

REINFORCING INDIGENOUS PEOPLES' RIGHT TO HEALTH IN THE WAKE OF THE COVID-19 PANDEMIC: A PANACEA FOR SUSTAINABLE HUMAN RIGHTS PROTECTION

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The rights of indigenous peoples have become an important issue of international law and policy over the past three decades as a result of movements led by indigenous peoples, civil society, international mechanisms and states at the domestic, regional and international levels. Indigenous peoples are widely recognized as being among the world's most vulnerable, disadvantaged and marginalized peoples. In order to identify, recognize and protect the rights of indigenous peoples, it is necessary to have a clear understanding of who the indigenous people are. Moreover, the definition that is derived cannot be static, but must change with the times and from place to place as well as adapt to the changing circumstances and environments. This paper analyses the statutory definitions of indigenous peoples and their rights as provided under the United Nations legal framework and other regional frameworks. Furthermore, it examines the unique perspectives on health held by indigenous peoples as well as their vulnerability to the COVID-19 pandemic. The question that was posed in this paper, however, was whether the right to health extends to indigenous peoples, thereby making it binding on a far greater number of actors. And what are the issues that pertain to the human rights of indigenous peoples. Nevertheless, this paper noted that the United Nations Human Rights System, as well as its mechanisms, laws and policies have been at the heart of these developments. This paper takes an analytical and qualitative approach to its research and builds its argument on existing literature, which is achieved through a synthesis of ideas. The paper concludes that the rights of indigenous peoples are increasingly being formally incorporated into the domestic legal systems of various countries.

Keywords: indigenous; peoples' rights; health; COVID-19; pandemic.

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Introduction

In general, indigenous peoples each have unique and distinctive cultures, languages, legal systems and histories. The notion of indigenous peoples' rights has been formally recognized by the United Nations (U.N.).¹ However, it does so in a way that applies human rights to indigenous peoples and their specific situations, thereby helping to reverse their historical exclusion from the international legal system. Furthermore, it must be emphasized that the rights of indigenous peoples, which are considered part of international human rights law, are *sui generis* because of their inclination towards the customs and traditions of the people concerned rather

¹ See U.N. General Assembly, Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1, 13 September 2007 (May 21, 2022), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>.

than an established corpus of positive law.² In addition, it is important to understand that international activity on indigenous peoples' issues has been expanding also in regional human rights bodies, such as the African and the Inter-American human rights systems, as well as in International law and policy areas as diverse as the environment, including climate change, intellectual property and trade.

In the same vein, it should be noted that the United Nations system has established a number of mechanisms with specific mandates to address the rights of indigenous peoples. One such mechanism is an advisory body of the Economic and Social Council that has the mandate to discuss indigenous issues relating to economic and social development, culture, environment, education, health and human rights.³ In sum, the purpose of this paper is to examine and analyze indigenous peoples' right to health under international human rights law in the wake of the COVID-19 pandemic. These rights are widely recognized under the International Covenant on Economic, Social and Cultural Rights.⁴ Additionally, this paper will examine the COVID-19 pandemic, the attendant World Health Organization (WHO) regulations and their effect on the fundamental right to health of indigenous peoples. It may be argued that even when there are no such extraordinary circumstances like the COVID-19 pandemic, indigenous peoples' right to health are rarely respected globally. These views are justified considering the chequered history of rejection of the rights of indigenous peoples, but the scope of this paper will be limited to indigenous peoples' right to health under the COVID-19 pandemic.

Thus, this paper will commence by providing an overview of indigenous peoples' rights in order to demonstrate the importance of the right to health to indigenous peoples. Subsequently, a conceptual clarification of key terms pertaining to the human rights of indigenous peoples will be presented in line with recognized international and regional human rights frameworks. Furthermore, this paper will examine the COVID-19 pandemic and its effects on indigenous peoples' right to health. Lastly, this paper will examine the right to health in accordance with the international human rights law and other international legal instruments. In this regard, this paper will summarize with a conclusion.

² *Aurelio Cal et al. v. Attorney General of Belize*, Supreme Court of Belize, Claims Nos. 171 and 172 of 2007, 18 October 2007, at 101 (May 21, 2022), available at <https://www.elaw.org/es/content/belize-aurelio-cal-et-al-v-attorney-general-belize-supreme-court-belize-claims-no-171-and-17>.

³ U.N. Permanent Forum on Indigenous Issues, General Comment on Economic and Social Council Resolution 2000, Art. 22 (May 21, 2022), available at <https://www.un.org/esa/socdev/unpfii/index.html>.

⁴ U.N. General Assembly, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), A/RES/21/2200, 16 December 1966, Art. 12 (May 21, 2022), available at [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A\(XXI\)_civil.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf).

1. Conceptual Clarification

1.1. Who Are Indigenous Peoples?

The term “indigenous peoples” has no single authoritative definition under international law and policy, nor is the term defined in the U.N. Declaration on the Rights of Indigenous Peoples. Different persons may define the concept on different platforms depending on their cultural, religious, social and economic backgrounds. These definitions of the concept are sometimes based on the concept’s own self-definition or even on the concept’s functions. Be that as it may, an indigenous person may be defined as follows:

One who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.⁵

Evidently, no formal definition has been adopted in international law. On the other hand, a strict definition is seen as unnecessary and undesirable. For instance, it is essential to emphasize that the U.N. Declaration on the Rights of Indigenous Peoples⁶ states:

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. [Art. 9]

Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. [Art. 33]

In this sense, in order to have a better understanding of the definition of the term “indigenous people,” the Martínez Cobo study⁷ provided the most widely cited working definition of indigenous peoples as follows:

⁵ Erica-Irene A. Daes (Chairperson-Rapporteur), *On the Concept of “Indigenous People,”* U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, para. 38 (May 21, 2022), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G96/129/80/PDF/G9612980.pdf?OpenElement>.

⁶ Declaration on the Rights of Indigenous Peoples, *supra* note 1.

⁷ José R. Martínez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problems of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, March 1987, para. 379 (May 21, 2022), available at <https://digitallibrary.un.org/record/133666>.

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them they form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institution and legal system.

In a similar vein, efforts to gain accurate insight into who indigenous peoples are led the International Labour Organization (ILO) Convention No. 169⁸ to set the following objective criteria for identifying them:

Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

In all contexts, there seemed to be efforts made to understand the concept of “indigenous people” by the ILO Convention, such as:

- i) Priority in time, with respect to the occupation and use of a specific territory,
- ii) The voluntary permutation of cultural distinctiveness, which may include language social organization, religion and spiritual values,
- iii) Self-identification,
- iv) Experience of subjugation, marginalization, dispossession, exclusion or discrimination.

