to allocate resources effectively for the rehabilitation of offenders. Moreover, it results in high maintenance costs of prison facilities."⁷⁵

As at 31 March 2003, South African prisons were overcrowded by 71%. This meant that they were forced to house 78 507 prisoners more than the number they had been designed to accommodate.⁷⁶ The Inspecting Judge of Prisons confirmed that overcrowding in South Africa's prisons was worse than it had ever been and provided the following bleak assessment of the situation:

"The problems that we have in our prisons can virtually all be attributed to overcrowding. We now have the highest number of prisoners we have ever had in our country and it is placing an unbearable burden on the Department of Correctional Services. As will be argued later, we do not need and cannot afford more prisons. We need less prisoners. That lies primarily in the hands of the police, the prosecutors and the magistrates."⁷⁷

The overcrowding in certain prisons during this period was so bad that the heads of certain prisons were forced to resort to section 63A of the Criminal Procedure Act 51 of 1977. In terms of this provision, a head of a prison, who

⁷³ Department of Correctional Services Annual Report for the period 1 April 2001 to 31 March 2002 Part 3.1 "The Prison Population."

⁷⁴ 2002-04-23 *Daily News* 3.

⁷⁵ Foreword to the Department of Correctional Services Annual Report for the period 1 April 2002 to 31 March 2003, by the Minister of Correctional Services.

⁷⁶ The Department of Correctional Services Annual Report for the period 1 April 2002 to 31 March 2003, Programme 2 Incarceration 31.

⁷⁷ Par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2002 to 31 March 2003.

is satisfied that overcrowding in his prison is constituting a material and imminent threat to the human dignity, physical health or safety of awaiting-trial prisoners who are unable to pay their bail amounts, is able to apply to court for their release under various conditions. According to the inspecting judge, around 176 prisoners were released in Cape Town following applications in terms of this provision, while similar applications in Johannesburg and Pretoria led to further releases.⁷⁸ In a telling passage, the judge pointed out in his report that, among other reasons, the introduction of the section had not been successful in reducing overcrowding since:

“[I]t is invidious for heads of prison to state on oath that the overcrowding in his/her prison ‘constitutes a material and imminent threat to the human dignity, physical health or safety’ of the accused. An affidavit to that effect could reflect on the head of prison and might be used in damages claims by prisoners.”⁷⁹

The inspecting judge concluded his report for this period by pointing, as he had done so often in the past, to the crisis which existed in South African prisons due to chronic overcrowding. He confirmed that 187 615 prisoners were confined in South African prisons on 20 January 2003, making this “the highest number we have ever had”.⁸⁰

The following year witnessed a continuation of the *status quo*, with the problem of chronic overcrowding within the South African penal system appearing as intractable as ever. For example, in March 2003 *Business Day* reported that a recent study by the South African Law Society had found prison conditions to be so bad that there were grounds for a legal challenge in the Constitutional Court. With the exception of prisons in Nelspruit and East London, the report found that conditions in South African prisons were worse than they had been when evaluated by the Law Society in 2001 and concluded that: “Government needs to be taken to task through its ministers via the Constitutional Court because what prisoners, particularly unsentenced and awaiting-trial prisoners, are experiencing comes well within the constitutional proscription of not to be treated in a cruel, inhuman or degrading way.”⁸¹

In his annual report for the period 1 April 2003 to 31 March 2004, the Minister of Correctional Services referred to the continuing efforts of the Department “to reduce the ever-increasing challenge of overcrowding which, like corruption, constitutes a serious stumbling block to successful realisation of the objective of rehabilitation”.⁸² In his report for this period, the inspecting judge of prisons pointed out, yet again, that the majority of prisons in South Africa were chronically overcrowded:

⁷⁸ Par 10.5 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2002 to 31 March 2003.

⁷⁹ *Ibid.*

⁸⁰ Par 12 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2002 to 31 March 2003.

⁸¹ 2003-03-28 *Business Day*.

