When Contact Kills: Indigenous Peoples Living in Voluntary Isolation During COVID

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ABSTRACT

During the global pandemic, people around the world are at risk of serious illness and death from contact and proximity to other people. But Indigenous peoples, particularly those in voluntary isolation, have always faced that risk. International organizations have relied on the right to self-determination as the primary legal grounds to justify the principle of no-contact for Indigenous peoples living in voluntary isolation. This Essay argues that the right to life and right to health when properly contextualized are stronger bases to push states to prevent outsiders from contacting people living in voluntary isolation.

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INTRODUCTION

A fifteen-year-old boy of the semi-isolated Yanomami peoples in Brazil died of COVID-19 in April 2020.1 Although the source of contraction is unclear, the thousands of illegal gold miners who have infiltrated Yanomami territory are plausible suspects.2 The global pandemic brings to the fore a problem that has long existed for Indigenous communities. Since the colonization of the Americas, Indigenous peoples’ contact with noncommunity members has led to disease, and, in many cases, death.3 This Essay focuses on Indigenous peoples living in voluntary isolation (IPLVI),4 for whom contact with the outside world and a lack of immunity to common illnesses continues to mean death even today. For example, a cold epidemic killed roughly 40 to 60 percent of the Yora (Nahua) people in Peru after they were contacted by illegal loggers in 1983.5

Estimates indicate there are over 10,000 IPLVI around the world, the majority of whom live in the Amazon regions of Brazil, Peru, Bolivia, Venezuela, Ecuador, and Colombia and the Gran Chaco region of Paraguay.6 Many IPLVI have had some form of contact with the Western world and retreated thereafter. These peoples are therefore said to be “in voluntary isolation” as opposed to “uncontacted.”7 IPLVI are particularly under threat because many of them live on

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2. See id.
4. The Inter-American Commission on Human Rights (IACHR) defines Indigenous Peoples Living in Voluntary Isolation (IPLVI) as:

   [I]ndigenous peoples or segments of indigenous peoples who do not maintain sustained contacts with the majority non-indigenous population, and who generally reject any type of contact with persons not part of their own people. They may also be peoples or segments of peoples previously contacted and who, after intermittent contact with the non-indigenous societies, have returned to a situation of isolation and break the relations of contact that they may have had with those societies.

   Id. ¶ 11 (footnotes omitted).
5. Id. ¶ 107.
7. IACHR Recommendations, supra note 3, ¶ 13.
lands that are rich with oil and other natural resources. Indeed, Brazil recently announced plans to expand extractive industries in the Amazon notwithstanding the negative impact this will have on IPLVI.

The United Nations (UN) and Inter-American Commission on Human Rights (IACHR) have made great strides in articulating guidelines and recommendations to protect IPLVI. Both the UN’s Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial Contact of the Amazon Basin and El Chaco (UN Guidelines) and the IACHR’s Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the Full Respect of their Human Rights (IACHR Recommendations), posit that IPLVI have indicated their desire to avoid contact with the Western world. This “principle of no contact” requires that states refuse concessions to companies seeking to undertake extractive projects and ensure that individuals do not illegally conduct mining or other activities in the lands where IPLVI reside.

COVID-19 is a deadly and highly contagious respiratory virus that does not require physical contact, but only proximity for transmission. It may also be contracted via surfaces. In the past, IPLVI have been infected by other contagious diseases through indirect contact. Individuals have left tools and other items within IPLVI territories, which then transmitted viruses to IPLVI. Pollution and dumping into rivers that enter IPLVI’s land also create health risks for IPLVI. Thus, in order to protect IPLVI’s lives and health during the

8. For example, the Tagaeri and Taromenane’s territory sits atop 20 percent of Ecuador’s untapped oil wealth. See Jason G. Goldman, Ecuador Has Begun Drilling for Oil in the World’s Richest Rainforest, Vox (Jan. 14, 2017, 10:00 AM), https://www.vox.com/energy-and-environment/2017/1/14/14263958/ecuador-drilling-oil-rainforest [https://perma.cc/L7PU-SKC3].