The analysis above makes it clear that the term “indigenous peoples” in the Asian context is generally understood to refer to distinct cultural groups, such as “Adivasis,” “tribal peoples,” “hill tribes,” or “scheduled tribes,” while, on the other hand, indigenous peoples in Africa are referred to as “pastoralists,” “vulnerable groups” or “hunter-gatherers.” It should be noted that based on the analysis presented, the Asian context of the term “indigenous peoples” is attributed to the positive element of the indigenous peoples’ definition, even if it satisfies the criteria of the indigenous peoples’ definition, while the negative element of the definition of “indigenous peoples” is attributed to the African context of the definition. However, in order to understand and correctly appreciate who the indigenous people, a modern approach

⁸ International Labour Organisation, Indigenous and Tribal Peoples Convention, 1989 (No. 169), 27 June 1989, Art. 1(1)(b) (May 21, 2022), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document.

should place less emphasis on the early definitions that focus on aboriginality and instead focus on self-definition as indigenous and distinctly different from other groups within a state. Again, the emphasis should be on a special attachment to and use of their traditional land, whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival, or an experience of subjugation, marginalization, dispossession and discrimination because of their different cultures, ways of life or modes of production than the dominant model.⁹

Broadly speaking, the benefits of this integrated approach are clearly evident in the definition of indigenous peoples since there is no universally agreed upon definition. Thus, the authors of this paper note that despite the lack of an authoritative definition, there are three criteria that help to define indigenous peoples. Furthermore, while this may be desirable in a modern approach, the authors noted that among the three criteria, the criteria of self-identification as the expression of the right to self-determination of indigenous peoples appears widely recognized today.

Given this scenario, Article 33 of the Convention No. 169¹⁰ states that,

indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.

Similarly, the ILO Convention No. 169 also asserts that self-identification as indigenous is a “fundamental criterion for determining the groups” that are indigenous.¹¹

1.2. What Is the Right to Health?

Conceptually, the right to health is an inclusive right¹² that is frequently associated with access to healthcare and the building of hospitals. This description is correct in some ways, but the right to health appears to have gone beyond that. In a similar fashion, the Committee on Economic, Social and Cultural Rights, a body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³ refers to the right to health as “an underlying determinant

⁹ See Report of the African Commission's Working Group on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005), at 92–93 (May 21, 2022), available at https://www.iwgia.org/images/publications/African_Commission_book.pdf.

¹⁰ Indigenous and Tribal Peoples Convention, *supra* note 8.

¹¹ *Id.* Art. 1(2).

¹² U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4, 11 August 2000 (May 21, 2022), available at <https://digitallibrary.un.org/record/425041>.

¹³ International Covenant on Economic, Social and Cultural Rights, *supra* note 4.

of health.” Additionally, the question as to what constitutes the right to health is dependent on the satisfaction of the following definitional requirements: first, the right to health must be inclusive; second, the right to health must contain freedom; third, the right to health must contain entitlements; fourth, health services, goods and facilities must be provided to all without any discrimination and fifth, all services, goods and facilities must be easily available, accessible, acceptable and of good quality.

It is worth noting that, despite the understanding of the right to health, there are still common misconceptions about the right to health. However, it has been misconstrued on the following grounds: firstly, the right to health is not the same as the right to be healthy. A common misconception in this regard is that the state has to guarantee good health. However, good health is influenced by several factors that are outside the direct control of states, such as an individual's biological make-up and socio-economic conditions. In this context, instead of describing the right to health as the right to the highest attainable standard of physical and mental health, it was described as an unconditional right to be healthy. Secondly, the right to health is not only a programmatic goal to be attained in the long term. In this sense, it may be argued that the fact that the right to health should be a tangible programmatic goal does not mean that no immediate obligations on states arise from it. Thirdly, a country's difficult financial situation does not absolve it from having to take action to realize the right to health. Furthermore, it is frequently argued that states that cannot afford to do so are not obliged to take steps to realize this right or may delay their obligations indefinitely. Nonetheless, no state can justify a failure to respect its obligations because of a lack of resources. Keeping in view these three misconceptions, it must be borne in mind that the importance given to the “underlying determinants of health,” that is, the factors and conditions which protect and promote the right to health beyond health services, goods and facilities, shows that the right to health is dependent on and may even contribute to the realization of many other human rights. From the above discourse, it is relevant to mention that an individual's right to health cannot be realized without the individual's realization of their other rights, violations of which are at the root of poverty. These rights include the right to work, the right to food, the right to housing and the right to education, as well as the principle of non-discrimination.

1.3. Principle of Non-discrimination and Equality

In order to provide clarity as to the application of the principle of non-discrimination to the right to health, the principles of non-discrimination and equality are fundamental human rights principles and critical components of the right to health. In other words, the International Covenant on Economic, Social and Cultural Rights¹⁴ and

¹⁴ International Covenant on Economic, Social and Cultural Rights, *supra* note 4, Art. 2(2).

the Convention on the Rights of the Child¹⁵ identified the following non-exhaustive grounds of discrimination: race, colour, sex, language, religion, social origin, disability, birth or other status such as HIV/AIDS.

In a similar manner, the International Convention on the Elimination of All Forms of Racial Discrimination¹⁶ also stressed that states must prohibit and eliminate racial discrimination and guarantee the right of every person to public health and medical care. It is argued here that there is no justification for the lack of protection of vulnerable members of society from health-related discrimination, be it in law or in practice. In this regard, it is pertinent to note that even in times of disaster like the COVID-19 pandemic, vulnerable members of society must be protected.

1.4. Indigenous Peoples' Rights

Indigenous peoples' rights under international law have evolved from preexisting international laws, including human rights treaties, to address the unique challenges indigenous peoples face as well as their priorities, such as rights to their lands, territories, resources and self-determination. It must be emphasized that despite the evolution of indigenous peoples' rights from the existing international law, many indigenous peoples continue to face a wide range of human rights issues. In particular, the implementation of the rights of indigenous peoples has remained far from perfect. Aside from the U.N. Declaration on the Rights of Indigenous Peoples,¹⁷ there have been a series of violations of their rights ranging from pressures on their lands, territories and resources as a result of activities associated with development and extraction of resources. In addition, their cultures continued to be threatened, and the protection and promotion of their rights were met with resistance. These have remained a human rights issue today.

