

Public health law and the war in Ukraine: Present and lessons for the future

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Abstract

In this paper, the theme of medical neutrality is highlighted, in particular, the definition of the concept and principles are defined, and examples of medical neutrality violation through the prism of armed aggression in Ukraine are given. Medical neutrality is seen as a social agreement that obliges society to protect health workers both in time of war and peacetime, and obliges medical personnel to provide medical care to all, regardless of religion, race, ethnic origin, political affiliation or other characteristics. The internationally coordinated system for the observance of human rights is clarified, attention is focused on the guarantees enshrined in Protocol I regarding the provision of medical care, as well as on the international axioms of the protection of medical workers and guarantees of their professional activity in martial law conditions, defined in Protocol I.

The issue of legal assessment of the professional activity of medical workers in the territories in which the aggressor state has established or is trying to establish an occupation regime is revealed, and a fine line between the essence of the concept of medical neutrality and the professional activities of medical workers in the temporarily occupied territories is stated, which emphasizes the need for clarity and certainty in the presentation of legal norms to prevent human rights violations.

Key words: collaborative activity, medical neutrality, medical assistance, medical worker, martial law

Słowa kluczowe: neutralność medyczna, pracownicy medyczni, stan wojenny, wsparcie medyczne, współpraca

The international armed conflict revealed many problems related to public health law in Ukraine, all of which directly or indirectly affect human rights and need to be solved. Within the scope of this research, we will reveal certain aspects of public health law through the lens of wartime conditions.

One of the important institutes of public health law is the concept of medical neutrality. This concept has become especially relevant for Ukraine at 2014, since the beginning of the armed conflict with Russian Federation. Little-known by then, it began its national development, but today it is only a scientific and educational component. However, it is very important to have a proper legal basis, as well as effective mechanisms for the protection of human rights that follow from this concept.

Medical neutrality is a social agreement that obliges society to protect health workers both in time of war and in peacetime, and obliges medical personnel to provide

medical care to all, regardless of religion, race, ethnic origin, political affiliation or other characteristics.

The concept of medical neutrality was introduced during the wartime in the Geneva Conventions on the Protection of Victims of War (Geneva, 12 August 1949), the Additional Protocol to the Geneva Conventions of 12 August 1949 concerning the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Resolution 2286 (2016), adopted by the UN Security Council at its 7685th meeting on May 3, 2016, the International Oath of the Doctor, Geneva Declaration (Geneva, 1948).

UNICEF, UNFPA and WHO published a joint statement calling for an immediate termination to all the attacks on health care system in Ukraine [1]. Horrific attacks on healthcare in Ukraine are killing and seriously injuring patients and healthcare workers, destroying vital healthcare infrastructure and forcing thousands of people to forego healthcare services despite dire need. Attacking the most

vulnerable people—infants, children, pregnant women, those already suffering from diseases, as well as health workers, risking their own lives to save other lives is an act of extreme cruelty.

The principles of medical neutrality include:

- protection of health workers, patients, health care facilities and other civilian medical units, medical vehicles from attacks or unlawful interference;
- free access to medical care, including treatment, as well as necessary medicines and medical devices;
- humane treatment to the entire civilian population;
- non-discrimination in the treatment of the sick or injured;
- observance of patients' rights, in particular to maintain patient's confidentiality, right to refuse medical intervention.

Statistical data from the briefing of the Minister of Health on June 7, 2022 clearly indicate a violation of the principles of medical neutrality by the aggressor state [2]. In particular, in Ukraine today: 817 health care institutions have been damaged, 122 health care institutions have been completely destroyed; 14 medical workers were killed (civilian doctors, not including military medicine), 48 civilian doctors were wounded; 85 ambulances (civilian) were destroyed, 105 vehicles were seized by the occupiers; 481 pharmacies were damaged, 43 were completely destroyed; 489 institutions are located in the territory where the aggressor state is trying to establish an occupation regime.

In addition to the statistical data, violations of the principles of medical neutrality are illustrated by specific illegal actions committed by the aggressor state in Ukraine. For example:

- 1) taking the doctors and patients of the Mariupol hospital as the hostages;
- 2) destruction of a maternity hospital in Mariupol and death of a pregnant patient;
- 3) shelling and destruction of the Kharkiv Regional Blood Service Center and murder of donors and a doctor;
- 4) intentional blocking of access to medical care and medical supplies, including attacks on humanitarian convoys;
- 5) forced donation;
- 6) lack of access to medical care and medicines in the occupied territories;
- 7) withdrawal of expensive medical equipment, medicines and their export outside the territory of Ukraine;
- 8) replacement of medicines with probative value, in particular drugs for thrombolysis, with drugs of the aggressor country without probative value, which are used exclusively in this country;
- 9) illegal use of the symbols of the International Red Cross, namely on military equipment.

