



ALTERNATIVES TO DETENTION

MODULE 3 — Decision making on ATDs



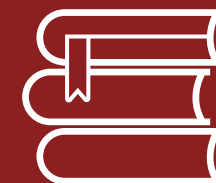
UNHCR
The UN Refugee Agency





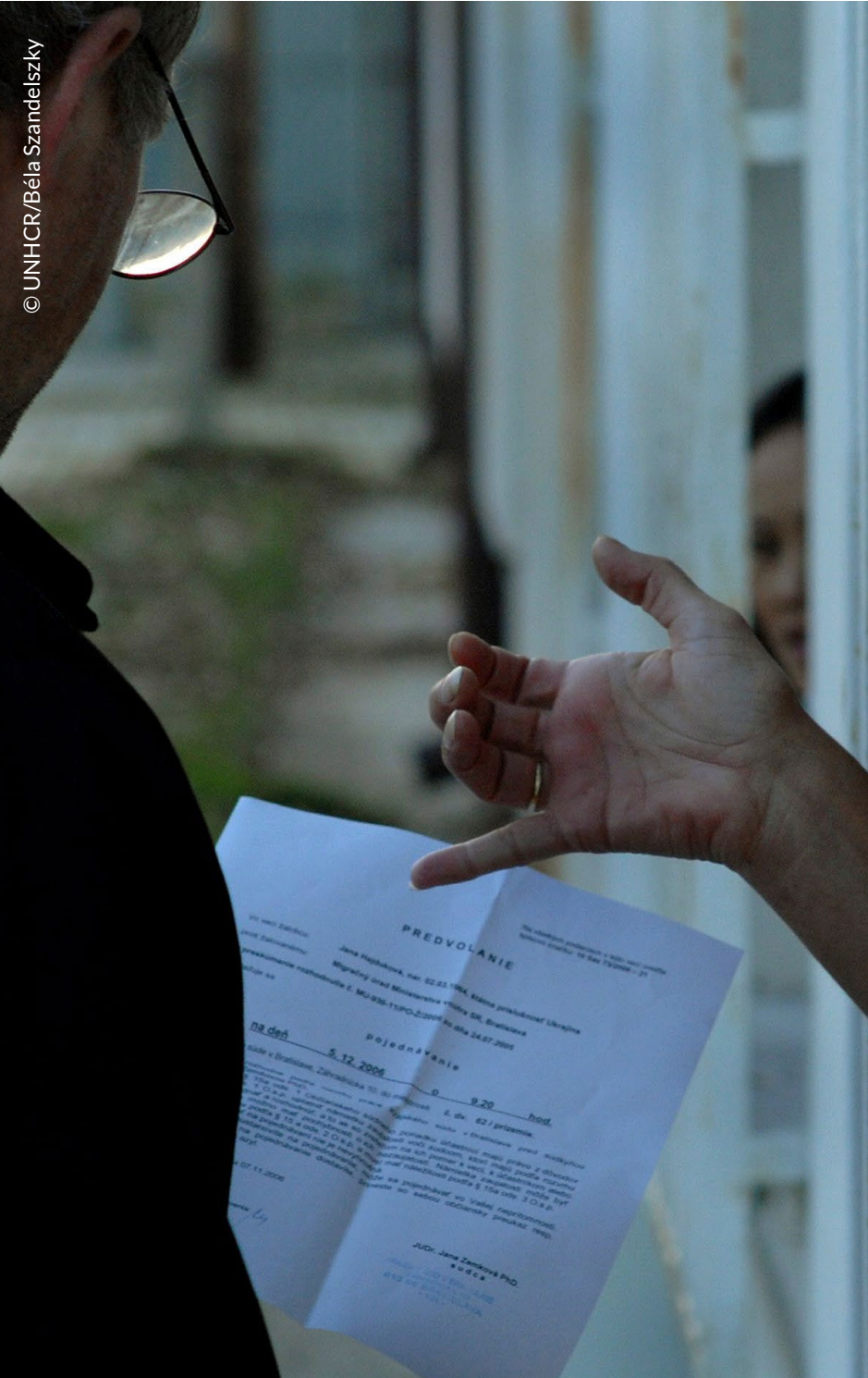
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LEARNING OBJECTIVES AND MODULE STRUCTURE

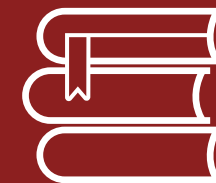


BY THE END OF THIS MODULE, YOU WILL BE ABLE TO:

- Describe the decision-making process on ATDs; and
- Explain how to carry out necessity and proportionality tests.

Please read the following screens carefully and complete the short assignments.

This module should take you around 60 minutes to complete.



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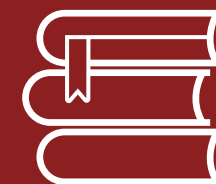
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CHAPTER 2

INTRODUCTION

This module will introduce the main elements of the decision-making process for developing and implementing alternatives to detention. Topics such as qualifying individual circumstances, the rationale for consideration of alternatives to detention, assessing necessity and proportionality requirements and the relevant actors involved in the process will be covered at length. As noted in previous modules, for ATDs to be effective an overall assessment of how they fit within the immigration legal framework remains essential. Otherwise, practitioners risk turning alternatives to detention into alternative forms of detention or alternatives to release, or even using them in place of appropriate reception arrangements.



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OBLIGATION TO CONSIDER INDIVIDUAL CIRCUMSTANCES

International law requires that the individual circumstances and specific needs of each individual are considered at the time of making a decision on any measure that might restrict their right to liberty or freedom of movement. This is summarily touched upon in Module 2. Respecting this obligation is also a precondition for deciding on whether to apply alternatives to detention.

Detaining entire groups of asylum-seekers without individualized assessments of the necessity to detain is not in line with international standards. As such, mandatory or automatic detention of asylum-seekers is always arbitrary in nature.

As seen in the Fundamentals of Immigration Detention e-Learning however, short (for example, up to 48 hours) initial detention periods at the border for the legitimate purpose of registration and/or identity verification, can be warranted if applied on an individual basis and with full consideration to the particular needs and circumstances of the asylum-seeker. International human rights and refugee law frameworks, when read together, give States flexibility to apply extremely short initial detention periods for such purposes, even to large groups. If however, detention needs to be extended for longer periods, an individual assessment

of the necessity and proportionality of such a measure needs to be carried out in the individual case, otherwise risking the validity of the initial legitimate grounds to detain.