Moreover, it is important to point out the fact that while the U.N. Declaration is the most comprehensive instrument detailing the rights of indigenous peoples in international law and policy, it appears to contain minimum standards for the recognition, protection and promotion of these rights. However, in terms of the obligation to fulfill the rights of indigenous peoples, the question that remains pertinent is why these declarations that guide states and indigenous peoples in developing laws and policies that will have an impact on indigenous peoples as well as devising means that will best address their claims are not uniformly or consistently implemented. In light of the foregoing, it is imperative to emphasize that the U.N. Declaration contained some of the most important substantive rights, such as:

¹⁵ U.N. General Assembly, Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49, 20 November 1989, Art. 2(1) (May 21, 2022), available at <https://www.ohchr.org/sites/default/files/crc.pdf>.

¹⁶ U.N. General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/6014, 21 December 1965, Art. 5 (May 21, 2022), available at <https://www.ohchr.org/sites/default/files/cerd.pdf>.

¹⁷ Declaration on the Rights of Indigenous Peoples, *supra* note 1.

The Right to Self-Determination, Autonomy, Self-Government and Indigenous Institutions

Indigenous peoples, as people who have long-standing traditions of self-government, independent decision-making and institutional self-reliance, have historically exercised what is now referred to as the right to self-determination, which is an inherent right derived from their political, economic, social structures, as well as their cultures, spiritual traditions, histories and philosophies.¹⁸

By implication, a key point to note is that the lack of meaningful involvement of indigenous peoples in decision-making processes, which has resulted in detrimental impacts, marginalization and a legacy of economic, social, cultural and physical challenges, has raised the question of what can indigenous peoples do to promote and exercise their right to self-determination? And why is the right to self-determination important to indigenous peoples?

Similar concerns have already been expressed about what procedures should be used for consultations with indigenous peoples. What does free, prior and informed consent mean? In answering the above questions, it is relevant to examine the statutory provisions that also explicitly prohibited restrictions of their rights within the international human rights systems. According to Articles 3 and 4 of the U.N. Declaration,

indigenous peoples have the right to self-determination, they have the right to autonomy and self-government in matters relating to their internal and local affairs.¹⁹

In the same vein, Article 3 of the U.N. Declaration mirrors Common Article 1 of the International Covenant on Civil and Political Rights²⁰ and the International Covenant on Economic, Social and Cultural Rights and condemns all forms of restrictions that negatively affect their human rights and which are contrary to recognized international standards.²¹ It must be emphasized that the above overview of the U.N. Declaration highlights that indigenous peoples see self-determination as a fundamental right recognized at the international level. In this context, the implementation of the right to self-determination also complements the implementation of other rights.

¹⁸ See Declaration on the Rights of Indigenous Peoples, Seventh Preambular paragraph.

¹⁹ *Id.* Arts. 3 & 4.

²⁰ U.N. General Assembly, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 16 December 1966, Art. 1 (May 21, 2022), available at [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A\(XXI\)_civil.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf).

²¹ International Covenant on Economic, Social and Cultural Rights, *supra* note 4.

Consequently, given the growing importance of indigenous peoples' right to determine their own economic, social and cultural development, and management, it has become necessary to consult with indigenous peoples and obtain their free, prior and informed consent, which is a crucial element of the right to self-determination.²² It is commonly said that the committees that oversee the implementation of Common Article 1 of the covenants have confirmed that the right applies to indigenous peoples, among others. This statement does have an essential kernel of truth. In this regard, the Committee on Economic, Social and Cultural Rights expressed its concern as follows:

The Committee is concerned about the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant ... The Committee ... urges the State party to intensify its efforts to improve the situation of the indigenous peoples and to ensure that they are not deprived of their means of subsistence.²³

Another important point to note with regard to the right to self-determination is that the right to self-determination is a collective right held by all members of the indigenous community or nation as a group and must be exercised in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.²⁴ In a similar fashion, and with regard to all rights in the U.N. Declaration, the authors of this paper noted that the right to self-determination is universal, inalienable and indivisible. In addition to this, it is interdependent and interrelated with all of the other rights stated in the U.N. Declaration.²⁵ Arguably, while all rights in the U.N. Declaration are understood to have equal states, the right to self-determination has been seen as a fundamental right, without which the other human rights of indigenous peoples, both collective and individual, cannot be fully enjoyed.²⁶

²² See Final Study on Indigenous Peoples and the Right to Participate in Decision-Making: Report of the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/EMRIP/2011/2, 26 May 2011 (May 21, 2022), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/134/58/PDF/G1113458.pdf?OpenElement>.

²³ U.N. Committee on Economic, Social and Cultural Rights, Concluding Observations on the Russian Federation, U.N. Doc. E/C.12/1/Add.94, 12 December 2003, paras. 11 & 39 (May 21, 2022), available at <https://www.refworld.org/docid/403f21e34.html>.

²⁴ Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 46(3).

²⁵ See U.N. Development Group, Guidelines on Indigenous Peoples' Issues (2009), at 27 (May 21, 2022), available at <https://digitallibrary.un.org/record/653673?ln=ru>.

²⁶ James Anaya (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), *Report on the Situation of Human Rights of Indigenous Peoples in Brazil*, U.N. Doc. A/HRC/12/34/Add.2, 26 August 2009, para. 22 (May 21, 2022), available at <https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.34.Add.2.pdf>.

According to Article 27 of the Covenant,²⁷ it had been generally perceived that individual rights would be sufficient to ensure adequate protection and promotion of rights with a collective dimension, such as the right to culture. Nevertheless, it should come as no surprise that the U.N. Declaration recognizes the right of indigenous peoples to autonomy or self-government in matters relating to their internal and local affairs,²⁸ as well as the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.²⁹ Furthermore, the U.N. Declaration recognizes that indigenous peoples have the right to promote, develop and maintain their institutional structure, as well as their distinctiveness, customs, spirituality, traditions, procedures, practices and where applicable, judicial systems or customs, in accordance with international human rights standards.³⁰

Given the preceding developments, as well as the significant challenges to the rights to self-determination of indigenous peoples, it can be argued that indigenous peoples are distinct from, yet joined to, larger units of social and political interaction.³¹ However, it should be pointed out that the issue of self-determination is extremely important to indigenous peoples, especially when it serves as a basis for social interactions and meaningful participation in effective dialogue. Indeed, it was also argued in this paper that there are many approaches to achieving effective implementation of the right to self-determination within the state context, the most effective of which are those that are developed in cooperation with indigenous peoples. Nevertheless, it should be noted that the exercise of the right to self-determination is often expressed through the development of treaties, agreements and constructive arrangements based on the mutual agreement of indigenous peoples and states.³²

The Right to Equality and Non-Discrimination

Interestingly, equality and non-discrimination are significant objectives of and underpin both the U.N. Declaration and the ILO Convention No. 169 on Indigenous and Tribal Peoples. According to Articles 1 and 2 of the U.N. Declaration,³³ it is relevant

²⁷ International Covenant on Civil and Political Rights, *supra* note 20.

