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No. 14: Policing Migration: Immigration Enforcement and Human Rights in South Africa

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Southern African Migration Project

Policing Migration: Immigration Enforcement and Human Rights in South Africa

Migration Policy Brief No. 14

Series Editors: Jonathan Crush and Vincent Williams

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Editorial note:

SAMP wishes to thank the authors for making this paper available for the Policy Briefs Series. The paper raises important policy questions about the behaviour of officials tasked with policing undocumented and refugee migration to South Africa. The views expressed in the paper are, however, those of the authors and are not necessarily endorsed by SAMP or its funders.

1.0 Introduction

- 1.1 This paper examines reported incidents of human rights abuses and violence directed towards foreigners where government employees have been the perpetrators. We discuss both direct human rights abuses and incidents of violence (with examples drawn from policing exercises such as “Operation Crackdown” and from the detention of undocumented migrants) and institutional violence (such as migration policy development and other executive actions promoting or at least failing to prevent victimisation of foreigners). In many of the reported incidents, law enforcement officials have been the direct perpetrators of the human rights violations.
- 1.2 The South African government is legally responsible for ensuring adherence to national and international human rights standards and the Constitution. We argue that the South African government needs to ensure that laws are adhered to but also to create a clear framework to guide and legally underpin police and immigration conduct to prevent human rights abuses.
- 1.3 We also scrutinise the involvement of non-Governmental organisations and the South African Human Rights Commission in their attempts to prevent unlawful arrests and to improve the conditions of detention.
- 1.4 In exploring the treatment of foreigners in South Africa, it is important to define some of the concepts to be used. This is particularly important because our definition of these terms differs from that in common usage. In much of South Africa, the term “foreigner” is regularly used to portray a coherent and uniform group of people without South African citizenship.¹ However, this definition not only disregards the internal diversity and complexity among foreign citizens in South Africa, but also risks ignoring the significant difference between documented and undocumented migrants.
- 1.5 There are various categories of documented non-nationals in South Africa, including refugees, asylum seekers and people with temporary and permanent residence who are legally in the country. These persons have applied for and been granted permission to reside in South Africa for a specific period. A significant group of non-South African citizens also present in the country are undocumented migrants or “illegal foreigners.” Undocumented migrants have not been granted permission to reside in South Africa. By law, they are therefore under some degree of command to leave the country, either by force or voluntarily.²

¹ The term *foreigner* is defined in the Immigration Act 13 of 2002 as “an individual who is neither a *citizen* nor a *resident*, but is not an illegal foreigner.”

² The term *illegal foreigner* is defined in the Immigration Act 13 of 2002 as “a *foreigner* who is in the *Republic* in contravention of this Act.”

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- 1.6 Although the difference between documented and undocumented migrants is relatively clearly defined in terms of legality,³ the two categories are persistently tangled and often ignored in practice by law enforcers. Documented migrants, especially black foreigners, are often incorrectly perceived *a priori* as being illegally in the country and treated as such. Direct human rights abuses and violations directed towards foreigners are often the combined result of xenophobia and other overlapping attitudes of hostility towards foreigners (Crush 2000). We argue that such actions towards foreigners stem from a social status of being black and foreign, a status that does not necessarily equate to a status of being illegally in the country.
- 1.7 The forms of human rights abuse and violence are not exclusively about physical harm but also incorporate instances of psychological and emotional harm inflicted upon victims. Bringing in the concept of victim integrity broadens this category further. For example, extreme force used by police that clearly exceeds the amount of necessary force violates that integrity of the victim and is therefore unjustifiable. When the state, or any agent of the state, initiates this action, state-supported violence is at issue. When violence is persistent and patterned it may be termed institutionalised.
- 1.8 To term such negative aspects of South African policy “institutionalised” requires a sensitive understanding of South Africa’s migration policy development and the policy context in which it operates. It has become international practice for governments—and South Africa is no exception—to control migration through restrictive immigration policies. Some of these policies include excessive visa requirements and other deterrent measures such as punitive and arbitrary detention, carrier sanctions, rejection at borders and large repatriation programmes. Some of these measures may be lawful; others are not. In any event, the enforcement of such policies generates a range of institutional points at which violence might occur.
- 1.9 The potential for human rights abuse and violation directed towards foreigners spans the entire criminal justice and immigration regime, ranging from the first contact with the arresting police officer to the final physical departure from the country in the deportation process. While the police serve various functions regarding the enforcement of immigration law, such as arrest and initial detention, the Department of Home Affairs retains ultimate responsibility for the granting of legal status to foreigners, the renewing of permits and the deportation of undocumented migrants.⁴ This paper examines the roles that the police and the Department of Home Affairs have played in the treatment of foreigners since 1994 (between 1994 and 2002).