Procedures to ensure appropriate screening of individual circumstances and vulnerabilities need to be in place. Decision-makers need therefore to always identify specific circumstances such as disability, age (children, elderly persons), gender, gender identity and sexual orientation (including risk of sexual or gender-based violence), health and welfare concerns (physical health, mental health but also risk of suicide, substance addiction, adult or child experiencing family violence, exploitation or abuse) and other protection needs (refugee and asylum-seeker, survivor of torture and trauma, victim or potential victim of trafficking in persons, stateless person). Amongst vulnerable groups, pregnant women and nursing mothers, who both have special needs, should not be detained. Older asylum-seekers may require special care and assistance owing to their age, vulnerability, lessened mobility, psychological or physical health, or other conditions.

Read:

- UNHCR and IDC, [Vulnerability Screening Tool](#), Identifying and addressing vulnerability: a tool for asylum and migration systems
- UNHCR [Detention Guidelines](#), Guideline No. 4, paras. 19–20; and
- Odysseus Network’s report on [Alternatives to Detention](#), chapter 2, point 1.1.



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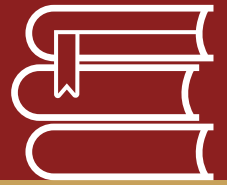
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WHEN SHOULD ATDS BE CONSIDERED?

The individual consideration of alternatives to detention is part of an overall assessment of the necessity, reasonableness and proportionality of detention for a particular asylum-seeker, because it ensures that the detention is truly a measure of last resort (see Module 2).

There are at least three stages of the detention-related decision-making process where the issue of ATDs may emerge. Click on each of the stages displayed in the diagram for more information.



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1. INITIAL DETENTION

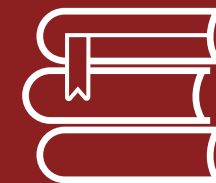
Initial detention assessment involves two sub-stages:

a) the initial detention decision by an administrative authority; and b) the initial review by a judicial/independent body within 24–48 hours of the initial detention decision.

Initial detention may be authorized by police, border or immigration authorities or a judge. Following initial detention, an asylum-seeker must be brought before a judge who conducts an initial review of the decision to detain to verify that detention is lawful and non-arbitrary. This should take place within 24–48 hours of the initial decision to detain the asylum-seeker (UNHCR *Detention Guidelines*, Guideline No. 7), because any form of detention must be ordered by, or be subject to, the effective control of a judicial or other competent authority (UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 4).

ATDs may emerge at this very initial stage, because the administrative or judicial authorities reviewing immigration detention must consider all less restrictive measures before authorizing detention. This assessment includes: considering individual circumstances, including a vulnerability assessment; assessing grounds for detention; and conducting necessity and proportionality tests.

Example: A group of asylum-seekers was detained after being apprehended immediately after their irregular crossing of the State border. Because none of them held identification documents and their identity had to be verified, they were transferred to a registration centre for an initial period of detention for 24 hours. Upon the expiration of this 24-hour period, the border authorities brought these individuals to a judge to decide on whether detention was still necessary in their individual circumstances. After careful consideration of each case, the judge found that the initial detention was lawful and that, for those persons whose identity could not be established (grounds for continuation of detention), transfer to a semi-open transit centre was ordered, where they would need to comply with reporting requirements. The others were immediately released and placed under normal reception arrangements in the community.



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2. PERIODIC REVIEW OF DETENTION

International law further requires that, after an initial review of the decision to detain, regular periodic reviews of the necessity for the continuation of such measure before a court or an independent body must be in place.

This requirement ensures that:

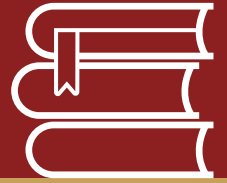
- The legitimate reasons that initially prompted detention are still valid;
- The detention is still necessary (legitimate purpose), reasonable (reasonable in all circumstances) and proportionate (a balance between the general interest of the community and the requirements to protect the individual's rights) to meet these legitimate reasons.

Thus, when the courts undertake their periodic reviews of detention orders, the need for ATDs may emerge at that stage. During such reviews, the judicial or administrative authorities should consider whether alternative measures should be applied. The need to consider ATDs might arise during the review, if, for example, the vulnerability of the asylum-seeker becomes evident during detention, or if there are such considerations as family, or close links to the host country or the community that make the use of alternatives to detention the best way to achieve the goal pursued by placing restrictions on the individual.

Examples

Lithuanian courts, following the Decision of the Supreme Administrative Court of Lithuania (in administrative case No. N143-3565/2008 of 21.07.2008), ruled that assessment of alternatives is their ex officio power, which they can discuss even if the parties to the case do not raise it.

The Canada Border Services Agency, the federal agency responsible for border and immigration enforcement and customs services, has the power to order the release, with or without conditions, of individuals in administrative detention, including asylum-seekers. This is done normally within 48 hours after the detention. If the person is not released within the 48-hour period, then a member of the Immigration Division (ID) of the Immigration and Refugee Board of Canada, the independent review body, will hold a detention review hearing within 48 hours or without delay thereafter. Subsequent detention review hearings occur after 7 days and then every 30 days until the ID is satisfied that there are no further grounds for detention. The ID reviews the grounds for detention to ensure that the person is not detained without sufficient reason, and that the situation that led to the detention continues to exist (see UNHCR Options Paper 2).



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3. CHALLENGING DETENTION BEFORE A COURT

If a detention decision has been made by the competent authority, an individual must be afforded the right to challenge the lawfulness of detention before a court of law at any time (UNHCR Detention Guidelines, Guideline No. 7). This means that all asylum-seekers have the right to challenge the legality of their continued detention. The right to an effective remedy is an important guarantee to address potential shortcomings in the initial decision-making process. Alternatives to detention might emerge at this stage. The institution hearing the appeal (a court) may decide that detention was neither necessary nor proportionate to a legitimate aim, and that an ATD can be applied. Such appeal is available in most countries. The percentages of initial detention decisions that are found unlawful on appeal attest to this. For example, in Austria, around 30 per cent of detention decisions appealed in 2013 were deemed unlawful because the proportionality assessment was inadequate (see the Odysseus Network's [report](#) on Alternatives to Detention).

Example:

In Lithuania, appeals against detention orders can be made to the Supreme Administrative Court of Lithuania by either the asylum-seeker or the State (see UNHCR [Options Paper 2](#)).

Review of detention is not the same as review of alternatives to detention, although both could be closely interrelated.