⁸² Foreword to the Department of Correctional Services Annual Report for the period 1 April 2003 to 31 March 2004, by Minister of Correctional Services, Balfour.

“Our prisons are bursting at the seams. With space for 114 787 prisoners, 187 640 are crammed in. The result is at best problems with food, health, exercise, stress levels and rehabilitation. At worst prisoners are dehumanised, develop a grudge against authority and turn prisons into universities of crime ... Far too many people are in prison. 4 out of every 1000 South Africans are prisoners. We are one of the worst countries in the world in our use of imprisonment. Two thirds of the world's countries have imprisonment rates of less than 1½ per 1000. The cost of keeping so many prisoners is enormous with a total cost to the State of about R20m per day. We have to drastically reduce the number of prisoners so that meaningful rehabilitation programmes can be implemented. For a start there is the appalling number of awaiting-trial prisoners – 53 876 out of our total of 187 640 prisoners. These prisoners remain in prison waiting to be tried for an average of about 3 months, some for years. About 60% of them will not be convicted. Until their court appearance they just lie or sit all day in overcrowded cells without any instruction that could improve them. Unnecessary arrests by the police, unaffordable bail and delays in completing cases are the main causes. As regards the sentenced prisoners, use of alternatives to incarceration such as correctional supervision should be encouraged.”⁸³

Later in his report, the inspecting judge pointed to the devastating consequences of this chronic overcrowding for the basic human rights of prisoners, describing the suffering of South African prisoners in the following moving terms:

“Virtually every prison had to cope with overcrowding which led to a litany of problems including gangsterism, contagious diseases, emotional stress of prisoners and staff causing low morale, inadequate ablution facilities, rehabilitation and educational courses hampered by the overcrowding, prisoners being kept in cells for many hours due to lack of staff to guard them when out of the cells. In April 2003 cells that were designed for 38 prisoners in Johannesburg Medium A Prison were crammed with 101 awaiting-trial juveniles, with a single toilet that at 10 am was not flushing because the water tank had run dry. There was also no water to drink at that hour.”⁸⁴

The inspecting judge pointed out that chronic overcrowding impacted very negatively on the health of prisoners. Not only was it conducive to the spread of disease, but there was a shortage of doctors, nurses and medicines due to the huge number of prisoners who had to be dealt with.⁸⁵ Finally, the inspecting judge unequivocally linked the scourge of overcrowding to a violation of the constitutional right of South African prisoners to be detained in conditions consistent with human dignity:

“Our Bill of Rights guarantees to prisoners the right ‘to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment’. (Act 108 of 1996 s35 (2)(e)). Such right is continuously being infringed in our prisons. Blame does not attach to the Correctional Officials. It is due to the awful conditions created by overcrowding

⁸³ Par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2003 to 31 March 2004.

⁸⁴ Par 14 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2003 to 31 March 2004.

⁸⁵ Par 12 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2003 to 31 March 2004.

and the Correctional Officials have no say in how many prisoners are sent to their prisons by the courts.”⁸⁶

It is difficult to imagine a more telling indictment of the South African penal system, almost ten years after the advent of democracy in 1994.

