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## Forced Displacement in a Time of a Global Pandemic

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### Abstract

Covid-19 has limited “access” by refugees and internally displaced persons (IDPs). First, access to protection at the frontiers of states and access to services in a state. Covid-19 was defined in terms of a disease from abroad, so refugees who were always seen as “other” are seen as tainted in yet a new way. Nevertheless, states have a right to control their own borders and in a time of a global pandemic, entry can be restricted. This paper will argue, however, that those controls cannot be arbitrary and must respect international refugee law and international human rights law, as well as the international rule of law. Those seeking asylum from persecution cannot be sent back to the frontiers of a territory where their life or freedom would be threatened, even if they are Covid-19 infectious.

Secondly, those admitted to the state must have the same access to life saving health care as anyone else within the territory of the state; to deny access to health care is not to make the problem go away, but to drive those fearing expulsion underground, placing even more people at risk during a pandemic. Beyond health care, refugees and IDPs must have access to all other rights during any lockdown and there can be no discrimination based on forced displacement status.

### I. Introduction

The protection sector's response to this rolling apex needs to be measured by the number of lives saved, not the number of webinars, seminars, guidance and strategies. What will save lives is putting well-resourced local staff capable of communicating with broader communities as close to the problem as possible.<sup>1</sup>

Part of that resourcing is putting forward legal analysis to ensure the greatest protection for those forcibly displaced during this pandemic. Part of any crisis is the natural willingness of governments to retreat from anything other than legally binding obligations.

Much has been published lately, but it is not the first time, even in recent years, that forcibly displaced persons have been caught up in health crises.<sup>2</sup> What is different this time is its global character and the threat to international human rights law (IHRL), international refugee law and the rule of law. These threats may not pass even after the pandemic has subsided. As at 10 June 2020, there had been no serious outbreaks of Covid-19 in any

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<sup>1</sup> Paul White, ‘Humanitarians in the Frontline: The protection sector in the COVID-19 humanitarian response’, Kaldor Centre for International Refugee Law, 23 April 2020, 7, <https://www.kaldorcentre.unsw.edu.au/publication/humanitarians-frontline-protection-sector-covid-19-humanitarian-response>.

<sup>2</sup> See, for the West African Ebola Crisis, 2013-16: UNHCR, ‘Gender-based violence prevention, risk mitigation and response during COVID-19’, 20 March 2020, 1, <https://www.refworld.org/docid/5e84bb2b4.html>. Equally, see IOM, ‘Mobilisation Against COVID-19 Draws on Ebola Response Experience’, 8 May 2020, [https://www.iom.int/news/mobilisation-against-covid-19-draws-ebola-response-experience?utm\\_source=IOM+External+Mailing+List&utm\\_campaign=a98996c8d1-EMAIL\\_CAMPAIGN\\_2020\\_05\\_08\\_05\\_54&utm\\_medium=email&utm\\_term=0\\_9968056566-a98996c8d1-43575781](https://www.iom.int/news/mobilisation-against-covid-19-draws-ebola-response-experience?utm_source=IOM+External+Mailing+List&utm_campaign=a98996c8d1-EMAIL_CAMPAIGN_2020_05_08_05_54&utm_medium=email&utm_term=0_9968056566-a98996c8d1-43575781).

refugee or IDP camp or settlement,<sup>3</sup> although that might be because only limited testing is possible. Nevertheless, states have limited refugees' access to protection and have curtailed the rights of displaced persons within their territories, as well as limiting access by humanitarian agencies to persons of concern in some cases.<sup>4</sup> Access in all those senses is not straightforward for forcibly displaced persons and humanitarian actors in normal times, but Covid-19 has raised this problem to new heights. This paper addresses this attack on protection under international law.