²⁸ Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 4.

²⁹ *Id.* Art. 5.

³⁰ *Id.* Art. 34.

³¹ James Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era in Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* 184, 193 (Claire Chartres & Rodolfo Stavenhagen eds., 2009).

³² Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 37; U.N. Expert Mechanism on the Rights of Indigenous Peoples, Expert Mechanism Advice No. 2 (2011): Indigenous Peoples and the Right to Participate in Decision-Making, U.N. Doc. A/HRC/18/42, 17 August 2011, para. 34 (May 21, 2022), available at https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf.

³³ Declaration on the Rights of Indigenous Peoples, *supra* note 1.

to mention that both articles articulate the right of indigenous peoples, as a collective or as individuals, to all human rights.

In the strictest sense, it means that the recognition of their rights as a whole is fully justified from an equality and non-discrimination perspective, taking into cognizance the discrimination they have experienced historically as peoples and individuals. It is necessary to mention here, albeit briefly, that an approach based on equality and non-discrimination also supports the recognition of their collective rights to their lands, territories and resources as being equivalent to the rights of non-indigenous individuals to their property, as the Inter-American Court of Human Rights³⁴ has held. The important aspect in this regard is that the U.N. Declaration³⁵ provides that:

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights.

In response to the above development and taking into account the real or actual causes of discrimination and inequality as well as the social and economic conditions of indigenous peoples, the United Nations has specifically called on states through the U.N. Declaration to take measures to combat prejudices and eliminate discrimination; promote good relations between indigenous and non-indigenous peoples; and provide prevention of and redress for any form of propaganda designed to promote or incite racial or ethnic discrimination directed against indigenous peoples.³⁶

In view of the above, it is worthwhile to ask whether states are prepared to eliminate both formal and substantive defects and forms of discrimination: and secondly, why is it necessary to adopt special measures for indigenous peoples? In this sense, the elimination of formal discrimination may suggest that a state's constitution, legislation, regulations or policies do not discriminate against indigenous peoples. Furthermore, the elimination of *de facto* discrimination requires states to implement laws and policies that facilitate substantive equality for indigenous peoples in the enjoyment of their rights. The above position is based, among other things, on the belief that the obligation to eliminate discrimination and provide for equality requires states to regulate the conduct of both public and private actors, as well as implement policies that provide for substantive equality.³⁷

³⁴ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgement, 31 August 2001, Series C, No. 79 (May 21, 2022), available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf; *Sawhoyamaya Indigenous Community v. Paraguay*, Judgement, 29 March 2006, Series C, No. 146 (May 21, 2022), available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf.

³⁵ Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 2.

³⁶ *Id.* Art. 15(2).

³⁷ See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Eco-

In the context of indigenous peoples, it may be worth bringing attention to the right to equality and non-discrimination when it comes to indigenous peoples' rights. However, these two concepts are viewed as offering dual protection. It would also mean that, on the one hand, it focuses on the conditions inherently required to sustain indigenous peoples' way of life, while on the other hand, it focuses on attitudes and behaviours that exclude or marginalize indigenous peoples from the wider society. Indeed, while it is true that some states maintain that the principle of equality prohibits states from treating any group differently from the other, it should be stressed that in order to achieve substantive equality, it is necessary to treat indigenous people as a distinct group experiencing unique circumstances that deserve the right to equality and non-discrimination. According to the Committee on the Elimination of Racial Discrimination:³⁸

To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same.

In other words, the Committee on Economic, Social and Cultural Rights, in its own view, held that,

Where discrimination of a particular group has been pervasive, states should take adequate measures to eliminate such discrimination that are not governed by the principle of international law.³⁹

Thus, while some of the more specific content of the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights may address the specifics of discrimination, there is a good argument to be made that policies that discriminate against indigenous peoples cannot entirely exempt indigenous women given their gender status.⁴⁰ However, since there is disagreement over this position, it is essential that states be able to empower indigenous women and ensure their participation in the design, delivery and monitoring of programmes that will affect their collective interest. Furthermore, it can be argued that indigenous traditions and customs are often discriminatory, particularly towards women. This

conomic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/20, 2 July 2009 (May 21, 2022), available at <https://digitallibrary.un.org/record/659980?ln=en>.

³⁸ U.N. Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination, U.N. Doc. CERD/C/GC/32, 24 September 2009 (May 21, 2022), available at <https://digitallibrary.un.org/record/667786?ln=en>.

³⁹ General Comment No. 20, *supra* note 37.

⁴⁰ *See Id.* para. 12.

view is predicated on the provisions of Article 46(2) of the U.N. Declaration on the Rights of Indigenous Peoples,⁴¹ which states:

Any limitation must be in accordance with international human rights obligations. It must also be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirement of a democratic society.

The Right of Indigenous Peoples to Participate in Decision-Making

According to Article 18 of the U.N. Declaration,⁴² indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making. As expressly stated in Article 19 of the U.N. Declaration, states are to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect their general well being.⁴³ In this context, it is relevant to mention that the institutions of decision-making should be designed to enable indigenous peoples to make decisions related to their internal affairs, as well as to participate collectively in external decision-making processes.

Free, Prior and Informed Consent

It could be argued that free, prior and informed consent is more than consultation. However, the same conclusion is not necessarily valid with respect to the states' obligation to obtain the prior consent of indigenous peoples before adopting any legislation or administrative policies that affect indigenous peoples,⁴⁴ undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mineral extraction or exploitation of resources,⁴⁵ relocation of indigenous peoples from their lands or territories,⁴⁶ and the storage or disposal of hazardous materials on indigenous peoples' land or territories.⁴⁷ Here again, an argument to the

⁴¹ U.N. Committee on the Elimination of Racial Discrimination, General Recommendation No. 25 on Gender Related Dimensions of Racial Discrimination, U.N. Doc. A/55/18, 20 March 2000, para. 69 (May 21, 2022), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/76a293e49a88bd23802568bd00538d83](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/76a293e49a88bd23802568bd00538d83).

⁴² Declaration on the Rights of Indigenous Peoples, *supra* note 1.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* Art. 32.

⁴⁶ *Id.* Art. 10.

