

# ALTERNATIVES TO DETENTION

## MODULE 2 – International legal framework on ATDs



**UNHCR**  
The UN Refugee Agency







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## CHAPTER 1

# LEARNING OBJECTIVES AND MODULE STRUCTURE

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

- Define the key standards of international legal framework applicable to ATDs;
- Specify national provisions on detention and ATDs; and
- Apply international standards on ATDs.

Please read the following materials carefully and complete the short assignments and self-check.

Reading the materials in the text and completing assignments in this module should take you approximately 45 minutes.



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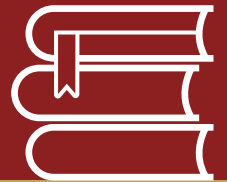
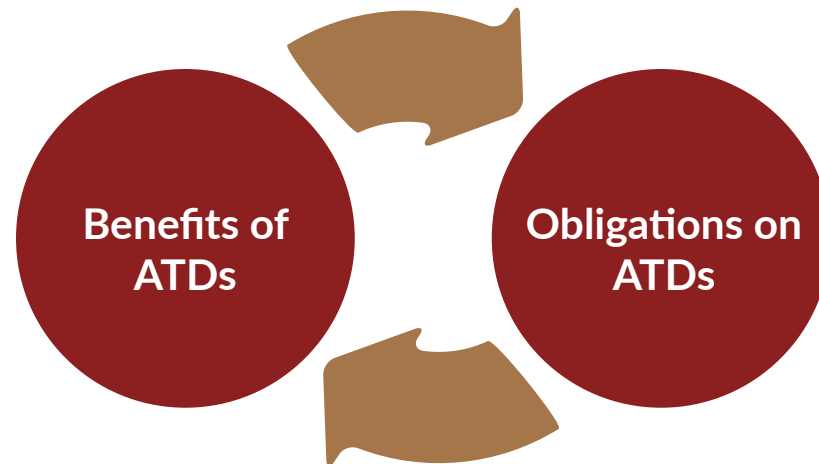
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## CHAPTER 2

# THE INTERNATIONAL LEGAL FRAMEWORK ON ALTERNATIVES TO DETENTION

Module 1 introduced the various benefits of applying ATDs. Besides the benefits, States are also required to apply alternatives under international and regional legislative frameworks.

The legal framework on alternatives to detention or applicable legal standards relevant to ATDs covers international and regional instruments, both binding and non-binding for States.



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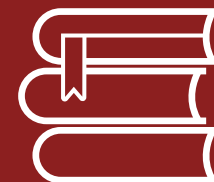
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Alternatives to detention must be in accordance with international law and human rights standards. The former UN Special Rapporteur on the human rights of migrants, Jorge Bustamante, **called** for the “recourse to alternative measures be based on an individual assessment of the migrant’s particular circumstances and be available in practice without discrimination.” He added that the measure chosen must be “the least intrusive and restrictive in order to attain the same objectives of immigration-related detention”.

International legal standards applicable to detention should also be respected when ATDs are applied. Read [UNHCR Detention Guidelines](#), Guideline No. 4.3, paras. 36–37.

Let’s see what these standards are.

The international legal framework includes the following key standards/requirements applicable to ATDs:

1. **Obligation to consider alternatives to detention**

2. **Proper legal basis in national law**

3. **Minimum intervention**

4. **Individual assessment obligation**

5. **Conformity with international standards**

## STANDARD 1: THE OBLIGATION OF STATES TO CONSIDER ALTERNATIVES TO DETENTION

The exceptional character of immigration detention under international law entails the obligation of States to ensure that alternatives to detention, as less coercive measures, are considered and made available before resorting to the detention of asylum-seekers. The obligation is based on these three principles:

Seeking asylum is not unlawful

Liberty is the default position

Detention is a measure of last resort

These principles have been explained in detail in the Fundamentals of Immigration Detention e-Learning, which stressed their importance in ensuring that arbitrary detention is avoided. They require that immigration detention be permitted under international law only where it is necessary, reasonable and proportionate to a legitimate aim, and as a last resort only, which means that less coercive alternatives must be explored beforehand.



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Let's now explore the international and regional legal framework relevant to States' obligation to consider ATDs.

