

VIEWPOINT

War, Political Conflict, and the Right to Health

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The Universal Declaration of Human Rights makes no reference to war except to assert that respect for human rights is a means of preventing it. The lack of attention is not surprising given that in the post-World War II period the conduct of war was the subject of the 1945 Nuremberg Declaration about war crimes and crimes against humanity, and intense debate in the lead-up to the re-drafting of the Geneva Conventions of 1949. Indeed, part of the push for addressing human rights in the UN Charter was the belief that respect for human dignity in peacetime was being neglected.¹ The consequence of that peacetime focus, though, led to almost 60 years of neglect of the right to health in armed conflict.

Over time, human rights ideas made their way into the law of armed conflict. Traditionally, the responsibilities of belligerents not to harm people not engaged in combat were grounded in the principle of humanity, to avoid unnecessary suffering. It a far more limited concept than ideas of human dignity that ground the UDHR and the conventions that followed. In the two decades leading up to the 1949 conference on new Geneva Conventions, some international humanitarian law experts sought to introduce human rights concepts, especially human dignity, into the Conventions. For political and institutional reasons, though, the drafters of the 1949 Conventions rejected that approach.² The new conventions only recognized a handful of rights, such as freedoms of religion and not to be tortured or be subjected to human experimentation.

While this initial effort to ground international humanitarian law in human rights was largely squelched, as David Luban has shown, human rights ideas came to influence interpretations of the laws of armed conflict.³ Moreover, as the global human rights movement grew in the last quarter of the 20th century, so did its embrace of documentation and advocacy to end impunity for violations of international humanitarian law. Human rights organizations also fought for its expansion, for example in treaties to ban anti-personnel landmines and cluster munitions, and to establish international tribunals for prosecution of war crimes and crimes against humanity. UN human rights mechanisms began to address violations of international humanitarian law.

Yet even as the human rights community employed international humanitarian law in its work, it largely ignored the right to health in situations of political and armed conflict. This neglect extended beyond war, to situations of political volatility and violence, where international humanitarian law does not apply. In part, this neglect was a product of the general lack of attention to the power of the right to health to advance human well-being. After all, the seminal article on health and human rights by Jonathan Mann and colleagues that launched this journal makes only passing mention of the right to health.⁴ Many

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human rights organizations expressed skepticism about the power and even the relevance of the right, adopted cramped interpretations of it, or ignored it altogether.

I was at Physicians for Human Rights in the 1990s when we issued a report on attacks on health care in the war in former Yugoslavia. Aside from its documentation of atrocities, the report proposed a classification of the nature of the violations of what we called medical neutrality (something of a misnomer, as immunity from attack does not depend on neutrality). The classification was supported by 30 citations to treaties, court decisions, declarations and the like, but only a single reference to the right to health, and that was in connection with torture.⁵ Even when the right to health began gaining traction in the human rights community, its application in armed conflict found no place. Except for references to humanitarian aid, the seminal General Comment 14 of the Committee on Social, Economic and Cultural Rights, released in 2000, ignored armed conflict altogether except to refer back to international humanitarian law and call for humanitarian assistance in war.

The omission had serious consequences. First, major gaps in Geneva Conventions regarding health in armed conflict are properly filled by the right to health. The Conventions require parties to the conflict to refrain from attacking the wounded and sick and the health workers that offer them care, to collect and care for the wounded and sick in war, and to provide care impartially. But they are silent on ongoing obligations by states engaged in war to offer available, accessible, acceptable and quality health services to the civilian population. Even during military occupation, the Conventions only obligate occupying military forces to preserve existing services and lack human rights criteria for their content and administration, much less any requirements for participation of the local population or accountability to it. The right to health fills this major gap in critical ways by requiring continuity of health services and mitigating the effects of war on the civilian populations such as through prevention and treatment of infectious diseases that so often accompany armed conflict.⁶ Especially in this

time of protracted and chronic armed conflict, governments cannot be left off the hook by ignoring the right to health.

The right to health is also a central tool to protect those in need of care and health workers and facilities in times of political violence short of war, where all too frequently protestors are denied access to health care because of their political activities and health workers are arrested and prosecuted for providing the care. Yet as late as the Arab Spring in 2011, a major human rights organization expressed uncertainty about states' obligations to refrain from interference with health workers who attend to wounded protestors beyond prohibitions on arbitrary arrests and curbing of free expression. Similarly, while the menace of applying ever-expanding counter-terrorism law to restrict medical and humanitarian action in war is clearly contrary to international humanitarian law, without the right to health the tools to counter the criminalization of health care by states only indirectly involved in conflict are weak.

Only in recent years has the importance of the right to health in war and other situations of political violence begun to develop. The first breakthrough likely came in a 2013 report by the Special Rapporteur on the Right to Health, Anand Grover. The report recognized that insecurity often limited states' ability to ensure the resources needed to maintain access to health but explained that the requirement of progressive realization remained in place, requiring "concrete steps towards the full realization of the right to health to all, without discrimination and regardless of the status of persons as combatants or civilians."⁷ His report was soon followed by another by the Office of the High Commissioner of Human Rights on economic, social and cultural rights in armed conflict.⁸ Then in 2018, Agnes Callamard, Special Rapporteur on summary, arbitrary and extra-judicial executions, wrote a powerful analysis entitled "Saving Lives is not a Crime" that showed how the criminalization of humanitarian aid and medical care under counter-terrorism law violates the rights to life and health.⁹

This recognition of the role of the right to health in armed conflict has been too long in com-

ing. Some soul-searching is warranted to ask why it was so marginalized in circumstances where infringements are so common and health needs are so great. Going forward, the right to health needs to be employed as a tool to seek to advance the well-being of people whose health is most in jeopardy. There is now some movement in that that direction. In Afghanistan, ongoing insecurity and violence against civilians and health facilities has resulted in enormous strains in the country's effort to construct a functioning health system. Threats and violence have led to closure of large numbers of clinics and hospitals. Nevertheless, the government's national health plan is premised on the right to health, using its criteria to develop its governance and programs.¹⁰ The right to health is also being used to contest the criminalization of health care and discriminatory and inequitable health care under occupation.

These are just the first steps. We know how devastating war is to health. Foregoing the use of the tool of human rights to try to lessen its harms can no longer be acceptable.

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