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IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC,
SOCIAL AND CULTURAL RIGHTS

Day of general discussion on the right to health

Discussion paper prepared by Mr. Juan Alvarez Vita, member of the Committee on the Right to Health, with particular emphasis on the implications of the principle of non-discrimination and of the concept that there is a minimum core content of each right which constitutes a "floor" below which the conditions should not be permitted to fall in any State party (E/1993/L.23, para. 4)

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I. INTRODUCTION

THE RIGHT TO HEALTH

1. In the field of human rights civil and political rights have always been regarded as rights as such. The unanimity concerning this group of rights has not extended in the same form or with the desirable force to economic, social and cultural rights. Moreover, some students of law - increasingly few in number - have questioned the legal nature of these rights and have affected adversely their conceptual development.

2. Furthermore, United Nations doctrine has confirmed the indivisibility, interdependence and interrelation of all human rights, including as such both civil and political rights and economic, social and cultural rights. Despite this repeatedly stated position, it cannot be denied that the two sets of rights do not receive equal treatment with regard to their promotion and protection either at the national or international level. This is because economic, social and cultural rights are defined less precisely than civil and political rights. In addition, they are less homogeneous in terms of their legal enforcement; but nor can it be denied that the course of developments is promising - as can be seen from the debates in the Committee on Economic, Social and Cultural Rights concerning the preparation of an optional protocol which will make it possible, within the framework of these rights, to expand the list of enforceable rights, as in the case of labour rights.

3. It has traditionally been maintained that the State must take a passive or negative attitude to civil and political rights with a view to respecting and not impeding the exercise of these rights; although this view is correct, it disregards the active attitude which the State must take in some areas, for example making all the necessary arrangements for holding elections, referendums or any other kind of participation or consultation offered to the people.

4. It has traditionally been held that the realization of economic, social and cultural rights implies a positive attitude by the State in taking action to satisfy these rights. Although this view is based on one of the fundamental responsibilities of the State, it cannot be applied exclusively, for this set of rights also requires action not only by individuals but also by non-State groups which have to exercise the rights and perform the duties implied by popular participation. Moreover, for the full exercise of these rights many countries require the cooperation of other States and international organizations, although this does not imply the exclusion of the contribution which individuals or non-governmental or non-national entities can make.

II. THE DUAL RESPONSIBILITY OF STATES

5. The human rights treaties have two increasingly clearly defined areas of application. The first is the commitment of the State - towards the other States parties - to carry out the provisions of a treaty, since failure to do so creates an international liability.

6. At the same time there is another area of application of the treaties in the internal affairs of each State party. Since the treaties are incorporated to a greater or lesser degree - depending on the particular system in each country - in the domestic law of States, the responsibility is not just an

international one but also an internal one, i.e. in the territory in which the State exercises its jurisdiction.

7. According to the new trends in international law, this responsibility is not attributable exclusively to States but also to international organizations. The possibility that it may extend - within the framework of international law - to non-State entities and even to individuals raises various kinds of problem whose solution is directly connected with the development of international law, for the responsibilities and obligations of all the actors involved in the respect and promotion of human rights require clearer definition in legal terms.

8. The progressivity of economic, social and cultural rights is usually regarded as an impediment to measuring the extent to which a State is implementing them. Since they are linked to the concept of progress, the main difficulty is to establish a scale of measurement to fix the limits of responsibility both nationally and internationally. This is perhaps the main difference to emerge from a cursory comparison of civil and political rights with economic, social and cultural ones.

9. But this distinction is based on the proposition that civil and political rights are to be implemented immediately but economic, social and cultural ones gradually. This invests civil and political rights with an absolute completeness, the acceptance of which implies that there is no further progress to be made where these rights are concerned. The question then arises as to whether democracy is not something which evolves and implies a daily greater participation by the people in decisions of State. Thus, nobody can deny that civil and political rights are not static and that - like economic, social and cultural rights - they are progressive; it is essential to make these points clear when seeking harmonious solutions which will ensure the balanced respect for and promotion of all human rights.

10. An assessment of the application of economic, social and cultural rights points to the conclusion that the greatest difficulties - which are both a cause and an effect of their violation - stem from the disparities with respect to these rights both within States and internationally. Some people view this problem from an exclusively political angle which ignores the very essence of human rights and seeks to limit the obligations, providing fewer State guarantees for this set of rights and thus introducing a new form of violation of human rights without precedent in world history.

11. While all students of human rights agree that the full enjoyment of economic, social and cultural rights means that they must be accessible to all human beings in a fair and equal manner in keeping with the dignity common - and in the broadest senses of equality - to all human beings, as stipulated in the Universal Declaration of Human Rights, the only workable solution is to "democratize" to the fullest possible extent all the economic, social and cultural rights, in the same way as the right to vote is today, with very few exceptions, a right universally exercised without discrimination of any kind.

12. In any event, it is currently a fact that an increasing number of States is assuming not only the traditional international human rights obligations but also those which are emerging as a result of the juridical activities of international organizations. Furthermore, at the domestic level States are showing an increasing readiness to apply the provisions of the relevant international treaties.

13. Accordingly the problem does not lie so much in the mandatory nature of these rights as in the way in which they are implemented and the possibilities for securing exercise of a right - a difficulty which, in the case of many economic, social and cultural rights, is due to the rather vague way in which they have been defined. In addition, there is the lack of resources or machinery for taking legal action. For this reason, expert opinion is very important, and in this area the work of the Committee on Economic, Social and Cultural Rights in formulating guidelines for the drafting of the reports which must be submitted by States parties to the Covenant guaranteeing these rights and in further defining the nature of each of the rights recognized therein is vital, and the Committee's activities must be expanded so that it will not examine only one right each year but also continue its analysis of those which have already been discussed and studied. At the same time the drafting of the optional protocol to the Covenant, which will render these rights legally enforceable at the international level, is an essential step in their promotion and protection and implies an enormous challenge to legal creativity in both domestic and international law. Here it is important to bear in mind that the domestic law of some countries already provides the possibility of legal recourse or proceedings, but at the international level economic, social and cultural rights still have far to go.

14. This imbalance which emerges from a comparison of the existing mechanisms for the protection of economic, social and cultural rights has no justification whatsoever, especially when there is a consensus of international opinion as to the close link between the right to life and the freedom from extreme want which endangers the right to life.^{1/}

III. INTERNATIONAL CUSTOM AND THE GENERAL PRINCIPLES OF LAW IN THE FRAMEWORK OF THE RIGHT TO HEALTH

15. When the United Nations University requested the Academy of International Law at The Hague to organize in 1978 a seminar on the right to health it was in the belief that the guaranteeing of this right had not received sufficient international attention. Fifteen years later we could draw virtually the same conclusions as that seminar, which can be summarized as follows:

1. That the right to health has not made the desired progress in its conceptual development;

2. That any study of the right to health must necessarily be a multidisciplinary one;

3. That the ethical and juridical origins of this right must be investigated, together with the economic factors which affect it, the successes achieved in this field by the international organizations dedicated to its promotion, and the connection between the right to health and healthy living conditions and the environment.

16. In the paper presented by the seminar's rapporteur, Professor Michael Bothe, entitled "The fundamental concepts of the right to health: the juridical standpoint" the author wonders whether customary law can be invoked, for not all countries are parties to the treaties which recognize the right to health - except for the Geneva conventions on international humanitarian law.

17. The issue raised by Bothe is whether with regard to the right to health the domestic law of States is an element constituting an international custom. In the light of such traditional elements as constant practice or the existence of an opinio juris sive necessitatis the author concludes that it is always difficult to prove that States agree to such guarantees in matters of human rights. Today, 16 years later, the intensive development of law in this area allows us to be more optimistic.

18. Bothe tells us that the duty of the State to refrain from any attack on physical or mental integrity can be confirmed in the light of all the existing evidence, starting from the Universal Declaration of Human Rights. However, he voices serious worries and asks what encroachments on physical integrity would be permitted. The examples which he gives, such as the taking of a blood sample by force for the purposes of a judicial investigation, the use of a degree of pressure during an interrogation, the use of physical force by the police, etc., still do not seem to have a response despite the passage of the years.

