

# COVID-19: A RECKONING OF THE IMMIGRATION DETENTION SYSTEM AND A CALL FOR ALTERNATIVES TO DETENTION PROGRAMS

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## I. INTRODUCTION: THE COVID-19 PANDEMIC EXPOSES IMMIGRATION DETENTION CONDITIONS

On September 8, 2020, media sources around the world captured the raging flames consuming the Moria refugee camp on the island of Lesbos, Greece. The devastating fire displaced 11,000 refugees from the camp, an amount four times the number of persons the facility could legally sustain.<sup>1</sup> This tragedy brought to light issues of detaining refugees, asylum seekers and stateless persons that have concerned immigration advocates for decades, but that have only worsened during the Covid-19 pandemic. Since the outbreak of the pandemic, strict quarantine measures and the closure of state borders have led to overcrowding in immigration detention centers, which have subsequently become hot spots for Covid-19 infections. The devastating effects of the global pandemic on the most vulnerable members of society, including refugees, asylum seekers and stateless person, have awakened an interest in alternatives to detention programs around the world. These programs, and community-based alternatives to detention in particular, have the potential to become permanent alternatives within the immigration detention system.

## II. CURTAILMENT OF THE RIGHT TO FREEDOM OF MOVEMENT OF REFUGEES DURING THE COVID-19 PANDEMIC

The freedom of movement of refugees, asylum seekers, and stateless persons constitutes one of the primary objectives and purposes of

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1. *Aftermath of Moria Refugee Camp Fire – Photo Essay*, THE GUARDIAN (Dec. 2, 2020, 2:00 PM), <https://www.theguardian.com/artanddesign/2020/dec/02/aftermath-moria-refugee-camp-fire-photo-essay>.

the 1951 Convention Relating to the Status of Refugees (“1951 Convention”) and the 1967 Protocol to that Convention. Article 26 of the 1951 Convention provides that “each contracting state shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory.”<sup>2</sup> The 1951 Convention reserves the curtailing of refugees’ right to freedom of movement through detention as a last resort. The U.N. High Commissioner for Refugees (UNHCR) Detention Guidelines state that “detention can only be exceptionally resorted to for a legitimate purpose [and w]ithout such a purpose, detention will be considered arbitrary.”<sup>3</sup> The UNHCR’s guidelines state that detention must not last so long as to be arbitrary or illegitimate,<sup>4</sup> but since the outbreak of Covid-19, quarantines and state border closures have limited refugees, asylum seekers and stateless persons’ freedom of movement for arbitrarily long periods of time.<sup>5</sup>

During the Covid-19 pandemic, countries around the world have relied on the premise that the detention of refugees, asylum seekers, and stateless persons does not constitute arbitrary detention under the UNHCR guidelines if carried out for the purpose of protecting the public health of the detaining state.<sup>6</sup> The UNHCR details in its guidelines that “carrying out health checks on individual asylum-seekers may be a legitimate basis for a period of confinement . . . as a preventive

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2. United Nations Convention Relating to the Status of Refugees art. 26, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

3. UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Guideline 4.1 (2012), <https://www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html> [hereinafter UNHCR Guidelines].

4. *See id.* Guideline 6 (“The length of detention can render an otherwise lawful decision to detain disproportionate, and therefore, arbitrary.”).

5. Spain has detained new arrivals of refugees at the Barranco Seco camp in freezing, cramped and tented conditions for periods that exceed the 72-hour detention limit in place at the facility. *See* Tony Winterburn, *Canary Island Immigrants Suffer Freezing Cold Temperatures and Cramped Conditions*, EURO WEEKLY NEWS (Jan. 16, 2021 10:09 AM), <https://www.euroweeklynews.com/2021/01/16/canary-island-immigrants-suffer-freezing-cold-temperatures-and-cramped-conditions/>; Saudi Arabia has arbitrarily detained hundreds (or thousands) of Ethiopian migrants for months in unsanitary and abusive facilities without the ability to legally challenge their detention. *See* Immigration Detention in Saudi Arabia During Covid-19, HUMAN RIGHTS WATCH (Oct. 19, 2020), <https://www.hrw.org/news/2020/10/19/immigration-detention-saudi-arabia-during-covid-19>.