³ There is an argument that the status of “illegal foreigner” in the Immigration Act is susceptible to constitutional challenge.

⁴ The term deportation as used here refers to an “action or procedure aimed at causing an illegal foreigner to leave the *Republic* involuntary,” see definitions in Immigration Act, 13 of 2002.

2.0 Operation Crackdown and Foreigner Policing

- 2.1 Operation Crackdown was the name given to a crime blitz that began in March 2000. The operation is an initiative by the South African Police Force (SAPS) to clean up the streets of certain crime-infested areas. The operations in Johannesburg were concentrated in Hillbrow, Yeoville, and Berea, three suburbs known for their high proportion of recent immigrants. During March 2000, the SAPS reportedly arrested 7068 “illegal immigrants” in these areas.
- 2.2 During these operations, the police were accused by migrants and human rights groups of operating in a manner that infringed on the rights of foreign citizens. Operation Crackdown provides a rather stark example of the similarities between South Africa’s current migration policing techniques and the policing of the pre-1994 apartheid state (Klaaren and Ramji 2002). Police raids on townships even before the apartheid era had ended up involving not only suspects, but also obviously innocent members of the black community who at times suffered serious injury at the hands of the police (Fernandez and Scharf 1992). Similarly, Operation Crackdown, which focused on areas that are predominantly populated by black immigrants, operated in a manner that actively made people illegal.
- 2.3 South African legislation allows for the arrest of suspected “illegal foreigners” based on a “reasonable grounds” test. In practice police officials have interpreted the “reasonable grounds” test as a right to arrest and detain persons who look or behave foreign, not illegal. Persons, for example, are commonly arrested and detained as a result of being too dark, mispronouncing words or having inoculation scars in the “wrong” place.
- 2.4 But it is not only the on-the-ground interpretation of the “reasonable grounds” test that is questionable. The constitutionality of the reasonable grounds requirement has already been criticised. The arrest of persons against whom action is being taken with a view towards repatriation arguably falls within the protection of the right to freedom and security in section 12(1) of the South African Constitution (Klaaren 1998).⁵ The right to freedom from arbitrary arrest should be understood together with the perspective offered by the entire range of fundamental human rights, including the presumption of innocence.
- 2.5 During operations such as Operation Crackdown, contrary to the policies behind these fundamental rights provisions, arresting police officers made very few perceptible efforts to differentiate between or separate foreigners with or without the legal right to reside in South Africa. In Operation Crackdown, many refugees were arrested and detained despite

⁵ The Constitution of the Republic of South Africa, Act 108, 1996, Section 12(1) states that everyone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause.