⁴⁷ *Id.* Art. 29.

contrary may be made. It is posited that indigenous peoples who have unwillingly lost possession of their lands, when those lands have been confiscated, taken, occupied or damaged without their free, prior and informed consent are entitled to restitution or other appropriate redress that can include lands equal in size and quality or just fair and equitable compensation.⁴⁸

For analytical reasons, an obvious and fundamental, but sometimes overlooked threshold issue in relation to the principle of free, prior and informed consent generally is the practical application of the principle. According to the United Nations Permanent Forum on Indigenous Issues:⁴⁹

Free should imply that there is no coercion, intimidation or manipulation, and prior should imply consent has been sought sufficiently in advance of any authorization of commencement of activities and respective requirements of indigenous consultation processes, while informed should imply that information is provided that covers a range of aspects.

It is then necessary to state that in order to achieve the practical application of this principle, the process should include the option of withholding consent.

1.5. COVID-19 Pandemic

To understand the term “COVID-19” as used in this paper, it is important to understand that the above term is commonly referred to as “coronavirus disease 2019.” In other words, COVID-19 is a new disease, and the details of its spread are still under investigation.⁵⁰ It must be emphasized that the ongoing coronavirus pandemic is caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).⁵¹ The authors of this paper noted that the outbreak of this pandemic was first identified in Wuhan, China, in December 2019.⁵² The World Health Organization (WHO) took the first step in this regard by declaring the outbreak a Public Health Emergency of International Concern on 29 January 2020

⁴⁸ Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 28.

⁴⁹ U.N. Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous People, New York, 17–19 January 2005, paras. 46–49 (2005) (May 21, 2022), available at <https://www.un.org/development/desa/indigenouspeoples/meetings-and-workshops/international-workshop-on-methodologies-regarding-free-prior-and-informed-consent-and-indigenous-peoples.html>.

⁵⁰ Coronavirus very likely of animal origin, no sign of lab manipulation, Reuters, 21 April 2020 (May 21, 2022), available at <https://www.reuters.com/article/us-health-coronavirus-who-virus/coronavirus-very-likely-of-animal-origin-no-sign-of-lab-manipulation-who-idUSKCN223180>.

⁵¹ Novel Coronavirus – China, World Health Organization, 12 January 2020 (May 21, 2022), available at <https://www.who.int/emergencies/disease-outbreak-news/item/2020-DON233>.

⁵² See WHO Director-General's opening remarks at the media briefing on COVID-19, World Health Organization, 11 March 2020 (May 21, 2022), available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

and officially a pandemic on 11 March 2020.⁵³ However, available research shows that by 17 May, 2020 over 4.66 million cases of COVID-19 had been reported in more than 188 countries and territories, resulting in more than 312,000 deaths. Over one million to seven million people have recovered. It should be noted that the virus is primarily spread between people during close contact, most commonly through the transmission of small droplets produced by coughing, sneezing and talking.⁵⁴ It is most contagious during the first three days after the onset of symptoms, although transmission is also possible before symptoms appear and from people who do not show symptoms.⁵⁵ Of course, common symptoms include fever, cough, fatigue, shortness of breath, and loss of smell.⁵⁶ In addition, complications such as pneumonia and acute respiratory distress syndrome may occur.⁵⁷ In this context, it is worth noting that the time from exposure to the onset of symptoms is typically around five days but may range from two to fourteen days.⁵⁸ More importantly, there is no known vaccine or specific antiviral treatment. Thus, primary treatment is symptomatic and supportive therapy.⁵⁹

As seen above, it is clear that the pandemic has caused severe global economic disruption,⁶⁰ including the largest global recession, which has led to the postponement or cancellation of sporting, religious, political and cultural events,⁶¹ wide-spread shortages exacerbated by panic buying,⁶² and decreased emissions of pollutants

⁵³ See COVID-19 Dashboard by the Center for Systems Science and Engineering, Johns Hopkins University (JHU), Public Health Update (May 21, 2022), available at <https://publichealthupdate.com/jhu/>.

⁵⁴ Claire Hopkins, *Loss of Sense of Smell as Marker of COVID-19 Infection*, Ear, Nose & Throat Surgery Body of the United Kingdom (2020) (May 21, 2022), available at <https://www.entuk.org>.

⁵⁵ Coronavirus Disease 2019 (COVID-19) Symptoms, United States Centers for Disease Control and Prevention, 20 March 2020 (May 21, 2022), available at <https://www.cdc.gov>.

⁵⁶ See Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19), United States Centers for Disease Control and Prevention, 4 April 2020 (May 21, 2022), available at <https://www.cdc.gov>.

⁵⁷ Symptoms of Novel Coronavirus (2019-NCoV), United States Centers for Disease Control and Prevention, 10 February 2020 (May 21, 2022), available at <https://www.cdc.gov>.

⁵⁸ Thirumalaisamy P. Velavan & Christian G. Meyer, *The COVID-19 Epidemic*, 25(3) Trop. Med. Int'l Health 278 (2020).

⁵⁹ Gita Gopinath, *The Great Lockdown: Worst Economic Downturn Since the Great Depression*, International Monetary Fund, 14 April 2020 (May 21, 2022), available at <https://www.imf.org/en/Blogs/Articles/2020/04/14/blog-weo-the-great-lockdown-worst-economic-downturn-since-the-great-depression>.

⁶⁰ A List of What's Been Canceled Because of the Coronavirus, The New York Times, 21 January 2021 (May 21, 2022), available at <https://www.nytimes.com/article/cancelled-events-coronavirus.html>.

⁶¹ Jade Scipioni, *Why There Will Soon Be Tons of Toilet Paper, and What Food May Be Scarce, According to Supply Chain Experts*, CNBC, 18 March 2020 (May 21, 2022), available at <https://www.cnbc.com/2020/03/18/supply-chain-experts-foods-that-could-be-less-available-in-pandemic.html>.

⁶² Jonathan Watts & Niko Kommenda, *Coronavirus Pandemic Leading to Huge Drop in Air Pollution*, The Guardian, 23 March 2020 (May 21, 2022), available at <https://www.theguardian.com/environment/2020/mar/23/coronavirus-pandemic-leading-to-huge-drop-in-air-pollution>.

and greenhouse gases.⁶³ The further implications of this pandemic included the closure of schools, universities, colleges, and churches, either on a nationwide or local basis in 186 countries, affecting approximately 98.5 percent of the world's student population.⁶⁴ It is important to emphasize that the general notion about this virus has spread online,⁶⁵ and there have been incidences of xenophobia and discrimination against Chinese people and those perceived to be from areas with high infection rates. It is also significant to note that the pandemic has resulted in a number of conspiracy theories and misinformation about the scale of the pandemic and the origin, prevention, diagnosis and treatment of disease.

