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### Human Rights and COVID-19 Responses: Challenges, Advantages, and an Unexpected Opportunity

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# Human Rights and COVID-19 Responses: Challenges, Advantages, and an Unexpected Opportunity

*Ingrid Nifosi-Sutton\**

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## Introduction

The World Health Organization officially declared the COVID-19 pandemic on March 11, 2020,<sup>1</sup> as the novel coronavirus was causing deterioration of people's health and deaths at an alarming rate and forcing governments and communities worldwide to introduce drastic changes in everyday life. With the pandemic ravaging the world, U.N. and regional human rights bodies and experts became increasingly concerned that its management was resulting in violations of international human rights or would give rise to their infringement. They urged States to pay special attention to their obligations under human rights law and not to leave anyone behind.<sup>2</sup>

Drawing on these developments, this Article discusses human rights implications of COVID-19 and argues that the pandemic should be addressed through implementation of a rights-based approach. Section I focuses on the right that is inherently and primarily at stake during the pandemic: the right to health. Section I explores challenges to the realization of this right resulting from governments' responses to the pandemic, specifically the lack of access to accurate information on the COVID-19 infection and the lack of universal access to healthcare. Section I first illustrates these problems by showing how they unfolded in Mexico and in the United States. In an effort to emphasize the advantages of a rights-based approach, Section I subsequently analyzes these problems through the lens of the right to health, as enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), or implied in Article 26 of the International Covenant on Civil and Political Rights (ICCPR) on the right to equal protection of the law.<sup>3</sup>

<sup>1</sup> See *Timeline of WHO's Response to Covid-19*, WORLD HEALTH ORG. (June 30, 2020), <https://www.who.int/news-room/detail/29-06-2020-covidtimeline>.

<sup>2</sup> Committee on Economic, Social, and Cultural Rights, *Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social, and Cultural Rights*, E/C.12/2020/1 at ¶ 2 (Apr. 17, 2020) [hereinafter *Statement on the Coronavirus Disease*]; *No Exceptions with COVID-19: Everyone Has the Right to Life-Saving Interventions*, U.N. HUM. RTS. OFFICE HIGH COMM'R (Mar. 26, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E> [hereinafter *Life-Saving Interventions*]; Committee on the Rights of the Child, *The Committee on the Rights of the Child Warns of the Grave Physical, Emotional and Psychological Effect of the COVID-19 Pandemic on Children and Calls on States to Protect the Rights of Children*, U.N. HUM. RTS. OFFICE HIGH COMM'R (Apr. 8, 2020), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en); Committee on the Elimination of Discrimination against Women, *Call for Joint Action in the Times of the COVID-19 Pandemic*, U.N. HUM. RTS. OFFICE HIGH COMM'R (Apr. 21, 2020), <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>; see also Lisa Reinsberg, *Mapping the Proliferation of Human Rights Bodies' Guidance on COVID-19 Mitigation*, JUST SECURITY (May 22, 2020), <https://www.justsecurity.org/70170/mapping-the-proliferation-of-human-rights-bodies-guidance-on-covid-19-mitigation/?fbclid=IwAR1C9ZWuUhd46guC-5vTlI8O8MH79f1NARjw9AGMxeBkeUD5dvervQ4MvM> (providing an overview of the various statements on COVID-19 by UN and regional human rights monitoring bodies and experts).

<sup>3</sup> See International Covenant on Economic, Social, and Cultural Rights, art. 12, *opened for signing* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; International Covenant on Civil and Political Rights, art. 26, *opened for signing* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into Force Mar. 23, 1976) [hereinafter ICCPR].

Section II emphasizes the importance of applying a rights-based approach in cases where governments' management of the COVID-19 pandemic has disproportionately affected the enjoyment of the human rights of certain groups of persons. While these groups are numerous, Section II does not purport to offer an exhaustive investigation of all their situations. For analytical purposes, Section II specifically and exclusively examines how responses to the pandemic have: (a) deprioritized the rights to health and life of persons with disabilities; (b) prevented Indigenous leaders from exercising fundamental civil rights to protect the territories of their communities against illegal mining; and (c) led to a dramatic increase of instances of gender-based violence against women and girls. Section II illuminates the added value of a rights-based approach to the COVID-19 pandemic by assessing the above groups' predicaments in light of the Convention on the Rights of Persons with Disabilities (CRPD), the ICCPR, and the Convention on the Elimination of All Forms of Discrimination against Women (Women Convention). This Article concludes that a rights-based approach to the management of the pandemic leads to more effective domestic responses and constitutes a tremendous opportunity to renew efforts to effectively realize international human rights.

## I. Challenges to the Realization of the Right to Health

Governments' responses to the COVID-19 pandemic highlight two problems that are especially relevant to an effective realization of the right to health under human rights law: lack of access to reliable information on the pandemic, and lack of universal access to healthcare.

