Alternatives to Detention

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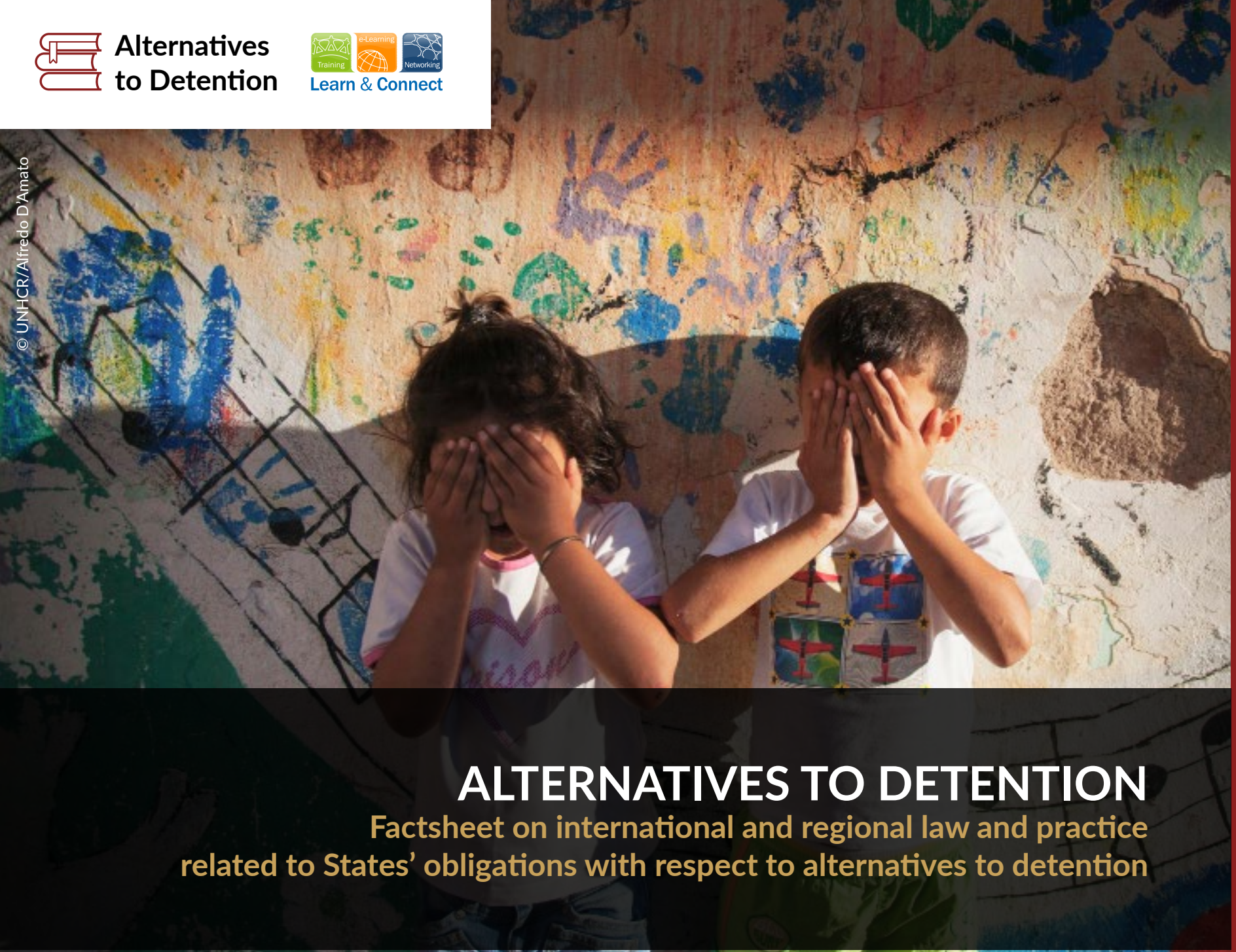

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ALTERNATIVES TO DETENTION

Factsheet on international and regional law and practice related to States' obligations with respect to alternatives to detention

UNHCR
The UN Refugee Agency

INTERNATIONAL LAW

International Covenant on Civil and Political Rights (ICCPR) (Article 9)

The obligation to examine ATDs follows from the rule that deprivation of liberty can only take place if it is necessary and proportionate to the objectives sought by such a measure. Therefore, when States examine necessity and proportionality of detention, alternatives should always be considered. Otherwise, if ATDs are disregarded and deprivation of liberty is applied when it is not necessary, such detention would be considered arbitrary (see also Fundamentals of Immigration Detention e-Learning).