- having valid refugee permits. Even South African citizens were arrested and detained during these operations.
- 2.6 According to reports, police officers denied detainees the opportunity to collect their valid immigration documents from their homes. Other immigration documents were destroyed by the police. Compounding the problem were lengthy delays in processing at the Braamfontein office of the Department of Home Affairs. These delays meant that many immigrants were unable to retain their legal status despite their good faith efforts. Of the approximately 7,000 persons who were arrested for the suspicion of being “illegal,” at least 400 were subsequently released, as they were found to be legally in the country.
- 2.7 Police powers to arrest and detain immigrants are also used for personal gain. Arbitrary arrests of foreigners in order to extract bribes have been widely reported not only during the operations but also as a standard procedure within the police. In one particularly alarming case, a Zimbabwean citizen was awarded damages after the state conceded that two police officers had unlawfully assaulted him and shot him in the legs following an unsuccessful attempt to extract a bribe from him (Amnesty International 2002). They had also maliciously persecuted him on criminal charges and detained him for 446 days. The South African Human Rights Commission has found that extortion and bribery are extremely widespread among apprehending officers and reports of assault during arrest are also not uncommon (SAHRC 1999).
- 2.8 The police reportedly also use excessive force in conducting arrests.⁶ In April 2002, the first page of *The Star*, the principal daily newspaper in Johannesburg, pictured a Burundian refugee who had been kicked in his face by the arresting officer. The refugee, who was arrested despite reportedly having valid documents, suffered severe injuries from the methods used by the arresting police officers to secure his arrest. The use of attack dogs by police has also been widely reported leading to at least one incident that attracted universal condemnation and criminal charges against five police officers.
- 2.9 A number of human rights organisations and refugee communities have acted in response to the allegations of human and constitutional abuses in Operation Crackdown and associations laid a formal complaint at the South African Human Rights Commission. The complaint included allegations of arbitrary and abusive means to identify undocumented migrants. Officers randomly stopped pedestrians and asked for their identification; taxis were randomly stopped and identification was demanded from passengers; and the police targeted people with recently expired permits waiting outside the Refugee Reception Office of the Department of Home Affairs. Lawyers for Human Rights also reported on the destruction of identification documents by apprehending

⁶ Although there were no provisions in the Aliens Control Act on the level of force that might be used in the arrest of a person reasonably suspected to be illegal, the Criminal Procedures Act places procedural safeguards on arrests that may at least be used as a model for minimum standards of the arrest. The Immigration Act 13 of 2002 has replaced the Aliens Control Act.

- officers and the loss of personal belongings during the raids. The South African Human Rights Commission responded to these allegations of human rights violations by questioning the nature of the arrests, which generally depended on the physiognomy rather than the criminal record of the individual. According to the then-Chairperson of the Commission, Barney Pityana, the speedy deportation of immigrants prevented individuals from establishing their lawful status and violated their rights to due process of law.
- 2.10 The government took great umbrage at the criticism of the SAHRC. The cabinet criticised the Commission for undermining the government's efforts to control crime in South Africa and for "creating the impression of being sympathetic" to undocumented migrants. Police Commissioner Jackie Selebi likewise strongly criticised human rights activists who accused police of unfairly targeting foreign immigrants under the guise of fighting crime.⁷ Gauteng Premier Sam Shilowa applauded the police for "sending a strong message to criminals."⁸ A SAPS spokesperson revealed the dubious assumptions informing the operation and its implementation, stating that "offenders of less serious crimes were arrested in an attempt to deter them from turning to more serious crime."⁹ Thus, immigrants were viewed per se as criminals and were arrested as a prophylactic measure (Klaaren and Ramji 2002).
- 2.11 This was not the first time that the Commission had questioned the heavy-handed approach of the police during arrests of migrants. In March 1999, just a year before Operation Crackdown, the Commission had reported on and criticised the fact that arresting police and immigration officials used inadequate methods relating to arrest of undocumented migrants. For instance, in the majority of cases, there were no reasonable grounds for an officer to suspect that a person was in fact in the country illegally. In their report, the Human Rights Commission recommended the introduction of regulations for the arrest of undocumented migrants and recommended that the Department of Home Affairs should disseminate concise guidelines to arresting officers to ensure clear and consistent criteria for arrest (SAHRC 1999). It appeared that none of their recommendations had been implemented a year later.
- 2.12 Insufficient communication between the DHA and SAPS in handing over suspects resulted in a number of persons being detained in excess of the 30 days statutory limit on detention pending deportation without review. The Human Rights Commission launched a legal challenge against the DHA's practice of permitting extensive periods without any attempt to approach the High Court for a legal extension (Algotsson 2001). However, according to figures from Lindela Repatriation Centre, an alleged 1,674 people were

⁷ Addressing a media conference after the operations, Selebi strongly criticised human rights activists, including the Human Rights Commission, for "trying to preach Catholicism to the Pope" and said that "the police targeted illegal immigrants because many were believed to be involved in crime syndicates." *The Citizen*, "Selebi angry at HRC view on raids," 20 April 2000, page 5.

⁸ SAPA, 20 March 2000.

⁹ SAPA, 30 March 2000.