## II. Accessing Protection

### a) Access to states

States have the right to control their borders, particularly to protect their own populations.<sup>5</sup> However, that obligation cannot justify ignoring other obligations with respect to IHRL, international refugee law and rule of law, such as respecting the right of individuals to seek and enjoy asylum from persecution and upholding the principle of *non-refoulement*.<sup>6</sup> Equally under Article 12 of the International Covenant on Civil and Political Rights, states cannot close their borders preventing people, including IDPs, from leaving to seek protection elsewhere.<sup>7</sup> Nevertheless, during the pandemic, states have closed borders and denied access:<sup>8</sup> as at 22 May 2020, 161 countries had closed their borders, 99 even to those seeking refugee status.<sup>9</sup> Closing borders resulting in persons seeking protection

<sup>3</sup> There were 25 confirmed cases in Kutupalong camp, Cox's Bazar, Bangladesh, that houses 860,000 refugees. See statistics at [www.unhcr.org](http://www.unhcr.org).

<sup>4</sup> UNHCR, 'COVID-19 Preparedness and Response', 24 April 2020, <https://www.refworld.org/docid/5e84bb2b4.html>.

<sup>5</sup> Even human rights treaty bodies recognise this power in states: see UN Human Rights Committee in *Aumeeruddy-Cziffra and nineteen other Mauritian women v Mauritius*, Communication No. 35/1978, UN Doc. CCPR/C/12/D/35/1978, 9 April 1981, para. 9.2b(2)(ii)3; The Committee Against Torture in *Agiza v Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 24 May 2005, para. 13.1. See also, UNHCR, 'Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response', 16 March 2020, paras. 1-3, <https://www.refworld.org/docid/5e7132834.html>.

<sup>6</sup> See, Art. 14, Universal Declaration of Human Rights 1948, UNGA Res 217(III), 10 December 1948, (hereafter, UDHR); Arts. 1A(2) and 33(1) 1951 Convention relating to the Status of Refugees, 189 UNTS 137. The European Union Commission stated on 16 April that '[registration] and processing of applications should continue', Press Release, 'Coronavirus: Commission presents guidance on implementing EU rules on asylum and return procedures and on resettlement', 16 April 2020, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_666](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_666). See also, Columbia, Cornell, Zolberg Institute, 'Human mobility and human rights in the COVID-19 pandemic: Principles of protection for migrants, refugees, and other displaced persons', Principle 6, (hereafter CCZI Principles), <https://zolberginstitute.org/covid-19/>.

<sup>7</sup> 999 UNTS 171 (ICCPR). See also, Principle 15, 'Guiding Principles on Internal Displacement', UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, on the right of IDPs to be able to seek asylum outside the state. And see, Kate Ogg, 'COVID-19 Travel Bans: The Right to Seek Asylum When You Cannot Leave Your Homeland', Kaldor Centre, 16 April 2020, 1, <https://www.kaldorcentre.unsw.edu.au/publication/covid-19-travel-bans-right-seek-asylum-when-you-cannot-leave-your-homeland>.

<sup>8</sup> See, on Malaysia blocking Rohingya refugees attempting to arrive by sea, BBC News, 'Rohingya crisis: Hundreds of refugees stranded in boats at sea', 26 April 2020, <https://www.bbc.co.uk/news/av/world-asia-52431222/rohingya-crisis-hundreds-of-refugees-stranded-in-boats-at-sea>.

<sup>9</sup> See UN Secretary-General, 'Policy Brief: COVID-19 and People on the Move', 19, [https://www.un.org/sites/un2.un.org/files/sg\\_policy\\_brief\\_on\\_people\\_on\\_the\\_move.pdf](https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_people_on_the_move.pdf). See also, UNHCR, 'The COVID-19 Crisis: Key Protection Messages', 31 March 2020, <https://www.refworld.org/docid/5e84b9f64.html>. See also, Gillian Triggs, 'We can secure both public health and the rights of refugees to protection', Kaldor Centre, 8 April 2020, 2, <https://www.kaldorcentre.unsw.edu.au/publication/we-can-secure-both-public-health-and-rights-refugees->

being forced back to persecution or conflict zones is a violation of the principle of *non-refoulement*.<sup>10</sup> While states can derogate in time of public emergency that threatens the life of the nation or in exceptional circumstances under Article 4 ICCPR or Article 9 1951 Convention, respectively, the 1951 Convention limits provisional measures to the case of a particular person and derogations under the ICCPR have to be non-discriminatory, proportionate, strictly required and established by law. Blanket bans on all persons arriving from outside the territory, therefore, are prohibited.<sup>11</sup>