Taking into account the above examples of gross violations of the principles of medical neutrality, we will analyze the provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (ratified by Ukraine on August 18, 1989) [3], in order to find out the internationally coordinated system for observance of human rights. Let's pay attention to the

guarantees enshrined in Protocol I regarding the provision of medical care, namely:

- 1) all the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones (Article 10);
- 2) it is prohibited to subject persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty, to any medical procedure that is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty (Article 11);
- 3) it is prohibited to carry out on such persons, deprived of their liberty, even with their consent: a) physical mutilations; b) medical or scientific experiments; c) removal of tissues or organs for transplantation, except where these acts are justified from a medical point of view and can be applied to citizens of the party that carries out such intervention (Article 11);
- 4) it is allowed to donate blood for transfusion or skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient (Article 11);
- 5) any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who in the power of the opposing Party, to which he does not belong, is prohibited (Article 11);
- 6) the person has the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient (Article 11);
- 7) each party to the conflict shall keep a record of all medical procedures applied to any person interned, detained or otherwise deprived of liberty (Article 11);
- 8) the Occupying Power is obliged to ensure further satisfaction of the medical needs of the civilian population in the occupied territory (Article 14);
- 9) the Occupying Power shall not requisition civilian medical formations, their equipment and materials or forcefully involve their personnel in labor, while these resources are necessary to ensure proper medical care of the civilian population and for continuous care of the wounded and sick who are already being treated (Article 14).

The abovementioned information once again emphasizes that Protocol I is grossly violated by the aggressor state in Ukraine.

We also need to draw attention to the international axioms of protection of medical workers and guarantees

of their professional activity in the conditions of martial law, defined in Protocol I, in particular:

- 1) medical units shall be respected and protected at all times and shall not be the object of attack (Article 12);
- 2) medical units cannot be used in an attempt to shield military objectives from attack (Article 12);
- 3) the protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only 1) after a warning has been given setting, whenever appropriate, a reasonable time-limit; 2) after such warning has remained unheeded (Article 13). We draw your attention to the fact that the analysis of the norms of Protocol I gives grounds for asserting that these two conditions must necessarily be present together;
- 4) shall not be considered as acts harmful to the enemy:
 - a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge; b) that the unit is guarded by a picket or by sentries or by an escort; c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units; d) that members of the armed forces or other combatants are in the unit for medical reasons (Article 13);
- 5) civilian medical personnel shall be respected and protected (Article 15);
- 6) if needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity (Article 15);
- 7) the Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions (Article 15);
- 8) the Occupying Power may not require that, in the performance of those functions, such personnel shall give priority to the treatment of any person except on medical grounds. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission (Article 15);
- 9) civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary (Article 15);
- 10) under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom (Article 16);
- 11) persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the Geneva Conventions or of Protocol I, or to refrain from performing acts or from carrying out work required by those rules and provisions (Article 16);
- 12) no person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse

Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected (Article 16).

Violation of the principles of medical neutrality is a war crime under Part 2 (b) of Art. 8 of the Rome Statute of the International Criminal Court. Ukraine adopted the Resolution of the Verkhovna Rada of Ukraine [4] on recognition and in accordance with clause 2 of the Art. 11 and para. 2, 3 of the Art. 12 of the Rome Statute of the jurisdiction of the International Criminal Court regarding crimes against humanity and war crimes committed by high-ranking officials of the Russian Federation and leaders of terrorist organizations “DPR” and “LPR,” which led to particularly grave consequences and the mass murder of Ukrainian citizens, starting on February 20, 2014 and lasting to the present time.

It is important to pay attention to the fact that regardless of the imposition of martial law in Ukraine and the constitutional possibility of the limitation of the human rights, the President of Ukraine did not introduce the restriction of Art. 49 of the Constitution of Ukraine in the Decree “On the Introduction of Martial Law in Ukraine” dated February 24, 2022. Highly appreciating the human right to health care, medical assistance and medical insurance at the legislative level, this right continues to apply in Ukraine; therefore, everyone has the right to fully benefit from medical assistance.

Another difficult issue in the field of public health law is the issue of legal evaluation of the professional activity of medical workers in the territories in which the aggressor state has established or is trying to establish an occupation regime.

At the briefing on July 6, 2022, Minister of Health V.K. Lyashko reported: “There is pressure on medical workers, the terrorist state is trying to induce to cooperation with the occupation regime. At the same time, I would like to emphasize for the medical workers who are in these territories that the performance of the official duties, providing medical aid, obtaining medicines, gasoline for the provision of emergency medical aid, in accordance with the current legislation of Ukraine, is not considered cooperation with the occupier. Therefore, your mission is to save Ukrainians, regardless of where, on what territory we are and what is happening around...” [2].

The Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Establishing Criminal Liability for Collaborative Activities” [5] was adopted with the aim of establishing a fair punishment for persons who cooperate with the aggressor state, as well as limiting the access of such persons to positions related to the performance of functions of the state or local self-government.