In its General Comment on Article 9 of the ICCPR, the UN Human Rights Committee states that "[t]he decision [on detention] must consider relevant factors case-by-case, (…) [and it] must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties and other conditions to prevent absconding".

The obligation of States to consider alternatives to administrative custody from which asylum-seekers and migrants can benefit is also recalled in the report of the UN Working Group on Arbitrary Detention (see para. 53). In particular, Guarantee No. 13 from the list of criteria for determining whether or not custody is arbitrary, developed by the Working Group, states the possibility for the person to benefit from alternatives to administrative custody. It means that a lack of such possibility may lead to arbitrary detention.

Convention on the Rights of the Child (CRC)

In Article 37(b) the CRC provides that detention of a child can be used only as a measure of last resort. However, several human rights bodies concluded that the principle of 'last resort' does not apply to children. It is not in their best interests to be detained (for more information on the best interests principle see Module 5). The Committee on the Rights of the Child stated in 2013 that States should expeditiously and completely cease the detention of children on the basis of their immigration status.

In its position, UNHCR underlines that "children should not be detained for immigration related purposes, irrespective of their legal/migratory status of that of their parents, and detention is never in their best interests. Appropriate care arrangements and community-based programmes need to be in place to ensure adequate reception of children and their families."

In the view of the Inter-American Court of Human Rights, when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parent, and requires the authorities to choose alternative measures to detention for the entire family. In its Advisory Opinion concerning the rights and guarantees of children in the context of migration and/or in need international protection, the Court addressed two key issues regarding the protection of the rights of refugee, asylum-seeking and migrant children:

1. The use of immigration detention with respect to the principle of last resort in immigration proceedings involving children; and
2. The appropriate alternative measures to protect the right to liberty of children.

Consistent with the framework for the protection of children's rights, the Court stated that the detention of children and adolescents in the context of migration policies and practices of States is, in all cases, arbitrary and contrary to interests of the child. The Court also found that, unlike criminal proceedings, in immigration matters concerning children the general principle is non-custodial and therefore the last resort principle as set forth in the CRC does not apply. Thus, States may never deprive children of their liberty solely based on their or their parents or legal guardians' irregular immigration status. Rather, in response to situations of vulnerability and to protect the rights of children in the context of migration, the Court held that states have an obligation to take measures to promote "the well-being and development of the child." In no case should such alternative measures mean the detention of a child, rather they are "measures for priority implementation, whose main objective must be the comprehensive protection of rights, based on an individualized assessment and the best interests of the child."

International legal standards related to ATDs for children seeking asylum are analysed in Module 5.

Non-binding international instruments

There are a number of non-binding international instruments that embody the obligation to consider alternatives before resorting to detention. For example, the United Nations has developed a set of basic principles to promote the use of non-custodial measures for people subject to alternatives to imprisonment in the criminal field. These rules are largely applicable to the immigration domain as well. This is the list of other non-binding instruments providing for ATDs:

- UN General Assembly resolution on protection of migrants calls upon all States to "adopt, where applicable, alternative measures to detention" and considers ATDs as "a practice that deserves consideration by all States" (para. 4.a).
- UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) provides that "[g]ender-specific options for diversionary measures and pre-trial and sentencing alternatives shall be developed within Member States' legal systems" (Rule 57).
- UN Rules for the Protection of Juveniles Deprived of their Liberty provide that "[d]etention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply
- alternative measures" (para. 17).

REGIONAL LAW

African Charter on Human Rights and Peoples' Rights (Article 6)

The obligation to examine ATDs follows from the rule that deprivation of liberty cannot be arbitrary.