The European Union Qualification Directive, contrary to EU states' commitments in the 1951 Convention, might appear to offer broader scope to prevent entry.<sup>12</sup> Under Article 33(2) of the 1951 Convention, states can *refoule* a refugee where there are reasonable grounds to regard them as a danger to security of the country; however, they must be a recognised refugee for Article 33(2) to apply. Under Article 14 of the EU Qualification Directive, states can decide not to grant refugee status, that is, effectively reject at the border, where 'there are reasonable grounds to regard her or him as a danger to security of the Member State'. It is not difficult to imagine a scenario where an EU member state decides to rely on Article 14(4) and 14(5) to deny protection on the ground that the applicants for refugee status might have Covid-19. However, not only does the EU Commission Coronavirus Press Release suggest that steps can be taken to process where the person is suspected of having Covid-19,<sup>13</sup> but in *Joined Cases C-715/17, C-718/17 and C-719/17*, the Court of Justice of the European Union (CJEU) held that member states could not apply particular EU laws:

for the sole purposes of general prevention and without establishing any direct relationship with a particular case, in order to justify suspending the implementation of or even a ceasing to implement its obligations ....<sup>14</sup>

Thus, not only ought regional mechanisms be interpreted in conformity with the 1951 Convention, even where individual applicants for refugee status were thought to be Covid-

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protection; Lucas Guttentag, 'Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors', *Just Security*, 13 April 2020, <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

<sup>10</sup> Uganda has apparently closed its borders. See also, Rebecca Blumenthal and Catriona Murdoch, 'COVID-19 and Humanitarian Access for Refugees and IDPs: Part 2 – Syria and Bangladesh', *Just Security*, 9 April 2020, <https://www.justsecurity.org/69570/covid-19-and-humanitarian-access-for-refugees-and-idps-part-2-syria-and-bangladesh/>. See also, UNHCR, 'COVID-19 Preparedness and Response' (n. 4), 4, 7. In the light of the reasoning in *Paposhvili v Belgium (GC)*, Application no. 41738/10, 13 December 2016, transposable to other international and regional human rights mechanisms, even if an asylum seeker's claim to refugee status were to be rejected, they should not be removed to any country where the treatment they could expect to receive would place them at risk of inhuman treatment because of the care they could expect in the country of nationality (paras. 186-91). In *Hirsi Jamaa and Others v Italy (GC)*, Application No. 27765/09, , 23 February 2012, Italy was found to have collectively expelled 12 Somali and 13 Eritrean asylum seekers who had been intercepted at sea by the Italian navy before reaching Italian waters and returned to Libya contrary to Article 4, Protocol 4 ECHR, so closing borders in such a way as to force return may be treated similarly, there being no way to challenge the closure (*cf. ND and NT v Spain (GC)*, Application Nos. 8675/15 and 8697/15, 13 February 2020).

<sup>11</sup> Guttentag (n. 9).

<sup>12</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9.

<sup>13</sup> EU Commission (n. 6).

<sup>14</sup> *Joined Cases C-715/17, C-718/17 and C-719/17, EU Commission v Hungary, Poland and Czech Republic* (CJEU Third Chamber, 2 April 2020) para. 160.

19 infectious, there is no justification for blanket bans because states can implement measures to protect their own population without forcing people back contrary to the principle of *non-refoulement*.

### ***b) Accessing services and protection in states***

For applicants for refugee status within a state and for IDPs generally, again there are access issues. Those issues are also tied up with access by humanitarian actors to persons of concern.

