

Annex to Policy Brief

COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?

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This Annex aims at revisiting some of the promising responses on COVID-19 and immigration detention identified in the [Policy Brief](#) published by the UN Network on Migration in April 2020, including obstacles in implementation that have emerged since. By taking a close look at some developments observed over the past months by members of the UN Migration Network Working Group on Alternatives to Detention, this document identifies both worrying trends and opportunities to address these.

The policy brief and its annex focus on helping States and other stakeholders to operationalize Objective 13 of the Global Compact for Migration, where governments reaffirmed the commitment “to prioritize non-custodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants”. Under the current international framework this translates into using detention as a measure of last resort only and never resorting to detention for children. Even when immigration detention is used as an exceptional measure of last resort, the norm should be non-detention for migration governance purposes. This norm of non-detention is practised by a number of States and has been maintained by them during the COVID-19 pandemic.

The ongoing COVID-19 pandemic continues to pose immense risks to those held in immigration detention, underscoring the ongoing need for governments that rely on detention or any other forms of deprivation of liberty to adopt and implement appropriate alternative measures.¹ In a context where new challenges arise every day and promising practices are being reversed, the practical guidance provided in the Policy Brief remains as relevant as ever. Alternatives to immigration detention allow individuals and families to live safely in the community with access to essential services, while engaging with their migration procedures. They facilitate access to long-term stability and support, something that is not possible in a detention setting.

In the context of the COVID-19 pandemic, moving away from immigration detention reduces the risk of spreading the virus and allows the inclusion of migrants in COVID-19 responses and recovery plans and efforts.

The pandemic has provided an opportunity for countries that employ detention or any other forms of deprivation of liberty for migration governance purposes to accelerate the use of alternatives, showing how migration can be governed without resorting to detention. It is now crucial that the positive developments and lessons learned during this crisis are taken forward. The Working Group calls on governments and stakeholders to sustain and expand the use of alternatives to move away from the use of immigration detention, thus operationalizing Objective 13 of the Global Compact for Migration.

¹ Immigration detention is defined here as any setting in which a person is deprived of liberty for reasons related to migration, regardless of its physical location, the name or justification used, or its classification in domestic law. Alternatives to immigration detention is not a legally defined term and has therefore been interpreted in distinct ways. Regardless of these different approaches, there is broad consensus that alternatives to immigration detention are a wide range of non-custodial measures and practices that, based on human rights, avoid the use of detention for reasons related to migration.

Promising responses and worrying trends since April 2020

1- Promising responses despite gaps in implementation

Some of the promising practices identified in the Policy Brief published in April 2020, including releases from immigration detention and moratoria on the use of migration-related detention, are still in place. However, operationalizing these practices to ensure that migrants who have not been detained or who have been released from detention are channelled into alternatives with access to rights, services, and relevant procedures has proved to be challenging in many countries. Instances of destitution, homelessness or immediate deportations without due process after release have been observed.

In some cases, where the situation did not allow for individuals to be returned, deportation proceedings were postponed or suspended, and migrants were released from detention. However, some were released without being granted temporary or permanent regular status; without adequate case management and assistance for continued engagement with their migration procedures; without access to any migration procedures at all; without access to adequate placement options; or without access to benefits and essential services.

Despite challenges in implementation in some countries, significant progress has also been made and positive developments observed in many contexts. In some States, migrants released from immigration detention have been placed in non-custodial community-based shelters run by civil society organisations, guaranteeing access to rights and services. In other countries, adequate screening and referral mechanisms have enabled the avoidance of immigration detention and allowed for migrants to be hosted in the community -- in their own places of residence, with family members or in open shelters -- with access to rights, services and case management options.

Each country situation presents a unique dynamic, which requires that solutions for migrants who have been released from detention be tailored to meet their specific circumstances. However, the positive developments discussed in this annex, together with the lessons previously learned from implementing alternatives in many countries before the onset of the pandemic, can assist governments to mitigate the dangers of COVID-19 while also reducing the use of immigration detention in the future.