American Convention on Human Rights (Article 7)

The obligation to consider ATDs is confirmed in the practice of the Inter-American Court of Human Rights. The Court in case of Vélez Loor v. Panama objected to those immigration policies that focused on mandatory detention of irregular migrants, without the competent authorities verifying in each specific case, and by an individualized assessment, the possibility of using less restrictive measures that would be effective for achieving the required objectives.

European Convention of Human Rights (ECHR) (Article 5)

ECHR includes the right to liberty. The European Court of Human Rights has found in several cases that States violated Article 5 by failing to apply detention as a last resort (arbitrary detention) where less coercive measures could have been used. The systems of the States were found to insufficiently protect the right to liberty for this reason. For example:

- The Court doubted that ATDs were not at the disposal of the authorities in Malta in case of Louled Massoud v. Malta (para. 68);
- In a number of cases the Court established that the authorities did not examine whether detention could be substituted with a less drastic measure (for example case of Rahimi v. Greece, para. 109, case of Yoh-Ekale Mwanje v. Belgium, para. 124, and case of Popov v. France, para. 119).

There are also several guidelines and recommendations of the Council of Europe's bodies:

- The Committee of Ministers and the Parliamentary Assembly of the Council of Europe has repeatedly emphasized the need for States to consider alternative non-custodial measures, based on individual assessments, before resorting to detention.
- Guideline 6 of a non-binding instrument, Twenty Guidelines on Forced Return of 4 May 2005, states that detention may only be ordered after all conditions are met and the authorities of the host State have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures.
- The Committee of Ministers' Recommendation on measures of detention of asylum-seekers of states that alternative and non-custodian measures, feasible in an individual case, should be considered before resorting to measures of detention (see para. 6).
- Nils Muižnieks, the Commissioner for Human Rights, presented 'a five step plan to abolish migrant detention'. He called for including a set of clear alternatives to detention in law and policy, developing a toolbox for implementing them, abolishing the detention of children, exchanging good practices and improved data gathering on detention.

Charter of Fundamental Rights of the European Union (Article 6 together with Articles 52(3) and 53)

The Charter requires that, subject to the principle of proportionality, limitations on the rights enshrined in the Charter may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. The Charter thus indirectly includes the requirement to look into alternatives before detention is authorized.

EU recast Reception Conditions Directive

Recital 20 and Article 8(2) of the Directive explicitly requires detention to be applied only if other less coercive alternative measures cannot be applied effectively (see also Article 28.2 and recital 20 of the EU Dublin Regulation). This Directive also provides an obligation not only to operationalize in practice alternative schemes, but also to enact such schemes via their national rules transposing the Directive (Art. 8.4). You can consult the Odysseus Network's analysis on ATDs for more information.

EU Return Directive

Recital 16 and Article 15(1) of the Directive provide that detention can only be applied if less coercive measures cannot be applied effectively in a specific case. This provision implies an obligation to consider alternative measures before resorting to detention of returnees.
You can consult the Odysseus Network's analysis on ATDs for more information.

The Court of Justice of the European Union in the case of Hassen El Dridi has ruled that removal should be carried out using the least coercive measure possible based on individual assessment.

Regional practices and initiatives

There are several regional practices and initiatives promoting ATDs:

- The European Union Agency for Fundamental Rights promotes alternatives to detention in asylum and return procedures as "[l]ess intrusive measures" reducing "the risk that deprivation of liberty is resorted to excessively".
- The MIDSA (Migration Dialogue for Southern Africa) process was initiated by the Southern African Development Community Member States and aims at developing "feasible framework to develop a common regional approach to respond to, and address the complex challenges of irregular and mixed migration". One of the goals is to implement alternatives to detention through, inter alia, legislative and policy changes, capacity building, data gathering and cooperation.
- In the San Jose Action Statement several countries in North and Central America declared to "endeavor to" improve in the field of "alternatives to detention [and] arrangements for reception conditions for asylum-seekers and refugees".

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This material was developed within the project 'Global Technical Assistance and Capacity Building Programme to Prevent Detention of Children and to Protect Children and Other Asylum-Seekers in Detention' funded by the European Union.