#### *i) Humanitarian Access*<sup>15</sup>

UNHCR has the unique mandate to provide international protection to refugees and its extended mandate includes conflict driven IDPs and other persons of concern.<sup>16</sup> To fulfil that role, the organization needs access to these populations. States also have a duty to co-operate with UNHCR in the exercise of its functions.<sup>17</sup> Nevertheless, during this pandemic access by humanitarian actors has been restricted, particularly in conflict zones that still face the same Covid-19 threat. To resolve this, regard needs to be had not just to IHRL, but also to the international law of armed conflict and rule of law that complement IHRL, but that have been strangely missing from much of the current analysis.<sup>18</sup> Under the 1949 Geneva Conventions, the ICRC and ‘any other impartial humanitarian organization’ may undertake care for the sick, while parties to the conflict should permit ‘relief actions which are humanitarian and impartial in character and conducted without any adverse distinction’.<sup>19</sup> In 2012, the General Assembly agreed that rule of law was applicable to states and to international organizations:<sup>20</sup>

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<sup>15</sup> For an in-depth discussion, see International Association of Professionals in Humanitarian Assistance and Protection, ‘Access and Humanitarian Protection: Lessons from restricted operational contexts and their application to the COVID-19 operational environment’, Webinar, 22 April 2020, <https://phap.org/PHAP/Events/OEV2020/OEV200422.aspx>.

<sup>16</sup> Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res 428(V), 14 December 1950 (hereinafter, 1950 Statute); the Cluster Approach was established in 2005 under the UN’s Inter-Agency Standing Committee (IASC) and UNHCR has the lead for protection of conflict driven IDPs (<https://www.globalprotectioncluster.org/about-us/who-we-are/>). See also, Volker Türk and Elizabeth Eyster, ‘Strengthening Accountability in UNHCR’, (2010) 22 *International Journal of Refugee Law* 159.

<sup>17</sup> Article 35, 1951 Convention (n. 6).

<sup>18</sup> E.g., CCZI Principles (n. 6).

<sup>19</sup> See Common Article 3, Articles 9 Geneva Conventions I-III, 10 GC IV, 70 and 71 Additional Protocol 1, and Article 18 Additional Protocol 2. See also, Principle 25, Guiding Principles on Internal Displacement (n. 7), as well as Geoff Gilbert and Anna Magdalena Rüsçh, ‘Creating Safe Zones and Safe Corridors in Conflict Situations: Providing protection at home or preventing the search for asylum?’, Kaldor Centre for International Refugee Law Policy Brief No.5, 2017, [http://www.kaldorcentre.unsw.edu.au/sites/default/files/Policy\\_brief\\_Creating\\_safe\\_zones\\_and\\_safe\\_corridors.pdf?mc\\_cid=6e9bb775e9&mc\\_eid=fb55c2c7c4&cn=bWVudGlvbG%3D%3D](http://www.kaldorcentre.unsw.edu.au/sites/default/files/Policy_brief_Creating_safe_zones_and_safe_corridors.pdf?mc_cid=6e9bb775e9&mc_eid=fb55c2c7c4&cn=bWVudGlvbG%3D%3D). Notably, the ICRC has not failed to promote the international law of armed conflict – ICRC Blog, ‘COVID-19 response in conflict zones hinges on respect for international humanitarian law’, 16 April 2020, [https://blogs.icrc.org/law-and-policy/2020/04/16/covid-19-respons...n\\_47\\_fQ70xw3RYCgH1h79PsBMvHjOG1l\\_qjxKHw90X\\_laJZxg&hsmi=86397599](https://blogs.icrc.org/law-and-policy/2020/04/16/covid-19-respons...n_47_fQ70xw3RYCgH1h79PsBMvHjOG1l_qjxKHw90X_laJZxg&hsmi=86397599). See also, the humanitarian principles of humanity, impartiality, independence and neutrality [UNGA res 46/182, 19 December 1991].