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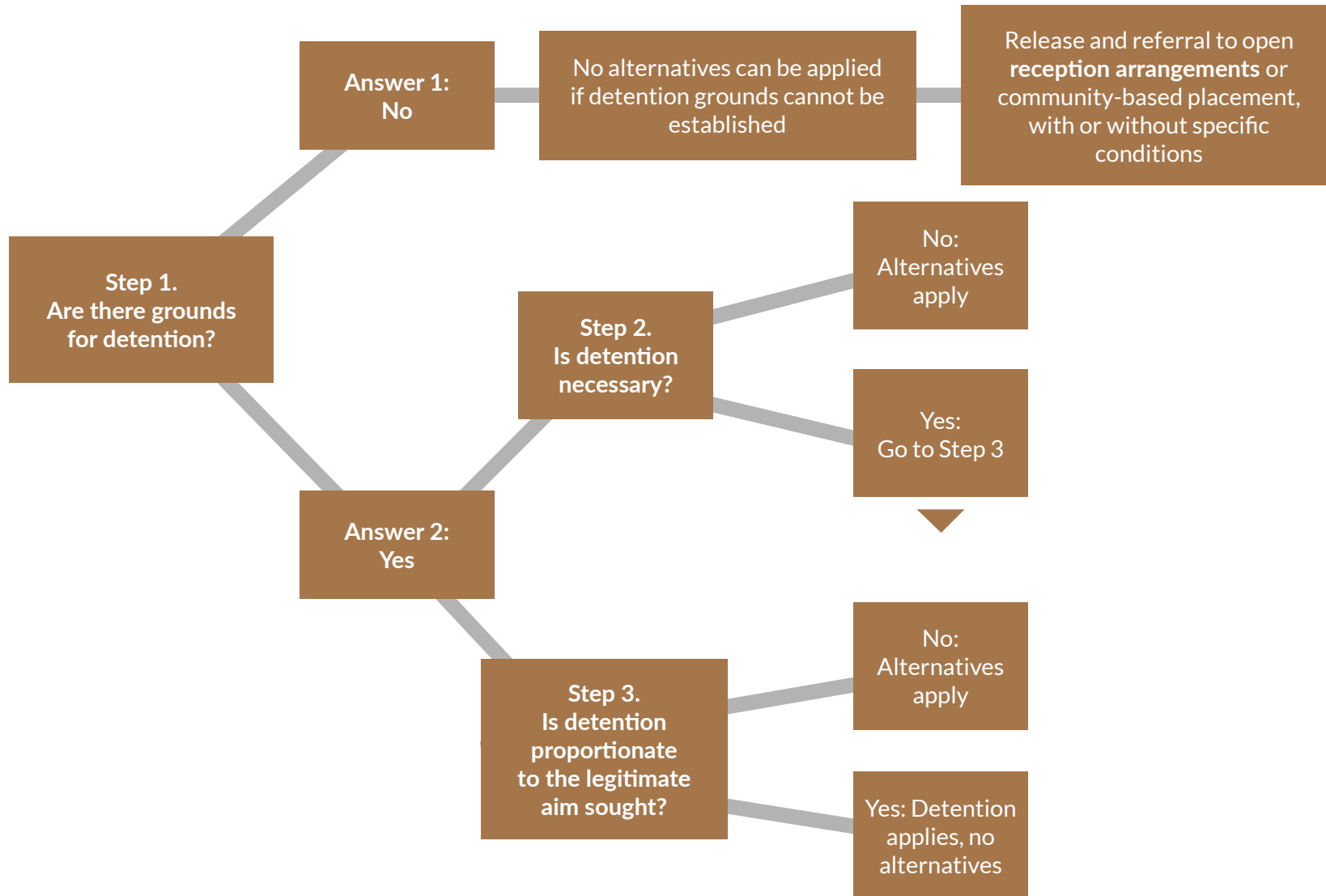
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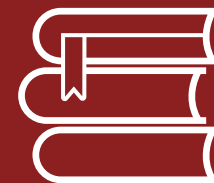
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See the checklist of decision making on ATDs in individual situations (click on each step for more details):



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Step 1: Are there grounds for detention?

To impose ATDs, national authorities must first establish that there are legitimate grounds to detain a specific individual, as explained in the Fundamentals of Immigration Detention e-Learning. Alternatives must not become a substitute for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers (UNHCR [Detention Guidelines](#), Guideline No. 4.3, para. 38). Where there are no grounds for detention, ATDs should not be used. The asylum-seeker should be released and be referred to open reception arrangements or community-based placement, with or without specific conditions.

See the practice of courts on this issue:

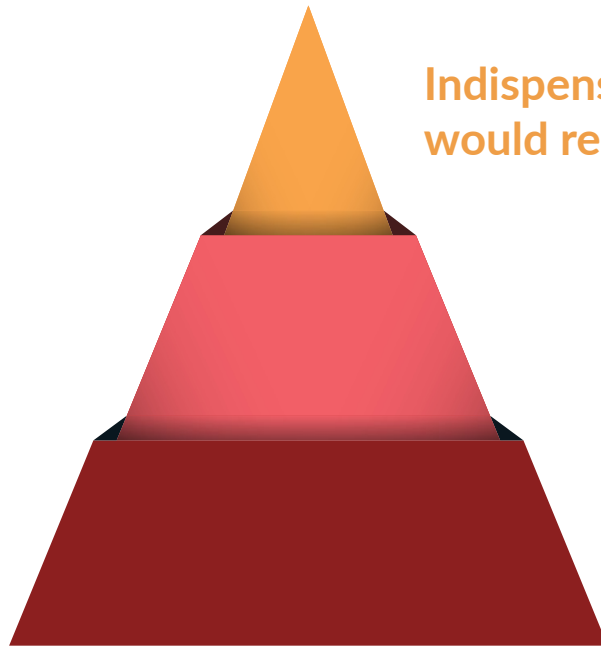
Some countries argue that certain circumstances may prevent the application of ATDs. For example, in cases of lack of established or verified identity. This argument has been turned down by national courts. For example, the Supreme Court of Lithuania ruled that non-established identity is not a justification for failing to consider alternatives to detention.

Step 2: Is detention necessary?

As analysed in the Fundamentals of Immigration Detention e-Learning, international and regional law mandates that the lawfulness of detention be conditioned on compliance with the principles of necessity and proportionality. So if there are detention grounds, then the test of necessity and proportionality becomes relevant. The test of necessity applies in relation to both the initial detention order as well as any extensions.

The principle of necessity means that restriction on freedom of movement is indispensable, and detention will be used as a measure of last resort. Detention is applicable only if the objectives of detention cannot be reached by other means. There should be clear and convincing evidence of the necessity in each individual case. Assertions not backed by facts are not sufficient. For example, Recital 6 of the [European Union's Return Directive](#) states that "decisions taken under the Directive shall be adopted on a case-by-case basis and based on objective criteria" and it is not enough to detain an individual on the mere basis of irregular stay.

Three elements are needed for carrying out the necessity test:



Indispensable - no other measures would reach detention objectives



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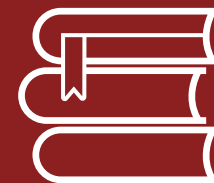
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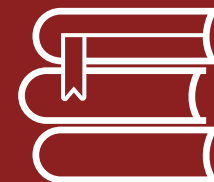
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Step 3: Is detention proportionate to the legitimate aim sought?