13. Id.


15. UN Guidelines, supra note 10, ¶ 62.
COVID-19 pandemic and beyond, governments should interpret the principle of “no contact” to include “no proximity.”

The UN and IACHR justify the principle of no contact on the basis of the right to self-determination. This Essay argues that the rights to health and life provide stronger grounds to legally compel states to protect IPLVI. In Part I, we explain how the UN and IACHR use self-determination to justify the principle of no contact. In Part II, we analyze some of the challenges and shortcomings of relying solely on the right to self-determination as a means of encouraging states to protect IPLVI from contact. In Part III, we suggest that the rights to health and life could be independent and stronger grounds to support the principle of no contact.

I. SELF-DETERMINATION AS THE RATIONALE TO PROTECT IPLVI

The UN Guidelines and IACHR Recommendations state that countries should ensure IPLVI are not contacted by the Western world. The principle of no contact is justified on the grounds of the right to self-determination. The IACHR Recommendations specifically note that the principle of no contact is “the expression of [IPLVI’s] right . . . to self-determination” and that the right to self-determination is “directly and profoundly related to the rights to [IPLVI’s] lands, territories, and natural resources.” The UN has stated that IPLVI’s “decision to remain isolated can be understood as one of the many forms of exercising the right to self-determination, which contributes to the respect of other rights.” In sum, the international community considers the right to self-determination as the primary justification for the protection of IPLVI and the framework through which all other rights for IPLVI should be understood.

To bolster state compliance with human rights norms (among other things), intergovernmental organizations, including the UN, have taken the position that every person has the same rights across time, space, and community. The UN,
however, deviates from a universal understanding of the right to self-determination when it comes to IPLVI. The UN explicitly states that “[t]he guarantee of self-determination does not mean the same thing for [IPLVI] as it does for indigenous peoples generally.” The standard account of self-determination would allow groups to form their own independent and sovereign political unions if they so desired. But IPLVI do not accept our global order and are certainly not seeking to establish their own sovereignty within it. Acknowledging this view, the UN Guidelines states that self-determination “for [IPLVI] means absolute respect for their decision to remain isolated.” Consequently, the UN has radically redefined the right of self-determination to accommodate the perceived desires of IPLVI. This is a rare, but necessary, departure from the universalism of human rights.

II. THE LIMITS OF SELF-DETERMINATION AS A BASIS TO PROTECT IPLVI FROM CONTACT

There are several limitations to using the right to self-determination to prevent miners, loggers, missionaries, tourists, and others from contacting or coming into proximity with IPLVI. The right to self-determination appears in several international and regional documents, but it is likely that the only instance where it creates a binding obligation that is immediately effective is the International Covenant on Civil and Political Rights (ICCPR). Even in the ICCPR, the right to self-determination is derogable, which allows states to deviate from it under certain circumstances. The ICCPR articulates the right to

(evaluating the tension between universal and culturally relative human rights). Yet, when it comes to IPLVI, the UN and IACHR seem to have recognized a need to deviate from this approach.

22. UN Guidelines, supra note 10, ¶ 47 (translated from original).
24. UN Guidelines, supra note 10, ¶ 47 (translated from original).
27. Commentators who claim that the right to self-determination is a peremptory norm under customary international law would disagree with this assessment because no derogation is permitted from peremptory norms. See, e.g., Héctor Gros Espiell (Special Rapporteur of the
self-determination in Article 1 but does not include it within the list of Articles specified as nonderogable in Article 4 of the ICCPR.\(^28\) States are allowed to disregard certain provisions of the ICCPR “in time[s] of public emergency which threaten[] the life of the nation and the existence of which is officially proclaimed.”\(^29\) In addition, the American Convention on Human Rights (American Convention) does not even contain a provision on self-determination.\(^30\) By comparison, under no circumstances can states derogate from the right to life found in the ICCPR\(^31\) and in the American Convention.\(^32\)

During the global pandemic, states have derogated from many important provisions of the ICCPR and other treaties\(^33\) and could refuse to honor the IPLVI’s right to self-determination. This is particularly problematic now because IPLVI are at greater risk during the pandemic.\(^34\) It is precisely when contact is more dangerous for IPLVI that states can use the pandemic as a reason to refuse to protect IPLVI from contact with outsiders.