19. Michael Bothe says in his paper that he was far from being convinced that States were obliged to recognize a right to health. Today the number of countries which have ratified the conventions recognizing this right and the conceptual development which has taken place with regard to human rights allow us to dismiss Bothe's doubts on the point.

20. Finally, Bothe wonders whether it may be held that States are obliged to respect certain human rights as general principles when such rights are recognized in domestic law. He has doubts in this regard. Today developments in the world, the conceptual expansion of human rights, the new situations which mankind has to confront, and the idea that our planet is a global village and all that implies incline us to think that much progress has been made towards the recognition at the world level of the general principles of law with respect to many human rights, including the right to health.

IV. THE FUNDAMENTAL CONCEPTS OF THE RIGHT TO HEALTH - LEGAL ASPECTS

21. The right to health is no exception to the difficulties which usually arise in conceptualizing any human right. This has resulted, owing to the differing standpoints from which the issue has been considered, in what some experts have described as "a certain conceptual confusion" due to the indiscriminate use of such terms as "right to health", "human right to health" and "human right to health care"; this matter was discussed at the seminar on appropriate indicators to measure achievements in the progressive realization of economic, social and cultural rights, held in Geneva from 25 to 29 January 1993.^{2/}

22. It was stated at the seminar that the right to health within the framework of human rights consisted in the right to health care and the right to healthy conditions, which implies that a person's health is inseparable from the environment in which he lives.

23. Some participants also argued that the right to health should be viewed as consisting of the right to medical care and attention, the right to embedded social security arrangements, the right to functioning social services, the right to family planning services, and the right to equitable access. Others emphasized that the right to health was embodied by the principle of equity in health status.

But what is the justification of the right to health?

In her paper Derecho a la atención de salud 3/ Ruth Roemer points out, as did Walter P. von Wartburg,4/ that as early as the fourth century B.C. Aristotle had indicated the importance of the right to health in the following terms:

"If we believe that people possess specific rights as human beings, then they have an absolute right to good health which society and society alone can provide."

Ruth Roemer draws the following conclusions from Aristotle's assertion:

- That if we share Aristotle's belief that health is a natural right, we must also accept the existence of a right to the protection of health;

- That it is both an individual and a collective right - and we can add that this principle is recognized first in article 12 of the International Covenant on Economic, Social and Cultural Rights and then in the Declaration on the Right to Development;5/

- That its exercise depends on the conditions prevailing in the society, because although the right is valid at all times and in all places its exercise is subject to the circumstances of the society in question.

V. THE GUARANTEES OF THE RIGHT TO HEALTH

24. The right to health like many others in the array of economic, social and cultural rights presents difficulties where its guarantees are concerned. From the legal standpoint it requires primarily detailed legislation which must be in conformity with the constitutional and international guiding principles. This implies non-action by the State in some cases and action in others.

The obligation of the State not to act

25. The right to health means in this context that individuals and communities have a right which requires the State to refrain from any act which may endanger the health of individuals or the community. This implies the right to personal safety, the right to life, the right to physical and mental integrity, and the prohibition of torture. But it must be remembered that the obligation of the State to refrain from inhuman treatment may entail an obligation to take positive action, as in the case of detainees or prisoners of war.

26. Furthermore, this whole concept of the right to health leads to the conclusion that the State must not authorize any act which may directly or indirectly harm an individual's health.

27. These rights are regulated in various international instruments such as the International Covenant on Economic, Social and Cultural Rights (art. 7), the Convention on the Prevention and Punishment of the Crime of Genocide (art. II), the International Convention on the Suppression and Punishment of the Crime of Apartheid (art. II), the European Convention on Human Rights (arts. 2 and 3) and the American Convention on Human Rights or Covenant of San José de Costa Rica (arts. 4 and 5).6/

28. Much progress has been made in this area with regard to the physical integrity of individuals. We could say today that the individual is protected worldwide by rules guaranteeing fairly effectively the right to physical integrity - which is indisputably connected with the right to health - and not to be subjected to torture, although there are still parts of the world where the law allows physical punishment of the perpetrators of certain crimes.

29. The practice of identifying the right to health with the right to life has been gaining ground and today it can be said to have the support of most expert opinion. The association of the right to health with the right to life prompts us to link both these rights to other rights such as environmental protection. Where these rights are concerned there are other issues such as the death penalty which deserve mention. Given the prevailing trend, we can say that the total abolition of the death penalty is the natural and inevitable conclusion which mankind must arrive at as it moves towards full respect for human rights; and abolition is a constant in this process, with the regrettable exceptions of the Philippines and Peru. The Constitution of Peru, approved by referendum in November 1993, extends the grounds for imposition of the death penalty, thus contravening the provisions of the American Convention on Human Rights, to which Peru is a party.^{7/}

The obligation of the State to act

30. We have said that health is both an individual and a collective right. From this angle the right to health consists of a set of measures which the State must take in order to prevent sickness and to treat sickness once it is apparent. This covers a vast range of action, including measures to prevent and combat epidemics, promote vaccinations, create conditions for speeding the development and maintenance of a public health and medical infrastructure, preserve a healthy environment, and provide State benefits such as sickness insurance and medical care for the poor.

31. Accordingly the right to health also requires positive action by the State by virtue of its status of collective right. This right has been gaining ground and taking shape in terms of positive law to the point where almost all modern constitutions recognize it as a continuing trend and part of the irreversible extension of human rights. The unfortunate exception is the new Constitution of Peru which has not only reduced the number of areas covered by constitutional rules, a status which article 105 of the previous Constitution accorded to the human rights precepts set forth in the treaties to which Peru is a party but also gives less emphasis to recognition of the right to health and has deleted the corresponding article authorizing special protection for the disabled.^{8/}

The legal enforcement of the right to health

32. Although, as we have seen, the degree of legal enforcement differs for each of the economic, social and cultural rights, these degrees are not recognized uniformly in all countries. A great effort of legal creativity is required within States and by the international community in order to ensure that this whole set of rights is accompanied by a system of guarantees which takes things beyond the merely declarative stage.

33. However, the legal precedents established by the courts have been moving matters forward and showing that there are always means of guaranteeing these rights. For example, in view of the lack of adequate domestic legislation and citing the provisions of the International Covenant on Economic, Social and

Cultural Rights relating specifically to the right to health, in 1988 a Peruvian judge succeeded in halting the indiscriminate felling of trees planned by the authorities in the Campo de Marte in Lima.^{9/}

VI. THE EGALITARIAN ASPECT OF THE RIGHT TO HEALTH

34. The preamble to the Constitution of the World Health Organization (WHO) states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. The WHO definition includes the physical, mental and social aspects.

35. The principle of equality is today enshrined in the legislation of all countries. It requires a commitment to overcome entrenched inequity and an effort to ensure that all people have equal and adequate access to health services. It has rightly been said that equality is the most tangible expression of health for all.^{10/}

36. The right to health is closely linked to the availability and the degree of development of other rights such as the rights to education, a decent standard of living, employment, popular participation, etc. It depends to a large extent on a country's economic and social circumstances and on equity in international relations, comprehensive protection of the environment, etc.

VII. DISCRIMINATORY PRACTICES AFFECTING THE RIGHT TO HEALTH

37. The principle of equality implies that there should be no discrimination in the exercise of the right to health. In this context discrimination based on different levels of wealth is an obstacle which absolutely must be overcome if the poor are to enjoy the same benefits as the rich.

38. It is important to consider two points. The first is non-discrimination in the exercise of the right to health within each State. The second is the differing degrees of protection and promotion of health in the various countries of the world.

39. These two points, taken up in the preamble to the WHO Constitution, warrant some attention:

The WHO Constitution states that health "is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition".^{11/}

On the second point the Constitution states that "unequal development in different countries in the promotion and control of disease, especially communicable disease, is a common danger",^{12/} an assertion which illustrates the global approach which must be taken to human rights and the need too for universal action to secure their full exercise, for it is impossible to speak of the rule of human rights in a world in which inequalities have not been eliminated.