7 OVERCROWDING IN SOUTH AFRICAN PRISONS FOLLOWING THE THIRD DEMOCRATIC ELECTION

The period following South Africa’s third democratic election in 2004 did not witness a significant reduction in the chronic overcrowding which had plagued the South African penal system during the first decade of the country’s democracy. In the introduction to his report for the period 1 April 2004 to 31 March 2005, the inspecting judge referred to the conditions in some of South Africa’s overcrowded prisons as “awful” and pointed out that although there had been a steady decline in the number of awaiting-trial prisoners, this was unfortunately matched by an increase in the number of sentenced prisoners.⁸⁷ Later in his report, the inspecting judge noted that as at 31 January 2005, there were 187 446 prisoners in South African prisons, made up of 52 326 awaiting-trial prisoners and 135 120 sentenced prisoners.⁸⁸ He maintained that there were at least 30 000 too many awaiting-trial prisoners, and 35 000 too many sentenced prisoners, in South African prisons.⁸⁹ He also listed the ten most overcrowded prisons in South Africa as at 31 January 2005, with overcrowding rates of between 268% and an incredible 383%.⁹⁰ Commenting on the excessive numbers of children confined in South Africa’s prisons,⁹¹ the inspecting judge stated that: “Children should not be in prison at all save in exceptional circumstances.”⁹² In order to illustrate the consequences of chronic overcrowding within the majority of South Africa’s prisons, the inspecting judge made reference to a series of pronouncements by reputable persons and institutions on conditions within the prisons. These pronouncements indicate clearly the extent to which the basic human rights of South African prisoners are violated as a result of continued chronic overcrowding:

⁸⁶ Par 15 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2003 to 31 March 2004.

⁸⁷ Par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

⁸⁸ Par 7.1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

⁸⁹ Par 7.3 and 7.4 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

⁹⁰ Par 6.3 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

⁹¹ According to the inspecting judge, there were 3 284 children under the age of 18 years in prison, with 12 being younger than 14 years. A total of 1 775 of these children were awaiting trial, while 1 509 were serving sentences. See Par 7.6 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

⁹² Par 7.6 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

“Most graphic were the words of Judge Bertelsmann when he and Judge Makobe refused to send Mrs Winnie Madikizela-Mandela to prison (11 February 2005):

‘During September 2004, our prisons that were built to house 113 825 prisoners, had 186 546 inmates, which meant that they were overcrowded by more than 63%. Most of our prisons are therefore forced to house prisoners in conditions which are indubitably in conflict with the aspirational values of the Constitution. In most prisons, inmates are crammed into cells designed many years ago for virtually half their number. Beds are placed bunk-style on top of one another, with only a few inches separating them. Prisoners are locked up for 23 hours per day, with sanitary facilities which are by definition overburdened and consequently in a regular state of disrepair. The same holds good for the warm water supply, electricity and other creature comforts.

It is no exaggeration to say that, if an SPCA were to cram as many animals into a cage as our correctional services are forced to cram prisoners into a single cell, the SPCA would be prosecuted for cruelty to animals. The crisis in our prisons has huge constitutional implications for the whole criminal justice system, and urgent steps need to be taken to address our entire sentencing and prison regimes.’

Judge Bozalek in a report after a prison visit on 13 May 2004 wrote:

‘[T]hey (the cells) are grossly overcrowded ... the facilities are outdated and unhygienic. There is no mess hall where the prisoners can eat and the toilets which they use are inside the cells and stand open. As a result the prisoners eat, sleep and perform their basic bodily functions in small overcrowded cells. Furthermore it appears that apart from their hour-long exercises each day conducted in the concrete courtyard and when the prisoners attend a parade or fetch their food to be brought back to their cells, they spend the entire day locked in their cells.’

The 2004 Prison Report of the Law Society of South Africa, published in March 2005, in the Executive Summary stated:

‘During the 2004 inspection visits, it was noted that the situation in the prisons continued to deteriorate further, with overcrowding again rearing its ugly head. A whole new paradigm shift is urgently needed to address the situation in our correctional facilities’ and “the growing problems of overcrowding in our correctional facilities, and the subsequent problems caused by this overcrowding.’

The boredom suffered by prisoners who were locked in their cells for 23 hours of the day in some prisons, was commented on, for example –

‘[I]t was found that the conditions in the juvenile section were appalling. There were 55 juveniles in a cell with maximum capacity of 28, and they were unable to move around the cell. They were sitting on the beds (both top and bottom bunks) and just stared at the walls. They also had to share bunks when sleeping as the cell could not accommodate enough beds.’