Globally, the implicit obligation of States to apply alternatives derives from the rule that the right to liberty is a default position, while detention must be a measure of a last resort. Therefore, less restrictive measures should be considered before detention is applied.

Under international law, the obligation to examine alternatives is implicitly contained in the application of the principles of necessity and proportionality of detention in order to avoid situations of arbitrary detention.

At the regional level, including in Africa, the Americas and Europe, several human rights instruments incorporate the obligation to consider ATDs.

The following international and regional instruments are relevant:

### International law

- International Covenant on Civil and Political Rights (Article 9)
- Convention on the Rights of the Child (Article 3, on the best interests of the child)
- Non-binding international instruments

### African regional law

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

### American regional law

- American Convention on Human Rights (Article 7)

### European regional law

- European Convention of Human Rights (Article 5)
- EU Charter on Fundamental Rights (Article 6)
- EU Return and Reception Conditions Directives

Read the factsheet to learn more about each of these instruments.



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## STANDARD 2: ESTABLISHED BY LAWS

As is the case for any other restrictions to human rights, alternatives to detention need to be governed by laws and regulations to prevent them from being arbitrary. All restrictions on liberty or freedom of movement need to be lawful, thus in accordance with and authorized by law. Legal regulations ought to specify and explain the definition, the various alternatives available, the criteria governing their use, as well as the authority or authorities responsible for their implementation and enforcement.

Note that detention or deprivation of liberty must be in accordance with and authorized by law. If not, it is unlawful.

You may wish to refer the following documents:

- [UNHCR Detention Guidelines](#), Guideline No. 3 and Guideline 4.3, para. 36
- [UNHCR Second Global Roundtable on ATDs](#), para. 20
- The United Nations Standard Minimum Rules for Non-custodial Measures ([The Tokyo Rules](#)), adopted by General Assembly resolution 45/110 of 14 December 1990, para. 3.1

## STANDARD 3: PRINCIPLE OF MINIMUM INTERVENTION

In designing alternatives to detention, it is important that States observe the principle of minimum intervention and pay close attention to the specific situation of particularly vulnerable groups such as children, pregnant women, the elderly, people with disabilities or survivors of trauma and violence. The principle of minimum intervention means that the least intrusive measure possible should be applied, based on an individualized assessment which takes into account the particular needs, vulnerabilities, risk and circumstances of the person concerned.

Please read the following documents:

- [UNHCR Detention Guidelines](#), Guideline 4.3, par. 39
- [UNHCR Second Global Roundtable on ATDs](#), para. 21
- The United Nations Standard Minimum Rules for Non-custodial Measures ([The Tokyo Rules](#)), para. 2.6

In the European Union, the Court of Justice of the European Union (CJEU) [confirmed](#) in the case of Hassen El Dridi that the Return Directive establishes an “order in which the various, successive stages” of the removal procedure are to take place. This order foresees a “gradation, which goes from the measure which allows the person concerned the most liberty (...) to measures which restrict that liberty the most” (also called ‘sliding scale’).

Also, the principle means that the imposition of a custodial measure should not be automatically resorted to following a failure of a non-custodial measure. Rather, additional alternative measures should first be considered using the ‘sliding scale’ approach (see [Council of Europe’s analysis on ATDs](#)).



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## STANDARD 4: INDIVIDUAL ASSESSMENT OBLIGATION

Alternative measures should be based on an individual assessment of the asylum-seeker's particular circumstances. This means that each case needs to be decided individually. For example, the Inter-American Court of Human Rights 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. The requirement of individual assessment follows from the principles of necessity and proportionality, where the examination of the individual profile is necessary for deciding on the type of alternative to apply as well as the variation within a given alternative (e.g. if an applicant will be subjected to a reporting requirement, and if so, the frequency of such an obligation). Individual assessment also covers examination of a person's vulnerability, because deciding on detention of certain vulnerable people may make the detention arbitrary.