2- Worrying trends

While some governments have responded to COVID-19 by attempting to address risks in the context of immigration detention and prioritizing the rights of migrants, others have since the publication of the Policy Brief resorted to worrying policies and practices, including in particular:

Public health concerns used to justify arbitrary and unlawful immigration detention practices

- Public health concerns used to justify immigration raids and arbitrary detention of migrants, including discriminatory blanket detention and longer periods of detention without due process.
- Quarantine requirements used to justify increased instances of migration-related detention upon arrival in already overcrowded detention centres and inadequate locations, such as quarantine vessels and ad-hoc sites at borders, rather than using human rights-respecting quarantine measures.
- Previously open shelters or reception centres turned into closed centres, and movement restrictions introduced for migrants in reception facilities or other settings without justification

while COVID-19 restrictions are lifted for others in the country. This has included turning residential care facilities for migrant children into closed-door facilities.

- Migrants arrested and detained for petty offences, often related to COVID-19 restrictions, in situations where nationals are not arrested and detained.

Governments are facing complex and unprecedented challenges due to the pandemic, and short-term deprivation of liberty for quarantine purposes may be justifiable on public health grounds, but only when the measures taken are necessary and proportionate and have a legitimate aim. Discriminatory measures targeting migrants that purport to protect public health but in fact amount to de facto immigration detention are not legal.²

Suspension of migration and other protection procedures and closure of borders

- Tighter immigration rules and obstacles to renewing or obtaining regular status
- Suspension of legal procedures or long delays, leaving migrants without documentation and at risk of being stranded, detained for longer periods of time, or deported when there is a real and foreseeable risk of death, torture or other irreparable harm.
- Lack of proper access to the justice system and to periodic reviews of immigration detention orders

Lack of appropriate medical safeguards to reduce the risk of COVID-19 in immigration detention and in the context of releases

- Inadequate medical care and treatment in immigration detention facilities
- Denial of COVID-19 testing
- Lack of personal protective equipment (PPE)
- Prohibition of detainees wearing face masks
- Lack of quarantine facilities which comply with basic standards and protection principles
- Ongoing transfers of detained migrants between different immigration detention facilities, spreading COVID-19 among detainees, staff and officials
- Release of migrants to civil society shelters without previous testing for COVID-19
- Lack of adequate external support to shelters to accommodate released migrants in a way that is COVID-19-safe
- Ongoing deportations of detained migrants without previous testing for COVID-19, contributing to the spread of COVID-19 across borders

Lack of adaptation of procedures in detention facilities

- Refusal of access to immigration detention facilities for visitors and service providers without providing alternative means of communication or virtual services
- Use of solitary confinement as a form of quarantine

Lack of provision of adequate facilities for migrants who were not detained or who were released

- Closure of shelters, leaving many released migrants, including children, on the street, or in overcrowded reception facilities
- Reduction of staff in many facilities, leading to lack of proper implementation of procedures and care models for children, including fewer staff following up on children and lack of capacity to apply established child protection procedures

² Working Group on Arbitrary Detention, Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies

- Lack of adequate measures and resources to verify whether migrants who are not detained or who have been released from detention have access to adequate accommodation, procedures, services and case management
- Release of former detainees without any support, leading to destitution
- Deportation without due process of migrants who were not detained or were released

Opportunities for targeted support in addressing gaps in implementation of alternatives to immigration detention: some country examples

As the overview above shows, positive and negative practices coexist. The pandemic has led many States to look into alternative policy solutions to put an end to the use of migration-related detention. However, even when a promising practice is implemented, that practice may have unintended or otherwise negative side effects, and its implementation can present gaps that prevent it from being sustained and scaled up.

The country examples below showcase some of the positive and negative developments mentioned in the previous section and identify gaps in implementation that can be addressed going forward through targeted support and stakeholder collaboration.