40. With regard to other treaty texts, still on the subject of health, mention must be made of article 2.2 of the International Covenant on Economic, Social and Cultural Rights, which proscribes discrimination of any kind in the exercise

of the rights enunciated in the Covenant. In addition, article 12 of the first and second Geneva Conventions, article 10 of Additional Protocol I, and article 3 of all four Conventions prohibit discrimination.

41. A problem which has been taken up on several occasions in the Committee on Economic, Social and Cultural Rights is the disparity in the enjoyment of these rights determined by the nationality of the person concerned.

42. Since any unequal treatment contravenes the principle of and right to non-discrimination and the very meaning of human rights, States whose legislation infringes these principles must obviously amend it to remove any trace of discrimination and comply with the provision of article 32 of Convention No. 130 of the International Labour Organization (ILO) which prohibits discrimination against non-nationals normally residing or working in the territory of a State party. In addition, ILO Convention No. 118 stipulates equality of treatment of nationals and foreigners in social security. Here the application of these rights is based on the principle of reciprocity, but it is doubtful whether the exercise of human rights can be subject to a system of reciprocity. That is clearly unacceptable in the light of the essential nature of human rights. The equality in dignity of all human beings is the overriding consideration. We therefore think that every trace of legal justification for different treatment - which is really is only another form of discrimination - must be eliminated. In this connection, the exception contained in article 2.3 of the International Covenant on Economic, Social and Cultural Rights, which provides that the developing countries are not obliged to accord and facilitate in respect of non-nationals the exercise of the rights recognized in the Covenant, although the reasons for this exception are understandable, is quite at odds with the fundamental philosophy of human rights.^{13/}

43. Discrimination against women takes very different forms. Sometimes hidden and at others very obvious, they constitute genuine violations of human rights.

44. According to the 1993 Human Development Report produced for the United Nations Development Programme (UNDP) by the Centre for Communications, Research and Documentation between Europe, Spain and Latin America (CIDEAL), in many industrialized countries the female human development index is only 80 per cent that of males. It adds that "women participate inadequately in employment, and in some industrialized countries, women's earnings are less than half those of men".^{14/} It goes on to say that "many developing countries exclude women from both political participation and productive work - whether by tradition, discriminatory laws or withheld education".^{15/}

45. In this context we must bear in mind yet again the indivisibility and interdependence of all human rights. Democracy is essential in this matter and it can therefore not be limited to periodic elections which are at times meaningless because large groups of citizens lack the education to enable them to make informed choices among the available options. If a democratic system is to be effective there must be popular participation with a higher level of education, and this is not possible in societies where discrimination exists.

46. It should be pointed out here that the Working Group of the Commission on Human Rights on Traditional Practices affecting the Health of Women and Children has identified several of these practices which have a clearly discriminatory origin:

(a) Female circumcision

This traditional practice, which consists in cutting off part of the external sexual organs of girls is regarded as a "rite of initiation" and is found in more than 20 countries of Africa, affecting according to the Working Group's figures approximately 75 million women. Female circumcision is a practice with very complex and varied roots and it affects the physical and mental health of the women subjected to it. Its elimination will require an enormous effort of education. It has been pointed out that the fact that this practice is not mentioned in the Koran may make it easier to introduce measures to secure its speedy disappearance.

(b) Preference for male children

This preference is obviously an offshoot of the discrimination against women. In many countries it is a tradition for parents to prefer male children; this generates a range of discrimination against girls which affects their physical and mental health. This preference for boys over girls is apparent in nutrition, medical care, etc. Studies of the issue indicate several of the causes of these practices, which clearly take place in southern Asia (Bangladesh, India, Nepal and Pakistan), in the Middle East (Algeria, Egypt, Jordan, Libya, Morocco, Syria, Tunisia and Turkey) and in parts of Africa (Cameroon, Liberia, Madagascar and Senegal). In any event, in the countries where the existence of traditional practices which give greater attention to boys has been verified, they are found typically and extensively among the less favoured population groups living in poverty or extreme poverty; this circumstance, together with other factors stemming from the economic system - mainly in rural areas - and the belief that women make a smaller economic contribution, the tradition in many villages that after marriage women cut themselves off completely from their own family and the belief that it is men who perpetuate the family line help to maintain this kind of discrimination against women. Women find themselves in a similar situation with regard to the armed forces and police and the preference given to boys in education, not to mention many other areas including religion, where in many cases women do not have the same status as men in the conduct of the services. Although this situation is not exclusive to the parts of the world mentioned above, in them it does have a more negative impact on women. In any event, this kind of discrimination illustrates with absolute clarity the interrelation, indivisibility and interdependence of all human rights.

The Working Group has also drawn attention to the fact that in some Latin American countries (Ecuador, Mexico, Peru and Uruguay) the statistics show a higher infant mortality rate among girls. It would be very useful to know the reasons for this fact.

The 1993 Human Development Report states that "the starkest example of gender discrimination in the household is revealed through child survival rates. In Bangladesh, nearly 15 per cent more girls than boys die in the first few years of life. And under the age of five, the mortality rate for girls in many countries is higher than that of boys - 5 per cent higher in Nepal, 4 per cent in Pakistan and India, and 2 per cent in Bhutan".

Other forms of discrimination

47. Almost all countries have large internal disparities, with very different regional development levels, between urban and rural areas or between ethnic groups - a fact reflected in the people's incomes.

48. This situation, as the Human Development Report indicates, means that richer areas have more political influence,^{17/} so that very little can be done to change things.

(a) Minorities and indigenous groups

Quite often minorities or indigenous peoples find it difficult to participate fully in societies which operate in favour of the dominant groups. Sometimes, as the Human Development Report states, discrimination is embedded in the legal framework - denying minority groups equal access to employment opportunities or to political representation. But exclusion is less a matter of official policy than everyday practice. It goes on to say that in the United States, where everyone is "created free and equal", there is a marked difference between the white and black populations, and if the United States was divided into two "countries", the one with only the white population would be in first place in the human development index, while the one with the blacks would be number 31. Moreover, in Guatemala the Indian population has an infant mortality rate 20 per cent higher than the rest of the population.^{18/}

There are also cases in which religious or ethnic minorities suffer violations of their right to health. For years now the United Nations Commission on Human Rights has been monitoring the situation of the Baha'i community in Iran, a country whose Government has systematically denied many human rights to the members of this religious group, including the right to obtain authentication of their educational qualifications - specifically in the case of health professionals - preventing them from having their qualifications accepted abroad so that they can engage in their professions in the countries to which they have been obliged to emigrate.

(b) Violence against ethnic groups

Since the Second World War - not to speak of earlier times - some 40 ethnic groups throughout the world have been persecuted, including cases of mass murder, and this situation persists with varying degrees of intensity today.

(c) The situation in rural areas

In the developing world rural dwellers take very little part in economic, social and cultural life. Rural per capita income is often around half the level of urban areas. According to the Human Development Report, rural people have less access to public services and "they receive on average less than a quarter of the education, health, water and sanitation services".^{19/}

(d) The situation of the disabled

It is estimated that the disabled make up 10 per cent of the world's population. Disability exists in all countries, both industrialized and developing. The Human Development Report states that the causes of disability tend to be different: "In the industrial countries, the principal causes are degenerative diseases associated with ageing, while in the developing world the

causes are more likely to be disease, malnutrition and war".^{20/} However, in areas regarded as "developing" there is also an increasing problem of ageing, which cannot therefore be considered an exclusive problem of the industrialized world. There is also a relation between poverty and disability, caused mainly by malnutrition. According to the Human Development Report, "children in poor families are 13 per cent more likely to be mentally retarded than those in middle- and upper-income families".^{21/}

In developing countries disability is also more common in rural than in urban areas.^{22/}

Special attention must be given to the fact that in many countries the disabled experience difficulties in the exercise of their civil and political rights.