The test of proportionality applies in relation to both the initial detention order as well as any extensions. In practice, a number of detention decisions are overturned by courts because the proportionality assessment was carried out inadequately or the length of detention rendered an otherwise lawful decision to detain disproportionate and, therefore, arbitrary (see the Odyssey Network's [report](#) on Alternatives to Detention, p. 80).

As discussed in the Fundamentals of Immigration Detention e-Learning, the principle of proportionality requires that a balance is struck between the importance of respecting an individual's rights to liberty and security of person and freedom of movement, on the one hand, and the public policy objectives that justify limiting or denying these rights, on the other.





Proportionality test means verifying in the individual case whether detention is a proportionate response to the legitimate objective to be achieved by it.

International and regional law requires a careful assessment of whether deprivation of liberty is proportionate to the legitimate objective and administrative aims to be achieved, or whether such aims could be successfully implemented by imposing less restrictive measures, such as ATDs (see e.g. Article 15(1) of the [Return Directive](#)). The authorities must ensure that they do not take any action exceeding that which is strictly necessary to achieve the pursued purpose in the individual case.

This involves:

Individual circumstances and risks

- Examination of the individual circumstances of the asylum-seeker;
- Identification of risks to public policy objectives



Measures to address the risks

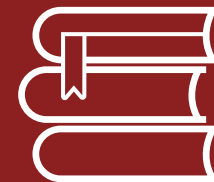
- Identification and assessment of measures that address the identified risks



Adoption of least intrusive measures

- Adoption of measures that are the least intrusive to the asylum-seeker's rights

Below we will analyse the factors related to the individual that may influence the decision to detain or to apply an ATD. Considering these factors is part of the individual assessment of the case and the proportionality test.



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Examples from courts' practice:

The European Court of Human Rights applies the principle of proportionality by requiring: a) good faith in the application of the measure, b) close connection to the purpose, c) appropriate place and conditions of detention and d) a duration which does not exceed that reasonably required for the purpose pursued. (See case *Saadi v the United Kingdom* App no 13229/03, ECtHR, G.C., 29 January 2008, para 74.)

The Supreme Administrative Court of Lithuania overturned a detention decision imposed on the basis of a threat to public order due to previous criminal convictions and substituted an alternative, because it considered the risk of absconding to be low because the applicant had a spouse in Lithuania as well as guarantees concerning the place of residence, was unwilling to return to his country of origin, and had made efforts to regularize his status. (See Supreme Administrative Court (Lithuania), 22 November 2012 App no 575-1317/2012.)

In considering the prolongation of detention, the Svencionys District Court in Lithuania ruled that detention would not be proportionate because the identity of the person was established and there was no evidence that he had failed to cooperate in establishing his legal status or posed a risk to national security or public order. It decided to apply, instead, periodic registration at the police office. (See Decision A-270-617/2012 of the Svencionys district court, 3 February 2012.)

CHAPTER 6

WHICH FACTORS INFLUENCE THE DECISION TO DETAIN OR ASSIGN AN ATD?

When deciding detention-related cases, authorities and courts must consider certain factors that may influence their decision to detain an individual or to apply an ATD. Considering these factors is part of the individual assessment of the case and also part of the necessity and proportionality test analysed earlier in this module. Below are some of such factors to consider when deciding detention-related cases. These are based on international law and judicial practice around the world. However, this list is not exhaustive, so other factors could also be considered.

A) VULNERABILITY OR OTHER RISK FACTORS

Vulnerability might be an important factor in deciding to impose an alternative to detention or even release without any restrictions on freedom of movement. It is one of the individual circumstances decision makers should consider when examining the necessity and proportionality of detention. The specific vulnerability of an individual may preclude the imposition of a detention decision because detention in that case could amount to inhuman or degrading treatment. For this safeguard to be effective, the authorities must first identify vulnerability and assess the special reception

needs of an individual (see Odysseus Network's [report](#) on Alternatives to Detention, pp. 75–76 and read Article 22 of the [EU recast Reception Conditions Directive](#)). For more details, refer to the [IDC/UNHCR Vulnerability screening tool](#). Also, other risk factors must be considered. These include, but are not limited to: risk of suicide, substance addiction, risk of experiencing violence due to sexual orientation and/or gender identity and others.

B) COMPLIANCE WITH PREVIOUS MEASURES

In deciding on whether detention is necessary, or whether less intrusive measures can be applied, a court may consider the history of an asylum-seeker in terms of compliance with the asylum or immigration procedure or with any previously assigned less restrictive measures. For instance, if an asylum-seeker frequently failed to comply with less restrictive measures (e.g. reporting to police), the court may decide that less coercive measures will not be sufficient to achieve the objective pursued, and resort to detention is justified. To the contrary, if an asylum-seeker has a history of compliance with the orders of the authorities, detention may be neither necessary nor reasonable.



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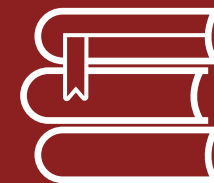
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C) TIES WITH THE ASYLUM COUNTRY

A court can also consider whether a person has certain ties with the asylum country in a broad sense. Such ties could range from having relatives residing in that country, to pending asylum procedures, if the person is interested to continue those. However, ties with the asylum country need to be considered carefully so as not to amount to discrimination against certain asylum-seekers. For instance, some asylum-seekers may have been living longer in an asylum country than others. Thus, if this criterion is applied as a condition, it would discriminate against newcomers. See the example below of discriminatory practices.

Discriminatory practices

When ATDs are applied only if the asylum-seeker has an alternative accommodation lined up, such practices could be considered discriminatory because they are based only on the financial and social resources of the individual. Thus, the absence of a place to stay or lack of material support should not prevent the application of alternatives to detention* (see the Odysseus Network's [report](#) on Alternatives to Detention, p. 69). For example, the Court of Justice of the European Union considered** the link between availability of means of supporting himself and availability of accommodation in a particular detention case and ruled that detention of that person could not be extended even if they had no means to support themselves and no accommodation or means supplied by the Member State. (See Case C-375/09 Kadzoev v. Bulgaria [2009], para. 71.)

D) OTHER FACTORS

Other factors to guide the decision-making process can also include: the stage of the asylum process, the asylum-seeker's intended final destination, the risk of absconding, and the asylum-seeker's willingness to comply and understanding of the need to comply (UNHCR [Detention Guidelines](#), Guideline No. 4, para. 19).