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28. See ICCPR, supra note 26, arts. 4, 6–8, 11, 15–16, 18.

29. Id. art. 4, ¶ 1.


In addition, state parties to the ICCPR and other documents mentioning the right to self-determination would likely reject the right as interpreted in its strongest form. One interpretation of the right to self-determination requires states to allow peoples to create their own independent political unions.\(^{35}\) States might fear acknowledging a self-determination derived principle of no contact for IPLVI, because it could suggest they would allow IPLVI and other Indigenous peoples to form their own political unions. Indeed, much of the pushback to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) arose from a provision of the UNDRIP stating that the right to self-determination for Indigenous peoples includes the right to autonomy and self-government.\(^{36}\) To address these concerns, the UNDRIP contains a clause denying Indigenous peoples the right to secede from the nation states in which their territories lie.\(^{37}\) What is perhaps most interesting is that, despite the no-secession clause and the UNDRIP’s merely “aspirational” status,\(^ {38}\) four countries voted against the UNDRIP because of “concerns over provisions on[, inter alia,] self-determination.”\(^{39}\) Given this discomfort with the right to self-determination, some states might be less inclined to follow the principle of no contact if it is based solely on the right to self-determination. In the next Part, we propose that the rights to health and life are important alternative and potentially stronger justifications for pushing states to protect IPLVI from contact with outsiders.

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35. See supra notes 23–24 and accompanying text. It should be noted that there is no accepted definition of the right to self-determination in international law. Some suggest that since the 1990s, the international community has seen it to include only the “freedom from a former colonial power, and, once independence has been achieved, . . . freedom of the whole state’s population from foreign intervention or undue influence.” Hurst Hannum, Legal Aspects of Self Determination, ENCYCLO. PRINCETONIENSIS, https://pesd.princeton.edu/node/511 [https://perma.cc/6AQH-D5XD] (last visited Oct. 2, 2020).

36. “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” UNDRIP, supra note 25, art. 4; see also Duane Champagne, UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights, WICAZO SA REV., Spring 2013, at 9, 12.

37. See UNDRIP, supra note 25, art. 46.


III.  RIGHT TO HEALTH AND RIGHT TO LIFE TO SUPPORT
THE PRINCIPLE OF NO CONTACT

This Essay argues that the right to health in combination with the right
to life is a stronger basis to support the principle of no contact than the right
to self-determination.\textsuperscript{40} Historically, after initial contact, Indigenous peoples’
mortality rates were as high as nine hundred for every one thousand Indigenous
persons in some areas of the Caribbean.\textsuperscript{41} Around 1620, roughly one hundred
years after contact, modern-day Peru and Mexico’s Indigenous populations had
dropped by 92 percent and 89 percent, respectively.\textsuperscript{42} Even today, the danger of
contracting diseases from the external world remains. Especially problematic is
IPLVI’s lack of immunity to many common infirmities, with diseases such as the
“cold, pertussis, hepatitis, malaria, tuberculosis, influenza, pneumonia, measles,
mumps, chicken pox, polio, and other diarrheal and gastrointestinal diseases”
having epidemic effects on IPLVI.\textsuperscript{43} Thus, contact for Indigenous peoples not only
puts their health at risk but could kill them on a large-scale.