Mexico has faced challenges in reducing the use of immigration detention despite a number of pilot programmes focusing on alternatives. During the COVID-19 pandemic Mexico did not introduce a moratorium on new immigration detention orders, but the response to the crisis did result in some releases. Following a court decision prompted by strategic litigation led by civil society actors, the government released a significant number of migrants and there was a decrease in the total number of individuals placed in immigration detention.

At the outset of the pandemic, the fear of indefinite detention in centres with unsafe and overcrowded conditions led to protests and riots among migrants, resulting in several injuries and the death of an asylum-seeker.

There are also reports of immediate deportation without due process of some released migrants. A small minority of those released has been housed in shelters run by civil society organizations or the Catholic Church or moved into rental accommodation with UNHCR's assistance. However, authorities have not always verified whether individuals released from immigration detention have access to rights, services, case management support, relevant procedures and adequate accommodation.

Further, some migrants were released without being tested for COVID-19 and then transferred to civil society shelters that did not receive adequate support to accommodate them in a way that was COVID-19-safe, putting migrants who were already in those facilities at risk.

Despite steps to minimise overcrowding by releasing significant numbers of migrants during the first month of the pandemic, non-nationals are once again being arrested and detained in facilities across the country.

In January 2021, an important positive step forward was taken, when a new law came into force ending immigration detention of children, and reinforcing determination of the best interest of the child in migration procedures.

With support from experts, more capacity in the shelter system to adapt to the current COVID-19 crisis, and concerted efforts to scale up already functioning pilot programs, alternatives to immigration detention could be made available to successfully respond to this crisis on a much wider scale. The lessons learned from pre-existing alternatives to immigration detention programs run by the government, local authorities, UN agencies and civil society organizations, coupled with the positive developments during the pandemic are paving the way for Mexico to advance the implementation of alternatives to immigration detention by sustaining, advancing and scaling up existing programs. Additionally, the legal reform codifying the prohibition of child immigration detention represents a key step forward towards ending this practice that will need strong implementation protocols and require adequate investments to strengthen the child protection system.

In **Malaysia** the pandemic has exacerbated the risk of arrests and detention for undocumented migrants. Despite the government's commitment to refrain from arresting and detaining undocumented migrants approaching health services for COVID-19 testing, large-scale immigration raids leading to the detention of undocumented migrants have been conducted in the name of containing the spread of the virus. This practice has unfortunately resulted in COVID-19 outbreaks in immigration detention centres. Concern has been expressed that this move towards a policy of roundups and detention could push individuals and groups in vulnerable situations into hiding and prevent them from coming forward for testing and seeking treatment, leading to further outbreaks among migrant and host communities.

In November 2020, Malaysia reported that it was holding hundreds of children in immigration detention centres. According to information provided by the country's Home Minister in response to questions from Parliament, 756 children were being held in immigration detention centres as of 26 October 2020. Of these, 405 were unaccompanied (326 of them from Myanmar).

Opportunities exist in Malaysia to explore community-based approaches that will allow effective tracking of COVID-19 risks without mass detention, which has proven to be costly and ineffective in stopping the spread of the virus. Furthermore, a pilot project on alternatives to immigration detention for unaccompanied and separated children is being established in Malaysia, with civil society putting forward further options for community-based alternatives to detention.

Zambia's National Screening and Referral Mechanism has successfully diverted many migrants in vulnerable situations from the detention system and has been highlighted globally for several years as a success story.

As a response to COVID-19, Zambian authorities announced that they would release all foreign nationals deprived of their liberty on misdemeanour and immigration charges and send them back to their countries of origin. They also stated that foreign nationals who are unable to travel to their countries due to suspension of flights will be able to regularise their stay in Zambia. Unfortunately, criminal justice releases did not translate to migration-related detention for those who could not be removed. However, overall, there was a reduction in migration-related arrests and detentions in 2020 due to the Immigration Department suspending most of its field operations in order to comply with the COVID-19 prevention guidelines.

There was also a significant increase (from over 5,000 in 2019 to over 10,000 in 2020) in the use of report orders (which allow migrants to check in with immigration officers for further formalities without

being detained) as an alternative to detention, in order to reduce numbers of detainees because of COVID-19.