In view of the abovementioned legal norm, the question of the possibility of bringing medical workers to responsibility for continuing to perform professional duties in the temporarily occupied territory of Ukraine seems

problematic. In this aspect, let's consider the regulation of this question through the lens of the Geneva Convention on the Protection of the Civilian Persons and Populations in Time of War of 12 August 1949 (ratified by Ukraine on July 3, 1954) [6].

Art. 56 of this Convention stipulates that the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties. The Occupying Power shall take into consideration the moral and ethical susceptibilities of the population of the occupied territory when deciding on the implementation of health protection measures and ensuring satisfactory sanitary conditions and during the performance of these measures.

According to Art. 20 of this Convention, persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases, shall be respected and protected. The management of each hospital shall at all times hold at the disposal of the competent national or occupying authorities an up-to-date list of such personnel.

In addition, we emphasize that in paragraph 3 of Art. 15 of Protocol I is stated that the Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions. Under no circumstances shall any person be subject to punishment for performing medical functions compatible with medical ethics, regardless of the interests of the person in whose interests those functions are performed. Therefore, international standards clearly outline the protection of the concept of medical neutrality.

Returning to the national legislation on collaborative activities, let's make a few remarks:

1) According to Part 2 of Art. 111-1 of the Criminal Code of Ukraine [7], the voluntary holding of a position not related to the performance of organizational and regulatory or administrative and economic functions by a citizen of Ukraine in illegal authorities established on the temporarily occupied territory, including in the occupation administration of the aggressor state, can be criminally punished. When extrapolating to the field of health care, these are positions in the health care structural divisions of local state administrations. The defining feature of the subjective side is the voluntariness of the person's action. When making a criminal-legal assessment, it should be remembered that the action or inaction of a person who caused damage to law-protected interests, committed under the direct influence of physical coercion, as a result of which the person could not control his actions, is not a criminal offense (Article 40 of the Criminal Code of Ukraine).

2) Part 4 of Art. 111-1 of the Criminal Code of Ukraine is difficult for qualification because the transfer of material resources to illegal armed or paramilitary formations created on the temporarily occupied territory and/or armed or paramilitary formations of the aggressor state, and/or carrying out economic activities in cooperation with the aggressor state by illegal authorities created in the temporarily occupied territory, including the occupation administration of the aggressor state can be criminally punished. Economic activity of medical practice (medical practice) is a type of economic activity in the field of health care, which is carried out by health care institutions and individual entrepreneurs for the purpose of providing medical assistance and medical services on the basis of a license [8]. So, the question arises whether it is possible to bring the provider of medical services to criminal responsibility for carrying out economic activities in the occupied territory. The cited international standards clearly indicate the need to provide medical assistance to the civilian population in the occupied territory, the obligation of the occupying state to create conditions for the possibility of performing a humanitarian function. Therefore, to prosecute the officials of the medical service provider for the continuation of the medical practice seems controversial and does not correlate with international acts. In addition, a medical worker who performs his professional functions of providing medical assistance to the population cannot be prosecuted either. It is important that the administration of the economic entity provides lists of medical workers to the national and occupying authorities in order to comply with the Geneva standards. We emphasize that Part 1 of Art. 56 of this Convention clearly states that the Occupying Power has the duty of ensuring and maintaining the activities of medical and hospital institutions with all available means and in cooperation with state and local authorities. Therefore, it is impossible to avoid interaction in order to ensure the possibility of providing medical assistance to the population.

In addition, let's remember that according to Art. 14 of Protocol I, the Occupying Power may, under certain circumstances established by the convention, carry out requisition of equipment and materials, therefore, to distinguish it from the transfer of material resources is impossible, since this norm of the article does not refer to voluntariness, to respect human rights. The concept of medical neutrality is law enforcement, and the national state cannot create a vulnerable position for doctors, endangering the civilian population, its life and health.

3) Part 5 of Art. 111-1 of the Criminal Code of Ukraine can be applied to bring to criminal responsibility a citizen of Ukraine who voluntarily takes up positions related to the performance of organizational and regulatory or administrative and economic functions in illegal authorities created in the temporarily occupied territory, including in the occupation administration of the aggressor state. When extrapolating to the field

of health care, that is, positions in the health care structural divisions of local state administrations. Taking into account Art. 40 of the Criminal Code of Ukraine the voluntariness of the act is also an important component of the subjective side of the composition of the crime, which should be subject to legal evaluation.

The fine line between the essence of the concept of medical neutrality and the professional activity of doctors in the temporarily occupied territories once again emphasizes the need for clarity and certainty in the presentation of legal norms in order to prevent violations of human rights. It seems that the norm of the Criminal Code, namely

Art. 111-1, will be problematic when projected onto the field of health care. In law enforcement, it is necessary to take a comprehensive approach to solving the issue of bringing medical workers to criminal liability for collaborative activities, keeping in mind the concept of medical neutrality and the Geneva standards.

The armed conflict in Ukraine illustrates the need to update international standards taking into account modern world conditions and prepare an appropriate national legal framework that would serve as a legal foundation for building a human-centered fortress of law enforcement and human rights protection.

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