



ALTERNATIVES TO IMMIGRATION DETENTION:



FOSTERING EFFECTIVE RESULTS



PRACTICAL GUIDANCE

**EXAMPLE OF POTENTIAL
DESIGN - CHAPTER 1**



1st PRELIMINARY DRAFT

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I. WHY ALTERNATIVES TO IMMIGRATION DETENTION?

1.1 The right to liberty

The consideration of alternatives to detention derives from the **right to liberty and security of person** that is enshrined in **all core international human rights instruments**.

At the Council of Europe level, deprivation of liberty is lawful only when it falls within the **exhaustive list of permissible exceptions** under Article 5 of the European Convention on Human Rights (hereafter “the Convention”). The central aim of Article 5 of the Convention is to protect **all individuals** within the jurisdiction of Member States from **arbitrary detention**.

Article 5 § 1(f) of the Convention **permits deprivation of liberty** in two different situations in the context of migration:

FIRST LIMB:

- detention to prevent an unauthorized entry into the country

SECOND LIMB:

- detention of a person against whom action is being taken with a view to his or her deportation or extradition

The notion of deprivation of liberty is understood as contemplated by the relevant jurisprudence of the European Court of Human Rights (hereafter “the Court”), the details of which are thoroughly explored in the aforementioned CDDH-Analysis.

1.2 Criteria for permissible exceptions to liberty

Overall, any deprivation of liberty in the context of migration must adhere to the general criteria developed in the case law of the Court.

- 1 Detention must be provided for in national law.
- 2 Detention must be carried out in good faith and closely connected to the aim pursued.
- 3 The place and conditions of detention must be appropriate.
- 4 The length of detention should not exceed that which is reasonably required for the purpose pursued.
- 5 Sufficient procedural safeguards must be in place, such as the provision of reasons for detention, access to legal assistance and representation, and effective remedies.
- 6 Proceedings should be carried out with due diligence.
- 7 There must be a realistic prospect of removal.

1.3 Immigration detention - exceptional measure of last resort

Immigration detention should be an **exceptional measure of last resort**. This entails that detention can only be justified if, **after a thorough and individual assessment of the particular circumstances in each case**, it has been established that **less coercive measures are insufficient**. According to the general principle of proportionality, States are obliged to examine alternatives to detention before any decision to detain is made.

1.4 Alternatives to immigration detention

There is broad consensus that alternatives to immigration detention are **non-custodial measures that respect fundamental human rights and allow for individual options other than detention**. This can include a range of different practices that may be employed to avoid detention.

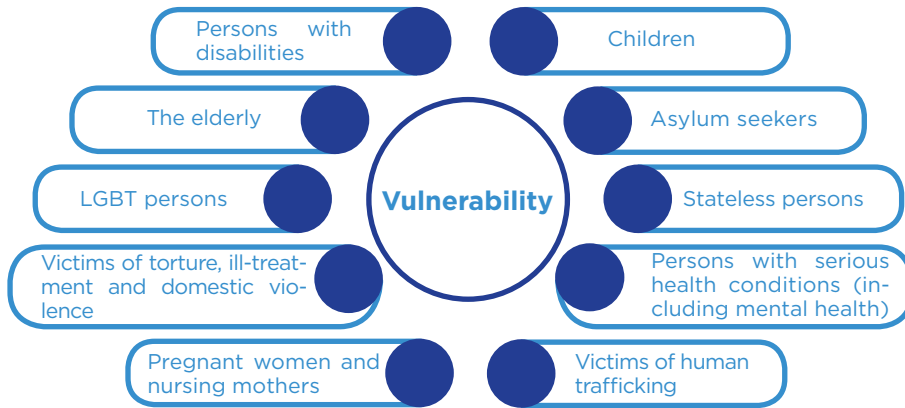
1.5 Human rights standards applicable to alternatives

The implementation of alternatives is as such subject to important human rights standards, such as the **principle of proportionality and non-discrimination**. In addition, alternatives should:



