

Vulnerability in times of Corona

Guidelines from the Inter-American Court of Human Rights on the Right to Health

Anna Kohte

2020-05-28T09:00:53

Two years ago, the Inter-American Court of Human Rights (Court) issued a seminal ruling regarding the right to health established in Article 26 of the American Convention on Human Rights (ACHR). For the first time ever, it held a State Party to be internationally responsible for not guaranteeing non-discriminatory access to health services (previously discussed [here](#) and [here](#)). In the same case, the Court also established the justiciability of the right to health. Today, this ruling is more relevant than ever. Indeed, the health emergency due to COVID-19 has reached Latin America with its full strength. The pandemic poses considerable challenges to this region, characterized by profound inequalities, as the virus has a disproportionate effect on people in vulnerable situations, such as [indigenous communities](#), [Afro-descendants](#) and workers in the [informal sector](#).

In order to prevent further impact of the pandemic, special attention should be paid to those for whom it is difficult to take basic measures to prevent infection and even more difficult to reach health centers. Against this background, it is argued that the Inter-American System of Human Rights, and in particular the case of [Poblete Vilches vs. Chile](#), provides useful guidelines for a more inclusive response to the pandemic. This is illustrated through recent examples concerning the protection of indigenous communities.

Lessons from the case of Poblete Vilches et al. vs. Chile

As discussed in more detail [previously](#), Mr. Poblete Vilches had been hospitalized due to an acute respiratory failure, but was denied access to intensive medical care because of his advanced age. He died two days later in the hospital. His family argued that Chile had violated his right to health, as Chile failed to provide the required minimum medical care. Additionally, they argued that Chile did fail to demonstrate the “real and effective impact” of its health policies on “the most vulnerable populations” ([para. 87](#)).

Following the applicants’ arguments, the Court recognized a violation of the right to health under Article 26 ACHR in connection with the prohibition of discrimination under Article 1.1 ACHR ([paras. 174-176](#)). Two obligations are specified in particular: First, the obligation to comply with a minimum standard in situations of medical urgencies ([paras. 118-124](#)), and, second, the transversal obligation of non-discrimination in the health care sector ([paras. 125-132](#)).

The Court’s finding is of direct relevance for the elderly during the pandemic, as it explicitly prohibits the denial of access to health care in situation of medical

urgencies on the sole ground of a person's advanced age ([paras. 126-127, 142-143](#)). While age is a major risk factor in times of Corona, it is not the only one. Other social conditions, some of them explicitly included in the non-exhaustive list of criteria in Article 1.1 ACHR, such as [gender](#) and [economic status](#), are likely to increase risk of infection and exacerbate the severity of outcomes during the pandemic, which highlights the necessity of an intersectional approach. By emphasizing the states' obligation to guarantee equal treatment in relation to health services in accordance with Article 1.1 ACHR ([para. 122](#)), the Court's finding becomes relevant in relation to any discrimination based on social conditions.

Furthermore, the Court considers that the prohibition of discrimination is comprised of two concepts: "a negative concept related to the prohibition of arbitrary differentiation of treatment and an affirmative concept related to the obligation of States Party to create real equal conditions towards groups who have been historically excluded or who are exposed to a greater risk of being discriminated" ([para. 123](#)). Importantly, the second element – the positive obligation – also means that States Parties are under an obligation to adopt all appropriate measures to protect and preserve the right to health of people in vulnerable situations ([para. 123](#)).

The judgment, adopting a sensitive approach towards economic constraints, furthermore provides specific guidelines of how health systems can be designed in a more inclusive way with minimum resource implications: Chile was ordered to strengthen relevant existing institutions, to design a publication which clearly and accessibly describes the rights of, in this case, the elderly in relation to health (to make it available in all public and private hospitals in Chile, both for patients and medical personnel as well as on the website of the Ministry of Health) and third, to design a general policy of comprehensive protection for the elderly ([paras. 239-241](#)).