(e) The situation in the international markets

The imbalances in the international markets mean that the poor countries cannot participate on an equal footing or extend market opportunities to their own people. The Human Development Report states most emphatically that "it would be short-sighted to assume that the growing demands for increased participation will stop at national frontiers. Millions of workers from developing countries have already voted with their feet and migrated, legally and illegally, to industrial countries or to neighbouring developing countries. And the process has only just started. Unless more people can begin to participate in global economic opportunities, the 21st century may witness an unprecedented migration across national borders".^{23/}

The Report predicts that increased participation at a global level will require a radical readjustment of the international order and a more democratic system of global governance. It also states that the obstacles to the attainment of these goals are primarily powerful vested interests, driven by personal greed, which "erect numerous obstacles to block off the routes to people's political and economic power".^{24/}

VIII. THE RIGHT TO HEALTH IN THE FRAMEWORK OF INTERNATIONAL HUMAN RIGHTS LAW

Genesis of the international system. International cooperation. The role of the United Nations

49. The right to health has been recognized as a human right in many international instruments; this process emerged quite clearly in the aftermath of the Second World War, although it is true that the antecedents of international human rights law date back to earlier times.

50. In his speech on the four freedoms President Roosevelt said that the world must be founded on four essential human rights: the freedom of speech and expression, the freedom of all people to worship God in their own way, the freedom from poverty, and the freedom from fear. He added that freedom from poverty implied economic commitments which would guarantee every nation a healthy and peaceful life for all its people in all parts of the world. By virtue of the Atlantic Charter this topic appeared in the Declaration of the United Nations on 1 January 1942, in which the Allies undertook to carry out

what was enunciated in the Atlantic Charter, which was to serve as the basis for the draft Charter of the United Nations.

51. Where human rights were concerned the provisions of the Charter of the United Nations did not fully reflect those assertions. This was simply a consequence of the internal problems, specifically human rights problems, of the victorious Powers. It explains why a system for the protection and promotion of human rights was not adopted, although the Charter does include a number of principles on which the United Nations has been - and is still - making advances by means of a network of rules and standards.

52. For example, Article 1, paragraph 3, of the Charter states that one of the purposes of the United Nations is:

"To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

53. Here it is worth citing as well Articles 55 and 56 of the Charter because they are the source of the creation of a whole universal system - including international responsibility - reflected in the existing international human rights law:

"Article 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

"Article 56. All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

54. This same concept appears in article 28 of the Universal Declaration of Human Rights:

"Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".

55. Article 2 of the International Covenant on Economic, Social and Cultural Rights reinforces these concepts.

56. There are also many provisions concerning the need for international cooperation to achieve effective respect for these human rights, for example

article 11.1 and article 23 of the International Covenant on Economic, Social and Cultural Rights.

57. Such international cooperation and assistance are essential if human rights are to be realized in practice, for the freedom from poverty requires action beyond what a State can do at the national level for the people under its jurisdiction. This proposition is a constant in the activities of the United Nations and it was clarified in article 4 of the Declaration on the Right to Development.

58. The need for international cooperation for the realization of all human rights, including both civil and political rights and economic, social and cultural ones, was also restated in paragraph 29 of the Limburg Principles drafted in June 1986 by a group of experts and professionals convened by the International Commission of Jurists.^{25/}

59. This international cooperation, which according to article 1.2 of the International Covenant on Economic, Social and Cultural Rights, must be based on free consent, implies compliance with the following requirements:

(a) Respect for the self-determination of peoples, a principle which is recognized in Article 1, paragraph 2, of the Charter of the United Nations and, as a human right, is stated in article 1 of the 1966 international human rights covenants and restated in article 1.2 and article 5 of the Declaration on the Right to Development, which stipulate respect for the sovereignty of States and for self-determination.^{26/}

(b) However, the right of peoples to self-determination requires, if it is not to be restricted to a notion void of content, certain obligations which imply action in some cases and non-action in others, and in both circumstances these obligations must be fulfilled - in the broadest possible sense - in accordance with the fundamental precepts of human rights.

(c) Hence an effort must be made to ensure that international life - characterized increasingly by mutual dependence - works to the benefit of mankind in terms of justice and equity, which categorically entail the correction or elimination of existing imbalances which may in themselves constitute violations of human rights and also may create or lead to other situations having an adverse effect on human rights although not per se amounting to violations. In this context the principle of solidarity can certainly be put into effect and it becomes an absolute imperative with respect not only to positive action but also to non-action such as refraining from harming other States and their peoples. Furthermore, until the world achieves acceptable levels of balance the more developed States have unilateral obligations towards the less developed ones.

The obligation to respect the right of other States to shared resources

60. Although all States have an obligation to protect, preserve and improve the environment within their jurisdiction and consider the interests of future as well as present generations, this obligation becomes a special one in the case of natural resources shared with one or more other States. In any event, all Governments are obliged to protect the environment since the welfare of peoples and the economic development of the whole world are closely linked to the preservation of the environment.

The right to benefit from science and technology, and the obligation to respect the access of all people to the world scientific heritage

61. The access of all people to the benefits of scientific and technological advances is a right which still has to contend with considerable opposition, especially when there already exist copyrights and patents which must be guaranteed and protected. The search for a solution to this problem will require action in many areas if discoverers or inventors are to enjoy the protection of their copyrights or patents while at the same time all mankind is enabled to benefit from scientific and technological progress on the basis of the proposition that global development implies a powerful element of solidarity.

The duty to cooperate and the right of association for protection against exploitation

62. Today all States accept the duty to cooperate with each other, but this cooperation must be subject to the promotion of human rights and therefore involve the elimination of any kind of discrimination.

IX. THE INTERNATIONAL BILL OF RIGHTS

The Universal Declaration of Human Rights

63. Article 1 of this document, which is regarded as the cornerstone of the whole modern structure of the international protection of human rights, reads as follows:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

64. Article 28 of the Declaration states that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".

65. Article 25 of the Declaration stipulates specifically the right to health. Furthermore, the Declaration mentions other related rights in articles 24 and 25.

66. The era when the mandatory nature of the precepts contained in the Universal Declaration was a topic of debate has passed into history. In this particular case the view that the Declaration is not binding because it is not a treaty has been abandoned. There is a large and abundant literature on the evolution of the Declaration in this respect, and today no State disputes the binding status which universal consensus has conferred on the Declaration.

67. The United Nations adopted the two international human rights covenants, and together they constitute the International Bill of Rights, dealing respectively with economic, social and cultural rights and with civil and political rights; the latter Covenant has an Optional Protocol setting out the jurisdictional functions of the organ which monitors the Covenant protecting these rights.

The International Covenant on Economic, Social and Cultural Rights

68. Article 12 of this Covenant is of importance to this study because it stipulates that:

"1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

"2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

69. This article, which was drafted in close collaboration with the World Health Organization, cannot not be interpreted in isolation from the other provisions of the Covenant which are closely related to the exercise of the right to health, for example article 7 (b) and (d):

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

....

- (b) Safe and healthy working conditions;

....

- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

70. Furthermore, the link between the right to health and the rights to clothing, food, housing, etc., compels us to affirm yet again the indivisibility, interdependence and interrelation of all human rights, be they civil, political, economic, social or cultural.

The International Covenant on Civil and Political Rights

71. The International Covenant on Civil and Political Rights also contains provisions on the right to health. In this connection it is important to keep in mind article 6.1:

"Every human being has a right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

And article 7 of the Covenant reads:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

72. It must be pointed out that, at the present stage of development of international human rights law, the provisions of a treaty should not be interpreted in isolation but rather in the light of all the other rules contained in other international treaties and of the conceptual evolution of human rights.

73. In fact, the Committee on Economic, Social and Cultural Rights takes a very broad view in its work and has recourse, in order to perform its functions better, to various international bodies and to the reports submitted to the other organs responsible for monitoring human rights.