- detained for over 30 days between March 2001 and March 2002. Persons were also detained at police stations for long periods, without the time in detention being reported to the DHA. As a result, persons are held in detention for lengthy periods before being released or deported.
- 2.13 A later development within the Department of Home Affairs seemed at least for a short while to have changed the highlighted problem, with the introduction of new guidelines for the police in relation to the arrest of illegal immigrants. The guidelines that came into effect in January 2002 require police officers to have reasonable grounds when arresting foreigners on suspicion of being illegally in the country. In addition, these guidelines compelled police officers to provide the Department of Home Affairs with documented proof of the reasons for arrest, including evidence that the suspect had been given an opportunity to prove his or her legal status in the country. Human rights organisations welcomed the policy and argued that it would “prevent the police from arresting and detaining foreigners simply for having a particular physical appearance, not speaking any of the main national languages, or for not carrying identity documents.”¹⁰
- 2.14 Unfortunately, these guidelines were apparently never put into action. In April 2002, Lawyers for Human Rights condemned new police raids in Hillbrow, where a number of refugees, in possession of legal documents, had been arrested by Hillbrow-based police officers and taken into custody until their identity and right to reside in South Africa was confirmed. As a result, refugees were detained for several days despite having valid documents. When confronted by South African Human Rights Commissioner Jody Kollapen about the arrest of legal foreign residents, it became evident that senior immigration officers were not aware of the new instructions and that no special arrangements had been made with the SAPS officials to ensure that the immigration officers received the affidavit from the arresting police officer referred to in the guidelines. Reports of unlawful arrests of foreign citizens lawfully in the country continue to land on the desk of human rights organisations that obtain the release of foreigners from unlawful detention on an almost daily basis.
- 2.15 One example concerns a refugee from Sudan who in June 2002 was stopped by the police on his way to his university. The man was asked to identify himself apparently because of his tall stature and dark complexion. He also did not understand the two policemen when they talked to him in their language. Since he had been granted refugee status in South Africa a few years previously, the man produced his papers from the DHA and the university with confidence. However, the police refused to accept the papers and tried to take him to a police station. The man resisted and maintained that he had a right to stay in South Africa. In their efforts to complete the arrest, the police kicked the man on his legs and hit him with a stick on his upper body. The man was arrested and detained for seven days before immigration officials confirmed his legal status in the country. However, as a

¹⁰ Lawyers for Human Rights, “Positive new guidelines for the arrest of illegal foreigners,” Press Statement, 6 February 2002.

result of the assault and the arrest, the man suffered severe trauma and bodily harm and went into hiding because of fear of similar incidents.

3.0 Lindela Repatriation Centre and Detention Standards

- 3.1 The Lindela Repatriation Centre in Krugersdorp south west of Johannesburg serves as a central holding centre for undocumented migrants prior to repatriation back to their countries of national origin. Indeed, Lindela is the largest detention centre for undocumented migrants in the country and is the only facility specially designated by the DHA for that purpose.¹¹ Outside of Gauteng, the DHA depends upon detention facilities of the South African Police Service (SAPS) and of the Department of Correctional Services (DCS). The DHA does not manage the operation of Lindela itself but has contracted out the operation of the facility, including the actual detention of undocumented migrants, to a private company, Dyambu Operations.¹² There is however a contingent of DHA officials who work regularly at Lindela and the DHA retains ultimate legal responsibility for the management of the facility.
- 3.2 For several years, the SAHRC has engaged both Dyambu and the DHA in a concerted attempt to improve the conditions under which persons are detained at the repatriation facility. Using its constitutional powers to investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated the SAHRC spent two years investigating and reporting on the conditions at the facility.¹³
- 3.3 A number of commissioners from the SAHRC visited Lindela for the first time in February 1997. While their initial report was relatively favourable, later work by the Commission found evidence of inadequate procedures for the processing of undocumented migrants as well as evidence of inhumane treatment of persons held at Lindela. An official investigation resulted in a March 1999 report titled *Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act*.¹⁴

¹¹ Lindela has its origins in an entrepreneurial set of persons clustered around a mining compound outside of Krugersdorp. Facilities of the DCS, which had been previously used for the detention of undocumented migrants, were found to be chronically overfull. The DHA either felt compelled to urgently find alternative holding facilities or was certainly receptive to such a proposal.

