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HEALTH AND HUMAN RIGHTS

ELEANOR ROOSEVELT DRIVES BY

The Honorable Michael Kirby AC CMG

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THE HONORABLE MICHAEL KIRBY AC CMG*

AN EPIPHANY DOWN UNDER

Where did it all begin? At least, where did it begin for me? In 1944 Australia was in the midst of a deadly struggle for survival. The danger of enemy invasion could not be discounted. Our military forces were fighting in the jungles and islands, shoulder to shoulder with the armed forces of the United States of America. I was in my first year of education, attending a kindergarten, conducted in a church hall near one of the main arterial roadways circling Sydney. Along the roadway, a seemingly endless parade of khaki coloured vans, bearing the white and red insignia of the Red Cross, could be seen on their way to the new Repatriation General Hospital at Concord, the suburb of my parental home.

On one particular day, the school children were all brought out to line the footpath. An important visitor was passing by on the way to the big new hospital. That edifice had been constructed with American aid to provide care and treatment to American and Australian soldiers wounded in the War. The visitor was the wife of Franklin D. Roosevelt, President of the United States. Eleanor Roosevelt was in Australia briefly to show the President's support for the war effort. We were commandeered to show our thanks. So we all waved flags and cried out as this great lady was driven past us.

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I wonder if our eyes ever met. If they had, I would have been proud. She was a special person. She was Eleanor Roosevelt. I was 6 years of age.

A bit more than a year later, the allies had won the War. A strange mushroom-shaped cloud invaded my consciousness. Soon after, in August 1945 every Australian school child received a round bronze medal, as big as a penny. It was the "V.P. medal" – Victory in the Pacific. Four years after that victory another event occurred. By now I was at a different school, well and truly embarked on the journey of education. Our teacher, Mr Redmond came into the boys only class with a packet containing an unusual gift. It was unusual in three respects. First, it had within it a large number of small pamphlets of miniature size, all bearing the blue insignia of the new United Nations Organisation, with which we school children were becoming more familiar. It was an odd shape, being oblong rather than square. And they were printed on airmail paper: a rarity in those days of post war reconstruction and austerity.

Our teacher began explaining the purpose of the documents, which was called the *Universal Declaration of Human Rights* (UDHR)¹. He mentioned that it had been drafted by a committee, chaired by the famous lady whose name I remembered, Eleanor Roosevelt. Moreover, it had been adopted by the General Assembly when an Australian, Dr Herbert V. Evatt, was in the chair as President of the Assembly. We knew that he was an important man. In fact, he was our country's foreign minister. Before the War he had been a Justice of the High Court. However, he had resigned to re-enter politics at a time when the country was in peril. We were told that the purpose of the UDHR was to express and re-enforce the basic rights that people everywhere enjoyed. Only if those rights were guaranteed and protected, would human beings escape the dangers of another war and the catastrophe of that mushroom cloud. Amazing how the lessons of youth can enter the imagination of a child and remain in the consciousness for 60 years and more.

Amongst the principles stated in the UDHR (and there were many) were those expressed in Article 25. Eleanor Roosevelt had a strong attachment to this Article

¹ UDHR, adopted and proclaimed by the General Assembly of the United Nations, resolution 217A (III) of 120 December 1948.

because she knew, from her husband and family, the importance of health and the challenge of disability:

25.1 Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family ... and medical care and necessary social services and the right to security in the event of ... sickness, disability ... [and] circumstances beyond his control.”

Our teacher told us how, in Australia, we had as recently as 1946 adopted one of the very rare amendments to our 1901 Constitution, so as to permit the establishment of a publicly funded national health scheme, so that the Federal Parliament could make provisions for “maternity allowances, widows’ pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services ... benefits to students and family allowances” [Australian Constitution s 51(xxiiiA)].

Later, I was to learn that the provisions of the *Universal Declaration* were converted into binding treaty language in two *International Covenants* adopted by the United Nations. One of these, the *International Covenant on Economic Social and Cultural Rights*, (ICESCR)² which came into force in January 1976, contained, in Article 12, an elaborate principle expressing the aspiration of a right to health:

12.1 The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

12.2 The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of these rights 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;

² ICESCR, 993 UNTS No. 14531 (1976).

- d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Years after this Covenant was adopted, after I had been elected a Commissioner of the International Commission of Jurists (ICJ) in Geneva, I came to know the ICJ commissioner elected from Canada: Professor John Humphrey of McGill University in Quebec. In quiet moments, John Humphrey would tell me of what it was like working with Eleanor Roosevelt, for he had been a key person in the Secretariat of the United Nations, then based at Lake Success near New York. He had helped with the first draft. Truly, he had been present at the creation of the new world order, essential for peace and justice for all humanity. I am a child of those times. I grew up believing in the values written down by Eleanor Roosevelt. I still do. Not just for Australians. Or Americans. For everyone.

HEALTH FOR ALL: INSTITUTIONAL

It was all very well, Eleanor Roosevelt and John Humphrey proclaiming health for all. But how could this bold aspiration ever be translated into action for ordinary people? Particularly for poor, marginalised and disadvantaged people? Sickness has always been with us, back to biblical times. Is it not just something we have to learn to live with? Could the world afford the expense included in health for all?

