



**Working Group on Arbitrary Detention
Global Stakeholders' Consultation on the Right to Challenge
the Lawfulness of Detention before Court**

**Opening Remarks by Mr. Bacre Ndiaye,
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Special Procedures Division
Office of the High Commissioner for Human Rights**

Geneva, Palais des Nations, Room XX

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Excellences,

Distingués experts du Groupe de travail sur la détention arbitraire

Distingués panelistes,

Mesdames et Messieurs,

C'est un honneur d'être parmi vous, au nom du Haut-Commissaire aux Droits de l'Homme, pour ouvrir la consultation globale sur le droit de contester la légalité de la détention qu'organise le Groupe de travail sur la détention arbitraire, en coopération avec notre Bureau.

Nos panelistes sont des experts renommés qui, sans aucun doute, vont animer, parmi nous, des discussions constructives sur ce thème.

Des juristes et des universitaires internationalement respectés, bien au fait de l'histoire et du fonctionnement du Groupe de travail, nous ont également rejoints. Leur expertise et leurs connaissances en matière de droit international des droits de l'homme contribueront certainement à la qualité au dialogue interactif qui suivra.

Je voudrais également souhaiter la bienvenue aux Etats, aux organisations internationales et régionales, aux membres des organisations de la société civile et des institutions nationales des droits de l'homme qui sont présents aujourd'hui. Tous jouent un rôle fondamental dans la façon dont le Groupe de travail remplit son mandat.

Mesdames et Messieurs,

L'établissement du Groupe de travail, il y a 23 ans, était une réponse à la pratique universelle et hélas croissante de la détention arbitraire. Et il a fait suite aux discussions et préoccupations grandissantes à ce sujet au sein de l'ancienne Commission des droits de l'homme. Je voudrais saisir cette opportunité pour remercier le Gouvernement de la

France pour avoir pris l'initiative de créer le Groupe de travail, et pour la constance de son soutien durant toutes ces années.

Le mandat du Groupe de travail demeure pertinent et nécessaire aujourd'hui. Nous sommes de plus en plus conscients du fait que la détention arbitraire est devenue endémique. Que ce soit dans le contexte des protestations récentes à travers le monde, de la mise en œuvre des décrets d'urgence et des politiques de sécurité nationale, ou des luttes pour le changement dans des régimes totalitaires; la détention arbitraire est devenue de plus en plus une arme utilisée pour réduire au silence, opprimer et éliminer toute opposition.

Je voudrais souligner le caractère unique de ce Groupe de travail en ce qu'il est le seul mécanisme des droits de l'homme qui délibère sur des cas individuels dans un processus contradictoire. En effet, l'ouverture du Groupe de travail à recevoir et à considérer des plaintes individuelles provenant d'une variété de sources, a attiré des cas provenant de toutes les parties du monde. Les avis du Groupe de travail ont été utilisés pour mobiliser les organisations de la société civile et initier des actions qui ont ensuite mené à la libération des individus détenus arbitrairement.

Le Groupe de travail continue de recevoir un nombre grandissant de cas à travers ses procédures, qu'elles soient régulières ou urgentes. Bien que l'objectif des communications du Groupe de travail soit d'assurer la libération des victimes de détention arbitraire, elles ont aussi joué un rôle important en élargissant la jurisprudence sur la privation de liberté en droit international, particulièrement à travers ses avis et ses études thématiques. Ses visites sur le terrain ont aussi offert une plateforme aux Etats pour engager un dialogue et initier des réformes en mettant la législation nationale en conformité avec les standards internationaux des droits de l'homme.

Your Excellencies,

Ladies and Gentlemen,

According to recent statistics, 10.75 million people in the world are deprived of their liberty, 3.2 million among them awaiting trial.¹ While international law provides a comprehensive framework for the protection of all persons deprived of their liberty, the harsh reality for these persons, in all regions, remains alarming and their numbers are constantly increasing. Deprivation of liberty places individuals in a vulnerable situation and has always been and remains a principal means by which human rights are suppressed and violated.

A number of important challenges relating to the protection of persons deprived of their liberty have been identified in the work and findings of international and regional human rights mechanisms, in particular, the lack of judicial oversight over the legality of their detention.

The right for anyone deprived of his or her liberty to take proceedings before a court in order for it to decide on the lawfulness of his or her detention is crystalized in Article 9, paragraph 4, of the International Covenant on Civil and Political Rights. The wording of this provision finds near replication in many international and regional human rights instruments, including: Article 14 of the Convention on the Rights of Persons with Disabilities; Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 17(2)(f) of the International Convention for the Protection of all Persons from Enforced Disappearances; Article 7(1)(a) of the African Charter on Human and People's Rights; Article 7(6) of the American Convention on Human Rights; Article 14(6, 7) of the Arab Charter on Human Rights; and, Article 5(4, 9) of the European Convention on Human Rights.