## STANDARD 5: CONFORMITY WITH INTERNATIONAL STANDARDS

Alternatives need to meet international standards both in terms of **ensuring effective access to rights and services to ensure an adequate standard of living**, but also in terms of safeguards to ensure their application is not unlawful or arbitrary. Full compliance with the principle of non-discrimination in the choice and application of the measure must be ensured, because Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires that the rights contained in the treaty, including Article 9 of the ICCPR mentioned earlier, are to be enjoyed equally and without discrimination. Therefore, when deciding on ATDs in the context of immigration detention, States cannot apply them on the basis of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

UNHCR *Detention Guideline* No. 4.3, para. 37 provides that alternatives to detention that restrict the liberty of asylum-seekers may impact their enjoyment of human rights and are subject to human rights standards.



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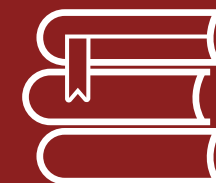
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Click on the listed standards to learn more about each of them.



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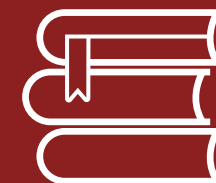
## PERIODIC REVIEW IN INDIVIDUAL CASES BY AN INDEPENDENT BODY

Some alternatives to detention may themselves impact a person's realization of their human rights, whether liberty or other rights. As a consequence, such measures also need to be in line with principles of necessity, proportionality, and other key human rights principles. Each alternative to detention must be assessed on its merits and individuals released subject to conditions that restrict their liberty or freedom of movement should enjoy the right to periodical review. Also, individuals subject to alternatives need to have timely access to effective complaints mechanisms as well as remedies, as applicable.

Please read paragraphs 12 to 16 from the [Summary Conclusions](#) of the Global Roundtable on ATDs.

The objective of periodic reviews is to reassess the necessity and proportionality of any conditions or restrictions imposed and to take into account any changes in individual circumstances over time. For example, such a review enables the authorities to identify changes that affect placement decisions, such as new vulnerability or risk factors, and identify any new or enduring barriers to case resolution (see [IDC's Handbook on ATDs](#), pp. 32–33).

Such a review prevents instances of arbitrary detention. Some regional legal frameworks already include the requirement of a periodic review of alternatives to detention. This is the case, for example, with the EU Return Directive (Article 15.2) and the EU Recast Reception Conditions Directive (Article 9.3).



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## DOCUMENTATION

All people subject to ATDs (but particularly those who are required to surrender their passports or other travel documents) need to be documented in a manner that enables them to provide evidence of their legal status in the country. This is important because they ensure that individuals who have already been screened by authorities are not picked up by another branch of government and re-processed unnecessarily. Documentation remains one of the key safeguards against arbitrary detention or re-detention for asylum-seekers, if they are picked up by different authorities (UNHCR, *Options Paper 2*, p. 4).

Such substitute documentation should also be appropriate to enable them exercise their economic, social and cultural rights. It can also be used by social support organizations to identify those individuals who are eligible for their services. It can also act as a de facto reporting mechanism if the identity documentation has to be reissued after a set of period of time or in particular circumstances (see *IDC's Handbook on ATDs*, p. 31).



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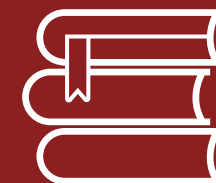
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## LEGAL ADVICE AND INTERPRETATION

Asylum-seekers should be able to access legal counsel. Individuals are in a better position to comply with authorities if they understand their legal status, the judicial and administrative procedures in which they are engaged, and the potential futures that await them. As one study concluded, “The single most important institutional feature that fostered trust was access to early, reliable legal advice and assistance” (see [article by Cathryn Costello and Ezra Kaytaz](#)). In addition, the use of legal counsel benefits the immigration system by creating a fairer system and increasing efficiency – and consequently reducing the overall costs – by ensuring that decision makers are not required to delay proceedings or spend time clarifying claims made by applicants without representation. Interpretation and translation are also extremely important to ensure vital information is effectively communicated (see [IDC’s Handbook on ATDs](#)).



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## RIGHT TO PRIVACY

The right to privacy is relevant to the discussion of ATDs in two respects. First, right to privacy is closely linked to the principle of minimum intervention of ATDs at the stage of deciding on ATDs. The measure that intrudes least on privacy and other rights should be applied. Secondly, right to privacy might be relevant when implementation of ATDs risks interfering seriously with the private life of the asylum-seeker. For example, constant electronic monitoring may interfere with privacy.