Although in some countries the choice of the measure and the details of its implementation are left entirely to the decision-making body, i.e. the administrative authorities or the courts, in other places guidance exists and prove useful in practice. In Sweden, for example, no public document (law or guidelines) specifies which criteria may be used to determine when supervision is sufficient or detention is necessary. On the other hand, absence of guidance may lead to difficulties in implementing ATDs. For example, in Austria, the absence of minimum standards and instructions led to major disparities in the practical implementation of ATDs (see the Odysseus Network's [report](#) on Alternatives to Detention, p. 87).

See the following example from United Kingdom, a checklist of factors influencing a decision to detain (see the Odysseus Network's [report](#) on Alternatives to Detention, p. 79). You may also want to read: [Enforcement Instructions and Guidance, Chapter 55.3.1 'Factors influencing a decision to detain'](#), United Kingdom Home Office, 2013.





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EXAMPLE OF UK ADMINISTRATIVE DECISION MAKING: FACTORS INFLUENCING A DECISION TO DETAIN

The following factors must be taken into account when considering the need for initial or continued detention:

- What is the likelihood of the individual being removed and, if so, after what timescale?
- Is there any evidence of previous absconding?
- Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
- Has the individual taken part in a determined attempt to breach the immigration laws (e.g. entry in breach of a deportation order, attempted or actual clandestine entry)?
- Is there a previous history of complying with the requirements of immigration control (e.g. by applying for a visa, further leave, etc.)?
- What are the individual's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the individual for support? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? Does the individual have a settled address/employment?
- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations, which afford incentive to keep in touch?
- Is this a child?
- Does the individual have a history of torture?
- Does the individual have a history of physical or mental illness?

CHAPTER 7

ACTORS INVOLVED IN DECISION MAKING ON ATDs

Decision making on detention and ATDs is usually undertaken by administrative bodies or/and by courts. Legal counselling is also involved, because asylum-seekers have a right to legal counsel during detention procedures (refer for details to Unit 5 of the Fundamentals of Immigration Detention e-Learning). The main role of these actors is to carry out the test of necessity and proportionality and examine alternatives before a detention measure is ordered, or assist an asylum-seeker in ensuring that alternatives have been appropriately considered.

Explore the roles of various actors in decision making on ATDs by clicking on each of them:



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Administrative authorities

In some countries, where initial administrative detention might be applied to asylum-seekers, ATDs may be considered by the same administrative authority that decides on the initial administrative detention. This authority should carry out the test of necessity and proportionality and examine alternatives before a detention measure is ordered.

Examples

Austria

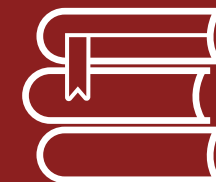
The Federal Office for Immigration and Asylum, an administrative body, makes decisions ex officio on detention and alternatives to detention.

Belgium

The Aliens Office decides on placement in family units ex officio.

Indonesia

ATDs are used for placement of asylum-seekers based on release orders from the Directorate-General of Immigration.



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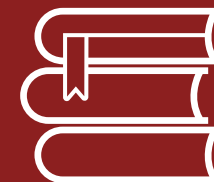
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Court

As discussed in the Fundamentals of Immigration Detention e-Learning, international law imposes limits upon the permissible duration of an initial arrest/detention. Usually this cannot exceed 24–48 hours. Any further detention of an asylum-seeker must be authorized by a court, which must review the necessity for continuing detention and ensure that detention is not arbitrary. The court should carry out the test of necessity and proportionality and consider ATDs before a detention is ordered. Also, for detention to remain non-arbitrary it must be reviewed by a court which assesses its continued necessity and proportionality. These reviews must take place at regular intervals.

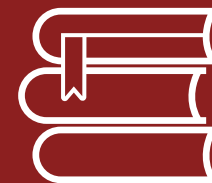
Examples

Lithuania

The judicial system plays a central role in the control of detention and development of alternatives to detention, because detention must be authorized by judicial authorities within 48 hours. ATDs are assigned by the district court of the foreigner's place of stay, but submission to the court has to be made either by the police, or other law enforcement authorities or by the asylum-seeker himself (see the Odysseus Network's [report on Alternatives to Detention](#), pp. 134 and 136). The local court may release the individual, extend the period of detention or impose an alternative to detention. Either the asylum-seeker or the State can make an appeal to Lithuania's Supreme Administrative Court (UNHCR, [Options Paper 2](#)).

Morocco

A court order is required for the detention of foreign nationals beyond 24 hours. Such a detention can then be extended for up to 15 days, plus 10 additional days (Art. 35 of the Migration Act, quoted from the Global Detention Project's [Morocco Immigration Detention Profile](#), 2014).



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Legal counsel

Every detainee has the right to legal counsel (UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17.1). Free legal assistance should be provided where it is also available to nationals similarly situated; this assistance should be available as soon as possible after arrest or detention to help detainees understand their rights (UNHCR [Detention Guidelines](#), Guideline No. 7). If detention is applied, asylum-seekers have a right to free legal assistance. Lawyers and other providers of legal counsel have an important role in communicating the individual circumstances of the applicants and the arguments that would warrant ATDs in a particular case. Lawyers may also initiate a review of the necessity for continuing detention once it has already been applied by raising the necessity to apply ATD in an individual's particular circumstances.

Example

In Canada, the Toronto Bail Program has been operating since 1996. It is a special agency funded by the government that acts as a third-party risk management programme. The organization identifies eligible detainees through a screening and assessment process and then supports their application for release on bail. It seeks to identify suitable bondspersons who could come forward on behalf of detainees. Its clients include, among others, asylum-seekers detained due to issues of credibility or because of flight risk.

Others

There are other actors that may be important in the ATD process. For example, with respect to unaccompanied children, child protection actors should be involved. NGOs, as well as other organizations, can play a role in providing guarantees on behalf of the asylum-seekers and thus take part in proceedings.

CHAPTER 8

CASE STUDY

Read and reflect on the case study below and carry out necessity and proportionality tests to decide whether detention or an ATD should be applied. Include the results of the tests by responding to the questions in the table below the case study. You will receive an automated feedback after responding to the questions.

Case study

Magda applied for asylum in Country A together with her husband and two children. In Country A, Magda and her family stayed in an accommodation centre for asylum-seekers and could come and go whenever they wanted during the day. However, she had to be present in the centre between 11 p.m. and 6 a.m. The family had been informed of the “clear prohibition” on exiting the country while in the asylum process, and they had been told of the consequences of doing so, including the possibility of detention.