74. But human rights, including the economic, social and cultural ones, have certain special features which must be taken into consideration in any assessment of their degree or level of implementation. Although one of the basic rules for interpreting treaties in general is to take the time-lapse into account, which means looking beyond the meaning and significance of the words used when the treaty was drafted. Given the constant evolution of these rights in the case with which we are concerned, it is vital not to interpret the real content of the rights set forth in the Covenant in the meaning and with the scope which they had in 1966, the year of their adoption, but to apply them *mutatis mutandis*, i.e. in the meaning and with the scope which they have at the time of application. Otherwise, we would be calling for the implementation of a right fossilized by the passage of the years, by scientific advances, and by the events resulting from the world's continual evolution. For example, the Committee would have to keep its study of environmental protection within the limits of environmental law as they stood almost three decades ago, when the celebrated Stockholm World Conference had not yet been held.

X. OTHER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

75. The international protection of human rights is not restricted to the provisions of the International Bill of Human Rights, for over the years the United Nations has been producing a series of treaties, declarations and resolutions concerning very specific issues such as torture, racial discrimination, slavery, genocide, women's rights, children's rights, etc. Many of these instruments refer specifically to the right to health; in addition to the ones already mentioned, we can cite the following:

1. The International Convention on the Elimination of All Forms of Racial Discrimination (article 5 (e) (iv));
2. The International Convention on the Elimination of All Forms of Discrimination Against Women (articles 10 (h), 11.2 (e)-(f), 14.2 (b));
3. The Convention on the Rights of the Child (articles 24 to 27);

4. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

5. The Declaration on Social Progress and Development (articles 10 (d), 11 (a));

6. The Declaration on the Rights of Mentally Retarded Persons (article 2);

7. The Universal Declaration on the Eradication of Hunger and Malnutrition (article 2);

8. The Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind (article 6);

9. The Declaration on the Rights of Disabled Persons (article 6);

10. The Declaration on the Right to Development (article 8);

11. The Declaration on the Rights of the Child (articles 4 and 5);

12. The Standard Minimum Rules for the Treatment of Prisoners (articles 15, 22, 23, 24 and 25);

13. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment;

14. The Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

15. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (article 26.2).

76. It must also be remembered that two specialized agencies of the United Nations, ILO and UNESCO, have also adopted a series of international treaties on human rights in their areas of competence, including the right to health. There are in addition the rules and standards of WHO, an agency dedicated specifically to the promotion of this right throughout the world.

XI. THE REGIONAL SYSTEMS

77. There are three regional systems for the protection of human rights. They developed from the idea which held sway in the period immediately after the adoption of the Universal Declaration of Human Rights that speedy progress could more easily be made by applying the provisions of the Declaration through regional organizations rather than through the universal United Nations system. Although the course of events has not produced a similar rate of development in the regional systems and although the universal system has to some extent succeeded in overcoming obstacles which initially appeared insuperable, the fact is that today we have the American, African and European systems.

78. It is not the business of this paper to make an exhaustive analysis of the functioning of each of these systems. The discussion will therefore be restricted to the right to health.

The American system

79. The American Declaration of the Rights and Duties of Man, adopted in May 1948, i.e. nine months before the Universal Declaration of the United Nations, lists the civil and political rights and the economic, social and cultural ones. Article XI proclaims the right to health in the following terms:

"Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."

80. In contrast, the American Convention on Human Rights (or Protocol of San José de Costa Rica), which entered into force in 1978, deals almost exclusively with civil and political rights. Economic, social and cultural rights are mentioned only generically in article 26, which reads as follows:

"The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires." 27/

The instrument which was intended to fill such a big legal vacuum was the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights - "Protocol of San Salvador" - adopted on 17 November 1988. Article 10 reads as follows:

"1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.

"2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:

- a. Primary health care, that is, essential health care made available to all individuals and families in the community;
- b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;
- c. Universal immunization against the principal infectious diseases;
- d. Prevention and treatment of endemic, occupational and other diseases;
- e. Education of the population on the prevention and treatment of health problems, and

f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable."

81. It is too early to offer opinions as to the effectiveness of the implementation of this Protocol, which has a monitoring system in the form of reports submitted by States parties.

The African system

82. The African Charter on Human and Peoples' Rights was adopted in 1981 and entered into force in 1986. It is concerned with the human rights of both individuals and peoples. It is drafted in less specific terms than the instruments of the American and European systems.

83. The right to health is mentioned in several articles of the African Charter, the most important being article 16, which reads as follows:

"1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

"2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."

84. Article 18.1 of this Charter stipulates that "the family shall be protected by the State which shall take care of its physical and moral health". Article 18.4 states that "the aged and the disabled shall ... have the right to special measures of protection in keeping with their physical or moral needs". The monitoring of these rights is entrusted to the African Commission on Human Rights.

The European system

85. This system is based on the European Convention on Human Rights and the European Social Charter, which entered into force in 1953 and 1965 respectively; the latter instrument mentions the protection of the right to health, the implementation of which is monitored by a special committee of experts.

86. In the view of students of the topic, this system is somewhat complex. States parties have binding obligations, at least pursuant to five of the seven articles of the Charter (Nos. 1, 5, 6, 12, 13, 16 and 19) which deal with the rights held to be essential: the right to work, the right to organize, the right to bargain collectively, the right to social security, the right to medical and social assistance, the right of the family to legal and economic protection, and the right of migrant workers and their families to protection and assistance. The Charter also guarantees the right of disabled persons to vocational and social rehabilitation. In addition to its great flexibility, this system also produces, as may be imagined, differing degrees of commitment by the States parties.

XII. SPECIALIZED INTERNATIONAL BODIES AND THE RIGHT TO HEALTH

87. The right to health is studied and analyzed by various specialized international bodies.

88. We should mention in this connection the universal standards elaborated by ILO and WHO and the regional ones produced in America and Europe.

89. As early as 1922 ILO had completed the drafting of the Convention stipulating a mandatory annual medical examination to monitor the health of workers aged under 16. And there are also Convention No. 121 concerning benefits in the event of work accidents and occupational diseases and Convention No. 130 concerning medical care and sickness benefits (further developed by Convention No. 102 with regard to social security).

90. It is worth stressing that the right to health is recognized in the preamble to the WHO Constitution.

91. At the regional level there are important antecedents in the European Code of Social Security and its additional instruments and in the Pan American Sanitary Code of 1924, which were replaced by the health regulations adopted at the WHO World Health Assembly in Boston in 1969.

92. Article 22 of the ILO Constitution requires the States members of the Organization to submit annual reports on the implementation of the conventions to which they are a party. The reporting system is also used by WHO in accordance with chapter XVI of its Constitution.

93. The Alma Ata Declaration, named for the city where the International Conference on Primary Health Care was held in 1978 under WHO auspices, is of particular importance.

94. Without health the other human rights have little meaning. The fundamental right - the right to life - is jeopardized by poor health. The education and general development of mankind and society cannot be achieved without good health. The same is true of a country's economic growth. It is therefore necessary to establish what the basic health services are. According to WHO, they are the following:

1. Maternal and child care, including obstetrics;
2. Nutrition;
3. Prevention and control of infectious diseases;
4. Sanitation and water supply;
5. Health education;
6. Health in the work-place.

Maternal and child care, including obstetrics

95. These services are closely linked with each other. They cover antenatal checks and care, including any treatment required by the foetus for its development, and postnatal care of the child throughout its infancy and adolescence.

Nutrition

96. The problem of undernutrition or malnutrition affects two thirds of the world's population, a terrifying figure with very particular ethical implications which are all the more pointed when the techniques and opportunities exist to increase the planet's food supply. This problem is one of the reasons for the high infant mortality rates in many countries of the world.