Article 12, Universal Declaration of Human Rights

Article 17(1), International Covenant on Civil and Political Rights

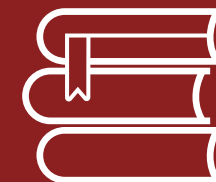
Article 16(1), Convention on the Rights of the Child

Article 11, American Convention on Human Rights

Article 5, American Declaration of the Rights and Duties of Man

Article 8, European Convention on Human Rights

Article 7, Charter of Fundamental Rights of the European Union



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## RIGHT TO FAMILY LIFE

The right to family life is relevant to the implementation modalities of ATDs. This right is guaranteed by a number of international and regional instruments. The right to family life might be relevant when ATDs risk interfering seriously with the family life of the asylum-seeker. For example, restrictions on freedom of movement might interfere with family life if a family member cannot be visited due to such restrictions or if visits are extremely rare.

Article 12 and 16(3) Universal Declaration of Human Rights

Article 23(1), International Covenant on Civil and Political Rights

Article 10(1), International Covenant on Economic, Social and Cultural Rights

Article 18, African Charter on Human and Peoples' Rights

Article 17(1), American Convention on Human Rights

Article 6, American Declaration of the Rights and Duties of Man

Articles 2 and 8, European Convention on Human Rights

Article 9, Charter of Fundamental Rights of the European Union



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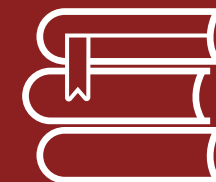
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## ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Lack of effective access to fundamental economic, social and cultural rights in the context of alternatives to detention can lead to an individual's marginalization or destitution and undermine the effectiveness of alternative measures (see [Jesuit Refugee Service, Alternatives to Detention of Asylum Seekers, Working paper](#), p. 7). It is important that all people subjected to ATDs be provided with adequate material support or access to means of self-sufficiency (including the right to work); thus they would be able to meet their basic needs (including food, clothing, housing, medical care, necessary social services, etc.). They should have access to services and support by the State, even if they are living in the community. The ability to meet basic needs is fundamental to human life and is protected and reinforced in various human rights instruments. In the EU, the Reception Directive requires Member States to provide asylum seekers with "an adequate standard of living" (Article 17.2) which guarantees their subsistence and protects their physical and mental health.

There is evidence that asylum-seekers are better able to remain in compliance with authorities if they can meet their basic needs while in the community. Asylum-seekers living in stable accommodation appear to be in a better position to remain in contact with authorities than those who have become impoverished or homeless (see [IDC's Handbook on ATDs](#), p. 27).



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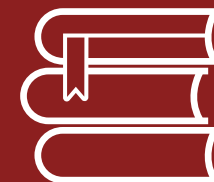
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Therefore, the following economic, social and cultural rights shall be guaranteed when implementing ATDs (list not exhaustive):

- Right to adequate housing. The ATD should be coupled with access to housing (for example, by providing a lump sum of money to pay for housing, or facilitating contact to find accommodation, etc.). Where there is no housing mechanism, States should foresee mechanisms that support the person to live in the community (especially if the person is not allowed to work). Asylum-seekers cannot be left to be destitute in the streets, e.g. with a report order. Such an ATD would not be considered appropriate and some States in Europe have been condemned by regional human rights bodies for placing asylum-seekers in situations that amount to inhuman and degrading treatment.

- Right to work, which includes the right to the opportunity to earn a living. In some cases, individuals are able to provide for their own needs through legal work. A number of countries provide asylum-seekers with the right to work while their status is being determined. However, those excluded from the labour market may need financial aid or direct provision of goods (see [IDC's Handbook on ATDs](#), p. 30). In addition, access to labour markets can reduce the economic burden on States, empower individuals to comply with asylum or migration processes based upon a sense of self-reliance, and facilitate integration (see [IDC's Handbook on ATDs](#), p. 60).
- Right to health (physical and mental), basic welfare (including social security), right to education, protection of family, right to cultural life (please consult Module 5 to learn more).

Non-government organizations often play an important role in providing for basic needs, with or without government or other sources funding.