Magda and her family were told to wait for months for their asylum procedure to be concluded. However, Magda was worried about her children, who were afraid of going to school, could not sleep, and were often wetting beds at night. She thought that her aunt and uncle, who lived in neighbouring Country D, could provide support to the whole family. One day they decided to leave for Country D. They took their passports and attempted to cross the border into Country D. However, the whole family was stopped at the border crossing point and informed that crossing the border was prohibited. The migration authorities decided to ask the court to detain the family for a period of six months. This was to prevent their subsequent attempt to leave the country without authorization. The authorities argued that the application of alternatives to detention would not be effective for reaching and enforcing an immigration decision, as absconding is treated as an obstruction to reaching a decision.



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Necessity and proportionality tests

Necessity of detention			Proportionality of detention		
Questions	Yes/no	Explain	Questions	Yes/no	Explain
Is detention indispensable?			Are there any risks in this case to meeting the public policy objectives?		
Are there objective criteria that necessitate detention?			Are there measures available to address these risks?		
Are there individual circumstances that would preclude detention?			Are these measures the least intrusive ones?		

CHECK



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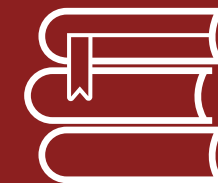
Feedback:

There is an objective reason to restrict the freedom of movement of an asylum-seeker who has ignored a clear prohibition on leaving the asylum country (Country A) without authorization. This may even lead to detention. However, this might not be necessary in Magda's case because:

Indispensable	The detention of the family is not indispensable, because the objectives sought might be achieved without applying restrictions to the whole family.
Objective criteria	While there is an identified objective criteria (risk of absconding) this needs to be weighed against the other factors of the assessment. In particular, considering the particular needs and circumstances of the family.
Individual circumstances	Detention would have negative effects on her children and their health and well-being. It is clear that they might suffer from PTSD (post-traumatic stress disorder) and thus require proper care arrangements. It is in the best interests of a child not to be detained for any immigration-related purposes.

Also, the detention of the family would not be proportionate to the objectives sought because:

Risks to meet objectives of detention	There are risks that the family might abscond again, however there are also measures that could mitigate or eliminate such risks (see below).
Measures to address these risks	To address the risk of absconding, the family might be asked to deposit their documents or be placed under community supervision arrangements. These measures could minimize or eliminate the risk of absconding. For a list of other alternatives to detention measures see Detention Guidelines, Annex A.
Least intrusive measures	The child's best interests require keeping the family together and the imperative requirement not to deprive a child of liberty extends to their parents and requires authorities to define alternative measures for the entire family.



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LITIGATING IN THE CONTEXT OF ATDS

There are several country-level examples where resorting to courts on problematic immigration detention issues resulted in substantive changes in practices, policies or even legislation. Litigation could therefore be an effective tool for raising awareness of problems and initiating and supporting the changes needed in the country, in particular those related to immigration detention.

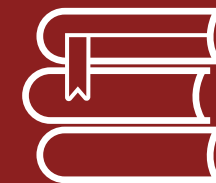
Examples



Immigrant Defense Project (IDP) provides expert advice and support on detention-related litigation in the United States to ensure that all immigrants receive due process in matters of detention. IDP's ongoing work includes support for habeas corpus petitions (petitions to bring a person to court to determine the legality of detention and decide whether to order release) and other detention-related federal litigation, bond litigation before immigration courts, and related parole negotiations with administrative agencies. More information [here](#).

Lithuanian network of lawyers: The dissemination of case law and other legal information among asylum and immigration legal practitioners is regularly conducted through the National Network of Asylum Lawyers in Lithuania. The network was instrumental in providing training to lawyers (via an e-platform and annual meeting) and coordinating country-level strategic litigation efforts of different legal service providers. These efforts resulted in several precedent-setting pronouncements by the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania. Strategic litigation efforts undertaken within the network clearly contributed to less-intensive resort to detention in Lithuania in 2015 (e.g. no children were detained*).

*Source: Information of UNHCR



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Bulgaria

Bulgarian non-governmental organization Foundation for Access to Rights (FAR) provides legal support to asylum-seekers in detention. Since 2015, FAR has implemented the HEAR project, which enabled many individuals to have hearings in courts with lawyers and succeed in having detention replaced by an ATD. The project, HEAR: Hearing Entails Awareness and Rights, promotes the application of immigration detainees' right to be heard by raising understanding, awareness and knowledge in this area. In addition to working in the national context, the FAR lawyers conduct strategic litigation in regional courts (e.g. the precedent-setting *Kadzoev v Bulgaria* judgment of the Court of Justice of the European Union).

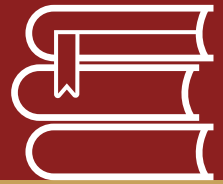
Israel

The network that could be used for litigation purposes includes actors such as Tel Aviv University's legal clinics, HIAS Fellowship Program, and the Pro Bono Program of the Israeli Bar Association. 94 pro bono lawyers have been trained on asylum issues, including detention, and 35 of them have already assisted asylum-seekers in various proceedings, including release from detention (source: UNHCR information).

Successful litigation requires certain preconditions to be established at the country level. Among these are:

1. The identification and assessment of legal problems related to detention/ATDs and a plan for addressing them;
2. The availability of competent lawyers to assist the asylum-seeker and/or strategic litigation cases;
3. The availability of a competent body that decides detention cases;
4. The availability of certain legal provisions in the country's legislation (e.g. necessity and proportionality of detention tests, and general jurisdiction of courts to analyse any complaint submitted by a non-national).

The absence of some of these preconditions might lower the chance for successful litigation, however, point 4 (for example) could be addressed through litigation itself.



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Let us briefly examine some of the different challenges related to immigration detention and ATDs that appear in practice around the world and how can we address them through strategic litigation. Read the short situations below and choose one or more answer(s).

Situation 1: Decisions on detention are issued automatically solely on the basis of irregular entry. No individual assessment is carried out, there is a lack of individualized determination of the lawfulness and proportionality of detention. The decisions fail to consider the individual circumstances of asylum-seekers, and the decisions are repetitive.

How would you address this situation? Select each option to see how these measures might be relevant in this case:

- a) Invoke international jurisprudence on individual assessments in a national court;
- b) Bring the case to a regional/international body to set a precedent;
- c) Bring the issue to the relevant administrative or constitutional court in your country (note that in some countries it might be a court of general jurisdiction rather than an administrative court); or
- d) Apply to an ombudsperson or similarly mandated national human rights institution to investigate and challenge the situation on detention of asylum-seekers.

FEEDBACK

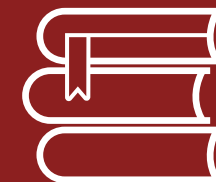
Feedback

Option a): This option is necessary if you are considering bringing the case to an international body. Strategic litigation is often all about thinking two steps ahead. Even if you know that the national court will decide against your case, it is required by the majority of international mechanisms that you exhaust all domestic remedies first. Consequently, bringing a case to a national court is only the first step for the entire strategic litigation. Remember to invoke relevant international law, standards, policy and jurisprudence of regional and international courts and bodies at your national court intervention. This will assist you in producing argumentation in support of the need of individual assessment. For example, domestic law might allow for such an automatic detention and the national courts may be reluctant to decide otherwise even though it is not in line with international law and standards.