¹² Dyambu Operations reorganised itself and a new company called Lindela began to operate the facility. The word "Dyambu" is used in this report to differentiate between the private company managing Lindela, and the facility as a whole.

¹³ The Commission has constitutional obligations in terms of section 184(1) of the Constitution of the Republic of South Africa to: (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and address the observance of human rights in the Republic. It further has constitutional powers in terms of section 184(2) to: (a) investigate and report on the observance of human rights; and (b) take steps to secure appropriate redress where human rights have been violated.

¹⁴ Available at www.sahrc.org.za

- 3.4 As the title indicates, the report investigated a topic considerably broader than simply conditions at the Lindela detention centre. The aim of this report was to look at the entire immigration policing system from arrest through to repatriation. Nonetheless, the report did make a number of specific findings with respect to persons detained in the immigration system. These were the following: (1) A significant number of persons with apparently valid cases for asylum did not have their cases investigated or decided; (2) some persons reported detention in police cells and at Lindela for periods longer than allowed by law, as well as being detained alongside criminal suspects; (3) there were widespread reported incidents of bribery or extortion during detention, as well as incidents of assault; and (4) common complaints about the conditions at Lindela included lack of adequate nutrition, inadequate medical care, and interrupted sleep, as well as being subjected to degrading treatment or intimidation.
- 3.5 The SAHRC recommended that DHA and SAPS should put in place effective strategies and should use all appropriate legal means to identify and eradicate corrupt practices at the privately-operated detention facility, the Lindela Repatriation Centre.¹⁵ It was also suggested that corruption at Lindela contributed to incidents of unlawful detention. These suggestions were confirmed in a December 2000 follow-up report of the SAHRC. However, as most bribery at Lindela concerned the release of detained persons in exchange for a sum of money, most persons had left the facility before extensive evidence could be taken. However, two men who had been re-arrested after being released from the facility only a few months earlier explained that they paid R300 and R200 to immigration officers in April and July 1999 respectively to be released from the facility.
- 3.6 The SAHRC also made a number of recommendations to the DHA and to Dyambu on the procedures of arrest and on the conditions of detention. However, the Report had little direct impact on the parties concerned as neither Dyambu nor the Department of Home Affairs significantly changed their practices in response.
- 3.7 In a follow up report based on research at Lindela conducted between September and December 1999, the SAHRC confirmed the continuation of unsatisfactory processes and conditions at the facility. After providing a period of time to allow for comment on the draft report, including a new set of recommendations, by both Dyambu and by the DHA, the SAHRC launched this report in December 2000, titled *Lindela Detention Facility—Getting to the Crossroads of Detention and Repatriation*.
- 3.8 In the report, the SAHRC confirmed the continuation of abuse regarding the apprehension and detention of undocumented migrants. The findings confirmed evidence of inhumane treatment and indignity of persons held at the facility with respect to constitutional and international standards of detention. The majority of complaints centred on lack of adequate nutrition, irregular or inadequate medical care and

¹⁵ See recommendation no 13, SAHRC on Lindela, March 1999.

systematic, forced interruption of sleep, inadequate living conditions, limited access to information, assault and unsatisfactory treatment of minors.