Please note, however, that simply providing legal entitlements to health care, employment or education is often not enough to ensure that people can access these effectively in practice. For example, frontline health care providers may not be aware of their obligations to provide treatment to migrant groups and the cost of accessing health services can be prohibitive. Or it may be difficult to obtain a work permit or employment. Work is particularly hard to secure with temporary status with short-term employment rights or when limited to working in set industries. An absence of documentation and/or previous school records can result in education providers denying access. In some countries, children are only able to access informal learning centres rather than government schools, preventing them from receiving an officially recognized qualification (see [IDC's Handbook on ATDs](#), p. 30).

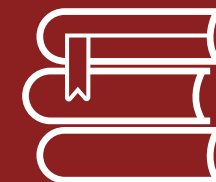
Article 11, International Covenant on Economic, Social and Cultural Rights

Article 25, Universal Declaration of Human Rights

Article 26, American Convention on Human Rights

Article 22, African Charter on Human and Peoples' Rights

Article 27, Convention on the Rights of the Child



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## EXAMPLES OF ACCESS TO SOCIO-ECONOMIC RIGHTS

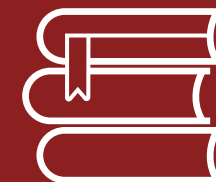
In Belgium, although families with children that file an asylum claim at the border are not placed in open reception centres, they benefit from a high level of services such as health care, education, in kind/financial assistance and social/psychological assistance, in or around the 'return houses'. Children between the age of 6 and 12 have good access to schooling because agreements have been concluded between the return houses and primary schools (see [Odysseus Network Report](#), p. 105 and 107).

In Sweden, children receive the same access to health care services as residents do. Adults benefit from health services for treatments that cannot be postponed. This may include psychological assistance. The challenge for accessing psychological support is probably greater for asylum-seekers who do not stay at the reception facilities, because such access depends on the discretion of the caregiver. Therefore, the involvement of NGOs and civil society is important. Asylum-seekers have immediate access to the labour market if they can prove their identity or help the authorities establish their identity. They do not have to apply for a work permit (see [Odysseus Network Report](#), p. 108).

In [Hungary](#), when residing in the community, asylum-seekers have access to basic rights (accommodation, medical assistance, education). Psychological assistance and legal assistance are provided by UNHCR partners.

In [Indonesia and Mexico](#), when residing in the community, asylum-seekers have access to accommodation, medical and psychological assistance, education and legal assistance.

In [Zambia](#), the most vulnerable people have access to basic rights, through a UNHCR partner.



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## PROHIBITION OF INHUMAN OR DEGRADING TREATMENT

Alternatives to detention shall respect the dignity of the individual and should not be degrading or inhuman. This right is guaranteed by a number of international and regional instruments.

Article 7, International Covenant on Civil and Political Rights

Article 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

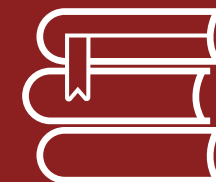
Article 3, European Convention on Human Rights

Article 25, American Declaration of the Rights and Duties of Man

Article 4, Charter of fundamental rights of the European Union

Article 5, American Convention on Human Rights

Article 5, African Charter on Human and People's Rights



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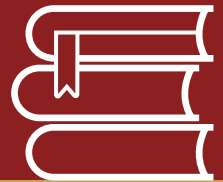


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# INTERIM ASSIGNMENT

Identify your country's (operation) national standards on alternatives to detention and compare them with the international standards analysed in this module. You may use the table below for such a comparison.

Standards	Yes	No	Description
Obligation to consider alternatives: Does your national legislation explicitly or implicitly (e.g., through the principle of proportionality and necessity) envisage the obligation of the authorities to consider ATDs while deciding on immigration detention cases?			
ATDs established by law: Are ATDs regulated by laws or only applicable in practice following a policy decision? If so, which aspects are regulated? If regulated by legislation, which level of law provides for ATDs?			
Minimum intervention: Do ATDs applicable to asylum-seekers who are subject to immigration detention respect the principle of minimum intervention? If so, how?			
Individual assessment: Are individual assessments carried out in detention cases? Who is in charge of these assessments? Are individual circumstances taken into account when deciding on ATDs? If so, is this assessment guaranteed by laws or practice?			
Access to rights: Is access to the following rights ensured and, if so, how (specify under each right below)?			
1. Periodic review: Is the possibility of periodic review of immigration detention/ATDs available in the laws applied to asylum-seekers? If so, is this review carried out by an independent body, or the body which made the original decision on detention/ATD? How often is this periodic review? Who can initiate it?			