<sup>20</sup> UN General Assembly, ‘Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels’, UNGA Res 67/1, 30 November 2012; Geoff Gilbert and Anna Magdalena Rüsçh, ‘Rule of Law and UN Interoperability’, (2018) 30 *International Journal of Refugee Law* 31.

2. We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.

Thick rule of law demands that all actors operationalize interoperability to uphold the full gamut of IHRL.<sup>21</sup> Given that 85 percent of persons of concern to UNHCR are in low- or middle-income countries (LMICs), their capacity to respond to the Covid-19 crisis will not be as great as that of states in the global north, so a concerted and co-ordinated response that includes humanitarian actors who are given full access is essential.<sup>22</sup> The joint work of the IASC's GPC and Health Cluster,<sup>23</sup> as White explains, placing humanitarian actors on the ground to work with local medics and other relief agencies, will be essential to saving lives.<sup>24</sup>

Finally with respect to humanitarian access, the General Assembly in 2018 adopted the Global Compact on Refugees.

5. The global compact emanates from fundamental principles of humanity and international solidarity, and seeks to operationalize the principles of burden- and responsibility-sharing to better protect and assist refugees and support host countries and communities.<sup>25</sup>

It applies to the international community as a whole, including states and international organizations and, if fully operationalised, benefits refugees, host communities and relieves the burden on host states.<sup>26</sup> While it does not expressly cover IDPs, host communities will often be mixed populations. During the global pandemic, categorising who benefits from protection should be irrelevant,<sup>27</sup> a comprehensive and inclusive approach that operationalizes interoperability can address several aspects of the consequences of Covid-19, upholding at the same time IHRL and the rule of law.

In Niger, UNHCR, in partnership with WFP and UNDP, is providing training on the production of soap, bleach and masks to over 5,000 refugees and hosts, among whom over 90% are women. Apart from improving health conditions and hygiene in the camp, this activity promotes women as economic agents, generates an income for refugee households and stimulates the local economy, mitigating the negative socio-economic impact of COVID.<sup>28</sup>

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<sup>21</sup> UN General Assembly, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence to the General Assembly', UN Doc A/67/368, 13 September 2012, para. 12. See also, Gilbert and Rüsç, *ibid.*, 45-46, 59-68.

<sup>22</sup> See UNHCR, 'COVID-19 Preparedness and Response' (n. 4), 3, 6 and 7, particularly as regards the situation in East and Horn of Africa and the Great Lakes.

<sup>23</sup> See, on the Cluster Approach under the IASC (n. 16).

<sup>24</sup> White (n. 1) 2.

<sup>25</sup> Global Compact on Refugees (GCR), UNGA Res 73/151, 18 December 2018, para. 5.

<sup>26</sup> See donations made to UNHCR by states to respond to COVID-19 Crisis, UNHCR 'COVID-19 Preparedness and Response' (n. 4) 3, 10; Triggs (n. 9) 4. See also, UN Sustainable Development Group, 'Shared Responsibility, Global Solidarity: Responding to the Socio-Economic Impacts of COVID-19', March 2020, <https://unsdg.un.org/resources/shared-responsibility-global-solidarity-responding-socio-economic-impacts-covid-19>.

<sup>27</sup> White (n. 1) 2-3. See also, WHO, 'Preparedness, prevention and control of coronavirus disease (COVID-19) for refugees and migrants in non-camp settings: Interim guidance', 17 April 2020, Guiding Principles 5 and 6, [https://www.who.int/publications-detail/preparedness-prevention-and-control-of-coronavirus-disease-\(covid-19\)-for-refugees-and-migrants-in-non-camp-settings](https://www.who.int/publications-detail/preparedness-prevention-and-control-of-coronavirus-disease-(covid-19)-for-refugees-and-migrants-in-non-camp-settings).

<sup>28</sup> UNHCR, 'COVID-19 Preparedness and Response' (n. 4), 11.