As the pandemic unfolded, government authorities in various countries downplayed its severity and failed to provide important information to the public on how to minimize its spreading. Circumstances in Mexico illustrate this point. There, President López Obrador contradicted health professionals' recommendations on the containment of the COVID-19 infection.<sup>4</sup> He told Mexican people that COVID-19 was less dangerous than the flu and that they should continue to live their lives as nothing was happening.<sup>5</sup> The president blamed the press and the opposition for raising the alarm about the virus in an effort to politically damage his government.<sup>6</sup> Mexican NGOs obtained three court rulings ordering the government to adopt basic COVID-19 preventive measures.<sup>7</sup> Following these rulings, President López Obrador's administration acknowledged that the pandemic was affecting Mexico.<sup>8</sup>

In some countries, healthcare is not accessible to everyone making it impossible for certain persons to be tested or treated for COVID-19. The United States is a case in point. According to Human

<sup>4</sup> See *Mexico: Mexicans Need Accurate COVID-19 Information*, HUM. RTS. WATCH (March 26, 2020), <https://www.hrw.org/news/2020/03/26/mexico-mexicans-need-accurate-covid-19-information> (continuing to hold rallies where he came into close contact with large crowds).

<sup>5</sup> See *id.* (advising the public to continue going out, eating at restaurants, and hugging others).

<sup>6</sup> See *id.* (claiming that the opposition was looking to “distort, alarm, and question the government”).

<sup>7</sup> See *id.* (explaining that competent judicial authorities have found “that the government has failed to take basic action to detect or respond to the COVID-19 pandemic”).

<sup>8</sup> See *id.* According to the Pan American Health Organization, Mexico may have 700,000 serious cases of COVID-19 requiring respiratory support; however, the public health system only has about 5,500 ventilators.

Rights Watch, millions of people in the United States do not have medical insurance and cannot obtain state-funded healthcare if infected with COVID-19.<sup>9</sup>

COVID-19 testing and treatment for these persons may cost approximately \$35,000.<sup>10</sup> Uninsured persons in the United States are frequently those with a lower income and often include immigrants.<sup>11</sup>

### A. Assessment Through the Lens of the Right to Health

The right to health is set forth in Article 12 of the ICESCR.<sup>12</sup> The Committee on Economic, Social, and Cultural Rights, the body that monitors States Parties' compliance with the Covenant,<sup>13</sup> has interpreted this right in its General Comment No. 14 of May 12, 2000. The Committee has made clear that the right to health incorporates, among its essential elements, access to information, which implies a right to seek and receive information about health issues.<sup>14</sup> When implementing this right, States Parties to the ICESCR are obligated to provide "access to information concerning the main health problems in the community, including methods of preventing and controlling them."<sup>15</sup> This obligation has to be fulfilled as a matter of priority and, based on paragraph 2(c) of Article 12, includes providing information to the public on controlling and preventing epidemics.<sup>16</sup> In the Committee's interpretation, a State Party to the ICESCR would violate the right to health if competent authorities withhold or intentionally misrepresent health-related information, thereby suggesting that the right to seek and receive information about health issues is a right to seek and receive accurate information about health issues.<sup>17</sup> Mexico is a party to the ICESCR and has

<sup>9</sup> See *COVID-19: A Human Rights Checklist*, HUM. RTS. WATCH (Apr. 14, 2020), <https://www.hrw.org/news/2020/04/14/covid-19-human-rights-checklist> [hereinafter *COVID-19: A Human Rights Checklist*] (providing an overview of healthcare access and pandemic responses in various countries).

<sup>10</sup> See Komala Ramachandra, *A Deadly Lack of Affordable COVID-19 Treatment in the US*, HUM. RTS. WATCH (Mar. 30, 2020, 5:09 PM), <https://www.hrw.org/news/2020/03/30/deadly-lack-affordable-covid-19-treatment-us> (reporting the costs incurred by one uninsured woman for her COVID-19 treatment).

<sup>11</sup> See Jennifer Tolbert et al., *Key Facts about the Uninsured Population*, HENRY J. KAISER FAMILY FOUND. (Dec. 13, 2019), <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/> (accounting for twenty-four percent of the uninsured are non-citizens).

<sup>12</sup> See ICESCR, *supra* note 3, at art. 12 (recognizing the right to the "highest attainable standard of physical and mental health").

<sup>13</sup> See Committee on Economic, Social and Cultural Rights, Report on the forty-fourth and forty-fifth sessions, Doc. E/2011/22 E/C.12/210/3, ¶¶ 19-59 (2011); see also Eibe Riedel et al., *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Developments*, Chapter I, (2014) (analyzing the practice of the Committee on ESCR).

