

IS THERE A HUMAN RIGHT TO SURGERY?



One.Surgery interviews Birgit Van Hout,
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Is access to healthcare a human right?

The right of every person to the highest attainable standard of physical and mental health is guaranteed under the international human rights treaties. The right to health is an inclusive right, which incorporates both access to health services, goods and facilities, as well as attention to the underlying determinants^[1] of health. The right to health also includes the right to a health care system that gives everyone an equal opportunity to enjoy the highest attainable level of health. Prevention, treatment and control of diseases, as well as access to essential medicines, are key aspects of the right to health. The UN further links health and development. In the 2030 Sustainable Development Agenda, for example, States committed to ensuring healthy lives and promoting well-being for all at all ages (Goal 3).

In the midst of war and mass migration, what responsibility do governments have to provide adequate healthcare to migrants?

The Universal Declaration of Human Rights of 1948, in its article 25, stipulates that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. If you read this article in combination with article 2 of the Universal Declaration, according to which everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, the logical conclusion is that governments should provide adequate healthcare to migrants.

This interpretation has been confirmed by the UN Committee on Economic, Social and Cultural Rights, which has clarified that all people under the jurisdiction of a State should enjoy the right to health, even when their situation in the country concerned is irregular. This interpretation is derived from the general principle of non-discrimination: protection from discrimination cannot be made conditional upon having a regular migration status in the host country.

[1] With determinants we mean food and nutrition, housing, grounds of discrimination, gender considerations, and social and cultural norms that impact the right to health for certain persons or groups.

Conversely, any differential treatment on grounds of nationality or migration status is only permissible if it does not amount to discrimination. Such differential treatment must be in accordance with the law, pursue a legitimate aim, and be proportionate to the aim pursued.

Based on this authoritative interpretation by the Committee, depriving certain groups of people from access to health care can constitute a human rights violation when it is discriminatory or disproportionate to the aim pursued.

Despite the protection afforded by human rights law, some groups risk being left behind. In reality, certain obstacles prevent migrants from enjoying the right to health. This puts their physical and mental well-being at risk and eventually drives up the cost of health care as for lack of treatment, these persons may end up in the emergency room. On the other hand, including migrants in health care carries benefits for the whole community as a whole. Not only does it have a positive impact on public health, but also addressing health problems early on lowers costs for the entire health care system.

What are some of the reasons to be optimistic in relation to refugee and migrant and refugee health?

The UN Human Rights Regional Office for Europe recently documented promising practices by local authorities to facilitate access to health for migrants [2]. Cities like Amsterdam, Barcelona, Bari, Eindhoven, Frankfurt, Geneva, Ghent, Oslo, Trondheim, Utrecht, Vienna, and Utrecht are coming up with creative and innovative solutions to overcome the various barriers that prevent migrants from accessing the right to health.

Some cities have established municipal health systems to provide treatments that the migrants cannot access through the national system or undertaken a campaign to inform migrants and health staff of their legal entitlements. Others have adopted simplified administrative procedures or made treatments affordable through a dedicated fund to cover care for irregular migrants or by providing support for non-governmental organizations treating migrants. The Italian Region of Puglia allows irregular migrants to register with general medical practitioners.

In September, our Office hosted a panel in Geneva,[3] with the participation of the World Health Organization, where some of the promising practices from cities in Europe were presented. We hope that other local authorities and eventually more national authorities will be inspired by these promising practices and follow their lead.



What are some of the challenges in ensuring adequate healthcare to migrants and refugees?

One of the main challenges is still to ensure migrants' access to healthcare. Apart from legal restrictions that often restrict access to emergency treatment only, migrants, especially those in irregular situations, may encounter other

[2] Promising local practices for the enjoyment of the right to health by migrants
https://europe.ohchr.org/EN/Stories/Documents/Publication_RtH_Mig_final_digital.pdf

[3] A recording of the panel can be viewed at
<https://www.facebook.com/europeohchr/videos/427248904582216/>

practical obstacles in their enjoyment of the right to health. Irregular migrants may be unable to meet administrative requirements such as proof of residence or a social security number. In some cases, the lack of documentation may force patients to pay the full cost of medical treatments. They may face linguistic and cultural barriers or xenophobic attitudes. In many cases, health staff and migrants lack information on migrants' health care entitlements. Also, one of the main reasons for which migrants refrain from seeking medical help is the fear of being reported to immigration authorities when approaching public health facilities. Firewalls, i.e. measures to strictly separate immigration enforcement activities from public services, can address this fear. Firewalls are designed to ensure that immigration enforcement authorities are not able to access information regarding the legal status of individuals who seek assistance at medical facilities, schools and social service institutions. Fortunately, numerous States are putting in place firewalls to prevent human rights violations.