6. UNHCR Guidelines, *supra* note 3, Guideline 4.1.2.

measure in the event of specific communicable diseases or epidemics.”<sup>7</sup> Yet, such restrictions should only last as long as strictly necessary to ensure an individual’s health status, as “any extension of [a refugee’s] confinement or restriction on movement on this basis should only occur if it can be justified for the purposes of treatment [and] only until the treatment has been completed.”<sup>8</sup> Furthermore, in addition to serving a permissible purpose, the restriction on movement must also be necessary to protect the detained person.<sup>9</sup> However, due to the curtailment of refugees’ freedom of movement and the halt of many immigration proceedings, immigration detention facilities around the world have become overcrowded and unable to maintain social distancing and basic sanitary measures, leading to massive outbreaks of Covid-19 cases—many of which are underreported.<sup>10</sup> For example, the Farmville ICE Detention Center in Virginia reported that 75% of its detainees had contracted Covid-19 over the summer months of 2020.<sup>11</sup> At the Tenerife’s Hoya Fria CIE detention center in Spain, 31% of the detainees had contracted the virus in November 2020.<sup>12</sup> To put these numbers into perspective, the number of deaths of ICE detainees in the United States during 2020 tripled from the previous year.<sup>13</sup> Most, if not all, of these deaths were attributed to a Covid-19 infection.<sup>14</sup> Needless to say, given these statistics, rather than protecting detainees, extended confinement has in fact increased their risk of contracting this often-deadly virus.

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7. *Id.*

8. *Id.*

9. UNHCR, *Legal and Protection Policy Research Series – Alternatives to Detention of Asylum Seekers and Refugees* 13, POLAS/2006/03 (April, 2006), <https://www.refworld.org/pdfid/4472e8b84.pdf>.

10. Carmen Sesin, *Covid-19 Cases Among Immigrant Detainees Could Be 15 Times Higher than ICE Reports, Study Says*, NBC NEWS (July 1, 2020, 5:46 PM), <https://www.nbcnews.com/news/latino/covid-19-cases-among-immigrant-detainees-could-be-15-times-n1232700>.

11. *Immigration Detention and Covid-19 – Immigration enforcement strategies must change to help alleviate the worst damage of Covid-19*, BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19> (last updated Mar. 8, 2021).

12. Natalia Vargas, *El Brote de Covid-19 en Hoya Fria Afecta a 21 Personas y Vuelve a Evidenciar las Carencias del CIE*, [The Covid-19 Outbreak in Hoya Fria Affects 21 People and Reveals the Shortcomings of the CIE] EL DIARIO (Feb. 3, 2021 7:02 PM), [https://www.eldiario.es/canariasahora/migraciones/cie-hoya-fria-brote-tenerife-covid\\_1\\_7191231.html#](https://www.eldiario.es/canariasahora/migraciones/cie-hoya-fria-brote-tenerife-covid_1_7191231.html#).

13. *Id.*

14. *Id.*

In order to comply with international human rights law and national law and to maintain the necessary sanitary conditions and social distancing measures, some countries initiated large-scale releases of immigration detainees. European nations, such as Spain, ordered the release of migrants from detention centers in order to comply with their own national law standards.<sup>15</sup> The pandemic also prompted legal challenges to the detention of refugees around the world, with litigation leading to the release of hundreds of migrants and refugees. In the United Kingdom, for example, a legal challenge against the Home Office, the agency responsible for immigration, brought by the non-profit Detention Action secured the release of 300 individuals.<sup>16</sup> In the United States, the American Civil Liberties Union won the release of two ICE immigrant detainees held in a facility in Massachusetts due to their high risk of illness or death in the event of a Covid-19 infection.<sup>17</sup> Courts in Portugal, France, Japan, Indonesia, and the Netherlands also ordered facilities to release immigrants.<sup>18</sup>

### III. EXAMINATION OF ALTERNATIVES TO DETENTION PROGRAMS AND COMMUNITY-BASED ALTERNATIVES DURING THE COVID-19 PANDEMIC

While litigation proved moderately successful in compelling immigration agencies around the world to release immigrant detainees, compliance with international human rights law and the 1951 Convention requires that alternatives to detention programs become the norm for securing the right to freedom of movement in a post-pandemic world. Despite hopes for mass vaccination and an impending return to a state of normalcy, the Covid-19 pandemic will unavoidably have lingering effects, in particular with regards to social distancing

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15. Karina Piser, *The End of Immigration Detention Doesn't Mean the End of Fortress Europe*, FOREIGN POLICY (July 31, 2020, 11:02 AM), <https://foreignpolicy.com/2020/07/31/coronavirus-asylum-end-immigration-detention-spain-france-end-of-fortress-europe/>.

16. Diane Taylor, *Home Office Releases 300 from Detention Centers Amid Covid-19 Pandemic*, THE GUARDIAN, (Mar. 21, 2020, 3:08 PM), <https://www.theguardian.com/uk-news/2020/mar/21/home-office-releases-300-from-detention-centres-amid-covid-19-pandemic>.