Prevention and control of infectious diseases

97. There is a very clear relation between the right to health and the prevention of the spread of infectious diseases. Cholera, malaria and the various eruptive diseases still affect large numbers of the world's population. Malaria is far from being eradicated, and in some countries where for lack of funds the necessary periodic prevention campaigns have not been carried out it is reconquering areas from which it had already been eradicated years ago. The same is true of cholera which has recently returned like a pitiless scourge in several countries of Latin America. Because AIDS emerged only recently, mankind is still hoping for scientific advances to defeat this fearful disease; AIDS is afflicting increasingly large groups of people, and moreover its victims are subjected to various kinds of discrimination which constitute violations of their human rights.^{28/}

Sanitation and water supply

98. The effective enjoyment of the right to health cannot be divorced from the right to decent housing. "Decent housing" will vary according to the natural environment and the socio-cultural context, but it does mean a minimum in the way of domestic equipment and furniture. This right is recognized in article 11 of the International Covenant on Economic, Social and Cultural Rights and in paragraph 8 of the Declaration on the Right to Development.^{29/}

99. As stated in the Declaration of Principles on Human Settlements adopted by the United Nations, a human settlement means not just individual housing but also material elements and services, including buildings, infrastructures and equipment.

Health education

100. The enjoyment of the highest possible level of health is closely linked to the degree of individual and collective access to education, including of course health education.

Health in the work-place

101. This issue is of increasing importance, and ILO and WHO on a joint basis and the Committee on Economic, Social and Cultural Rights are giving it special attention, for the health of workers is not a purely personal matter and has social implications.

XIII. THE COMMISSION ON HUMAN RIGHTS, INTERNATIONAL HUMANITARIAN
LAW AND THE RIGHT TO HEALTH

102. The United Nations Commission on Human Rights is also studying the question of physical and mental health. It has examined for example traditional practices which affect the health of mothers and children, the question of persons detained by reason of poor mental health, and the question of discrimination against AIDS-sufferers.

103. In addition to these topics, the United Nations has been studying the human rights implications of biological discoveries such as in vitro fertilization, genetic engineering and transplants of organs taken from living or dead persons.

104. In our view, it is impossible to examine these complex problems, or those stemming from the arguments for or against prolonging the life of incurably ill or very old people, not to mention the whole question of intervention affecting the life of unborn babies, without taking into consideration human dignity itself - the dignity on which the whole doctrine of human rights rests - or its ethical implications.

105. Cases in which passive subjects of psychological, pathological or physiological experiments on human beings have not given their full and conscious consent are clear violations of human rights under article 7 of the International Covenant on Civil and Political Rights, which states:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

106. Furthermore, several articles of the 1949 Geneva Conventions and their two Additional Protocols of 1977 guarantee physical and mental integrity. The fullest statement of this requirement is in article 11 of Protocol I which prohibits endangering the physical or mental integrity of persons deprived of liberty or in the power of the enemy, especially the population of occupied territory. In this article the prohibition of medical experiments is more complete than in article 7 of the International Covenant cited above, for it does not mention the consent of the person concerned as authorization for this kind of experiment.

107. In the context of international humanitarian law it must be pointed out that in armed conflicts all the wounded or sick are guaranteed the medical care and attention required by their condition (article 12 of the first and second Geneva Conventions; article 10.2 of Protocol I; article 7.2 of Protocol II).^{31/} Owing to the concern expressed by a number of countries with less developed medical services, the relevant articles of the Protocols include the term "to the fullest extent practicable", a wording which does not specify the level of care which must be furnished.

Experiments on human beings

108. The following aspects of experiments on human beings in the field of health must also be taken into consideration:

(a) Clinical testing of drugs

109. Research on drugs which may eventually be approved for human consumption must be founded on ethical bases when it comes to testing on human beings, and every necessary precaution must be taken to ensure that such testing does not lead to violations of human rights.

(b) Use of chemical additives in foods and drinking water

110. It has become a common practice in recent years to use chemical additives to improve product conservation or presentation, and in some cases such practices can be regarded as violations of the human right to health since there can be no absolute certainty that they are not harmful to human beings. Obviously, this category does not include action designed to enhance health, such as the fluoridation of drinking water or the addition of iodine and malaria-inhibiting substances to salt.

(c) Environmental degradation

111. Any degradation of the environment, for example air, water and marine pollution, soil erosion, etc., affects in one way or another several human rights such as the right to life and the right to enjoy good health. The herbicides and pesticides used in farming and the eradication of malaria can have very adverse effects on human health owing to their indestructibility and high toxicity.

(d) Pharmaceutical products - prices and uses

112. The situation in the pharmaceuticals industry also has a considerable effect on the right to health. The prices of pharmaceutical products are generally high because of the excessive profits taken by the manufacturers at the expense of consumers and national health services. According to a report prepared in April 1992 by the Geneva Centre for Applied Studies in International Negotiations, these prices bear no relationship either to real production costs or to the degree of innovation, a situation encouraged by the fact that it is the manufacturers who decide which products to produce and which to discontinue. This has a negative impact on the health of poorer people, and the situation is very much worse in the developing countries, which are often unable to treat patients suffering from certain diseases requiring medicines available only at very high prices.^{32/}

The right to enjoy the benefits of scientific and technological progress

113. The continuous extension of this right requires a study which will take a practical look at the similarly extending spectrum of human activities in all fields - economic, social, cultural and political.

114. With specific respect to the right to health there are several questions which require clarification, such as the freedom to create and to conduct research.

115. According to article 15.3 of the International Covenant on Economic, Social and Cultural Rights, the States parties may not impose any restriction on such activities. This provision, which is connected with the freedoms of expression and belief, is apparently limited only by the requirements of ethics and morality and, as we have seen, it opens up an area with extremely varied

implications for the rights to life, health and a healthy environment, for it is clear that not all scientific and technological advances necessarily work to the benefit of mankind; in some cases indeed they limit and impede the promotion and application of human rights, while in others - with graver consequences - they can constitute violations.

XIV. IMPLICATIONS OF THE EXERCISE OF THE RIGHT TO HEALTH FOR HUMAN DEVELOPMENT

116. The relation between the exercise of the right to health and development is such a powerful one that it may well be argued that without exercise of the right to health the right to development is a concept void of content. In this connection, article 8 of the Declaration on the Right to Development indicates clearly the correlation between the right to health and the other human rights, and therefore "States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices".^{33/}

117. As the United Nations Conference on Human Settlements rightly stated, health is a crucial element in individual development.^{34/} Without good health it is impossible to speak of respect for human rights.

118. The Declaration on the Right to Development, which was adopted by the United Nations General Assembly on 4 December 1986 with only one dissenting vote, that of the United States, is today, thanks to a change of position by that country at the World Conference on Human Rights in Vienna in May 1993, acquiring consensus support and binding status in all quarters.

119. The Declaration was conceived as a synthesis of all human rights and it marks out the route to be followed by all persons and all States, implying a titanic effort for its implementation, which will require the full participation of all and a total national and international restructuring.

120. Although there are problems both in the developed countries and in the developing ones, the magnitude of the problems in the latter countries is beyond all comparison.

121. To illustrate just a few of the problems in one underdeveloped area we will cite the following examples of the situation of the right to health in Latin America and the Caribbean.

122. In Latin America an average of 5 per cent of the gross national product is spent on health. In Canada and the United States, in contrast, the figures are 8.6 and 10 per cent respectively.

123. Underdevelopment and poverty determine general social development in the countries of Latin America and the Caribbean, a circumstance which is particularly marked where health is concerned.

124. In Latin America and the Caribbean there are several factors adversely affecting the exercise of the right to health:

(a) Growth and ageing of the population

Although the problem of ageing is a frightening one throughout the world, especially in the light of forecasts of the future situation, it is not a problem exclusive to the developed countries. For example, in Latin America an average of somewhat more than 7 per cent, and in some countries 10 per cent, of the population is aged over 60. This change in the population structure exerts great pressures in social, political and economic affairs.

(b) Rapid urbanization

The whole world is undergoing rapid urbanization, but the consequences are more serious in the developing countries. In Latin America and the Caribbean, for example, more than 75 per cent of the population will be urban by 2000. This runaway growth is creating a number of problems which affect the right to health, such as pollution, inadequate infrastructure, unemployment, violence, insecurity, and marginalized population both on the periphery and in the towns themselves. These violent changes are producing new attitudes to health, especially with respect to the demand for and use of services. They are also creating problems of poverty, transmissible diseases and malnutrition.