As an example in March 2017, the Hungarian Parliament adopted a law permitting the automatic detention of all asylum-seekers, including families with children and unaccompanied children older than 14 years. The Commissioner for Human Rights of the Council of Europe expressed concerns about the detention situation in Hungary and issued a report which could then be used and quoted in strategic litigation.

Option b): This option is usually applicable after all domestic remedies have been exhausted. The majority of the regional and international human rights mechanisms require this before the case is admitted for consideration. Be aware that some countries might be oblivious to international pressure following the outcome of the proceedings before the regional and international human rights mechanisms.

To follow our example, in March 2017 the European Court of Human Rights found Hungary (*case Ilias and Ahmed v. Hungary*) in violation of the European Convention on Human Rights (ECHR). The Court argued that placement in transit zones without a legal framework was unlawful detention. As a response, the Hungarian Government talked about withdrawing from the ECHR.



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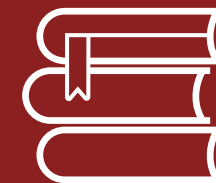
Option c): This option is applicable only if national legislation allows for an individual petition to the constitutional court. Note that not all countries around the world have constitutional courts. In those States where individual petition is possible, this might be a very effective option. Do not forget to litigate in front of the regular courts but also, in some cases related to migration and refugee law, before administrative or high/supreme courts. This option has the potential to bring significant changes to national law and practice.

Option d): This option depends on a given country. There needs to be an ombudsperson or a similarly mandated national human rights institution in place. In the majority of countries, ombudspersons formulate recommendations for the authorities, recommendations that might not be directly enforceable. Nevertheless, reports and recommendations published by the ombudsperson might be helpful in arguing for the cases in front of national courts and international or regional human rights mechanism(s). In addition, such recommendations could support advocacy-related activities.

Important sources for legal argumentation

International and regional law on the individual assessment requirement that might help you in litigating your case(s):

- UN Human Rights Committee, *F.K.A.G. et al v Australia*, Communication no 2094/2011(HRC), para 9.3: “to detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security”
- UN Human Rights Committee, *M.M.M. et al v Australia*
- American Court of Human Rights, *Vélez Loor v Panama*



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Situation 2: The courts in Country X are charged with carrying out authorization and review of immigration detention; however, because they do not carry out necessity and proportionality tests in each individual case, alternatives to detention are seldom assigned.

You represent a case in front of the court. How would you address this practice?

- a) Invoke international and regional legal standards on the mandatory nature of necessity and proportionality tests during review of detention decisions;
- b) In your submission to the court, you focus on the individual circumstances of your client to demonstrate that detention is neither necessary nor proportionate to the objectives sought in this particular case;
- c) Present to the court the examples of individuals in a similar situation as your client for whom alternatives were applied;
- d) Write an article to a law journal explaining international and regional standards on the mandatory nature of necessity and proportionality tests during the review of detention decisions.

FEEDBACK



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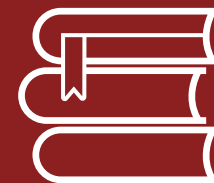
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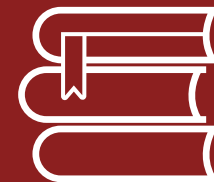
Feedback

Option 'a': This is an effective option. There are strong arguments, jurisprudence, and legal basis available in international/regional law to support your claim.

Option 'b': This option is a good idea, because the court would have to reflect on these individual circumstances and thereby carry out the necessity and proportionality tests.

Option 'c': While such examples might be convincing and illustrative, the courts rely on legal arguments and such information may not be key to making a decision. However, you may want to use these examples to support your legal argumentation. This option is often complementary with other options presented here.

Option 'd': This may be a good advocacy and awareness-raising tool, but is not necessarily effective in litigation. Remember that judges make decisions based on evidence and materials gathered in a particular case. However, an academic article could be a source (but not a primary one) that helps you argue your case in court.



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Important sources for legal argumentation

International/regional law (cases) on the necessity/proportionality requirement that might help you in litigating your case(s):

- Necessity/proportionality/reasonableness:
 - UN Human Rights Committee, *F.K.A.G. et al v Australia*, Communication no 2094/2011(HRC), para 9.3: “Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time”.
 - UN Human Rights Committee
 - *C. v Australia*, Communication no 900/1999 (HRC), para 8.2: “In particular, the State party has not demonstrated that, in the light of the author’s particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party’s immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author’s deteriorating condition”;
 - *Baban et al v. Australia*, Communication no 1014/2011 (HRC), para 7.2, on the same issue;
 - *Zeyad Khalaf Hamadie Al-Gertani v Bosnia and Herzegovina*, Communication no 1955/2010 (HRC), para 10.4: “[...] while the initial arrest and detention may have been justified on the basis of information available to the State party, the latter has failed to justify the necessity of continued and prolonged detention since 2009 and to demonstrate that other, less intrusive, measures could not have achieved the same end”.
- Necessity: European Court of Human Rights, *Witold Litwa v Poland*, App no 26629/95 (European Court of Human Rights, 4 April 2000), para. 78.
- Proportionality: European Court of Human Rights
 - *Soering v the United Kingdom*, App no 14038/88 (European Court of Human Rights, 7 July 1989), para. 89;
 - *Saadi v the United Kingdom*, App no 13229/03 (European Court of Human Rights, G.C., 29 January 2008), para 74.

Situation 3: In Country X, ATDs are often implemented by the courts. However, they are almost always assigned only if asylum-seekers have secured private accommodation. According to a recent study on asylum-seekers in Country X, the majority of them do not have access to accommodation other than that which is provided by the authorities.

How could this situation be addressed through litigation?

- a) The arguments of non-discrimination based on international and national standards could be invoked in this case. One can argue that asylum-seekers are discriminated against because of their social status. This means that those who have financial resources to rent private apartments or who have been staying in Country X long enough to develop social links and connections are treated more favourably compared with those who cannot afford private accommodation or who have just arrived in Country X.
- b) It could be argued in court that such requirements do not follow international and regional law, thus should not be applied.
- c) Try to convince the court that there are other alternatives that could be assigned. For example, an asylum-seeker could live in an open reception centre or shelter run by the State or a non-governmental organization.