<sup>14</sup> See Committee on Economic, Social, and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health, art. 12 of the International Covenant on Economic, Social and Cultural Rights, ¶ 12 (b) (iv), Doc. E/C.12/2000/4 (Aug. 11, 2000) (emphasizing that access should not impair the right to privacy and confidentiality).

<sup>15</sup> *Id.* at ¶ 44 (d).

<sup>16</sup> See *id.* at ¶ 44. Paragraph 2 (c) of Article 12 is concerned with the obligation to adopt measures necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.

<sup>17</sup> See *id.* at ¶ 34.

violated one of the most critical dimensions of Article 12 during the COVID-19 pandemic.<sup>18</sup> Competent authorities have infringed upon the right to receive accurate information about health issues by recklessly providing information that underestimated the deadly impact of COVID-19 and the importance of controlling the infection for political expediency.

While the United States is not a party to the ICESCR, its conduct during the COVID-19 pandemic can be examined through the lens of Article 26 of the ICCPR, which the United States ratified in 1992.<sup>19</sup> This provision is concerned with all persons' equality before the law and their entitlement, without any discrimination, to the equal protection of the law.<sup>20</sup> Specifically, this provision prohibits any kind of discrimination, based on the internationally recognized grounds, "in law or in fact in any field regulated and protected by public authorities."<sup>21</sup> Internationally prohibited grounds of discrimination include, *inter alia*, race, sex, social origin, or other status.<sup>22</sup> In its concluding observations made following analysis of the United States' periodic reports on the implementation of the ICCPR, the Human Rights Committee (HRC)<sup>23</sup> indicated that Article 26 encompasses the right of people who are poor, under relevant domestic legislation and policies, to access healthcare, and that the United States should increase efforts to realize this right.<sup>24</sup> The staggering number of persons without medical insurance and the exorbitant cost of COVID-19 treatment demonstrate that in the United States, during the pandemic, a large group of individuals cannot enjoy access to government-funded health care on an equal basis because of their socio-economic status, which often intersects with migrant status. Consequently, the United States is failing to fulfill the right to access healthcare without discrimination of any kind as required under Article 26.<sup>25</sup> The United States should be more mindful of its obligations under the ICCPR and

<sup>18</sup> See generally ICESCR, *supra* note 3, at art. 12. Mexico acceded to the ICESCR in 1981.

<sup>19</sup> See ICCPR, *supra* note 3, at art. 26.

<sup>20</sup> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See ICCPR, *supra* note 3, at art. 26.

<sup>21</sup> Human Rights Committee, General Comment No. 18: Non-Discrimination, ¶ 12, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Nov. 10, 1989).

<sup>22</sup> See quoted material *supra* note 20.

<sup>23</sup> The Human Rights Committee monitors compliance with the ICCPR by States Parties. See Human Rights Committee, *Working Methods*, U.N.

HUM. RTS. OFFICE HIGH COMM'R 4, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx>.

<sup>24</sup> In 2006, the Human Rights Committee reviewed the United States and recommended that "[i]n the aftermath of Hurricane Katrina, the State party should increase its efforts to ensure that the rights of the poor, and in particular African-Americans, are fully taken into consideration in the reconstruction plans with regard to access to housing, education and healthcare."

Human Rights Committee, *Concluding Observations on the Second and Third Periodic Report of the U.S.*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, ¶ 26 (Dec. 2006). See also Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the U.S.*, U.N. Doc. CCPR/C/USA/CO/4, ¶ 15 (Apr. 23, 2014) [hereinafter *Fourth Periodic Report*].

<sup>25</sup> The Committee on Economic, Social, and Cultural Rights corroborates the point that international human rights law requires States to ensure the right of access to healthcare for non-nationals. The Committee has held that "[a]ll persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care." See Committee on Economic, Social, and Cultural Rights, General Comment No. 19, *The Right to Social Security*, art. 9, ¶ 37, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008).

heed the U.N. Special Procedures' warning that the use of insurance schemes during the pandemic should never lead to discrimination against certain patients,<sup>26</sup> since “[e]verybody has the right to health.”<sup>27</sup>

Effective realization of the right to health is not simply a technical legal issue or a moral imperative. It leads to a more robust response to the COVID-19 pandemic. As the Committee on Economic, Social, and Cultural Rights has maintained in its latest statement on COVID-19, the right to receive accurate information about health issues is of critical importance since “[a]ccurate and accessible information about the pandemic is essential . . . to reduce the risk of transmission of the virus.”<sup>28</sup> Similarly, ensuring universal access to COVID-19 prevention and treatment can result in more successful management of the pandemic. Given the high contagiousness of the virus, failure to provide access to COVID-19 prevention and treatment to certain persons would dramatically increase the risk of infection for other communities. Some States have understood this problem and expanded coverage of their national health systems. Thus, in an effort to further limit the spreading of COVID-19, the Portuguese government issued an order in March 2020 guaranteeing that all individuals who had applied for residency and asylum had access to health care under the national system on an equal basis with permanent residents until June 30, 2020.<sup>29</sup>

In sum, realizing the right to receive accurate information about the COVID-19 pandemic, implied in Article 12 of the ICESCR, and facilitating universal access to healthcare in compliance with Article 26 of the ICCPR, constitute indispensable steps that should be at the heart of any response to the pandemic.