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An awareness of all the available frameworks for protection is essential if refugees, local communities, countries of asylum and the international community as a whole are to meet all their commitments.

*ii) Accessing in-state services*

Displaced persons need to be able to obtain a variety of services in the hosting state whether they are refugees or IDPs.<sup>29</sup> During the pandemic, the most obvious is access to health care. However, this is an area of law where status matters. IDPs, by definition are within their country of nationality or habitual residence and should have access to all such services as normal, taking into account the cause and effects of the displacement – their displacement might have been part of some event that disrupts services for everyone. As for refugees, if they have been recognised as such by the country of asylum, then the 1951 Convention complements normal IHRL, but if they are asylum-seekers then their rights are not so broadly based.<sup>30</sup> Regardless, there should be no discrimination based on seeking refugee status for the purposes of IHRL.<sup>31</sup>

Thus, accessing refugee status determination is important during the pandemic. As discussed above, gaining access to the state will be the first hurdle, but that does not mean that refugee status determination will proceed smoothly thereafter. The EU Commission contemplates delays in the process and that accommodations will be needed for social distancing, but clearly provides that status determination will take place.<sup>32</sup> Furthermore, the applicant needs to be able to access legal advice as regards the application – if quarantined, as may well happen, there will be additional difficulties.<sup>33</sup>

Refugees, asylum-seekers and IDPs must also be able to access health care. Fear that seeking medical advice might lead to detention and removal will only drive those seeking protection to conceal their presence, risking spreading the virus much further if they are infectious. At this time, it makes sense for the state and the host community that displaced persons have as much access as possible to health care. Equally, they need access to information, which includes access to the internet, something equally important for those seeking refugee status, discussed above.<sup>34</sup> Access to the internet for information has been recognised as a right by the Human Rights Council,<sup>35</sup> but states and international

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<sup>29</sup> On IDPs, see OHCHR, 'COVID-19: Do not forget internally displaced persons, UN expert urges Governments worldwide', 1 April 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25763&LangID=E>.

<sup>30</sup> Articles 3-30, 1951 Convention (n. 6), apply either to all those seeking refugee status, refugees 'lawfully in the territory' or 'lawfully staying in the territory'.

<sup>31</sup> See, CCZI Principle 1 (n. 6).

<sup>32</sup> EU Commission (n. 6).

<sup>33</sup> See Kerry Murphy, 'COVID-19: Some issues for asylum seekers and refugees in Australia - Kaldor Centre', 17 April 2020, 1, <https://www.kaldorcentre.unsw.edu.au/publication/covid-19-some-issues-asylum-seekers-and-refugees-australia>.

<sup>34</sup> See UNHCR, 'Key Protection Messages' (n. 9).

<sup>35</sup> UN Human Rights Council, 'The promotion, protection and enjoyment of human rights on the Internet', UN Doc. A/HRC/RES/32/13, 18 July 2016. See also, Human Rights Committee, General Comment no. 34, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 15.

organizations must ensure there is no digital divide.<sup>36</sup> CCZI Principle 9 on the right to information provides:<sup>37</sup>

Migrants, refugees, and other displaced persons have a right to information about COVID-19, including information related to symptoms, prevention, control of spread, treatment, and social relief. The internet is an indispensable source of information, and blocking or interfering with access during a pandemic is not justifiable.<sup>38</sup>

As UNHCR's guidance has made clear, information must be understandable by refugees, asylum-seekers and IDPs, possibly requiring the state and UNHCR to combine their resources.<sup>39</sup>

Article 12, International Covenant on Economic, Social and Cultural Rights (ICESCR), provides that everyone has the right to the enjoyment of the highest attainable standard of health.<sup>40</sup> CCZI Principle 2 expands on the right to health, including preventive medicine. WHO Guiding Principle 1 is in similar terms.<sup>41</sup> This right applies just as much to forcibly displaced persons as anyone else. Moreover, more vulnerable displaced persons need to be ensured even greater access to health care.<sup>42</sup> When it is also remembered that many displaced persons are caught up in conflict zones, where too often the parties do not respect the international law of armed conflict and health services are diminished or destroyed,<sup>43</sup> then the risks are even higher and the need for international rule of law is greater than ever.