Dr Jonny Steinberg, the author of the book ‘The Number’ dealing with prison gangs, in January 2005 produced an insightful report for the Centre for the Study of Violence and Reconciliation on ‘Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa’. In the concluding paragraph, he wrote:

‘A campaign on prison overcrowding is as much a moral and political campaign as it is a legal one. The task is ambitious. It entails asking the post-apartheid polity why it is prepared to cause a great many people a great deal of suffering in exchange for very little. It entails rubbing against the grain of a deep current of retribution and revenge, one that finds expression in the belief that causing pain will assuage our fear of crime and make us safer ...’⁹³

⁹³ Par 6.2 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

8 SUGGESTIONS FOR REDUCING SOUTH AFRICA'S TOTAL PRISON POPULATION

Year after year, the Inspecting Judge of Prisons pointed to the fact that South Africa's total prison population was in need of drastic reduction. For example, in his report for the period 1 April 2002 to 31 March 2003, the inspecting judge stated that:

"We are already incarcerating far too many people. 4 out of every 1000 South Africans are in prison. We are among the countries with the highest prisoner numbers per population in the world. 65% of all countries have incarceration rates of 1.5 or less people per 1 000. In Africa the median rate for Western and Central African countries is only 0.6 per 1 000.

We are the highest in Africa, (Rwanda perhaps excepted) with about 10 times as many per 1000 as Nigeria, also 3 times as many per 1000 as Brazil. We have almost 4 times more per 1000 than the UK and Western European countries."⁹⁴

In his report for the following year, the inspecting judge confirmed that South Africa was one of the worst countries in the world in its use of imprisonment, and pointed to the high cost of imprisoning so many people:

"The cost of incarceration is enormous. During 2002/2003 the cost amounted to R7 115 101 000, that is R19.5-million per day. As pointed out earlier, because of the conditions in our prisons, we are not effectively curbing crime by locking up so many people. On the contrary, we are creating criminals because of the conditions they are subjected to. There is one answer only. We must reduce our prison population drastically. At least from the present 187 640 to say 120 000 (which would be equivalent to 2.6 per 1000 which is still high)."⁹⁵

In his report for the period 1 April 2004 to 31 March 2005, the inspecting judge made it clear that conditions within the majority of South African prisons were "lamentable", and that the cause was overcrowding.⁹⁶ The judge stated that the Department of Correctional Services was not to blame for this state of affairs, but that the blame lay "with the operation of the criminal justice system from arrest to sentence and with legislation".⁹⁷ Once again, the judge made it clear in his report that South Africa was imprisoning too many people.⁹⁸ The impact of chronic overcrowding on prisoners was so grave that the inspecting judge suggested a number of short-term fixes, including the release of awaiting-trial prisoners who were too poor to pay

⁹⁴ Par 11.3 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2002 to 31 March 2003. For similar comments in relation to the need to drastically reduce the prison population see: par 1 – Annual Report of Inspecting Judge of Prisons for the period 1 April to 31 December 2000; and par 7.1.1 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

⁹⁵ Par 15 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2003 to 31 March 2004.

⁹⁶ Par 6.1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

⁹⁷ Par 6.1 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

⁹⁸ See Par 8.2 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

their bail amounts (according to the judge there were 13 880 such prisoners on 31 March 2005); an amnesty (*ie* unconditional release) for certain categories of sentenced prisoners; and the advancement of approved parole dates for sentenced prisoners.⁹⁹ As far as long-term solutions were concerned, the judge recommended that the aim should be to reduce the total prison population from 187 000 (52 000 awaiting trial and 135 000 sentenced) to 120 000 (20 000 awaiting trial and 100 000 sentenced).¹⁰⁰ The judge pointed out that, even if the total prison population could be reduced to 120 000, it would still mean that 2.6 out of every 1 000 South Africans would be confined in prison. This would still be bad by world standards, but at least South Africa would “no longer rank among the very worst” countries in the world.¹⁰¹

The inspecting judge did not only point to the importance of reducing the South African prison population. He also made practical suggestions as to how this could be achieved. For example, in his report for the period 1 April 2003 to 31 March 2004, the inspecting judge stated as follows in relation to awaiting-trial prisoners:

“Why are there so many prisoners awaiting trial? One of the reasons is unnecessary arrests by the police. More than 16 500 cases would appear to be withdrawn each month after the accused had waited on average 3 months in prison. Arrest should be used only if a notice to attend court would not be effective.