17. *After ACLU Sues, ICE Releases 2 Detainees with Medical Conditions at Plymouth*, THE ASSOCIATED PRESS (Mar. 30, 2020), <https://www.wbur.org/news/2020/03/30/bristol-jail-releases-detainees-coronavirus>.

18. Piser, *supra* note 15.

measures, that will require non-detention alternatives to become a permanent part of the future of the immigration system.<sup>19</sup> Yet, for states to comply with Human Rights and International Law, alternatives to detention programs must respect the individual's fundamental rights and freedom of movement that lie at the core of the 1951 Convention and the 1967 Protocol.<sup>20</sup>

The justifications expressed by states for their continued use of detention instead of alternatives to detention are unfounded. States justify their detainment of asylum seekers and refugees by citing the need "to prevent absconding and, correspondingly, to ensure compliance" with immigration procedures.<sup>21</sup> However, case studies prior to the Covid-19 pandemic suggest that alternatives to detention programs may ensure similar rates of compliance with immigration proceedings. Alternatives to detention programs include "bail, bonds or sureties" payment releases; police reporting requirements for the period of the individual's release; electronic monitoring and home curfew measures; release upon surrendering passports and/or other documentation; release upon a designated residence in a state-sponsored accommodation; and community-based programs.<sup>22</sup> Several countries, such as Canada, have implemented a number of these programs. In 2018, the Canadian government, alongside non-governmental organizations such as the Salvation Army and the Toronto Bail program, expanded a bail program that provided "supervision and case management services to individuals released into the community."<sup>23</sup> The bail program had a

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19. *See id.* (Arguing that immigration advocates believe that pandemic-driven releases of immigrant detainees could prompt a reckoning for the broader system of immigration detention).

20. *See* 1951 Convention, *supra* note 2 (The Convention affirms the United Nations' concern to assure that refugees enjoy the widest possible exercise of their fundamental rights and freedom, and details certain fundamental rights provisions, such as the protection from refoulement (art. 33), protection against unlawful expulsion or detention (art. 32), the right to employment, housing and education (arts. 17, 21 and 22), access to the courts (art. 16), and freedom of movement (art. 26)); *See Protecting Refugees: Questions and Answers*, UNHCR, (Feb. 1, 2020), <https://www.unhcr.org/publications/brochures/3b779dfe2/protecting-refugees-questions-answers.html> (stating that a refugee should receive at least the same rights and basic help as any other foreigner who is a legal resident).

21. *Legal and Protection Policy*, *supra* note 9.

22. *Id.*

23. *A Better Way: Community-Based Programming as an Alternative to Immigrant Incarceration*, NATIONAL IMMIGRANT JUSTICE CENTER, (April 22, 2019), <https://immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration#canada>.

94% compliance rate and cut costs substantially—\$10-12 per day, per person compared to \$179 per day, per person for detention.<sup>24</sup> Other countries that have pushed for similar alternatives have reported diminishing costs compared to a detention model, as well as similar compliance rates.<sup>25</sup>

Alternatives to detention measures like bail bonds or electronic monitoring, however cost-effective and compliance-enforcing they may be, comprise paternalistic policies that curtail the individual's fundamental rights of dignity, liberty, choice, and freedom of movement similarly to, if not more so than, explicit detention. Such alternatives therefore fail to protect core fundamental rights guaranteed by international human rights law and the 1951 Convention.

On the other hand, community-based alternatives to detention, such as the ones implemented during the Covid-19 pandemic, may ensure the balance between states' interests and the protection of fundamental rights of refugees. The Covid-19 pandemic has unveiled a number of community-based alternatives to detention that show promising results and the potential for an end to immigration detention in the future. At the height of the Covid-19 pandemic, the U.N. Network on Migrations called for states to institute community-based alternatives to detention, such as accommodating refugees in the community through relatives, friends or diaspora networks, in shelters operated by civil society organizations, and in hotels or other vacant vacation facilities.<sup>26</sup> Following this call for community-based alternatives to detention, several nations around the world instituted similar initiatives. Some countries allowed for the release of detainees into the community. Spain, following a national court order for the release of migrants from detention centers, released detainees into reception facilities run by civil society organizations.<sup>27</sup> Migrants were not required to stay in the shelters and were issued work permits to work in the agricultural sector.<sup>28</sup> In Mexico, the government released detainees into public

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24. *Id.*

25. *Legal and Protection Policy*, *supra* note 9 at 49-50.