- 3.9 The Commission put forward recommendations for improvements at the facility to the DHA and Dyambu. Perhaps the most important of these recommendations was one for a permanent inspectorate system at the facility. It is worth examining the rationale for the recommendation. The report argued that the most effective way to enable the development of positive rights for persons held in detention is through the establishment of minimum standards of detention. The SAHRC thus suggested amendment of the Aliens Control Act (or amendments of the Immigration Bill then experiencing a tempestuous time in Parliament) to include a set of minimum standards of detention.¹⁶
- 3.10 The Commission also recommended that proper enforcement of minimum standards of detention required an independent body with clearly defined powers and duties to enquire into specific incidents as well as monitoring the general conditions of detention. The current legislation provided no statutory limitations or immediate oversight of immigration detention facilities. The problem had two aspects. Firstly, the Department of Home Affairs has no apparent statutory obligation to review, monitor or report on activities at the facility. Secondly, and equally important, public confidence in the concept of a privately operated detention centre relies on a mechanism of external civilian control of the facility.
- 3.11 This recommendation for a judicial inspectorate with coverage over Lindela responded directly to a gaping hole in the then-current legislation. That legislation provided no statutory limitations or immediate oversight on the operation of Lindela. Indeed, there were no formal procedures for the inspection of the facility. The DHA itself has no explicit statutory powers to review, monitor or report on activities at Lindela. Nor does the Department have the explicit authority to intervene in a situation at the centre, which threatens to get out of hand, as the contract between the DHA, and Dyambu provides no such powers.
- 3.12 The SAHRC met with both parties in order to give the parties the opportunity to respond to its recommendations. The reactions differed sharply. Dyambu, a private company, responded positively to the recommendations. Over the ensuing year, Dyambu took an active interest in co-operating with the SAHRC to improve the conditions at the centre. Dyambu implemented most of the report's recommendations relating to the physical conditions at Lindela. They completed a reconstruction of the facility including a library which contains writing material, daily newspapers and books; a new female section separated from the rest of the facility; a crèche for children; recreation facilities such as a television, net-ball, soccer field, basketball court and Ithjuba; new beds and bedding; and

¹⁶ The report recommends that during the transformation process, interim measures should be taken to include a set of detailed minimum standards for the detention of undocumented migrants at Lindela in the contractual arrangement between the DHA and Dyambu.

daily access to toilet paper and soap. Dyambu fully supported the suggestion for external monitoring of the facility and made a room available to the Commission for a permanent presence at the facility.

- 3.13 The DHA, on the other hand, did not respond to the recommendations in any substantive manner. Nor did the Department take any major steps to elucidate the recognised rights of persons detained under the legislation or to improve the conditions under which persons are detained at the facility. In fact, the Department of Home Affairs demonstrated a strong reluctance to consider changes at Lindela, both as a matter of departmental policy and in terms of amendments to legislation.
- 3.14 In 2002, Lawyers for Human Rights, in collaboration with the South African Human Rights Commission, began an initiative to facilitate an interim system of detention monitoring pending the establishment of a permanent structure. Initially, the initiative was intended as a cooperation project with the Department. However, the Department eventually withdrew their support from the initiative. In fact, both the Director General of the Department of Home Affairs and Director of Refugee Affairs expressed harsh criticism of the principle of exposing and acting against abuse of immigrants and made it clear that the Department did not support the activities of Lawyers for Human Rights. The initiative intends to expand its scope to include the monitoring of other places of detention, such as airports, army camps and prisons. Lawyers for Human Rights has received a number of disturbing reports of refugees and migrants being held in detention in army bases along the northern borders where soldiers are alleged to have sexually harassed and assaulted the detainees. Concerns have also been raised about the continuing problem of private airline companies detaining and deporting asylum seekers without respecting international and domestic refugee law.
- 3.15 Subsequent reports of human rights abuses at Lindela Repatriation Centre include the assault, death and riot at the facility on 9 March 2002. On the day that the Human Rights Commission visited Lindela Repatriation Centre to investigate the alleged murder of an immigrant at the facility, officials at the facility could not clearly state the nationality of the victim or accurately explain the event. The Human Rights Commission subsequently wrote to the Director General of Home Affairs with a request for information about the death, without response.

4.0 Conclusion

- 4.1 This paper has focused on instances and patterns of abuse of foreigners in policing and detention. What protection is there against violence inflicted on foreigners? Foreigners may be particularly ignorant of the limitations prescribed by law on the conduct of police officers. Many others refrain from taking legal action, either because they cannot afford legal assistance or because they fear victimization by the police. Other causes are structural or institutional. For instance, the police may often be resistant to assist

foreigners but the police also may lack the competence to speak a language that would allow them to do so.

- 4.2 Under the Aliens Control Act with its focus on discretionary action by immigration officers, one could argue that the failure to provide legislative criteria for the arrest of migrants resulted in discriminatory patterns of detention and deportation. The Immigration Act with its elaborate system of regulations promised better times.. However, little may change with the change in immigration legislation. Even though the new Immigration Act does contain a single subsection referring in a phrase to minimum conditions of detention that respect human dignity and human rights, this legal provision will mean little without true leadership and will mean little without effective implementation.

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