Are there any particular issues around human rights and access to affordable surgery in particular?

The twin human rights principles of equality and non-discrimination are premised on the recognition that all human lives have equal value. Hence, the human rights-based approach (HRBA) is a starting point for guaranteeing equal surgical care or access to surgery as part of the right to health. The inclusive nature of the HRBA seeks both to prevent and to address inequalities. When it comes to surgery, a HRBA involves elements such as personal autonomy, beneficence, non-maleficence, confidentiality and justice.[4] The notion of justice in medicine seeks the equitable distribution of healthcare resources. In the context of access to affordable surgery, justice is particularly important.

[4] Respect for autonomy – the patient has the right to refuse or choose their treatment. Beneficence – a practitioner should act in the best interest of the patient. Non-maleficence – to not be the cause of harm. Justice – concerns the distribution of scarce health resources, and the decision of who receives which treatment.





As a highly specialized field of medical services, surgery is expensive. This underscores the importance of achieving universal health coverage so that everyone can afford surgery that is essential for life or quality of life, whether preventive, promotive or curative. Also, surgery requires well-functioning hospitals; this in turn leads to the need to put whole care systems in places where such facilities are not accessible.

The importance of access to health services and affordable surgery in particular was also underlined in a ruling by the European Court of Human Rights in Strasbourg. Although the Court did not expressly affirm the right to surgery as such, it concluded hospital authorities had failed when making necessary surgery conditional upon the payment of a financial deposit. In *Mehmet and Bekir Şentürk v. Turkey*, the Court examined the case of the first applicant's pregnant wife who visited a university hospital complaining of persistent pain. She was examined by a team of doctors, who found that the child she was carrying had died and that she required immediate surgery. She was then allegedly told that a fee would be charged for her operation and that a deposit of approximately EUR 1,000 had to be made.

Since the first applicant did not have the financial resources, the emergency doctor

arranged for the wife to be transferred to another hospital, but she died on the way. The Court found that the requirement of an advance payment for the surgery had served as a deterrent for the patient, causing her to decline treatment. Such action was considered a denial of access to appropriate emergency treatment and the State was found in breach of its obligation to protect the patient's physical integrity.

The International Covenant on Economic, Social and Cultural Rights [5] also requires States to provide the "highest attainable standard of physical and mental health." This means that States shall ensure the essential levels of each of the rights enunciated in the Covenant. Accordingly, this could be an argument made for considering access to essential surgery within the right to health. Surgery should not be viewed as being in a different category than other treatments: it is also part of the "health goods, facilities and services" envisaged under the right to health. Thus, surgical care should be addressed as one of the key elements of achieving highest attainable standard of health.

What role has UN Human Rights played in ensuring that migrants and refugees are able to access healthcare?

Over the last years, UN Human Rights has contributed to a better understanding of the normative content of the right to health of migrants and advocated for its implementation. In 2014, the Office launched a publication on The economic, social and cultural right of

[5] The International Covenant on Economic, Social and Cultural Rights

https://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf

migrants in irregular situations that sought to help policymakers, national human rights institutions, civil society, lawyers, judges and migrants themselves to understand the scope and content of the right to health of migrants in an irregular situation and to challenge common assumptions about their entitlements.

More recently, UN Human rights led the development of the Global Migration Group's Principles and Guidelines on migrants in vulnerable situations [6], which offer practical guidance on the protection of the most marginalized and excluded migrants, including through the realization of their right to health.

UN Human Rights has also undertaken human rights monitoring missions to different regions and countries of the world to speak directly with migrants about their experiences and to report on their situations, including challenges related to their access to healthcare in the context of transit, borders and immigration detention.

Over the past two years, UN Human Rights has actively engaged with States in the development and implementation of the Global Compact for safe, orderly and regular migration, including as a member of the new UN coordination structure on migration– the UN Network on Migration.

The Global Compact is the first inter-governmentally negotiated agreement under the auspices of the United Nations that cover international migration in all its dimensions, including in relation to access to healthcare and essential services. It shows a recognition of need for an inclusive and comprehensive approach to the protection of migrants' rights. The Global Compact also has significant synergies with the 2030 Agenda for Sustainable Development.

In conclusion, I would like to plead for advancing the right to health through multi-sectoral approaches. Let's leave no one behind and start with persons and groups in the most precarious, marginalized or vulnerable situation. That is what human rights are all about.

[6] Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations.
<https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>