## II. Groups Disproportionately Affected by Responses to COVID-19

Governments' responses to the COVID-19 pandemic have resulted in violations of fundamental rights of certain populations. For the purposes of this Article this Section considers: the situations of persons with disabilities, Indigenous Peoples, and women and girls. This Article further analyzes violations of rights suffered by these groups through the lens of relevant U.N. human rights treaties to further highlight the added value of a rights-based approach to the pandemic.

### A. Persons with Disabilities

More than one billion persons with disabilities are at a heightened risk of contracting COVID-19 and dying if infected.<sup>30</sup> Risk factors specific to persons with disabilities include old age, pre-

<sup>26</sup> *Life-Saving Interventions*, *supra* note 2.

<sup>27</sup> *Id.*

<sup>28</sup> *Statement on the Coronavirus Disease*, *supra* note 2, at ¶ 18.

<sup>29</sup> *See COVID-19: A Human Rights Checklist*, *supra* note 9.

<sup>30</sup> *Statement on Persons with Disabilities in the COVID-19 Outbreak and Response*, GLOB. ACTION DISABILITY NETWORK (2020), <https://gladnetwork.net/search/resources/glad-network-statement-persons-disabilities-covid-19-outbreak-and-response>.

existing health conditions, or living in residential institutions.<sup>31</sup> U.N. experts and NGOs have indicated that persons with disabilities in residential institutions are a “significant portion of the total infection cases and fatalities”<sup>32</sup> owing to the “high risk of contamination [due to overcrowding] and the lack of external oversight.”<sup>33</sup>

In some instances, these persons’ survival may not be a priority for authorities who are responding to the COVID-19 pandemic. Reports indicate that persons with disabilities have been “de-prioritized in health services.”<sup>34</sup> In Italy, the professional organization that sets guidelines for intensive care has concluded that intensive care treatment should prioritize COVID-19 patients with the highest chance of “therapeutic success.”<sup>35</sup> This may mean, in the view of some experts, that if persons with disabilities have a pre-existing health condition or their disability reduces chances of recovery, they may not receive intensive care treatment.<sup>36</sup>

The situation of persons with disabilities during the pandemic should be dealt with in accordance with the CRPD when affected States, such as Italy, are parties to this treaty. Relevant provisions include Articles 10, 11, and 25.<sup>37</sup> Article 11 requires States Parties to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk.<sup>38</sup> Article 10 sets forth the right to life and the duty to “take all necessary measures to guarantee its effective enjoyment by persons with disabilities on an equal basis with others.”<sup>39</sup> This Article should be read together with Article 25 enshrining the right to health and obligating States Parties to provide persons with disabilities with the same range, quality, and standard of free or affordable health care as provided to other persons.<sup>40</sup>

The Chair of the U.N. Committee on the Rights of Persons with Disabilities has clarified the concrete import of these provisions during the COVID-19 pandemic, which can be regarded as a “situation of risk” within the meaning of Article 11.<sup>41</sup> Ensuring safety of persons with disabilities

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Catalina Devandas, *COVID-19: Who Is Protecting the People with Disabilities?*, U.N. HUM. RTS. OFFICE HIGH COMM’R (Mar. 17, 2020),

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25725&LangID=E>.

<sup>34</sup> Helen Dickinson & Anne Kavanagh, *People with Disabilities Are More Likely to Die from Coronavirus – but We Can Reduce the Risk*, NEWSROOM (Mar. 27, 2020), <https://newsroom.unsw.edu.au/news/health/people-disability-are-more-likely-die-coronavirus—we-can-reduce-risk>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Convention on the Rights of Persons with Disabilities, arts. 10–11, 25, *adopted by the general assembly* Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008) [hereinafter CRPD]; *see also* Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?* 30 HUM. RTS. QUARTERLY, 494 (2008) (discussing the nature of the rights set out in the Convention).

<sup>38</sup> CRPD, *supra* note 37.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*



in residential homes would entail acceleration of their deinstitutionalization.<sup>42</sup> Effective implementation of Articles 25 and 10 would require competent authorities to refrain from discriminatory denial of health care or life-saving services on the basis of disability.<sup>43</sup>

Persons with disabilities “are at a much higher risk from COVID-19.”<sup>44</sup> Implementing a rights-based approach to protect their safety and well-being would ensure that they are not neglected or dismissed because of their disability while responses to the pandemic are truly inclusive.