FEEDBACK



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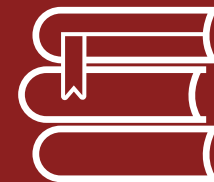
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Feedback

Option 'a': The principle of non-discrimination is a cornerstone of international and national law and a relevant argument in this situation. The practice clearly discriminates against less advantaged individuals, creating a situation in which the application of ATDs is based on arbitrary circumstances rather than a necessity and proportionality assessment. To support these arguments, reference to international standards will need to be included, because they do not lay out such conditions (e.g. having accommodation available) for the application of ATDs.

Option 'b': This argument is relevant if a strong legal background is demonstrated. Note, however, that the courts may be of the opinion that what is not explicitly prohibited is allowed.

Option 'c': This could be argued at court. However, there would have to be open reception centres and shelters available to asylum-seekers in Country X. These could be run by the state, non-governmental organizations or private companies. It might be useful to combine this argument with the previous two on international standards and the principle of non-discrimination.



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Important sources for legal argumentation

International/regional law on accommodation issue (cases) that might help you in litigating your case(s):

- **Said Shamilovich Kadzoev (Huchbarov)**, Case C-357/09 PPU, judgment of the Court of Justice of the European Union (Grand Chamber) of 30 November 2009, European Court Reports 2009 I-11189, ECLI:EU:C:2009:741.
- In this case, the Sofia City Administrative Court (Bulgaria) asked the Court of Justice of the European Union whether “Article 15(4) and (6) of Directive 2008/115 allow the person concerned not to be released immediately, even though the maximum period of detention provided for by that directive has expired, on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose” (para. 68, emphasis added). The Court responded that “the answer to Question 4 is that Article 15(4) and (6) of Directive 2008/115 must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose” (para. 71, emphasis added).

Here are several tips to help you with strategic litigation:

- **Try to explore constitutional measures:** Detention is a general subject to national laws, thus constitutions of countries frequently have provisions concerning the right to liberty. These provisions could sometimes be invoked in the context of immigration detention. For example, this could be done through a request in a court hearing to approach the constitutional court on constitutionality of immigration detention measure when ATDs are not used (thereby detention is not treated as a measure of last resort measure, which is in violation of international law). In countries where the direct access to the Constitutional Court is guaranteed (e.g. the Czech Republic, Thailand, Turkey) you may consider using this option and petition the court on the constitutionality of immigration detention measures.

Example

In a landmark case from 1999, the Constitutional Court of the Republic of Lithuania decided on detention as an ultima ratio measure. This decision until now has been invoked in many immigration detention judgements made by administrative and general jurisdiction courts.

- Use regional and international jurisprudence in national strategic litigation, highlighting various legal limitations applied by international human rights bodies in relation to the detention of asylum-seekers and people in situations of vulnerability/risk (such as children, families, the elderly, people with disabilities). Such jurisprudence can be found on the official websites of international and regional bodies:



United Nations Human Rights Committee



European Court of Human Rights



Inter-American Court of Human Rights



African Court on Human and Peoples' Rights

- Use recourse to the general court system. In situations where there are no specified courts with jurisdiction over immigration detention issues (e.g. where only administrative bodies decide on immigration detention and ATDs), use the general court system. There is usually a legal possibility in each country to complain to the court about the decisions or actions of a State authority.



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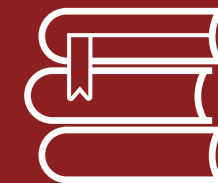
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INTERIM ASSIGNMENT: ESTABLISHING COUNTRY NEEDS FOR LITIGATION – COUNTRY NEEDS ASSESSMENT

Reflect on and complete a checklist of the problems related to detention and alternatives to detention in your country that could be addressed by litigation. This information might be useful to you in designing a strategy to address these issues.

Before filling in the chart, you may want to consult the [Second Annual Roundtable on Strategic Litigation and International Refugee Protection: Trends and Best Practices, 20 June 2014](#).

Questions to be answered	Yes	No	Not applicable	Explanation
Legal system				
Are there lawyers who provide legal assistance free of charge to asylum-seekers?				
If so, are these lawyers trained in refugee law, standards related to detention of asylum-seekers and ATD-related issues?				
Are courts the competent institution under national legislation to decide on immigration detention and ATDs?				
If not, is it possible to bring detention/ATD-related cases to the court based on constitutional/general provisions of the laws?				



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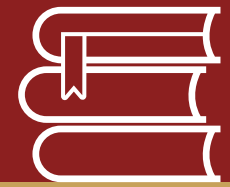
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Questions to be answered	Yes	No	Not applicable	Explanation
Detention/ATD-related problems				
ATDs are assigned without detention grounds being present				
No individual assessment, detention decided automatically, thus no possibility to consider ATDs				
No necessity and proportionality of detention tests carried out, thus no possibility to consider ATDs				
No review of detention measure envisaged despite changes of circumstances (e.g. identification of vulnerability/risk)				
ATDs assigned not subject to review				
ATDs applied for unlimited period of time				
Legal system does not allow non-nationals to submit complaints, while public interest defence practices/procedures are underdeveloped in the country				
Other problems (specify under explanation)				



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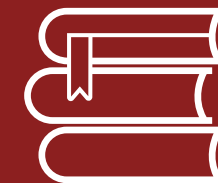
Any decision to detain must be based on an assessment of an individual's particular circumstances and needs.

If a person is detained, there is an obligation to bring him/her before a judge.

Review of initial detention and periodic reviews of the necessity for continuation of detention or alternatives before a court or an independent body must always be ensured.

There are at least three stages of the detention-related decision-making process where ATDs must be considered:

- initial detention and its initial review
 - periodic review of detention
 - challenging detention decision





Actors involved in decision making on ATDs may include:

- administrative authorities, courts;
 - legal counsel;
- child rights protection agencies, guardians, NGOs, guarantors and other organizations.

Decision making on ATDs in individual situation involves at least three steps:

- Are there grounds for detention?
 - Is detention necessary (are measures indispensable)?
- Is detention proportionate to the legitimate aim sought (individual circumstances and risks, measures to mitigate the risks, adoption of least restrictive measure)?

Factors influencing the decision to detain or assign ATDs:

Vulnerability, compliance with previous measures, ties with asylum country and others.

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FURTHER READINGS

- UNHCR, Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families, 2015, <http://www.refworld.org/docid/5523e8d94.html>
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- Edwards, Alice, Back to Basics: The right to liberty and security of person and 'alternatives to detention' of refugees, asylum-seekers, stateless persons and other migrants, UNHCR, April 2011, pp. 20–28
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ALTERNATIVES TO DETENTION

MODULE 3

CHAPTER 1

CHAPTER 2

CHAPTER 3

CHAPTER 4

CHAPTER 5

CHAPTER 6

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CHAPTER 8

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CHAPTER 12

CHAPTER 13



Alternatives to Detention



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