Likewise, Article 11 ICESCR sets out a right to an adequate standard of living, including housing.<sup>44</sup> Adequate in the time of a global pandemic that requires social distancing is clearly different from what would be acceptable at other times. It should also be noted that over 60 percent of refugees live in urban settings, not camps, so the ability of international organizations to regulate accommodation in such circumstances is limited. A range of related matters arise in relation to standard of living during this particular pandemic. There is no explicit right to water in the ICESCR,<sup>45</sup> but, in terms of sanitation, the right to the

<sup>36</sup> See, statistics from the International Telecommunication Union, <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>. See also, Matthew Downer, 'Bridging the mobile gender gap for refugees', GSMA, March 2019, <https://www.gsma.com/mobilefordevelopment/africa/sizing-the-mobile-gender-gap-in-refugee-contexts/>; UNHCR, 'Displaced and Disconnected', February 2019, <https://www.gsma.com/mobilefordevelopment/resources/displaced-and-disconnected/>.

<sup>37</sup> CCZI (n. 6) – emphasis added.

<sup>38</sup> Bangladesh has restricted access to the internet in Cox's Bazar – Blumenthal and Murdoch (n. 10), 10-11, 15-16.

<sup>39</sup> UNHCR, 'Risk Communication and Community Engagement (RCCE) – COVID-19', 21 March 2020, 1 <https://data2.unhcr.org/en/documents/download/75289>. On promoting protection and assistance for refugees and host communities see the GCR and rule of law principles (n. 25, 20 respectively). Moreover, if contact tracing is part of controlling the spread of infection, then displaced persons need to be able to access the internet, although with even greater protection of their privacy. See, UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, May 2015 <https://www.refworld.org/docid/55643c1d4.html>; White (n. 1), 4, 5-6.

<sup>40</sup> 999 UNTS 3 (hereafter, ICESCR).

<sup>41</sup> WHO Guiding Principles (n. 27).

<sup>42</sup> UNHCR, 'Age, Gender and Diversity Considerations – COVID-19', 21 March 2020, <https://www.refworld.org/docid/5e84a9dd4.html>.

<sup>43</sup> Article 12 AP1 and Article 11 AP2 (n. 19), as well as Article 56 GC IV. See also, Ngala Killian Chimtom, 'Cameroon's deadly mix of war and coronavirus', BBC News, 10 May 2020.

<sup>44</sup> See also, Article 21, 1951 Convention (n. 6).

<sup>45</sup> Cf. CESCR, 'General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant)', UN Doc. E/C.12/2002/11, 20 January 2003..

highest attainable standard of health during this pandemic demands access to water.<sup>46</sup> In terms of upholding the right to adequate housing, Article 12 ICCPR establishes the right to choose one's residence.<sup>47</sup> Principles 5 – 9 Guiding Principles on Internal Displacement provide that all authorities shall prevent displacement from one's home or habitual residence.<sup>48</sup> Furthermore, parties to a conflict cannot, according to Article 51(7) Additional Protocol 1, constrain the movements of non-fighters 'in order to attempt to shield military objectives from attacks or to shield military operations'; similarly, Article 17(1) Additional Protocol 2 that applies in non-international armed conflicts provides '[the] displacement of the civilian population shall not be ordered for reasons related to the conflict *unless the security of the civilians involved or imperative military reasons so demand*' (emphasis added).<sup>49</sup>

Accessing employment opportunities is always difficult for displaced persons, but when so many places of work are closed, the informal economy is even more restricted.<sup>50</sup> The consequence is that refugees', asylum-seekers' and IDPs' standards of living are even more threatened. At the same time, cash-based interventions are more difficult to implement due to the requirements of social distancing.<sup>51</sup> One very predictable consequence of lockdowns in inadequate housing with limited resources for families has been an increased risk of sex and gender-based violence in refugee and IDP settlements.<sup>52</sup> More than ever, states need to uphold rule of law so that victims can seek protection.<sup>53</sup>