A lawyer and a judge (even a judge of a final court) can occasionally make contributions to this macro problem. One of the last decisions I delivered before concluding my service as a judge on the High Court of Australia in February 2009, concerned a challenge by a medical practitioner to features of the Australian Medicare system. A doctor contended that it amounted to, or authorised, a form of “civil conscription”, which was expressly prohibited by the grant of power afforded to the Federal Parliament by the Australian people. Obviously, with that grant came the necessities of administration and auditing of the huge sums of federal money involved. The difficulty was presented of drawing a line between the inherent necessities of control and its consequential impositions. By a majority, in which I

participated, the Court rejected the medical practitioner's challenge³: Decisions like this, however contentious, whilst important for people in a particular country cannot really touch the huge global challenges presented for affording the best attainable health care to human beings everywhere. But that had been Eleanor Roosevelt's aspiration.

On a global level, the United Nations duly established the World Health Organisation (WHO), an agency with a mandate to tackle health across borders. This agency has played a key role in advancing international co-operation so as to eradicate endemic diseases. In my lifetime, substantially with the aid of WHO, diseases such as smallpox have been eradicated and polio contained in ways that would have been impossible in early centuries.

When new and dangerous diseases have manifested themselves, WHO has played a leadership role in mobilising the response of the international community. It has done this in the case of *Ebola*; and new strains of influenza (popularly known as 'swine flu' and 'chicken flu'). It was an initiative of WHO that established the *Global Programme on AIDS* (GPA), under an inspired international civil servant Jonathan Mann, in 1985. From Geneva, in 1988, Dr Mann invited me to join with others in the initial *Global Commission on AIDS*. This was established to advise WHO and national governments on the response that should be presented to the AIDS epidemic and specifically to the Human Immunodeficiency Virus (HIV). Without a pharmaceutical cure or a safe and reliable vaccine, innovative steps had to be taken to address the unexpected epidemic. I was privileged to participate in that global commission with the two scientists credited with identifying HIV, Luc Montagnier (France) and Robert Gallo (U.S.A). Also a member of the Commission was Professor June Osborn (U.S.A., Uni of Michigan). She established the principle that every strategy had to be measured against the gold standard of the best empirical data. Dr Mann insisted that universal human rights were an essential ingredient in fighting HIV/AIDS. Only by this means would there be any chance of getting into the heads of those whose decisions were essential for the ways HIV was transmitted.

³ *Wong v The Commonwealth of Australia*

Later (1993-1996) UN Secretary-General Boutros Boutros Ghali appointed me his Special Representative for human rights in Cambodia. In the aftermath of the genocide of the Khmer Rouge regime, I identified the 'right to health' and to be free of infection by HIV as central considerations of human rights which United Nations and the Cambodian Government had to tackle. Initiatives taken at that time contributed to the fall in the rate of infection. Yet, globally, HIV infections have continued to spread. More than 30 million human beings have died of AIDS since it was first identified. More than 34 million are today living with HIV and AIDS. Beneficial anti-retroviral drugs can radically improve lives, reduce infectability and increase economic and personal welfare. Yet in the current circumstances of the Global Financial Crisis, the funds necessary to provide such drugs to all in need of them are diminishing. United Nations targets are not being met. Will people who live in developed countries with effective public health systems be treated? But people in other countries, through inability to secure and maintain access to pharmaceuticals, lose their lives?

At least, when AIDS came along, the world confronted the new challenges, substantially as a global family. To reduce tensions and competition between United Nations agencies, a joint body, UNAIDS was created to give leadership and so as to mobilise every agency and all available resources. But what of other life threatening conditions? Especially conditions predominating in developing countries? What of malaria? Tuberculosis? Sickle Cell Anaemia? River blindness? Are these less important because less well known in the developed countries of the West?

HEALTH FOR ALL: NEW INITIATIVES

Because Eleanor Roosevelt's dream of universal access to essential health care was increasingly seen as an attribute of our shared human rights, the United Nations Human Rights institutions over the past 20 years have increasingly given attention to this feature of global human rights:

- * In my work as a UN special representative in Cambodia, I faced some resistance from local officials when I insisted on HIV/AIDS as a human right

- concern. Powerful people objected to conceptualising disease in terms of legal human rights. Yet persistence won converts. The result saved lives;
- * Other special representatives and special rapporteurs of the United Nations also became engaged with the AIDS epidemic. One of the early cross mandate meetings of these officials in 1994 concerned the relevance of HIV to many of the mandates;
 - * In due course, a special Rapporteur on the right health was established. At present, this is Mr Anand Grover (India). Earlier, he had established the innovative HIV/AIDS Legal Collective in Mumbai to promote co-operation between lawyers and medical scientists so as to reduce the impact of this epidemic. Extrapolating from that experience, Mr Grover now reports to the United Nations Human Rights Council on priority issues in his mandate. He has been forthright and courageous. This, notwithstanding, he secured a second term; and
 - * UNAIDS continues to pursue a steady course in holding its diverse collection on UN agencies to a human rights respecting strategy in their responses to the HIV epidemic. It works through a small but highly professional secretariat led by Susan Timberlake (U.S.A.). Through the ongoing work of its reference group on human rights, posted on the website. And also through one-off expert meetings on particular topics, such as recent meetings on criminalisation of HIV transmission and whether this kind of law is conformable to human rights standards and also effective in slowing the epidemic.