## B. Indigenous Peoples

Arbitrary enforcement of anti-COVID-19 measures is making it harder for Indigenous leaders to exercise fundamental civil rights to protect Indigenous territories from illegal mining. Human rights-monitoring bodies have deemed these territories to constitute essential elements of Indigenous Peoples’ right to enjoy their own culture.<sup>45</sup>

U.N. experts reported that on April 6, 2020, approximately 100 police forcibly dispersed thirty Indigenous and environmental defenders who were blocking fuel tankers of OceanaGold Philippines Inc. from entering the Oceanagold Didipio mining site located in the northern part of the Philippines.<sup>46</sup> The mine, which has been operating on the ancestral lands of a local Indigenous community without its consent, has been blockaded by the community since June 2019, “when the company continued mining while it waited for renewal of an expired permit.”<sup>47</sup> President Duterte’s office authorized the entry of the mining company’s vehicles, irrespective of the government-imposed locked down.<sup>48</sup> Protesters were injured by the police, and one Indigenous leader was charged with ignoring isolation measures, such as quarantine.<sup>49</sup>

<sup>42</sup> Danlami Basharu & María Soledad Cisternas Reyes, *Joint Statement: Persons with Disabilities and COVID-19 by the Chair of the U.N. Comm. on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary-General on Disability and Accessibility*, U.N. HUM. RTS. OFFICE HIGH COMM’R ¶ 5, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25765&LangID=E>.

<sup>43</sup> *Id.* at ¶ 7. The Committee on the Rights of Persons with Disabilities monitors States Parties’ compliance with the CRPD. See Committee on the Rights of Persons with Disabilities, *Questions and Answers*, U.N. HUM. RTS. OFFICE HIGH COMM’R, <https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>.

<sup>44</sup> U.N. Office of the High Commissioner for Human Rights, *COVID-19 Guidance*, U.N. HUM. RTS. OFFICE HIGH COMM’R 2 (Mar. 31, 2020), [https://www.ohchr.org/Documents/Events/COVID-19\\_Guidance.pdf](https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf).

<sup>45</sup> Human Rights Committee, General Comment No. 23 (50), art. 27, ¶¶ 3.2, 7, CCPR/C/21/Rev.1/Add. 5 (Apr. 26, 1994).

<sup>46</sup> Special Rapporteur on the rights of Indigenous Peoples, Special Rapporteur on the rights to peaceful assembly and freedom of association, and Special Rapporteur on human rights and the environment, *Philippines Mine Standoff: Indigenous and Environmental Rights Must Be Respected, Say UN Experts*, U.N. HUM. RTS. OFFICE HIGH COMM’R (Apr. 30, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25850&LangID=E> [hereinafter *Philippines Mine Standoff*].

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; see also *Standoff Over Philippines Didipio Mines Escalates Despite Covid-19 Lockdown*, MONGABAY (Apr. 6, 2020), <https://news.mongabay.com/2020/04/standoff-over-philippines-didipio-mines-escalates-despite-covid-19-lockdown/>.

<sup>49</sup> *Philippines Mine Standoff*, *supra* note 46.

The above situation violates the right of peaceful assembly enshrined in Article 21 of the ICCPR, to which the Philippines is a party.<sup>50</sup> This right requires that resort to the use of force for the purpose of “policing assemblies” must always be reasonably necessary to achieve a given law enforcement objective and proportional to the objective to be attained.<sup>51</sup> In this situation, the Philippines breached Article 21 because the use of force by the police to enforce anti-COVID-19 measures against the protesters “was unnecessary and disproportionate.”<sup>52</sup> The Philippine government should have engaged with the protesters “in peaceful and constructive talks instead of dispersing [them] forcefully”<sup>53</sup> and injuring them.

The Indigenous defenders’ right to freedom of expression, under paragraph 2 of Article 19 of the ICCPR, is also at stake since the defenders were advocating for Indigenous Peoples’ rights and the Philippine government silenced them by arbitrarily resorting to the use of force to enforce anti-COVID-19 measures.<sup>54</sup> This conclusion is in line with the HRC’s point that, while the right to freedom of expression as set out in Article 19 can be restricted to protect public health, restrictions may never be invoked, and by extension enforced, “as a justification for the muzzling of any advocacy of . . . human rights.”<sup>55</sup> Moreover, the HRC has recently asserted that freedom of expression and the right of peaceful assembly “constitute important safeguards for ensuring that States Parties resorting to emergency powers in connection with the COVID-19 pandemic comply with [rights and] their obligations under the Covenant.”<sup>56</sup>

The rights the Indigenous defenders were upholding are contained in Article 27 of the ICCPR, concerned with individuals belonging to ethnic, religious, and linguistic minorities. The HRC has construed Article 27 to imply the right to enjoy a particular culture, which, when it comes to Indigenous communities and their members, may consist of a way of life closely associated with territory and use of its resources.<sup>57</sup> The HRC’s practice shows that Article 27 requires contracting States to effectively protect sacred areas of Indigenous Peoples from mining.<sup>58</sup> By authorizing tankers of OceanaGold Philippines Inc. to enter the mining site located on Indigenous lands without the consent of the local Indigenous community, the Philippines violated Article 27. The

<sup>50</sup> The Philippines ratified the ICCPR in 1986. See ICCPR, *supra* note 3.