### *iii) Detention*

The flipside of in-state services is detention by the state. Quarantining those who may have the virus is undoubtedly permitted, but it must be provided for by law, proportionate and no longer than is necessary. Article 26 1951 Convention<sup>54</sup> and Article 12 ICCPR grant freedom of movement and choice of one's place of residence.<sup>55</sup> Under IHRL, forcibly displaced persons cannot suffer discriminatory treatment because of the situation in which they find themselves. Furthermore, states must ensure that detention would not place displaced persons at greater risk of infection from Covid-19 – social distancing and proper sanitation must be part of any detention regime where that is the proportionate response. The UN Network on Migration has called on states to:<sup>56</sup>

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<sup>46</sup> Blumenthal and Murdoch (n. 10), 14-15.

<sup>47</sup> ICCPR (n. 7).

<sup>48</sup> Guiding Principles (n. 7).

<sup>49</sup> AP 2 (n. 19), and Gilbert and Rüsçh (n. 20).

<sup>50</sup> Cf. CCZI Principle 13 (n. 6).

<sup>51</sup> UNHCR, 'COVID-19 Preparedness and Response' (n. 4), 5.

<sup>52</sup> UNHCR, 'Gender-based violence' (n. 2), 1; Blumenthal and Murdoch (n. 10), 3-4.

<sup>53</sup> Gilbert and Rüsçh (n. 20), 50, 58, fn128.

<sup>54</sup> 1951 Convention (n. 6). Article 31 allows for detention of those who enter the country of asylum unlawfully, but it must be proportionate and only until their situation is regularised.

<sup>55</sup> See also CCZI Principle 7 (n. 6).

<sup>56</sup> UN Network on Migration, 'COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?', 29 April 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). While the Network speaks on migration issues, UNHCR has stated that the recommendations are relevant to refugees and asylum seekers in immigration detention. See, p 13.



1. Stop new detentions of migrants for migration- or health-related reasons and introduce a moratorium on the use of immigration detention.
2. Scale up and urgently implement non-custodial, community-based alternatives to immigration detention in accordance with international law.
3. Release all migrants detained into non-custodial, community-based alternatives, following proper safeguards.
4. Improve conditions in places of immigration detention while alternatives are being scaled up and implemented.

Ultimately, quarantine is a temporary measure to protect the health of the host community while the individual is treated: immigration detention is something very different and is wholly inappropriate for those seeking protection from persecution.<sup>57</sup>

### III. Conclusion

The lives of forcibly displaced persons are already complicated and challenging and Covid-19 has added a further layer of complexity, if not outright threat. The interaction of various sub-disciplines of international law make it difficult to navigate their situations, without having regard in addition to the domestic laws where they find themselves seeking protection. If, as is often the case, the situation is one of acute crisis resulting from armed conflict or generalized violence, then yet further problems confront the refugee or IDP seeking protection and the humanitarian actors trying to provide it. This paper has sought to address the most pressing issues caused by the pandemic for all the various actors within the already complicated context of forced displacement. Refugees and IDPs have to be resilient to survive displacement, but they are in situations of vulnerability and, when states are threatened, the “outsider” is frequently left unprotected.<sup>58</sup>

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<sup>57</sup> See also, *Joined Cases C-924/19 PPU and C-925/19 PPU FMS, FNZ (C-924/19 PPU) SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, CJEU Grand Chamber.

<sup>58</sup> Jane McAdam, “The impacts of COVID-19 on the world's displaced people: A watching brief”, Kaldor Centre, 6 April 2020, 2, <https://www.kaldorcentre.unsw.edu.au/publication/impacts-covid-19-world's-displaced-people-watching-brief>.