26. *Covid-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?*, U.N. NETWORK ON MIGRATION (2020), [https://migrationnetwork.un.org/sites/default/files/docs/un\\_network\\_on\\_migration\\_wg\\_atd\\_policy\\_brief\\_covid-19\\_and\\_immigration\\_detention\\_0.pdf](https://migrationnetwork.un.org/sites/default/files/docs/un_network_on_migration_wg_atd_policy_brief_covid-19_and_immigration_detention_0.pdf).

27. *Room for Hope – IDC Briefing Note: An Overview of Promising Alternatives to Detention in the Era of Covid-19*, INTERNATIONAL DETENTION COALITION (Oct. 2020), <https://idcoalition.org/wp-content/uploads/2020/11/Covid-19-Briefing-Paper-2020-ENGLISH.pdf>.

28. *Id.*

shelters and public accommodations, offered asylum seekers a stipend for accommodation and food, and granted access to workshops to understand their rights during immigration procedures.<sup>29</sup> Certain states, including the United Kingdom and Japan, relaxed reporting requirements like the requirement that migrants and refugees under provisional release report to immigration authorities.<sup>30</sup>

Despite the lack of statistics on the success rate of community-based alternatives to detention programs during Covid-19, previous studies have examined the practical effectiveness of these alternatives in meeting states' main objective of "preventing absconding and ensuring compliance with [immigration] procedures."<sup>31</sup> These studies suggest that compliance with immigration proceedings is not a significant problem, since "people go to extreme lengths to enter these territories . . . and have no obvious reason to disregard or abandon such system so long as they have any hope of gaining legal status or some right to remain."<sup>32</sup> Reports also suggest that the main factors influencing the effectiveness of these measures include refugees' access to legal advice, whether persons are informed of their rights and obligations, refugees' understanding of the conditions and consequences of their release, provision of adequate material support and accommodations, and more importantly, the existence of community groups and community ties in order to create guarantors or sponsors.<sup>33</sup> Alternative measures have also proven futile if persons are kept from essential services and labor markets for extended periods of time.<sup>34</sup>

While many community-based alternatives to detention, such as Spain's issuance of agricultural permits, will remain valid only during the Covid-19 pandemic, these measures exemplify successful approaches for future alternatives to detention programs.<sup>35</sup> Community-based alternatives to detention provide promise for improving immigration systems by strengthening the community ties of refugees and asylum seekers, which in turn create an incentive for those persons to appear in immigration proceedings. Those released into the community may receive additional support in understanding the immigration

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29. *Id.*

30. *Id.*

31. *Legal and Protection Policy*, *supra* note 9 at 24.

32. *Id.* at 25.

33. *Id.* at 45.

34. *Id.* at 47.

35. *Room for Hope – IDC Briefing Note: An Overview of Promising Alternatives to Detention in the Era of Covid-19*, INTERNATIONAL DETENTION COALITION (Oct. 2020), <https://idcoalition.org/wp-content/uploads/2020/11/Covid-19-Briefing-Paper-2020-ENGLISH.pdf>.

process and their rights, thanks to the resources of civil society organizations. Also, community-based alternatives may further increase refugees and asylum seekers' likelihood of thriving in a new country of residence after having built community-based relations throughout the immigration process. In addition, community-based alternatives that provide working permits will also reduce costs while bolstering rates of compliance. Lastly, and most importantly, community-based alternatives to detention, unlike other more restrictive measures, maintain the fundamental rights and freedoms of refugees that are the main objectives of the 1951 Convention and international human rights law. Thus, given the need to comply with Covid-19 social distancing and hygiene measures in a post-pandemic world and the benefits of these alternatives to the immigrant population and the state at large, it is encouraging that more states may choose to adopt community-based alternatives as permanent measures in their immigration systems.

#### IV. CONCLUSION

In the wake of Covid-19 and the reckoning of a post-pandemic world, states must halt the detention of refugees, asylum seekers, and stateless individuals in order to comply with the necessary safety, hygiene, and social distancing measures intended to curtail the ongoing spread of Covid-19 infections. The alternatives to detention necessitated by the pandemic may transform into permanent initiatives post-Covid-19. Alternatives to detention have proven more cost-effective than detention, while also satisfying the states' objective of preventing absconding and ensuring compliance with immigration proceedings. While there exists a wide array of alternatives to detention, including bail bonds and monitoring measures, community-based alternatives to detention, whether instituted by state or non-governmental actors, best assure states' compliance with the 1951 Convention and international human rights law by protecting the fundamental right of refugees, asylum seekers, and stateless individuals to move freely.