2. COVID-19 Pandemic and Indigenous Peoples' Right to Health

Clearly, indigenous peoples in many regions have a long history of devastation caused by epidemics introduced by their colonial masters upon their arrival in their host countries. Furthermore, it should be noted that the first Europeans and Americans brought small pox and other communicable diseases to the Yanonami of Brazil and southern Venezuela in the 1950s and 1960s that nearly wiped out the tribes.⁶⁶ Recently, the World Health Organization designated the novel coronavirus, otherwise known as COVID-19, as a pandemic. This pandemic has therefore led to the suspension or restriction of some of the otherwise guaranteed fundamental human rights of indigenous peoples. First and foremost among these rights that have been violated is the right to health. The right to health is an inclusive right.⁶⁷ However, it should be noted that prior to this pandemic, the right to health was perhaps the least respected right by state actors towards indigenous people. This perspective is particularly significant for an understanding of the COVID-19 pandemic which has presented a new threat to the health and survival of indigenous peoples within the global emergency zone as well as in society at large. In this regard, it must be emphasized that indigenous populations in nearly all countries fall into the most "vulnerable health category."

⁶³ COVID-19 Educational Disruption and Response, United Nations Educational, Scientific and Cultural Organization (UNESCO), 24 March 2020 (May 21, 2022), available at <https://www.unesco.org/en/articles/covid-19-educational-disruption-and-response>.

⁶⁴ Rachel Clamp, *Coronavirus and the Black Death: Spread of Misinformation and Xenophobia Shows We Haven't Learned from Our Past*, The Conversation, 5 March 2020 (May 21, 2022), available at <https://theconversation.com/coronavirus-and-the-black-death-spread-of-misinformation-and-xenophobia-shows-we-havent-learned-from-our-past-132802>.

⁶⁵ Sabrina Tavernise & Richard A. Oppel, Jr., *Spit on, Yelled at, Attacked: Chinese Americans Fear for Their Safety*, The New York Times, 23 March 2020 (May 21, 2022), available at <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html>.

⁶⁶ Heather Pringle, *How Europeans Brought Sickness to the New World*, Science, 4 June 2015 (July 18, 2020) (May 21, 2022), available at <https://www.sciencemag.org/news/2015/06/how-europeans-brought-sickness-new-world>.

⁶⁷ General Comment No. 14 (2000), *supra* note 12.

At the same time, the COVID-19 pandemic is disproportionately affecting indigenous peoples, exacerbating underlying structural inequalities and pervasive discrimination. Additionally, they have significantly higher rates of communicable and non-communicable diseases than their non-indigenous counterparts, as well as high mortality rates and lower life expectancies. Other contributing factors that increase the potential for high mortality rates caused by COVID-19 in indigenous communities include malnutrition, poor access to sanitation, lack of clean water and inadequate medical services.

Admittedly, indigenous peoples, like all individuals, are entitled to all human rights. Human rights are interdependent, indivisible and interrelated.⁶⁸ This means that violating the right to health may often impair the enjoyment of other human rights. It should be borne in mind that the importance given to the “underlying determinants of health,” that is, the factors and conditions which protect and promote the right to health, is dependent on, and contributes to, the realization of many other human rights. It has often been argued that an individual’s right to health cannot be realized without realizing their other rights, the violations of which are at the root of poverty, such as the rights to work, food, housing and education, and the principle of non-discrimination. Essentially, specific rights that are of particular relevance to indigenous peoples during this crisis, both individual and collective in nature, include the right to self-determination;⁶⁹ the right of indigenous peoples to participate in and be consulted on measures that affect them in both general and specific forms;⁷⁰ and, of course, the requirement to seek their free, prior and informed consent.⁷¹

However, the implementation of the COVID-19 restrictions has left much to be desired as it relates to the right to health of indigenous peoples. The impact of the COVID-19 pandemic has posed a significant risk to indigenous peoples living remotely or in voluntary isolation and who lack immunity to a wide range of infectious diseases. Indeed, it has been argued that the health rights of indigenous peoples were already at risk prior to the pandemic, and the vulnerable situation they are in has been exacerbated by the COVID-19 pandemic, as the underlying challenges have not been addressed by state actors.⁷² Furthermore, it is claimed that indigenous communities are frequently located in remote regions, leaving them with limited

⁶⁸ U.N. General Assembly, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23, 12 July 1993 (May 21, 2022), available at <https://digitallibrary.un.org/record/183139>.

⁶⁹ Declaration on the Rights of Indigenous Peoples, *supra* note 1, Arts. 3 & 4.

⁷⁰ U.N. General Assembly, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, U.N. Doc. A/HRC/15/35, 23 August 2010 (May 21, 2022), available at https://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf.

⁷¹ Declaration on the Rights of Indigenous Peoples, *supra* note 1, Arts. 10, 19, 21, 23, 24, 28 & 29.

⁷² See U.N. Expert Mechanism on the Rights of Indigenous Peoples, COVID-19 yet another challenge for indigenous peoples, 6 July 2020 (May 21, 2022), available at <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2020/04/EMPRIP-English.pdf>.

or no access to healthcare and medical support. In this regard, it is also relevant to mention that the elderly in indigenous populations and those with underlying medical conditions are more likely to require urgent and intensive respiratory care and may have difficulty accessing medical care in these areas. However, it is debatable whether the principles of non-discrimination apply to the right to health of indigenous peoples. Firstly, an understanding of the term “discrimination” is fundamental. In this context, discrimination is defined as any distinction, exclusion or restriction made on the basis of various grounds which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms. Thus, it is linked to the marginalization of specific population groups and is generally at the root of fundamental structural inequalities in society. This, in turn, may make these groups more vulnerable to illness.

According to the International Covenant on Economic, Social and Cultural Rights⁷³ and the Convention on the Rights of the Child,⁷⁴ non-discrimination and equality are fundamental human rights principles and critical components of the right to health. As a result, it is argued here that Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, Article 2(1) of the Convention on the Rights of the Child, as well as Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination have thus created an inseparable connection between non-discrimination and equality, which presupposes that the obligation to ensure non-discrimination requires specific health standards to be applied to particular population groups, such as indigenous peoples.

This position was endorsed by the Committee on Economic, Social and Cultural Rights, which agreed that there is no justification for the lack of protection of these vulnerable members of society from health-related discrimination, be it in law or fact.⁷⁵ However, the authors of this paper noted that this position does not necessarily reflect current practice today. In a similar vein, it is argued that the failure of states to comply with their duty to consult with indigenous peoples on matters affecting them is a deeply rooted challenge that has been an area of concern in recent years.⁷⁶ Therefore, it is argued here that the lack of appropriate mechanisms for the consultation and participation of indigenous peoples in designing, implementing and evaluating measures which may affect them often leads to responses that are not culturally appropriate and that may not be in conformity with indigenous peoples' rights in international law, which, of course, include the requirement to seek their free, prior and informed consent. As a result, in order to guarantee their participation in adopting measures to combat the COVID-19 health crisis that directly affects them, it must be established that consent in this context has to be genuine, valid and explicit.