Another reason is the fixing of bail at an unaffordable amount. Once a court has decided that an accused can await his trial outside prison, it should not thwart its own intention by fixing bail at a sum the accused cannot afford ... There are about 13 000 prisoners who cannot afford the bail set and are being held in prison only because of their poverty.

Unnecessary remands of cases is another reason for the delays in concluding cases. In 1995 about 4 300 awaiting-trial prisoners were held for more than 3 months, now there are 21 883 such prisoners.”

The inspecting judge acknowledged in his report that the total number of awaiting-trial prisoners, which had grown drastically in the years just before the turn of the century, had stabilised and even begun to decrease slightly in the years which followed.¹⁰² Unfortunately, the total number of awaiting-trial

⁹⁹ Par 9 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

¹⁰⁰ Par 10 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

¹⁰¹ Par 10 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

¹⁰² In his report for the period 1 April 2004 to 31 March 2005, the inspecting judge acknowledged the steady decline in the total number of awaiting-trial prisoners since the year 2000 as follows: “During the period 1995 to 2000, the increase in our prisoner population was caused mainly by the explosion in the number of awaiting-trial prisoners from 24 265 in January 1995 to 63 964 in April 2000. Since April 2000 the number of awaiting-trial prisoners has decreased, owing to the concerted efforts of inter alia the police, the prosecutors, the magistrates, the judges, the heads of prison and NICRO with its diversion programmes. The steady decline in the number of awaiting-trial prisoners to the latest figure of 52 326 is most welcome. It must now continue down to the target figure of 20 000 such prisoners.” See par 11.3 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

prisoners remained at around 50 000, whereas the South African penal system had accommodation for only 20 000 such prisoners. In his report for the following year, the inspecting judge pointed to problems similar to those outlined in the above quotation, as contributing to the unacceptably high number of awaiting-trial prisoners, that is, the large number of unnecessary arrests (accounting for around 18 000 awaiting trial prisoners per month, who were eventually released after appearing in court); the large number of awaiting-trial prisoners who were unable to afford their bail (accounting for around 14 000 awaiting-trial prisoners); and court delays which resulted in lengthy periods awaiting trial (the judge called for "urgent attention" to be paid to speeding up the judicial process).¹⁰³

In relation to sentenced prisoners, the inspecting judge pointed out time and again that the total number of such prisoners was continuing to increase at a pace beyond the capacity of the South African penal system to cope with these prisoners. As South Africans prepared to celebrate the first ten years of their democracy in 2004, the inspecting judge was becoming increasingly concerned with the effect of minimum sentence legislation on the total number of sentenced prisoners in South Africa. This legislation had been introduced in 1997 as an emergency measure, but continued in force in the years which followed, and was contributing to the steady increase in the number of sentenced prisoners. In his report for the period 1 April 2003 to 31 March 2004, the inspecting judge pointed out that the number of sentenced prisoners in South African prisons had "steadily increased from 92 581 in January 1995 to 133 764 on 31 March 2004". He proposed that greater use be made of diversion and of the many alternatives to incarceration and recommended that the minimum sentencing legislation should be repealed. He suggested that the aim should be to reduce the number of sentenced prisoners to 100 000. In his report for the following year, the inspecting judge focused once again on the problems caused by the minimum sentence legislation, and proposed that this legislation (first introduced as an emergency measure and since extended to 30 April 2005) not be further extended, but allowed to lapse. He pointed out that:

"The effect of the minimum sentence legislation has been to greatly increase the number of prisoners serving long and life sentences. It has resulted in a major shift in the length of prison terms ... Our sentenced prisoner population has increased by 26 813 prisoners since April 2000, despite about 7 000 being released on nine months' advanced parole in September 2003. The growth rate of about 7 000 per year will inevitably lead to such inhumane conditions that mass releases will be required periodically."¹⁰⁴

Unfortunately the suggestions made year after year by the inspecting judge were either not implemented at all or not decisively enough to deal effectively and decisively with the problem of chronic overcrowding in South Africa's prisons. For the fact remains that, after more than ten years of democratic rule, South African prisons remain chronically overcrowded.