The necessity of examining alternatives is of particular importance as regards **persons in a vulnerable situation**. Due consideration must be given to the **special needs** of persons concerned, ensuring that they have access to **appropriate protection and care**. While lists or categories of vulnerable groups can vary between different international instances - with increasing focus on what constitutes being in a **context-specific vulnerable situation** - the following persons or groups of persons have been specifically addressed by one or more international bodies in non-exhaustive, indicative listings:

1.6 Vulnerability - special needs and protection



- **Vulnerable individuals/groups** and/or persons in a vulnerable situation require **special protection**.
- This **narrows** both the **scope for detention** and the **State's margin of appreciation**.
- In such cases, detention will be unlawful if the aim pursued by detention can be **achieved by other less coercive measures**.
- Alternatives must be thoroughly considered and **detention used as a last resort**.
- **States should detect vulnerabilities** that may preclude detention by virtue of vulnerability assessment procedures.

As to children in particular, their **extreme vulnerability** takes precedence over their immigration status, and **their best interests** should be a **primary consideration in all actions** concerning them. This entails, *inter alia*, that alternatives **must** be sought. According to the Court's case law, detention can only be admissible in exceptional circumstances and for a very short period. Other international bodies have further concluded that immigration detention always contravenes the best interests of the child, maintaining that in this context children should **never be detained**.

Children

The principle of the **best interests of the child** must be a primary concern. The **extreme vulnerability** of the child takes precedence over immigration status. Children have specific needs based on their **age, lack of independence and status**.

The fact that children are accompanied by their parents does not release the authorities from their obligation to protect the children. All efforts should be made to maintain **family unity**.

Alternatives that allow children to remain in non-custodial, community-based contexts **must** be developed.

Varied international instances have called for the prohibition of immigration detention of children.

1.7 The benefits of effective alternatives

1.7.1 COMPLIANCE WITH IMMIGRATION PROCEDURES

When implemented effectively, alternatives can improve migration governance by **promoting compliance with immigration procedures**. Alternatives have likewise been shown to **help stabilise individuals** who are in a vulnerable situation. The European Commission has, among others, noted that the benefits of alternatives to immigration detention "may include higher return rates (including voluntary departure), improved co-operation with returnees in obtaining necessary documentation, financial benefits (less cost for the State) and less human cost (avoidance of hardship related to detention)."

1.7.2 RESPECTING HUMAN RIGHTS AND AVOIDING SUFFERING

The use of alternatives to immigration detention is **necessary to meet international human rights standards** in particular cases. These standards require that special attention be given to vulnerable individuals and groups, particularly children. At the individual level, alternatives can **prevent the serious consequences** that detention can have on **physical and psychological health** and well-being. A place of detention is inherently a place of risk and the detention of vulnerable persons is particularly problematic. **The impact of detention on children can be extreme**, including long-term effects on their cognitive and emotional development.

1.7.3 COST-EFFECTIVENESS

In so far as information is publically available, detention has been shown to be **twice and up to seventeen times more expensive** than alternatives. Obviously, cost-benefits can **only be realised if alternatives are used *in lieu* of detention**, i.e. help to reduce the overall detention estate. If alternatives are merely expanded *in addition* to maintaining or even increasing the existing immigration detention capacity of States, they will unavoidably **increase overall costs**. Such “net widening” has been roundly criticised within the criminal justice sector.

Compliance with immigration procedures

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Respecting human rights

The use of alternatives to immigration detention is necessary to meet international human rights standards in particular cases.

Saving costs

Depending on the context, detention has been shown to be twice and up to seventeen times more expensive than existing alternatives.

1.8 Alternatives may be for all

Overall, it is important to note that alternatives to detention can be successfully applied also to persons who are not deemed particularly vulnerable. A number of persons may be fully **capable and likely to comply** with procedures outside of detention without having been identified with special needs. The development of a **wide range of alternatives** could increase the number of persons suited to particular alternatives, contributing to reductions in unnecessary detention and cost-efficiency.