The Ministry for Community Development and Social Welfare has established shelters for vulnerable children. Since the pandemic, new shelters for unaccompanied migrant children have been constructed and others renovated. Guidelines are currently being formulated on how shelters for vulnerable migrants should be run, with a human rights-based approach, to ensure that migrants are protected and not kept in correctional facilities.

Zambia is working to amend its laws to ensure better protection of migrants and non-detention of children. The government is also developing a legal framework to help actors identify vulnerable migrants. A national migration policy is being developed using a whole-of-government approach to address the challenges and opportunities of migration, including in relation to migration and health. If more resources are directed towards supporting alternatives to detention, the progress made in reducing the use of immigration detention, including through increasing the use of report orders, can be sustained and expanded.

Conditions in the “Foreigner Internment Centres” (*centros de internamiento de extranjeros* – CIEs) in **Spain** have long been the subject of scrutiny and criticism. In the spring of 2020 **Spain** emptied these immigration detention facilities and detainees were released into the community, with authorities verifying whether those released had access to support, either from their families or from NGOs. The Ombudsman’s Office worked in close coordination with the Police and Secretary of State for Migration to guarantee that releases were in accordance with health and security measures and to ensure that individuals were referred to humanitarian reception and assistance agencies or to their families for accommodation and support. Coordination with civil society was essential to ensure access to health, housing and other services of released migrants regardless of status.

However, concern remains about the situation of migrants being held in overcrowded transit centres and improvised spaces in extremely inadequate conditions on Spain’s North African enclaves of Ceuta and Melilla and in the Canary Islands.

Spain has demonstrated that it is possible for a State to quickly release migrants into alternatives that respect human rights, guarantee services and ensure case follow-up. However, as border closures started to lift, Spain reopened the CIEs and is slowly going back to using pre-removal detention, despite the fact that the first few months of the pandemic showed it to be unnecessary.

The existing enabling environment linked to large-scale releases during the pandemic, coupled with concerted efforts and support from all stakeholders, can allow Spain to sustain progress towards completely eliminating the use of immigration detention in the coming years.

In recent years, the **UK** government has been piloting alternatives to immigration detention that have shown early signs of success. Since the onset of COVID-19, nearly 1,000 former detainees were released following reviews of their cases. This led to a reduction in UK immigration detention to its lowest level in 10 years.

Although the releases from immigration detention were welcomed, concerns have been expressed that the authorities have not always verified whether individuals released have access to services, migration procedures and accommodation. The lack of support has reportedly led to destitution in some cases.

The main alternative to detention used in the UK is immigration bail. The number and type of immigration bail conditions imposed vary depending on the circumstances of the individual case, but the most regularly used condition is requiring the individual to report. Since the start of the pandemic the UK has had a blended approach to reporting, including in person and by telephone.

Building on the successes of the UK alternatives to immigration detention pilot programmes, increased investments to scale up these programs can further reduce the use of immigration detention post-pandemic. Future ATD programming should include systems to ensure that all migrants being released from immigration detention have access to suitable and safe accommodation and basic services and support.

Canada has made progress on alternatives to detention over the past 5 years.³ In 2018 a National Immigration Detention Framework (NIDF) that prioritises alternatives to detention was adopted. The aim has been to establish a consistent and comprehensive national Alternatives to Immigration Detention Program (ATD Program) with less reliance on provincial correctional facilities. The expansion of the ATD Program was prompted by the NIDF and was established as a priority by the Minister of Public Safety and Emergency Preparedness. The expanded ATD Program is anticipated to be more cost-effective than immigration detention.⁴ Canada has found that in all alternatives to immigration detention instances, support in the community is essential to increase an individual's likelihood of compliance. The provision of stable housing and socio-health programming also helps to mitigate risk.