<sup>51</sup> Maina Kiai & Christof Heyns, *Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies*, U.N. Doc. A/HRC/31/66, § E, ¶¶ 50, 57–58, (Feb. 4, 2016).

<sup>52</sup> *Philippines Mine Standoff*, *supra* note 46.

<sup>53</sup> *Id.*

<sup>54</sup> The Human Rights Committee has taken the view that the right to freedom of expression encompasses, inter alia, human rights advocacy. See Human Rights Committee, General Comment No. 34, *Freedom of Opinion and Expression*, art. 19, ¶ 23, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

<sup>55</sup> *Id.*

<sup>56</sup> Human Rights Committee, *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, ¶ 2(f), U.N. Doc. CCPR/C/128/2 (Apr. 30, 2020), <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>.

<sup>57</sup> Human Rights Committee, *supra* note 45.

<sup>58</sup> Human Rights Committee, *Concluding Observations on the Consolidated Second and Third Periodic Reports of the Philippines*, U.N. Doc. CCPR/CO/79/PHL, ¶ 16 (Dec. 1, 2003); *Fourth Periodic Report*, *supra* note 24, at ¶ 25.

government should put an end to this violation by stopping the company's operations until consultations with the Indigenous community have been held "and [its] consent obtained."<sup>59</sup>

The Philippines also violated paragraph 3 of Article 12 of the ICCPR on freedom of movement. This provision necessitates that restrictions on freedom of movement implemented to protect public health are not discriminatory.<sup>60</sup> There is a breach of this provision because the Philippine government enforced quarantine and other isolation measures against one of the Indigenous leaders but failed to similarly enforce them against workers of the mining company. As the U.N. experts put it, "[t]he [Indigenous] community is left with the impression that the COVID-19 restrictions are more strictly enforced against them, than against businesses operating on their lands without their consent."<sup>61</sup>

"Indigenous peoples are [disproportionately] impacted in the COVID-19 pandemic."<sup>62</sup> The rights-based approach requires that their leaders fully exercise civil rights and denounce governments that take advantage of the pandemic to threaten Indigenous communities' way of life. This guarantees that pandemic responses are fair and predicated on the rule of law.

### C. Women and Girls

On March 18, 2020, the Committee of Experts of the Follow-up Mechanism of the Belém do Pará Convention (MESECVI), issued a statement in which it warned that measures adopted to mitigate the consequences of COVID-19 would intensify violence against women and girls in the Americas.<sup>63</sup> The Committee was specifically concerned that social distancing and quarantine mandates would place women "at a very high risk of extreme violence by forcing full time cohabitation with their aggressors."<sup>64</sup>

The Committee's warning was prophetic, as available statistics show a dramatic worldwide increase of instances of violence against women, especially domestic violence, during the pandemic. According to U.N. Women in Argentina, emergency calls for domestic violence have

<sup>59</sup> *Philippines Mine Standoff*, *supra* note 46.

<sup>60</sup> Human Rights Committee, General Comment No. 27, Freedom of Movement, art. 12, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999); see Adina Ponta, *Human Rights Law in the Time of Coronavirus*, 24 AM. SOC'Y INT'L L.: INSIGHT 5 (Apr. 20, 20220), <https://www.asil.org/insights/volume/24/issue/5/human-rights-law-time-coronavirus> (examining derogations under the ICCPR and limitations on rights under the ICESCR).

<sup>61</sup> *Philippines Mine Standoff*, *supra* note 46.

<sup>62</sup> *Id.*

<sup>63</sup> See Committee of Experts, *Committee of Experts Urges the Incorporation of the Gender Perspective in the Measures Taken to Mitigate COVID-19 and the Strengthening of Actions for the Prevention and Care of Gender-based Violence*, ORG. AM. STATES MESECVI (Mar. 18, 2020), <https://mailchi.mp/dist/communiquecovid-19-and-the-prevention-of-gender-based-violence?e=148d9c4077> (listing factors that contribute to increased violence against women and girls and providing measures States can implement to prevent this type of violence).