(c) Insufficient and inadequate health services

Health services are having to cope with problems and situations connected with the needs, modes of perception and demands of the poorer population groups. This situation is more serious in the countries of the developing world. In Latin America 80 to 90 per cent of health funding is spent on secondary and tertiary care. A third of the population lacks a regular and reliable income to meet their essential health needs.

The coexistence of systems of public and private services, social security, cooperative insurance, and charitable organizations accentuates these disparities. There is thus a broad range of situations with different classes of benefits, privileges, and quality of services.

Many health professionals are preoccupied with personal standing and monetary success. On the other hand, in some poor countries as a result of economic adjustment policies it is common for health professionals to engage in activities having nothing to do with the training they have received. Many of them work as taxi drivers, street vendors in the informal sector, etc. This misuse of human resources aggravates the health services situation - a paradox in the light of the shortage of health professionals in rural areas.

(d) Social security constraints

States must use their social security systems to guarantee all their people equal access to health services. It is important to modify the political, conceptual, legal and financial bases of these systems and eliminate the practice in some countries of using social security funds for other purposes which produce no benefit for those making the direct contributions.

(e) Popular or traditional medicine

So-called traditional medicine is a common practice, particularly in rural areas. It performs an important function of special benefit in certain communities. Its advantages and drawbacks must be investigated in greater depth

and it must be properly channeled in the light of the fact that in many developing countries health professionals are unable to provide their services in rural areas. The impact of urbanization on traditional medicine should also be studied, for peasants who migrate to the towns often bring all their cultural concepts with them.

The challenges

125. In the introduction to El Derecho a la Salud en las Américas (The right to health in the Americas), published by the Pan American Health Organization, the Organization's Director, Carlyle Guerra de Macedo, identifies the challenges presented by the right to health in Latin America and the Caribbean, many of which are also found in other areas of the developing world.

126. He points to the enormous social debt represented by hunger, malnutrition, undernutrition, the lack of immunization and basic health measures in general, hygiene, health education, proper diet, and appropriate medical care.

127. Mr. Guerra de Macedo stresses the need for increased political will and determination, for a better distribution of power in societies, and for States to play their role in the quest for and achievement of development. He explains that all this has given rise to a permanent conflict between health needs and the allocation and use of limited resources which are elements of the exercise of power and therefore of the social process of decision-making; viewed from this angle the situation is obviously political, and the solution to the problems will necessarily be expressed in legal terms.^{35/}

128. It should be pointed out here that during the seminar on appropriate indicators to measure achievements in the progressive realization of economic, social and cultural rights, held in Geneva from 25 to 29 January 1993, it was stressed that most health problems are linked to poor housing, unemployment, poverty and insufficient food, pollution of air, food and water, the cruelty and suffering inflicted on children, and low standards of health care.^{36/}

129. It was also argued that the right to health should be viewed in the political context which largely determines the priorities for exercise of the right.^{37/}

130. The participants in the seminar pointed out that some countries had devised health policies designed to encourage a fair distribution of health funding, but that the implementation of these policies had encountered difficulties of access in some places owing to geography or armed conflicts.^{38/} They reiterated that the right to health is closely linked to the exercise of the right to food and the right to housing since an insufficient diet limits children's learning ability. In the same way, the lack of suitable housing has an adverse impact on health.^{39/}

131. Accordingly, we can say that there is general agreement that the solutions to the complex problems of health must amount to more than an attempt to reduce the risk of sickness and death. Conditions must be improved so that people can achieve maximum physical and mental development, taking into account for this purpose several factors such as the environment, occupational health, decent housing, maternal and child care, the protection of food, nutritional habits and health education, etc. It is therefore necessary to take into consideration the social and global nature of the right to health, which is determined largely by development.

132. Any attempt to take into consideration this social characteristic of the right to health about which we have been speaking implies, as Guerra de Macedo points out,^{40/} several dimensions:

1. Equality, a matter already discussed;
2. Integration in two areas which must be dealt with simultaneously:
 - (a) Health measures such as promotion, prevention, recovery and rehabilitation, which require several levels of care, including long-term care;
 - (b) Health in the development process.

The first area amplifies the notion of equality as the right to integrated and prompt access to all levels of care. It is concerned with equality in quality of care and the preservation and promotion of health so that all people are able to achieve their maximum development.

The second area is concerned with health as an intersectoral responsibility and the need to make it the highest expression of well-being which, in turn, is regarded as the principal goal of development.

Participation means the establishment of a relationship of common responsibility between society and the health services and systems which will create a civic awareness of health and of the common responsibility to preserve it. It includes, as Guerra de Macedo argues, the exercise of power in society, the union of individual freedom and social responsibility, solidarity and the function of the State. Real participation does not diminish the State's responsibility for health.^{41/}

Attention must be drawn to the existence of a tradition which holds that participation belongs in the field of civil and political rights; this is correct but it should not mean the exclusion of participation from the field of economic, social and cultural rights, for it is truly indispensable to their realization.^{42/}

133. A final point on the implications of the exercise of the right to health for human development: it is essential to take action to create awareness of the true meaning of human rights so that development experts, whose participation in intergovernmental development-finance bodies and in the government machinery of many countries is of great importance, can carry on their activities in harmony with the respect and promotion of human rights.

XV. EVALUATION OF THE IMPLEMENTATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

134. As the seminar on appropriate indicators to measure achievements in the progressive realization of economic, social and cultural rights correctly pointed out, the fact that a State has a satisfactory credit balance in social and economic matters is not necessarily a result of its intention to respect economic, social and cultural rights. It was also stated that it was important to determine what a State was willing and able to do, for in some cases a State might be incapable of guaranteeing a specific right.^{43/}

135. The seminar also concluded that in order to measure the progress made in the area of economic, social and cultural rights additional work was required in particular to:

1. Clarify the nature and content of the various rights, bearing in mind that certain economic, social and cultural rights require further conceptual definition;
2. Define more precisely the content of each right, especially the immediate core obligations of States parties to ensure the satisfaction of at least the minimum essential levels of these rights;
3. Identify the immediate steps to be taken by States parties to comply with their legal obligations with respect to the full implementation of these rights.^{44/}

136. It is very difficult to establish criteria for judging whether a State is taking steps to ensure the full realization of this right. One obstacle is that not all States have the same degree of development or the same economic capacity or the same level of popular education, to mention only a few of the factors to be borne in mind in making this assessment.

137. Great efforts are being made in the various international bodies to verify compliance with obligations in respect of economic, social and cultural rights. The Committee responsible for monitoring this group of rights - naturally enough - has been constantly improving its methodology. In this connection the establishment of minimum limits below which a State cannot be held to be respecting economic, social and cultural rights certainly represents an advance in the realization of these rights. In any event, it is implicit that these limits should be adjusted from time to time. Furthermore, in view of the impact which economic factors have, in other respects, on the enjoyment of these rights, the limits would have to be set at a level consistent with each country's capacity, its present degree of development, and the possible need for assistance which another State would have to furnish. For these reasons it is impossible to set uniform minimum limits for all States.

138. Moreover, given the particular complexity of economic, social and cultural rights, and within the parameters indicated above, a specific level will have to be set for each right.

139. At all events, it must be made very clear that such minimum limits are simply means of measurement and can never be regarded as calling into question the oneness of mankind or the dignity of the human being which implies the right of all people to enjoy all human rights without distinctions of any kind, and indeed without any differences in the level of this enjoyment, for all human beings have the right to the same level of health.

CONCLUSIONS

140. The following conclusions may be drawn from this study of the right to health:

1. It is a right applicable in two spheres - within States and internationally.

2. It is held by human beings and also by human communities.

3. Its international promotion and application must take into account the domestic legislation of each State and the provisions of the international treaties to which the State is a party. Customary law and the general principles law may also be applied.

4. The standards set in international treaties concerning the human right to health should be interpreted mutatis mutandis.