⁷³ International Covenant on Economic, Social and Cultural Rights, *supra* note 4, Art. 2(2).

⁷⁴ Convention on the Rights of the Child, *supra* note 15, Art. 2(1).

⁷⁵ General Comment No. 14 (2000), *supra* note 12.

⁷⁶ *Id.*

However, it can also be argued that the consent that counts is that which takes into account indigenous peoples' distinctive concepts of health, which are inextricably linked with the realization of other rights, including the rights to self-determination, development, culture, land, language and the natural environment. It can therefore be said that free consent can be given only when both parties possess some measure of independence.

2.1. Right to Health Under International Human Rights Law

In light of what has been discussed above, one may be tempted to ask whether the right to health is an integral part of human rights law. However, it must be emphasized that any right to the highest attainable standard of health is regarded as an integral part of human rights recognized in international human rights law. According to the International Covenant on Economic, Social and Cultural Rights, which is widely considered to be the central instrument of protection for the right to health, it recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."⁷⁷

However, today, there are many United Nations human rights treaties relevant to the right to health of indigenous women and men. These treaties are as follows: the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁷⁸ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁷⁹ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁸⁰ and the International Covenant on Civil and Political Rights (ICCPR).⁸¹ In addition to core human rights treaties, the health rights of indigenous peoples are covered by a number of other international instruments, most notably the International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples.⁸²

2.2. International Covenant on Economic, Social and Cultural Rights

In response to the right to adequate healthcare of indigenous peoples and taking into account their vulnerability to pandemics, which tend to deepen existing inequalities and discrimination, the International Covenant on Economic, Social and Cultural Rights has developed the corresponding rights in the Universal Declaration of Human Rights in considerable detail, specifying the steps required for the full realization of the right to health of indigenous peoples. In light of the above, it

⁷⁷ International Covenant on Economic, Social and Cultural Rights, *supra* note 4, Art. 12.

⁷⁸ International Covenant on Economic, Social and Cultural Rights, *supra* note 4.

⁷⁹ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 16.

⁸⁰ U.N. General Assembly, Convention on the Elimination of All Forms Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180, 18 December 1979 (May 21, 2022), available at <https://www.refworld.org/docid/3ae6b3970.html>.

⁸¹ International Covenant on Civil and Political Rights, *supra* note 20.

⁸² Indigenous and Tribal Peoples Convention, *supra* note 8.

can be asserted that the right to health, which the Declaration covers as part of an adequate standard of living, has a separate article in the covenant. Thus, Article 12 of the Covenant⁸³ recognizes the right to the highest attainable standard of physical and mental health as well as specific health-related issues such as environmental hygiene and epidemic and occupational disease. Moreover, it should also be noted that this covenant has codified the right to health as a constituent element of the right to an adequate standard of living.

The above analysis of the legal framework on the right to health for indigenous peoples under the covenant also reveals that all the rights in the international Covenant on Economic, Social and Cultural Rights must be exercised in accordance with Article 2(2)⁸⁴ and Article 3⁸⁵ of the Covenant. To be more specific, this indicates that indigenous peoples have the right to enjoy the right to adequate health during the COVID-19 pandemic without being subjected to discrimination and on an equal level with the population that constitutes the majority. Similarly, indigenous women have the same right to health without discrimination and on an equal basis with indigenous men and the majority population. In sum, having due regard to the provisions of the covenant which recognize the right to the highest attainable standard of physical and mental health, it is thus important to note that the actions of the security agents in enforcing the lockdown orders orchestrated by the COVID-19 pandemic can lead to the derogation of these rights, particularly where such persons or groups of persons are suffering from infectious or contagious disease, as is currently the case. However, the question that remains pertinent is whether these rights can be restricted without necessarily subjecting indigenous peoples to inhumane and degrading treatment. The obvious answer to the question is in the affirmative.

2.3. International Covenant on the Elimination of All Forms of Racial Discrimination

By virtue of Articles 1 and 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination,⁸⁶ States parties are required to prohibit racial discrimination and to guarantee the right to equality in the enjoyment of economic and social rights, including the right to health.⁸⁷ In other words, the Convention has adequate provisions for the protection of indigenous peoples' health rights. Furthermore, while the Convention makes no explicit guarantee of equality between men and women within racial groups, the Convention's

⁸³ International Covenant on Economic, Social and Cultural Rights, *supra* note 4.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 16.

⁸⁷ *Id.*

General Recommendation No. 25 deals with gender-related dimensions of racial discrimination, noting that:

There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.⁸⁸

It has been argued that while the right to adequate health services for indigenous peoples has gone beyond a mere humanitarian service in the wake of the COVID-19 pandemic, the Convention states that except for reasonable cause, the right to health shall not be denied.

2.4. Convention on the Elimination of All Forms of Discrimination against Women

According to the provisions of Article 12 of the Convention,⁸⁹

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

This implies that in cases where it is reasonable to do so, the right to health of women shall not be infringed upon. However, it should be noted that several restriction orders across the globe have affected the aforementioned rights of indigenous women. In practice, one may therefore ask the question, is this not a derogation from the Convention? The answer must be in the affirmative. It is widely accepted that the language formulation used by the United Nations in the Convention is aimed at protecting women against discrimination and ensuring women's equality in political, economic, social and cultural realms. However, it should be emphasized that the denial of the right to health or discrimination against women in healthcare services takes place under the guise of COVID-19 restriction orders.

2.5. International Covenant on Civil and Political Rights

Pursuant to Article 1 of the Covenant,⁹⁰ all persons have the right of self-determination. By virtue of this right, they are freely able to determine their political status and freely pursue their economic, social and cultural development. Conversely, it is arguable that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, states parties may take measures

⁸⁸ See General Recommendation No. 25, *supra* note 41, para. 1.

⁸⁹ Convention on the Elimination of All Forms Discrimination against Women, *supra* note 80.