Because of IPLVI’s isolation, it is difficult to say exactly how COVID-19 is
affecting their health and wellbeing. The experiences of the world’s “contacted”
Indigenous peoples with COVID-19, however, does not bode well for IPLVI. In
Brazil for instance, the age-adjusted COVID-19 mortality rate for Indigenous
peoples was five times higher than that of Brazil’s general population in July of
2020.\textsuperscript{44} Around that same time, some 48 percent of Brazil’s Indigenous peoples
who sought hospital care had perished.\textsuperscript{45} Even in the United States, COVID-19
has killed one in every 2300 Indigenous Americans compared with one in every

\textsuperscript{40} Both the UN Guidelines and IACHR Recommendations mention the rights to health and life
of Indigenous peoples, but they are portrayed as corollary to the right of self-determination. See UN Guidelines, \textit{supra} note 10, ¶ 62; IACHR Recommendations, \textit{supra} note 3, ¶ 137.2. Only recently, in light of the pandemic, did the IACHR issue a resolution specifically
connecting the principle of no contact with health, noting that governments should “[r]espect
unconditionally non-contact with indigenous peoples or groups who are in voluntary
isolation, given the very severe impact that [COVID-19] could have on their livelihood and

\textsuperscript{41} IACHR Recommendations, \textit{supra} note 3, ¶ 115.

\textsuperscript{42} Id.

\textsuperscript{43} Id. ¶ 117.

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\textsuperscript{45} Id.
It is obvious that COVID-19 will disproportionately affect or is already disproportionately affecting IPLVI. Moreover, IPVLI lack access to healthcare and preventative measures that have lowered mortality rates in the outside world.47

Like the right to self-determination, the right to health and life must be contextualized to recognize the special circumstances of IPLVI.48 While for Western peoples, the right to health might mean access to healthcare services,49 for IPLVI it should mean that the government ensures that IPLVI’s health and lives are protected by preventing contact with and proximity to outsiders. This means not just refraining from granting concessions to extractive industries, but also actively patrolling IPLVI lands to ensure that outsiders do not conduct any unauthorized activities such as mining, logging, tourism, or even missionizing50 near IPLVI land.


49. For Western peoples, the right to health is traditionally conceived as the right to the “highest attainable standard” of physical and mental health and has typically been seen as a “positive right” requiring states to take action by guaranteeing the: (1) availability, (2) accessibility, (3) acceptability, and (4) quality of health services, goods, and facilities. See Poblete Vilches v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 349, ¶ 106 (Mar. 8, 2018); OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS. & WORLD HEALTH ORG., THE RIGHT TO HEALTH: FACT SHEET NO. 31, at 1 (2008), https://www.ohchr.org/Documents/Publications/Factsheet31.pdf [https://perma.cc/FZC6-LHEL].

50. Missionaries are often the catalyst for initial contact and act in parallel with extractive industry operators. For example, the Waorani peoples of Ecuador were first contacted in the 1950s by the Summer Institute of Linguistics (SIL), an organization comprised of U.S. evangelical missionaries whose purpose is to translate the Christian Bible into lesser known languages. See Carlos Andrés Vera, Taromenani, el Exterminio de los Pueblos Ocultos, VIMEO [https://perma.cc/47UM-MPFB]. Working in conjunction with Texaco, which had discovered oil in the Ecuadorian Amazon, the SIL deciphered the Waorani language through conversations with a Waorani woman who had been kidnapped by Ecuadorian colonists. See id. The SIL and Texaco subsequently helicopter-dropped gifts and radios speaking the Waorani language into Waorani territory in order to coax the Waorani out of isolation. See id.
Health is a right that is to be granted progressively, while the right to life is something that states must immediately protect.51 As a result, the right to health is often bootstrapped to the right to life to strengthen it and the rights are strongly connected in case law for contacted Indigenous communities under the Inter-American Court of Human Rights (IACtHR).52 For example, in *Yakye Axa Indigenous Community v. Paraguay*, the IACtHR held that the right to life implicates not only the state’s negative obligation to ensure that no person is arbitrarily deprived of his or her life, “but also the right not to be denied the conditions required to ensure a decent existence.”53 The IACtHR also held that the right to health is implicated by the “right to a decent life.”54 In practice, this means that where states fail to provide access to things like healthcare, food, and clean water, the IACtHR may find violations of the right to life and the right to health.55