<sup>64</sup> *Id.*

increased by twenty-five percent since the March 20, 2020 lockdown began.<sup>65</sup> In Cyprus and Singapore, help lines have registered an increase of respectively thirty percent and thirty-five percent.<sup>66</sup> In France, there has been a spike of thirty percent in cases involving domestic violence against women since the March 17, 2020 lockdown.<sup>67</sup> In South Africa, police statistics indicate that “they received 460 calls a day to their gender-based violence hotline in the first five days of the lockdown alone, nearly double from the weeks prior.”<sup>68</sup> These statistics prompted Ndileka Mandela, Nelson Mandela’s grand-daughter, to use social media to let women stuck at home with abusers know that “they [were] not alone, and to encourage them to call police hotlines for help.”<sup>69</sup>

Lockdowns can also exacerbate instances of gender-based violence against women and girls by men other than those who are within the family circle, thereby aggravating women and girls’ objectification and dehumanization. What happened to Juliet M., a sixteen-year-old Kenyan girl, illustrates this point.<sup>70</sup> For four days, Juliet was kidnapped, held in captivity, and sexually abused by a man.<sup>71</sup> The perpetrator reportedly explained that “he kidnapped [Juliet] because he needed female company to get through the government-imposed COVID-19 lockdown.”<sup>72</sup> Neighbors rescued Juliet and sheltered her in a safe house in Nairobi.<sup>73</sup>

Gender-based violence against women (GBV) is a form of discrimination against women and girls prohibited under Article 1 of the Women Convention to which all the above States are parties.<sup>74</sup> As the Committee on the Elimination of Discrimination against Women (CEDAW)<sup>75</sup> has pointed out, GBV is violence “directed against a woman [or a girl] because she is a woman [or a girl] or

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<sup>65</sup> *Infographic: The Shadow Pandemic—Violence against Women and Girls and COVID-19*, U.N. WOMEN (Apr. 6, 2020), <https://www.unwomen.org/en/digital-library/multimedia/2020/4/infographic-covid19-violence-against-women-and-girls>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Kim Harrisberg, *Mandela’s Granddaughter Ndileka Uses Social Media during Lockdown to Help Abused Women*, REUTERS (Apr. 23, 2020), <https://www.reuters.com/article/us-health-coronavirus-safrica-women-trfn/mandelas-granddaughter-ndileka-uses-social-media-during-lockdown-to-help-abused-women-idUSKCN2251W6>.

<sup>69</sup> *Id.*

<sup>70</sup> Agnes Odhiambo, *Tackling Kenya’s Domestic Violence Amid COVID-19 Crisis*, HUM. RTS. WATCH (Apr. 8, 2020), <https://www.hrw.org/news/2020/04/08/tackling-kenyas-domestic-violence-amid-covid-19-crisis#>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 35, Gender-based Violence against Women, Updating General Recommendation No. 19*, 67th sess., U.N. Doc. CEDAW/C/GR/35, ¶ 1 (July 26, 2017); United Nations Convention on the Elimination of All Forms of Discrimination against Women, art. 1, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (1980) [hereinafter *Women Convention*]; see also *Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4) (last visited July 13, 2020) (listing the countries that are members of the Convention).

<sup>75</sup> See generally Andrew Byrnes, *The Committee on the Elimination of Discrimination against Women*, WOMEN’S HUM. RTS.: CEDAW INT’L, REGIONAL NAT’L L. 27 (Anne Hellum & Henriette Sinding Aase eds. 2013) (discussing how CEDAW functions and its potential added value).

that affects women [and girls] disproportionately.”<sup>76</sup> Gender-based violence prevents women and girls from achieving substantive equality and enjoying human rights and fundamental freedoms set out in the Women Convention. These rights and freedoms include primarily the right to a life free from gender-based violence;<sup>77</sup> the rights to life, health, and liberty; freedom from torture;<sup>78</sup> and freedom of movement.<sup>79</sup> What happened to Juliet, specifically the fact that she was kidnapped and held captive for four days, is a clear example of how being subjected to gender-based violence may cause women and girls to experience violations of the right to liberty meant as “freedom from confinement of the body.”<sup>80</sup> Juliet’s right to be free from torture has been violated too. Torture, for the purposes of human rights law, is treatment that inflicts severe physical and mental suffering for a certain purpose.<sup>81</sup> Purposes include extracting information and any reason based on discrimination of any kind.<sup>82</sup> The perpetrator can be a state official<sup>83</sup> or a private actor.<sup>84</sup> Juliet’s right to be free from torture is undoubtedly at stake. She was subjected to protracted sexual abuse inflicting severe physical and mental suffering because, owing to her gender, the perpetrator thought he could dispose of her as his individual property.

The CEDAW has specified in its latest guidance note on COVID-19 that States Parties to the Women Convention have to protect women and girls from gender-based violence during the pandemic. Given that all the countries considered in this Section are parties to the Women Convention, these countries must act with due diligence to prevent and protect “women from, and

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<sup>76</sup> Committee on the Elimination of Discrimination against Women, *supra* note 74; *see also* Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19, Violence against Women*, 11th sess., U.N. Doc. CEDAW/C/GR/19, ¶ 6 (1992).