⁹⁰ International Covenant on Civil and Political Rights, *supra* note 20.

derogating from their obligations under the present covenant to the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Ironically, the central theme of the government regulation on COVID-19 is the restriction of freedom of assembly and association, and not the restriction or denial of the right to health of indigenous peoples. Again one may ask the question, is this not a derogation from the Covenant? And again the answer must be in the affirmative. Beyond the immediate impact this can have on indigenous peoples, it is evident that the International Covenant on Civil and Political Rights contains five provisions of particular relevance to this paper which are as follows:

- Article 3 calls for equality between men and women.
- Article 1 recognizes the right of all persons to self-determination and to freely determine their political status and freely pursue their Economic, Social and Cultural Development.
- Article 26 prohibits any discrimination on a variety of grounds including race, national and social origin, property or birth or other status.
- Article 17 protects everyone from arbitrary or unlawful interference with their privacy, family, or home.
- Article 27 states that ethnic, religious or linguistic minorities should not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

To be fair, one should recognize that, theoretically at least, the five provisions listed above are particularly relevant to indigenous peoples. However, in a particular scenario such as the COVID-19 pandemic, there is, therefore, a conflict between the right to health of indigenous peoples and the rights of the government at all levels to protect indigenous peoples against infectious diseases like the COVID-19 pandemic.

2.6. International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples

Despite the relatively conservative language used in the text of the ILO Convention,⁹¹ it is increasingly seen and presented within the United Nations system as one of the most comprehensive and up-to-date international instruments on the living and working conditions of indigenous and tribal peoples. However, under Article 25 of the ILO Convention,⁹² health services shall be the sole responsibility of the government and should be provided in such a way that all indigenous peoples may enjoy the highest attainable standard of physical and mental health. By a perusal of this article, it becomes clear that the first two clauses (1) and (2) of Article 25

⁹¹ Indigenous and Tribal Peoples Convention, *supra* note 8, Art. 25(1-4).

⁹² *Id.* Art. 2(2)(c).

refer to the government's responsibility to ensure that adequate health services are made available to the people concerned so that they may enjoy the highest attainable standard of physical and mental health, and also that health services shall be community-based to the greatest extent possible. These suggest, in both clauses, that the government should assist indigenous peoples in eliminating socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.⁹³

On the other hand, clauses (3) and (4) of Article 25 provide that the healthcare system shall give preference to training and employment of local community health workers and focus on primary healthcare services. In addition, the provision of such health services shall be coordinated with other social, economic and cultural measures in the country. It is clear from the above provisions that the ILO Convention contains non-discrimination clauses which shall be applied without discrimination to male and female members of these population groups.⁹⁴ The ILO Convention also places an emphasis on the right of indigenous and tribal peoples to decide their own priorities for the process of development and to exercise control, to the greatest extent possible, over their own economic, social and cultural development. However, it remains questionable whether the aforementioned frameworks would really make a difference when medical practitioners sometimes treat indigenous peoples as objects of treatment rather than rights-holders and do not always seek their free and informed consent when it comes to treatments. In this context, it seems reasonable to argue that such a situation is not only degrading, but also a violation of the human right to health under the conventions. This position is also reflected in the current COVID-19 pandemic, which led to the suspension or restriction of some of the otherwise guaranteed fundamental human rights of indigenous peoples, particularly the right to health.

Lastly, it is relevant to mention that the right to health is not only recognized in international instruments, as was noted above, but also in a number of regional instruments, such as the African Charter on Human and Peoples' Rights,⁹⁵ the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as the Protocol of San Salvador,⁹⁶ and the European Social Charter.⁹⁷ Furthermore, the American Convention on

⁹³ Indigenous and Tribal Peoples Convention, *supra* note 8, Art. 3.

⁹⁴ *Id.* Art. 7(1).

⁹⁵ Organization of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 27 June 1981 (May 21, 2022), available at <https://www.refworld.org/docid/3ae6b3630.html>.

⁹⁶ Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), A-52, 16 November 1999 (May 21, 2022), available at <https://www.refworld.org/docid/3ae6b3b90.html>.

⁹⁷ Council of Europe, European Social Charter (Revised), 3 May 1996, E.T.S. 163 (May 21, 2022), available <https://www.refworld.org/docid/3ae6b3678.html>.

Human Rights⁹⁸ and the European Convention for the Protection of Human Rights and Fundamental Freedoms⁹⁹ both contain provisions related to health, such as the right to life, the prohibition on torture and other cruel, inhumane or degrading treatment, and the right to family and private life.

Conclusion

This paper has largely dealt with the ongoing COVID-19 pandemic and its corresponding health implications for the constitutionally guaranteed right to health of indigenous peoples, which is recognized in several international and regional instruments. The COVID-19 phenomenon is a new infectious disease that perhaps requires strategic interest and protection desired by indigenous peoples beyond the humanitarian paradigm. This is particularly true with the existing legislation and regulatory agencies that are in place so as to ascertain its functionality in terms of the protection of indigenous peoples' right to health. What this paper has done, therefore, is to examine whether the existing legal frameworks and policies are tailored towards providing adequate healthcare to indigenous peoples rather than passively allowing seemingly neutral laws and policies to benefit mainly the majority groups. This paper has equally examined the concept of "indigenous peoples" from different perspectives, and it has been noted, as a matter of course, that there are three criteria, that serve as the criteria for self-identification, as an expression of the right to self-determination of indigenous peoples, which appear to be widely recognized today.

Furthermore, it can be concluded that the COVID-19 pandemic experience of indigenous peoples highlights the fact that their right to adequate healthcare is more than just an abstract code or ideological commitment. The health rights of indigenous peoples were already at risk prior to the COVID-19 pandemic, and the vulnerable situation they are in has only been exacerbated by the crisis as the underlying challenges have not been addressed.

Despite the significance of the fundamental principles of non-discrimination and equality applicable to the right to health and its long-term effectiveness as an operational tool, it is surprising to note that indigenous peoples, who have historically been discriminated against and marginalized, often bear a disproportionate share of health problems even today. The principles of non-discrimination and equality are fundamental human rights components of the right to health. On occasion, questions are raised as to the impact of the COVID-19 pandemic on indigenous peoples' rights

⁹⁸ Organization of American States, American Convention on Human Rights, 22 November 1969, Treaty Series, No. 36 (May 21, 2022), available at <https://www.refworld.org/docid/3ae6b36510.html>.

⁹⁹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, E.T.S. 5 (May 21, 2022), available at <https://www.refworld.org/docid/3ae6b3b04.html>.

to participation and consultation. However, the lack of appropriate mechanisms for the consultation and participation of indigenous peoples in designing, implementing and evaluating measures that may affect them frequently results in responses that are not culturally appropriate and that may not be in conformity with the rights of indigenous peoples under international law, including with the requirement to seek their free, prior and informed consent.

What follows from the foregoing, therefore, is that states should adopt specific measures to combat the COVID-19 health crisis that directly affects indigenous peoples since the pandemic has presented an even greater risk for indigenous peoples in the absence of public information on prevention and access to healthcare in indigenous languages.

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