¹⁰³ Par 11 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

¹⁰⁴ Par 12 – Annual Report of Inspecting Judge of Prisons for the period 1 April 2004 to 31 March 2005.

9 CONCLUSION

More than a decade after the introduction of democracy in 1994, continued chronic overcrowding within the prisons of South Africa and the consequent ongoing violation of the basic human rights of the majority of prisoners in this country, remains a national disgrace. It is a disgrace which is shared not only by those politicians and officials directly involved in correctional services, but by the South African public as a whole. It is clear that this "dirty secret" of South Africa's democracy is well-known to ordinary South Africans, and has been for many years. Shortly after the turn of the century, for example, the Inspecting Judge of Prisons made it clear in his annual report that prison overcrowding and its consequences was receiving wide coverage in the South African media:

"The media played a significant role during the year to create awareness of the overcrowding problem in prisons. The open door policy of the Department of Correctional Services led to extensive TV, radio, newspaper and magazine coverage. 'The Cage of Dreams' produced at Pollsmoor Prison was seen by millions on TV. Overcrowding was discussed in Parliament and referred to by the Minister of Correctional Services in speeches. On International Human Rights Day on 10 December groups of attorneys visited 12 major prisons around the country and witnessed the overcrowding. This office was also involved in TV and radio interviews, addresses to meetings as well as magazine articles."¹⁰⁵

Despite the public awareness created by wide media coverage, South Africans continue to call for ever harsher measures to be taken against criminals, and turn a blind eye to the appalling conditions of imprisonment in this country. Political pressure has resulted in more arrests and longer sentences, causing the problem of chronic overcrowding to become worse during the first decade of democracy. The problem of chronic overcrowding within the country's prisons, as well as the negative impact of this phenomenon on the basic human rights of the majority of prisoners, has been acknowledged time and again by politicians as well as the highest officials within the Department of Correctional Services. Certain of these politicians and officials have even gone so far as to acknowledge publicly that the overcrowded conditions in South African prisons constitute a breach of the constitutional rights of inmates, leaving the government exposed to the risk of constitutional litigation by prisoners. Year after year, the Inspecting Judge of Prisons has pointed out the absolute necessity of reducing the total number of persons imprisoned in South Africa, as well as the consequences of not doing so. And yet, despite acknowledgement of the severity of the problem by all concerned, the *status quo* is maintained year after year, and South African prisoners continue to be confined in grossly overcrowded conditions.

More than a decade after the advent of democracy, the question confronting all South Africans is whether fear of crime, as real as this fear may be, has caused us to lose our moral compass in relation to the manner

¹⁰⁵ Par 7.1.3 – Annual Report of Inspecting Judge of Prisons for the period 1 January 2001 to 31 March 2002.

in which we treat convicted criminals. If our institutions of punishment have become instruments of degradation and even torture, due to continued chronic overcrowding, should we not admit this to ourselves and the world? If we are not prepared to make such an admission, are we not morally bound to demand that drastic and immediate action be taken by the South African government to reduce the prison population, so as to allow punishment, whether its aim be to rehabilitate, to deter, or simply to provide a measure of retribution, to take place in a humane manner? The time has come for South Africans to resolve that we will no longer allow inhumane punishment to take place in our name, even if this means that some criminals receive more lenient punishment than we would like, or escape punishment altogether. It is a hard choice, but it is one that can no longer be avoided.