Implementing the right to health in times of corona: the case of indigenous communities

Just like the elderly – albeit for different reasons –, indigenous communities are particularly vulnerable with regards to COVID-19. High risks for indigenous peoples in the Americas have been repeatedly stressed (see e.g. [Peru](#), [USA](#), and [Brazil](#)). The [Science Magazine](#) appealed to Brazil's government to expand the risk group designation to include indigenous peoples, highlighting that "pathogens have historically been one of the most powerful factors in decimating Indigenous peoples in South America". The vulnerable situation of indigenous communities has also become known through an open letter of global figures urging Brazil's leaders to immediately take action "[on the eve of a genocide](#)". Taking inspiration from [Poblete Vilches vs. Chile](#), two examples concerning indigenous communities shall illustrate possible ways of a more culturally sensitive approach to the pandemic.

Timely and culturally adequate pandemic responses and security protocols

Peru is the country that has applied the [most restrictive quarantine](#) in Latin American to stop the spread of the virus. However, the national organization of indigenous peoples of the Amazon River Basin in Peru (Asociación Interétnica de Desarrollo de

la Selva Peruana, AIDSESEP) lodged a [petition](#) to the Inter-American Commission on Human Rights (among other protection mechanisms), alleging that, even 36 days after the declaration of the state of emergency, no regulatory mechanisms had been presented determining specific measures to take in respect of indigenous communities in the Amazon region, whether by the state or by regional entities. It is argued that the lack of regulations and security protocols violates their “intercultural right to health” under the ACHR, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, [among others](#).

Considering the case of *Poblete Vilches vs. Chile*, special attention should be paid to people in vulnerable situations. As delineated above, states parties are not only under the obligation to formulate health policies with a view to achieve quality health services. But they are also under an obligation “to create real equal conditions towards groups who have been historically excluded” ([para. 123](#)). Considering the oftentimes pre-existing barriers for members of indigenous communities to [reach health centers](#), prevention and early detection becomes crucial. Lack of secure land rights often makes it difficult to close territories. Dissemination of information can take days and resources, including potable water, are frequently scarce, require sharing among community members and make [social distancing inappropriate](#). Against this background, timely response and adjusted strategies become crucial in the fight against the virus. According to the framework of the case of *Poblete Vilches vs. Chile*, national pandemic responses should also take into account the particular socio-economic and cultural context of minorities.

Translate official information on the pandemic into indigenous languages

In Mexico, members of different indigenous communities have successfully requested precautionary measures, arguing that the lack of information on the pandemic in their indigenous language (Tsotzil, Tseltal, Zoque and Chol) violated their right to health and information under the Mexican Constitution. Oftentimes, monolingual indigenous communities have to organize themselves in order to get official materials in their languages. A [regional Court](#) recognized the potential violation of the right to health under the Mexican Constitution and the federal and regional governments are now under the obligation to disseminate – in a culturally adequate manner – the [information in indigenous languages through the mass media](#) (visual, oral and graphic). This echoes the statements on the right to be informed issued by the Court in *Poblete Vilches vs. Chile*. But it also illustrates how States can react more inclusively even with minimum resource implications and how a more socio-economic and culturally contextualized approach of rights becomes crucial in order to timely prevent further spreading of the disease.

While Corona deepens inequality, inequality furthers its spread

Even administrations with little interest in addressing issues of discrimination need to remain aware of the fact that excluding people in vulnerable situations from national pandemic responses can create remaining hotspots of infection, which will return to affect national health as a whole. It is thus neither in the interest of specially affected

people, nor can it be in the interest of the majority, to leave the most vulnerable behind. Pandemic responses can only be effective if they include all equally.

Against this background the case of *Poblete Vilches vs. Chile* provides for a useful framework: First, it states clear obligations arising of the right to health and reminds us of the transversal dimension of the obligation of non-discrimination within the particular framework of the right to health. Second, its court orders provide for feasible examples of more inclusive health policies.

Applying those standards and frameworks in times of corona can facilitate a more effective prevention of contagion as well as provide for affordable and inclusive solutions in times of extreme constraints. Providing non-discriminatory access to health care should ultimately help to prevent the aggravation of already existing inequalities in Latin America. It also provides an opportunity to take root causes into account and reminds us to pay special attention to the interplay between economic, social and cultural rights.

[Anna Kohte](#) is a postgraduate student at University of Amsterdam and Humboldt University of Berlin.

Cite as: Anna Kothe, “Vulnerability in times of Corona – Guidelines from the Inter-American Court of Human Rights on the Right to Health”, *Völkerrechtsblog*, 28 May 2020.