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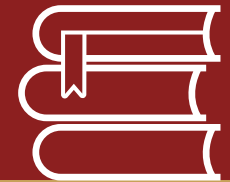
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Standards	Yes	No	Description
2. Documentation: Are documents provided for asylum-seekers subject to ATDs? If so, which ones? Do these document protect the asylum-seeker against (re)-detention?			
3. Legal advice: Is free legal aid provided for in law(s) and implemented in practice? If so, how and by whom?			
4. Interpretation: Are interpretation services provided for in law(s) and implemented in practice? If so, how and by whom?			
5. Right to privacy: Are guarantees of privacy for people subject to ATDs established by law? Are such guarantees applied in practice? If so, which ones?			
6. Right to family life: Is the right to family of asylum-seekers subject to ATDs established by laws? Is this right applied in practice? If so, how?			
7. Prohibition of inhuman and degrading treatment: Are guarantees against inhuman and degrading treatment provided for in law for asylum-seekers subject to ATDs? Are such guarantees applied in practice? If so, which ones?			
8. Ensuring economic, social and cultural rights: Do asylum-seekers subject to ATDs have access to economic, social and cultural rights? Is this access guaranteed by laws, practice? If so, which rights are guaranteed?			



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### SELF-CHECK

#### QUESTION 1

Where does the obligation to consider alternatives to detention come from?

Select one or more of the following answer(s):

a) It derives from the rule that detention of asylum-seekers shall be a measure of last resort.

b) It derives from the principles of necessity and proportionality of detention.

c) It derives from and follows the right to liberty and security of person.



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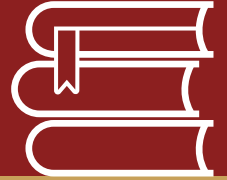
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## QUESTION 2

Why should an individual assessment be carried out in order to apply ATDs?

Select one or more reason(s).

Reasons	Why should an individual assessment be carried out in order to apply ATDs?
1. Vulnerabilities can be identified only during an individual assessment.	
2. States prefer an individual assessment because this is a good tool for managing migration.	
3. An individual assessment helps address the specific circumstances of the asylum-seeker.	
4. Lack of individual assessment may lead to arbitrariness of restrictions.	
5. Individual assessment justifies the application of ATDs	
6. Individual assessment is required by international law.	
7. It is possible to determine whether restrictions are necessary and proportionate only if an individual's situation is known.	



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The exceptional character of immigration detention entails the obligation of States to ensure that alternatives to detention are considered and made available.

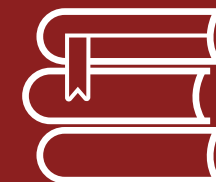
This obligation is based on the principles that:

- Seeking asylum is not unlawful;
- Liberty is the default position; and
- Detention is a measure of last resort.

The international legal framework on ATDs includes the requirements of:

- Obligation to consider ATDs;
- Proper legal basis in national law;
- Minimum intervention;
- Individual assessment; and
- Access to rights.

Alternatives will only be appropriate if they ensure access to rights.





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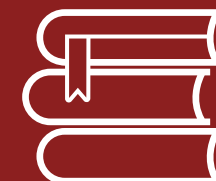
### FURTHER READINGS

Factsheet on international and regional law and practice on States' obligations in connection with alternatives to detention

IDC, *There are Alternatives: A handbook for preventing unnecessary immigration detention (revised edition)*, 2015.

Cathryn Costello and Esra Kaytaz, *Building Empirical Research into Alternatives to Detention: Perceptions of asylum-seekers and refugees in Toronto and Geneva*, PPLA/2013/02.REV.1, June 2013

UNHCR, *Second Global Roundtable on Reception and Alternatives to Detention: Summary of deliberations*, August 2015.



#### ALTERNATIVES TO DETENTION

#### MODULE 2

CHAPTER 1

CHAPTER 2

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# Alternatives to Detention



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.

The views expressed herein can in no way be taken to reflect the official opinion of the European Union.