In response to COVID-19, from March 2020, a review of the detention population was undertaken and the Canada Border Services Agency (CBSA) released a considerable number of detainees into alternatives to immigration detention. An Operational Bulletin was released in April 2020 reminding officers that it was becoming increasingly important to explore all viable alternatives to immigration detention. This ability to move quickly was made possible because of the NIDF's prioritising of alternatives to immigration detention in 2018 and the progress that had been made since then in their expansion. In-person reporting was amended to direct line telephone reporting to their assigned case officer, or voice reporting through the new voice biometric system. Detentions reduced by 61% between March and November 2020. In the event of eased border restrictions while COVID-19 continues to be an issue, it is expected that officers continue to leverage the ATD Program to the extent possible in order to limit the number of individuals detained.

The expansion in alternatives to immigration detention both pre-COVID-19 and since COVID-19, coupled with concerted efforts and support from all stakeholders, could allow Canada to further sustain its progress towards a move away from the use of immigration detention post-pandemic.

In **Japan**, provisional release on grounds of health and other considerations is used as an alternative to detention under the current immigration law. With COVID-19, provisional release has been used more than usual since April 2020, due to difficulties with carrying out deportations because of international flight suspensions, and due to the need to reduce over-crowding in detention facilities to assist with

³ Prior to 2018, the following options were available nation-wide in Canada - release on generic terms and conditions and deposits and guarantees. Voice reporting and community case management and supervision (CCMS) were only available in the Greater Toronto Area. Since 2018 there has been an expansion of the voice reporting and the CCMS programs. Pre-COVID, the expanded ATD options had succeeded in: establishing programming in all major cities; creating the Community Liaison Officer (CLO) role; establishing positive working relationships with the service providers; regular, transparent check-ins with CLOs and service providers; and increased uptake and officer buy-in through training done by CLOs since the launch.

⁴ The ATD program is internally funded with an approximate cost of CAD\$8 million annually. At an average cost of detention of approximately CAD\$380/day and an average length of detention of approximately 13.9 days, the projected volume of uptake in ATD enrolment could result in a cost-avoidance of upwards of CAD\$7 million, which is re-invested into the program.

social distancing. As a result, the number of detainees dropped by 60%, from 1,100 in April 2020 to 430 in November 2020.

Japan is currently drafting a bill to amend the immigration law and planning to introduce a new alternative to detention.

The progress made in reducing the use of immigration detention since COVID-19 will require support so that the momentum created in Japan can be sustained post-pandemic. The expertise and involvement from all stakeholders will be key in accelerating progress and expanding alternatives to immigration detention.

Call for action: making alternatives to detention the norm, not the exception

Acknowledging the complexities of ensuring availability of alternatives to immigration detention and some of the challenges that have led to gaps in implementation and worrying trends, the UN Network on Migration, through its Working Group on Alternatives to Detention, stands ready to continue offering technical support to States and stakeholders and to keep creating opportunities for peer learning among different actors at all levels.

The elements of successful alternatives to detention unpacked in the Policy Brief and in this Annex are meant to serve as examples of how some of the challenges and gaps in implementation which have emerged over the past few months can be addressed.

Collaboration among all actors is not only vital to sustain promising practices, but also to expand and mainstream pre-existing ones. Only by showcasing how migration can be governed without resorting to detention will we put an end to the use of immigration detention.

The United Nations Network on Migration was established to ensure effective, timely and coordinated system-wide support to States in their implementation, follow up and review of the Global Compact for Safe, Orderly and Regular Migration.

The Working Group on Alternatives to Immigration Detention is one of six thematic working groups established under the Network, tasked with promoting the development and implementation of human rights-based alternatives to detention in the migration context. The Working Group is comprised of representatives of UN agencies, civil society organizations, young people, local governments and technical experts working on immigration detention and alternatives all over the world. The drafting of this document has benefitted from their broad and diverse experience.

While recognizing the mandate of the Working Group as limited to migration, UNHCR recalls that the recommendations in this document are also relevant and applicable to refugees and asylum-seekers in immigration detention. In addressing challenges related to COVID-19 and preserving public health, measures taken need to respect the human rights of all concerned, regardless of migration status.