5. Like any human right, the right to health must be viewed in the context of its indivisibility and its interdependence and interrelation with all others human rights.

6. The attainment of the highest level of health is the individual and collective responsibility of States, non-State entities, and human beings. It is the responsibility of the international community to monitor the situation and adopt measures to enable all the peoples of the world to attain the same level of health.

7. In order to attain the goal of the highest possible level of health, it is essential to improve world education standards and at the same time to make all communities aware that the application of the principles of solidarity will benefit not only the recipients of assistance but also its providers and mankind in general, and that solidarity is essential in today's world in which the rapid travel of human beings from one end of the planet to the other and the environmental situation make world health policies an imperative.

8. At a theoretical level and bearing in mind that all human beings are equal in the dignity which is the foundation of human rights, it is impossible to avoid the conclusion that all human beings have the right to enjoy the same level of health. Therefore, to set different limits for the enjoyment of this right depending on a country's degree of development would be incompatible with human dignity and would to some extent signal the partial legalization of discrimination constituting in itself a violation of human rights.

9. Since it is the human ideal to attain the highest possible standard of living, it is impossible to set a uniform minimum limit below which it may be held that a given State is not fulfilling its obligations with regard to health. However, it can be determined on the basis of the progressive nature of the right to health whether there is progress, regression or stagnation in its exercise.

10. Given the obligation of States to cooperate, a mechanism must be established to enable the Committee on Economic, Social and Cultural Rights to secure a detailed report on the assistance which a given developing country has received and the results of this assistance.

11. A minimum level of cooperation must be set below which it is held that the State furnishing the assistance is not fulfilling its international obligations.

12. Scientific and technological advances, regardless of their provenance, must be placed at the service of all human beings in order to improve mankind's standard of living as quickly as possible and in a harmonious and uniform manner.

13. Medical experiments, including genetic experiments, must respect human dignity, and constant care must be taken to ensure that they do not lead to violations of human rights.

14. The international community and national communities must make every possible effort to preserve the values of traditional medicine and use it, where possible and making any possible adaptations, for the benefit of all mankind.

15. Indigenous peoples and minorities must be given special attention in the application of the right to health. Respect for their traditions must not hamper in any way their access to other health practices.

16. Discrimination affecting the right to health takes many different forms and often does not officially exist.

17. Economic discrimination in satisfying the right to health is a grave violation of human rights which must be avoided by all possible means. This kind of discrimination occurs in varying degrees, the most serious of which is to impede the access to health services of persons requiring very urgent treatment.

18. Every effort must be made to eliminate the discrimination against women and children where health is concerned, especially in certain parts of the world.

19. It is essential to continue the efforts to eliminate the discrimination against AIDS-sufferers which fans out into several fields such as education, employment, migration and even the health services themselves.

20. The discrimination in certain social groups in some countries on grounds of age against children and old people must be eradicated.

21. Special attention must be given to the coercive control of the birth rate, including the widespread abortion and sterilization apparently practised some areas of Asia.

NOTES

1/ EIDE, Absjorn, El Derecho a la Alimentación Adecuada como Derecho Humano. United Nations, New York, 1989, pp. 21 and 71.

2/ A/CONF.157/PC/73.

3/ ROENER, Ruth, Derecho a la Atención de la Salud in El Derecho a la Salud en las Américas - Estudio Constitucional Comparado. Pan American Health Organization, Washington, 1989.

4/ WARTBURG, Walter P., A Right to Health? Aspects of Constitutional Law and Administrative Practice in The Right to Health as a Human Right, seminar held in The Hague from 27 to 29 June 1978, René-Jean Dupuy editor, Alphen aan den Rijn, Netherlands, Sijthoff and Noordhof, 1979, p. 112.

5/ ALVAREZ VITA, Juan, El Derecho al Desarrollo, Inter-American Institute of Human Rights and Peruvian Institute of Human Rights, Cultural Cuzco, 1988.

6/ Article 7 of the International Covenant on Economic, Social and Cultural Rights states that "the States Parties to the present Convention recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:....(b) Safe and healthy working conditions ...". Article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that "in the present Convention, genocide means any of the following acts committed with the intention to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; ...". Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid states: "For the purposes of the present Convention, the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person: (i) By murder of members of a racial group or groups; (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; ...". Articles 2 and 3 of the European Human Rights Convention state: "Article 2.1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection. Article 3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 4 of the American Convention on Human Rights or Covenant of San José de Costa Rica stipulates: "1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.". Article 5 of this Convention states: "1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person...".

7/ Article 235 of the 1979 Constitution reads as follows: "There is no death penalty, except for treason of the homeland in case of a foreign war."

Article 140 of the 1993 Constitution reads as follows: "The death penalty shall only be applied for the crime of treason of the homeland in case of war, and of terrorism, in accordance with the law and the treaties to which Peru is a party."

As may be seen, the new version extends the scope of application of the death penalty, which is expressly prohibited by article 4.2 of the American Convention on Human Rights to which Peru is a party and which reads: "... The application of such punishment shall not be extended to crimes to which it does not presently apply."

8/ Article 19 of the 1979 Constitution states: "The individual unable to take care of himself because of physical or mental deficiency is entitled to the respect of his dignity and to a legal system of protection, services, rehabilitation, and security. Nonprofit organizations which provide the services anticipated under this system as well as those which are responsible for disabled individuals do not contribute to the payments to be applied to the related expenses. Neither do they make payments earmarked for the same purposes."

The 1993 Constitution has no provision of this kind.

9/ This was Judge Vladimir Paz de la Barra of the Fifteenth Court of Lima.

10/ See Derecho a la Salud en las Américas - Estudio Constitucional Comparado. Pan American Health Organization, Washington, 1989.

11/ WHO Constitution.

12/ Ibid.

13/ International Covenant on Economic, Social and Cultural Rights, article 2.3.

14/ Human Development Report 1993, published for UNDP by CIDEAL, Madrid, 1993, p.25.

15/ Ibid., p.25.

16/ Ibid., p.26.

17/ Ibid., p.76.

18/ Ibid., p.26.

19/ Ibid., p.26.

20/ Ibid., p.27.

21/ Ibid., p.27.

22/ Ibid., p.27.

23/ Ibid., p.28.

24/ Ibid., p.28.

25/ The Limburg Principles (E/CN.4/1987/17).

26/ CRISTESCO, Aurelio, El Derecho a la Libre Determinación. New York, 1981.

GROS ESPINELL, Hector, El Derecho a la Libre Determinación. New York, 1979.

27/ When the OAS Charter was adopted in 1948 it did not mention the rights referred to in article 26 of the American Convention on Human Rights. The Protocol of Buenos Aires was adopted in 1967 and entered into force in 1970; it contains a number of additions in the chapters on economic and social standards and standards concerning education, science and culture. Health and related aspects are dealt with under economic and social standards.

28/ VARELA QUIROZ, Luis, Discriminación de las Personas Infeccionadas por el VIH o de las Personas con SIDA (E/CN.4/Sub.2/112/10 and E/CN.4/Sub.2/1993/9).

29/ ALVAREZ VITA, Juan, op.cit.

30/ A/CONF.70/15.

31/ The Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1986, and Protocols Additional to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1977.

32/ Pharmaceuticals, Prices and Profits: Political, Social and Economic Implications, report prepared at the Centre for Applied Studies in International Negotiations (Issues and Non-Governmental Organizations Programme), Geneva, April 1992.

33/ Declaration on the Right to Development.

34/ A/CONF.70/15.

35/ GUERRA DE MACEDO, Carlyle, El Derecho a la Salud en las Américas. Pan American Health Organization, Washington, 1989.

36/ A/CONF.157/PC/73.

37/ Ibid.

38/ Ibid.

39/ Ibid.

40/ GUERRA DE MACEDO, op. cit.

41/ Ibid.

42/ ALVAREZ VITA, Juan, El Medio Ambiente, Sunday supplement of the newspaper El Comercio, Lima, Peru, 1989.

43/ A/CONF.157/PC/73.

44/ Ibid.