Against the enormity of the challenge to fulfil the aspirations of the *Universal Declaration* and the Covenants that grew out of it relevant to access to health care, even the above initiatives seemed paltry. So what can be done to step up the momentum to achieve health for all and true fulfilment, sixty years later, of Eleanor Roosevelt's hopes for humanity?

- * Stimulated by Professor Lawrence Gostin (Georgetown Law – U.S.A.) a global campaign for a 'Framework Convention' on global health has been launched. It has the support of leaders in this field, including Special

Rapporteur Anand Grover. I myself have signed onto the statement that is circulating calling for such a convention “to give true force to international law and extend its reach into the communities where we live, to create the conditions for health and wellbeing for everyone”. The initiative acknowledges the “vast inequalities in health between richer and poorer countries and within countries [that] result in nearly 20 million avoidable deaths every year”. Just imagine such enormous wastage. Just contemplate the suffering and grief. But the threads are coming together, at least among the opinion leaders in the global moves for health as a human right. In particular, the significance of “human rights, gender justice, universal systems of social protection and a fair economic system” are now almost universally supported by leaders who work in this field. No longer is health care seen as a stranger to human rights. Now they work in tandem. And the proposed *Framework Convention* is an initiative as bold, in our time, as the demand to end global slavery was in the 1820’s;

- * In the particular field of maintaining the momentum to reduce the spread of HIV/AIDS, bold projects are being advanced to which I, and many others, have contributed. One of these was the report of the Eminent Persons Group on the future of the Commonwealth of Nations⁴. This report unanimously identified reform of criminal laws on commercial adult sexual conduct; and on homosexual activities as key priority goals for nations of the Commonwealth. Of them, 41 of 54 nations continue to criminalise consenting adults homosexual acts;
- * Coinciding with the publication of this volume is the launch by the United Nations Development Program of the report of its *Global Commission on HIV and the Law*⁵. This report, following 18 months of extensive research, analysis and deliberations, recommends many bold new actions to reform laws which currently impede attainment of health care. These impediments present obstacles that undermine strategies that have been proved to work. The usual list of targets is identified: Laws against commercial sex work; laws against homosexuals; laws that disempower women and children; laws on

⁴ Commonwealth of Nations, Eminent Persons Group, *A Commonwealth of the People: Time for Urgent Reform* (2011) published by Commonwealth Secretariat, London 2011. See esp. 98-102 (“Advocacy on HIV/AIDS a Commonwealth Health and Economic Development Priority”)

⁵ United Nations Development Programme, *Rights, Risks and Health* July 2012, New York.

drug use; laws that criminalise HIV transmission; the international intellectual property (patent) regime and;

- * In addition to such large initiatives, smaller, patient but productive strategies are being taken, sometimes supported by the United Nations and other bilateral and multilateral donors. In recent days, I have had the privilege of dialogue with justices of the Supreme Court of Nigeria. And with judges from the Caribbean, specifically Jamaica. A decade ago, with Justice Edwin Cameron (now of the Constitutional Court, South Africa) I participated in a dialogue for Anand Grover and Mandeep Dhaliwal (UNDP) with the judiciary of India. Sensitising and informing judges about the needs of national and global health can occasionally assist in advancing awareness and enlightenment. In India, an important court decision in 2010 struck down as unconstitutional, the criminalisation of adult, private consensual same sex activity. Amongst the reasons cited in the opinion of the Court was the impediment that the criminal law presented to attainment of public health envisaged by Article 12 of the ICESCR and the obstacle that such legal provisions presented to successful health strategies, including to combat HIV/AIDS⁶.

HEALTH FOR ALL: ATTAINING THE DREAM

We have not yet attained the dream expressed by Eleanor Roosevelt and her colleagues in the *UDHR*, the *Covenants* and the new world legal order to which they gave rise. But now we have instruments of the international community and rules of international law. We have specialised agencies and institutions that harness the aspirations of humanity. We have experts who advise on how we can embrace the rational and optimistic attributes of human nature. And avoid the peril of war, genocide and cruel discrimination. No nation can tackle these challenges alone. Healthcare in men, women and children is something so basic that we can all understand it and grasp its necessity when we reflect on our own lives and those of our loved ones. Expression of the theory and concepts is essential to stimulate us into action. The examples of practical measures are necessary to show the benefits that action can produce and that change can occur.

⁶ *NAZ Foundation v Delhi* [2009] 4 LRC 838 (Delhi High Court, A P Shah CJ and S. Muralidhar J.; appeal to Supreme Court of India heard and reserved).

These high aspirations were probably going through the mind of Eleanor Roosevelt, that great champion of humanity and of human dignity, as her car approached Concord in Sydney, Australia in 1944. The young school children waved to her. Even they knew that she was an important messenger that the future need not be like the past. And that it was a duty of new generations to make it so.