<sup>77</sup> The Committee on the Elimination of Discrimination against Women has derived this right from the prohibition of gender-based violence against women implied in Article 1 of the Women Convention. Committee on the Elimination of Discrimination against Women, *supra* note 74, ¶ 15.

<sup>78</sup> *Id.* *See* Juan E. Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading, Treatment or Punishment*, U.N. Doc. A/HRC/31/57, ¶ 51 (Jan. 5, 2016) (maintaining that gender-based violence, including rape and other forms of sexual violence, amounts to torture); *see also* Committee Against Torture, *General Comment No.2, Implementation of Article 2 by State Parties*, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008), [hereinafter *Committee Against Torture*].

<sup>79</sup> Committee on the Elimination of Discrimination against Women, *supra* note 74, ¶ 15.

<sup>80</sup> Human Rights Committee, *General Comment No. 35, Liberty and Security of Persons*, art. 9, ¶ 3, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014). *See also* Odhiambo, *supra* note 70 (describing the kidnap of Juliet).

<sup>81</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *opened for signing* Dec. 10, 1984, 1465 U.N.T.S. 85, 113 (1988) (“For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See* Mendez, *supra* note 78 (noting that State authorities have to exercise due diligence to investigate, prosecute and punish private actors); *see also* Committee Against Torture, *supra* note 78 (describing how States that fail to exercise due diligence are considered complicit or otherwise responsible for consenting to or acquiescing in impermissible acts of torture by non-State actors).

hold perpetrators accountable for, gender-based violence.”<sup>85</sup> These countries should make sure that women and girls who have been subjected to, or are at risk of, GBV have effective access to justice, in particular to protection orders, medical and psycho-social assistance, shelters, and rehabilitation programs.<sup>86</sup> Moreover, national response plans to COVID-19 should prioritize “availability of safe shelters, hotlines[,] and remote psychological counselling services and inclusive and accessible specialised and effective security systems”<sup>87</sup> to avoid exacerbating women and girls’ exposure to violence during quarantine and lockdowns.<sup>88</sup> Where reservations to the Women Convention hamper operationalization of the above measures, reserving States should withdraw them promptly.<sup>89</sup>

### III. Conclusions

The challenges posed by government management of the COVID-19 pandemic highlight the importance of applying a rights-based approach to the pandemic response. Implementing the right to receive accurate information about the pandemic, implied in Article 12 of the ICESCR, and facilitating universal access to healthcare in compliance with Article 26 of the ICCPR, are essential steps to contain and respond to the pandemic. Through guaranteeing non-discriminatory enjoyment of the rights to health and life, in pursuance of the CRPD, governments can ensure that they do not overlook the health needs of persons with disabilities, a group who is historically marginalized and at a higher risk of contracting COVID-19. Governments must give these persons priority consideration and adopt measures specifically tailored to their predicament. By exercising civil rights under the ICCPR, Indigenous leaders can hold governments accountable when the governments take advantage of the COVID-19 emergency to deprive Indigenous communities of their right to preserve and enjoy their way of life. The rights-based approach also better equips governments to prevent and tackle GBV during pandemics by requiring them to prioritize protecting against this egregious form of discrimination against women.

The rights-based approach renders management of the pandemic more participatory, inclusive, fair, predicated upon the rule of law, and, hence, more effective. This approach may also create, given the long-term repercussions of the pandemic, the opportunity for States to renew efforts to

<sup>85</sup> Committee on the Elimination of Discrimination against Women, *Guidance Note on the Women Convention and COVID-19*, U.N. HUM. RTS. OFFICE HIGH COMM’R., ¶ 3, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/STA/9156&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/STA/9156&Lang=en) (last visited Aug. 18, 2020).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Singapore entered a reservation to Article 2(e) of the Women Convention, requiring elimination of discrimination against women by non-State actors, that may hamper efforts to tackle GBV during the COVID-19 pandemic. *See Singapore Reservations to the Convention on the Elimination of All Forms of Discrimination against Women, Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFFICE HIGH COMM’R, <https://indicators.ohchr.org/> (select CEDAW under “Select a Treaty”, and follow “Singapore” hyperlink under “Countries”) (“In the context of Singapore’s multiracial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of Article 2, paragraphs (a) to (f), [...] where compliance with these provisions would be contrary to their religious or personal laws.”).

realize international rights “to lay the foundation for achieving the ideal enshrined in the Universal Declaration of Human Rights of . . . a world of free human beings enjoying ‘freedom from fear and want.’”<sup>90</sup>

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<sup>90</sup> *Statement on the Coronavirus Disease, supra* note 2, at ¶ 25. See Kenneth Roth, *We Can Beat the Virus Only by Protecting Human Rights*, WASH. POST (May 6, 2020), <https://www.washingtonpost.com/opinions/2020/05/06/we-can-beat-virus-only-by-protecting-human-rights/> (analyzing a rights-based approach to pandemic response).