The IACtHR will only find such a violation where there exists a causal connection between state inaction and the alleged violation of the rights to life and health.56 A causal connection may be shown where: (1) state authorities knew or should have known of the circumstances that gave rise to the violation; (2) it was foreseeable that the circumstances would result in conditions posing an immediate risk to preserving the right to life; and (3) state authorities did not take necessary measures which could be “reasonably expected to prevent or avoid such risk.”57

If a state fails to adequately protect IPLVI from contact, then, under the legal standard articulated above, the state is in violation of the rights to health and life. First, states know that contact with IPLVI, including by legal and illegal resource extraction, tourism, and missionizing, can lead to sickness and death among IPLVI. Second, the fact that contact causes illness and death among IPLVI should be foreseeable to states, as documented by the many cases where contact with

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51. See Am. Convention on Human Rights, supra note 30, art. 4; ICESCR, supra note 25.
54. *Id.* ¶ 162.
57. *Id.*
Western peoples has led to the death of Indigenous community members.\textsuperscript{58} Third, refusing to grant extractive industry concessions to companies on IPLVI land and providing active police patrol designed to prohibit the entry of illegal and legal loggers, miners, tourists, and missionaries into IPLVI territories are measures that are “reasonably expected to prevent or avoid such risk.”\textsuperscript{59} Consequently, under this interpretation of the right to life and health, states that do not take active measures to prevent outsiders from being in proximity to IPLVI would be in violation of the American Convention.

The right of IPLVI to self-determination is what the UN and IACHR use to justify why states should not contact isolated Indigenous communities. A combination of the rights to health and right to life provides a potentially stronger and more direct basis for pushing states to adopt active measures that will ensure isolated Indigenous communities do not come into contact with people outside of their communities.

\textbf{CONCLUSION}

The IACHR and UN have relied on self-determination as the primary grounds to justify the principle of no contact for IPLVI. We argue that the rights to health and life provides stronger support for the principle of no contact than the right to self-determination. Unlike the right to self-determination, the right to life is not derogable.\textsuperscript{60} In addition, states may be reluctant to grant the right to self-determination for fear that it signals that they accept the territorial sovereignty claims of Indigenous communities.

On the other hand, IACtHR case law on the rights to health and life of Indigenous communities gives strong grounds to argue that state parties are obligated to take active measures to prevent any individuals from being in proximity to IPLVI. Measures that are required to protect the health and life of IPLVI are different than those required to protect people in the Western world. For example, to advance the right to health for people in the Western world might require providing them with access to health services. On the other hand, to advance the right to health for IPLVI requires states to prevent outsiders from contacting them or even being in proximity to them. Under this framework, states

\begin{footnotes}
\footnote{See, e.g., IACHR Recommendations, \textit{supra} note 3, ¶¶ 115, 117.}
\footnote{See Sawhoyamaxa, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 155.}
\footnote{The current COVID-19 pandemic has led the international community to permit restrictions on various ICCPR rights to “protect the right to life and health of all individuals.” \textit{UN Statement on Derogations, supra} note 33, ¶ 2.}
\end{footnotes}
must not grant concessions to firms in IPLVI lands, but also prevent miners, loggers, tourists, and missionaries from entering IPLVI territories.

Self-isolation has become a survival strategy for people around the world during the global pandemic. Over one hundred governments around the world have adopted measures that require people to stay at home and not interact with others as a way to slow the transmission of COVID-19. In this way, we remain confined to our own small community (our households). Many people now realize what IPLVI have always known—that contact can kill.