Opening address to the UNHCR-OHCHR Global Roundtable on Alternatives to Detention

Bacre Ndiaye, Director, Human Rights Council and Special Procedures Division

11 May, International Labour Organisation

Assistant High Commissioner Erika Feller,
Delegates,
Ladies and gentlemen,

Allow me to extend a warm welcome to all of you. We are honoured to have the opportunity to co-host this roundtable with the Office of the High Commissioner for Refugees, and I would like to thank you all for your important presence.

The Office of the High Commissioner for Human Rights firmly believes that this roundtable is both timely and important. It is our belief that the protection of all migrants is one of the most urgent human rights challenges of today. The Office consistently advocates for a human rights approach to migration. By this we mean the need to place human rights principles and standards at the centre of migration considerations and to make use of the human rights mechanisms and international legal framework to protect migrants from human rights violations.

This roundtable follows a panel discussion convened during the 12th session of the Human Rights Council on the human rights of migrants in detention centres, in which States emphasized the need to find alternatives to the administrative detention of migrants, including migrants in an irregular situation.

Indeed, a wide range of human rights mechanisms including the human rights treaty bodies, the Special Procedures and the Universal Periodic Review have underscored with increasing urgency their concerns about human rights violations related to the detention of migrants and of asylum seekers. Moreover, these bodies have drawn attention to the overall context which facilitates such violations, including the disturbing trend to criminalise irregular migration.

The Office of the High Commissioner for Human Rights shares these concerns. Migrants are often the only people in a country who can be detained without having committed a recognisably criminal offence, and without judicial oversight and review. This detention can be for lengthy periods of time, often in severely substandard conditions, and in some cases is prolonged or even indefinite.

Under international human rights law, and because of the drastic impact of detention on the individual human being, the deprivation of liberty should in all cases be a measure of last resort and as the result of an individual determination. The Office is of the view that there should in general be a presumption against immigration detention, established by law. Authorities should examine carefully the necessity, proportionality and legitimacy of the decision to detain itself. Only then should the search for alternatives to detention
begin. Having said that, I should emphasize the need to ensure that human rights principles, including the fundamental principles of non-discrimination and proportionality, guide the application of alternatives to detention as well.

The High Commissioner for Human Rights has stated clearly her view that infractions of immigration rules do not make a person a criminal. Criminalizing irregular stay in a country exceeds the legitimate interest of States to control and regulate irregular migration and can lead to unnecessary detention. Entering a State without a valid visa or overstaying a tourist visa should be considered administrative infractions and not criminal offences. Often irregular migrants have been in a country for several years, earned an honest living through hard work which is frequently carried out in difficult, degrading and abusive conditions. Many migrants fall into an irregular status through arbitrary or unlawful acts over which they have little control.

As you begin your deliberations on the important issue of alternatives to detention, allow me to provide a brief global context to your discussions. Migration is today one of the most vexed issues in the international arena, and the recent turmoil across North Africa has once again demonstrated the vulnerability of migrants. Although they are foreigners to the conflict that rages around them, migrants can nevertheless be its most wretched victims. They have been accused of being mercenaries and subjected to violence and discrimination, they have faced unimaginable humanitarian suffering while stranded between borders, they have fallen prey to traffickers and other criminal gangs, and many have been compelled to make dangerous journeys in search of protection.

It is vitally important for us to recognize that, regardless of their legal status, all migrants can be vulnerable to human rights violations. As the Global Migration Group noted recently, the lack of a regular legal status should not deprive any migrant either of his or her humanity or human rights.

Today around the world, the migrant is seen as a dangerous, alien presence in society. He or she is targeted in hate speech, is subject to harassment and violence and is the scapegoat for societal problems, including crime and economic difficulties. Persistent anti-migrant sentiments, often bolstered by official pronouncements, create a public atmosphere that is hostile to the presence of migrants. Such sentiments are reinforced by legislation, regulations and policies which criminalise and exclude migrants. Migrants in an irregular situation are often prevented officially from being able to access adequate healthcare, from renting decent accommodation, and in some countries are even unable to get married.

We are also witnessing an increasing trend to criminalise persons who engage with migrants, whether they are public officials such as healthcare personnel, the police or teachers or private individuals such as landlords or employers, who are also at risk of criminal penalties for renting housing to irregular migrants or employing them. The message which is sent is that contact with migrants is a risk that is to be avoided.
The association of irregular migration with criminality promotes the stigmatisation of migrants and encourages a climate of xenophobia and hostility against them. We are witnessing today a steady advance of the discourse of ‘illegality’ in migration law and policy. The High Commissioner for Human Rights has advised that public officials, the media and other relevant stakeholders should avoid using terms such as “illegal immigrants” to describe the status of migrants in an irregular situation. Rather we must employ the internationally accepted definitions of “irregular” or “undocumented” migrants, which more accurately describe the situation of not having, or having lost, the proper documents allowing them to reside in a given territory or to work there.

This would help to clarify that most migrant workers in an irregular situation perform jobs which are perfectly legal and necessary in the countries in which they work. Such neutral language also helps to avoid inflammatory and often xenophobic rhetoric which dehumanises migrants. Criminalizing and demonizing migrants is counter-productive to effective migration policy, creates a climate of prejudice and even xenophobia against migrants, and can lead to a spiral of human rights violations.

Migration is a social phenomenon which requires multilateral and coordinated action by states. Irregular migration has increased and thrived not only because of push factors in migrants’ countries of origin, but also because of a lack of coherence in immigration mechanisms and procedures in countries of destination.

There is an urgent need for coherent, comprehensive and better coordinated frameworks to address migration at national, regional and international levels. These should be explicitly premised on international human rights norms and standards. In this context we would call on all States to ratify and effectively implement all human rights instruments, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Governments should look at the real need for migrant labour emanating from their economies and societies, as well as ensure that they put in place adequate safe and legal means for migrants to enter and work in their countries. This could reduce the necessity of migrants to resort to risky irregular movement, particularly those facilitated by smugglers and traffickers.

The search for alternatives to detention is one step along the road to more coherent migration policy, and provides a powerful counterbalance to the damaging public discourse on migration. To adequately implement such alternatives will require sustained political will and the leadership of States committed to promoting and protecting the rights of all migrants, regardless of their status.

I wish you all success in your deliberations over the next few days, and look forward to the outcome of your discussions.