¹ International Center for Prison Studies, World Prison Population List (9th edition, 2011); Open Society Justice Initiative, The Global Campaign for Pre-Trial Justice, the Facts and Figures, www.pretrialjustice.org.

Despite international and regional legal frameworks guaranteeing the right to court review of detention, ensuring adequate judicial oversight in practice remains a serious challenge. It is important to note that judicial oversight of legality of detention not only is essential for assessing whether a person is deprived of his or her liberty arbitrarily but also serves to ensure the protection of his or her other rights.

Without access to judicial oversight and remedies, persons deprived of their liberty are at heightened risk of suffering abuse of authority, humiliation, ill-treatment and other unacceptable deprivations of rights, including torture. It has also been noted that custodial deaths occur in the context of extremely poor prison conditions and nearly non-existent prison oversight.

The mere absence of a remedy of the right to court review of detention (sometimes referred to as habeas corpus in the common law system) has been considered as a human rights violation, as it deprives the individual of the right to protection from arbitrary detention. However, the existence of a mechanism ensuring judicial oversight of the legality of detention is not sufficient; it must also be effective.

The body conducting the judicial review must not only be able to determine the legality of detention but also have the power to order release if it is determined that the detention is not lawful. The review must take place promptly and must be conducted by an independent body. Moreover, effective access to judicial review of detention must be ensured, including through legal aid.

Judicial oversight of the legality of detention is not limited to criminal procedure but extends to all forms of deprivation of liberty. For instance, human rights mechanisms have expressed concern regarding detention justified by medical or public health grounds, which is often not subject to judicial supervision. The inability of migrants deprived of their liberty to effectively exercise their right to challenge their detention based on immigration regulations, and limited access to procedural safeguards, such as

legal aid and adequate interpretation services, have also been identified as a cause for concern.

The most important step towards the protection of persons deprived of their liberty is to ensure the implementation of the relevant international human rights norms and standards at the national level. The right to challenge the lawfulness of detention before court ranks high among these norms and standards.

In recognition of this serious challenge before us, the Human Rights Council, in its Resolution 20/16, encouraged all States to respect and promote the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful, in accordance with their international obligations.

The Council called on the Working Group on Arbitrary Detention to prepare draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty, to bring such proceedings before court. The aim of which is to assist Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty in compliance with international human rights law.

Great efforts have been made over the past two years by the Working Group to actively engage with states, UN mechanisms, including the treaty bodies and special procedures of the Human Rights Council, as well as national human rights institutions, civil society and academia, to solicit views on the scope and framework of the procedural guarantee at the national level and how it can be strengthened. For this, I wish to express my gratitude to the Working Group, as well as to all actors and stakeholders who constructively took part in the call for input.

The protection of the rights of persons deprived of their liberty remains a very important international concern. It is also a key thematic priority of the Office of the High

Commissioner for Human Rights to assist States in enhancing protection of the rights of such persons. Our Office, as before, continues to stand ready to provide help and assistance in your endeavours.

Protecting the right not be arbitrarily deprived of liberty is not only a human rights imperative, but it is also essential to strengthen accountability and reinforce the rule of law. Successful strategies in guaranteeing the rights of persons deprived of their liberty involve working with governments and national actors including National Human Rights Institutions, judges, prosecutors, lawyers, corrections officers, police, other security forces, including military forces, as well as medical and other personnel working in places of deprivation of liberty and civil society at large. I believe that the draft principles and guidelines on the right to challenge the lawfulness of detention can serve as an important guide for all of them.

We are all aware that there are different options for addressing the challenges faced by different categories of persons deprived of their liberty to court review of detention. However, the path chosen must be within the framework of international human rights standards, including the recommendations of human rights mechanisms. Furthermore, in considering the options available and examining which combination of law, regulation and policy is best suited to address the specific problems at stake, knowledge sharing, comparative experiences and lessons learned can go a long way. In addition to knowledge and capacity, the commitment of Governments is necessary to develop or refine their own capacity to protect the rights of persons deprived of their liberty both within their borders and those under their extra-territorial control.

Let me conclude by affirming that we are looking forward to the new and creative ideas that will emanate from your presentations and discussions to further sharpen our work with international, regional and national mechanisms and pursue our shared goal of eliminating unlawful detention and ensuring full protection of persons deprived of their liberty.

With this, I wish you a fruitful and constructive session and thank you for your participation, for your commitment and for your active engagement in the process.

Thank you for your kind attention.
