SPEAKING NOTES
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ADDRESS TO THE SAN CARLOS DIPLOMATIC ACADEMY,
MINISTRY OF FOREIGN AFFAIRS

BOGOTÁ, COLOMBIA
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Minister Frank Pearl,

Your Excellency Ambassador Forero-Ucros,

Your Excellency Ambassador Martin,

Honourable Parliamentarians,

Distinguished guests,

Ladies and gentlemen:

I. INTRODUCTION

It is an honour to have been invited to speak before you today at the San Carlos Diplomatic Academy, and on issues that have formed the central focus of my career, both academically and professionally. Having been a public servant in some way, shape or form since 1967 when I became Chair of my home province of New Brunswick's Human Rights Commission, I have, since that time, served in various positions; positions that ultimately led me to my current role as Speaker of the Senate of Canada.

As Speaker, I am privileged to engage regularly with foreign dignitaries, both in Ottawa and overseas. I like to remind those whom I encounter that, as

Speaker of the Senate, I engage in parliamentary diplomacy, as opposed to the diplomacy of the executive. The distinction is clear and important. Canada's role in the world, incorporating its policy pronouncements, negotiations and high-level meetings, has traditionally been defined by the government of the day. However, increasingly, parliamentarians are being called upon to play a greater part in fostering relationships and pursuing policy objectives with other countries. Not being 'of' the executive, parliamentarians tend to have greater flexibility in discussing issues of concern that may, in time, lead to solutions to everyone's mutual satisfaction.

The Canadian Parliamentary System

This dynamic between Canada's Parliament and its Executive is based on a classical parliamentary federation modeled on the British Westminster tradition, with legislatures at both the federal and provincial levels. Under this model, the Executive, comprised of the Prime Minister and the Cabinet, is incorporated into Parliament, though the Executive branch retains a sphere of independence and authority from Parliament. The Judiciary, consisting of the Supreme Court of Canada and all other courts, is the third branch of government and is independent of Parliament and the Executive.

The *Constitution Act* of 1867 established Canada's federal Parliament, designating the Queen, represented by the Governor General, as the formal head of State; a lower chamber of elected representatives – the House of Commons; and an upper chamber of government appointed representatives – the Senate. The principle of responsible government means that the Prime Minister cannot govern without the consent of the elected House of Commons, which makes the Executive

branch accountable to the people. In turn, the Executive must retain the confidence of the House in order to stay in power.

In the Chamber that I represent, the Senate, seats are allocated so as to provide each region of Canada with equal representation. Over half of the seats in the Senate are distributed to less populated regions of the country, complementing the representation-by-population basis of the House of Commons. The Senate's intended role is to safeguard regional, provincial and minority interests – reflecting Canada's commitment to protecting diversity. The Senate is also intended, in the words of Sir John A. Macdonald, Canada's first Prime Minister, to provide "sober second thought" to legislation initiated in the House of Commons. To become law, a bill must be passed by both the House of Commons and the Senate, ensuring that both popular and minority views are taken into account in the legislative process.

Federalism

With the experience of some 144 years of federalism behind us, Canadians are familiar with the unique challenges – and significant benefits – of governing an ethnically and regionally diverse, as well as a geographically vast nation. Through the division of powers, a measure of self-government is vested in national minorities, allowing them to protect and promote their culture, religion and language.

This division of powers within the constitution, as well as constitutional practice, gives the power to conduct foreign policy to the Crown in the form of the federal Executive. However, the division of powers between our federal and provincial governments places limits on the scope of the authority that can be

exercised. Specifically, it is the practice in Canada that the federal government cannot ratify an international treaty that affects an area of provincial jurisdiction without the written consent of all of the provinces.

The first such case of this was when then-Prime Minister R. B. Bennett used the International Labour Organization conventions as part of his "New Deal" package of economic reforms to confront the Great Depression. However, labour issues fall under the jurisdiction of the provincial legislatures under s. 92 of the *Constitution Act of 1867*. And as the ILO was created by the Treaty of Versailles, which Canada had acceded to without seeking the consent of the provinces, the ILO conventions were ruled to have no effect by the Judicial Committee of the Privy Council, then Canada's Supreme Court.

The precedent set by this case affects the powers of the Parliament of Canada to practice its foreign policy powers to this day, and most particularly with respect to human rights, which also falls under the jurisdiction of the provincial legislatures under s.92. In fact, in 1948, in the second to last vote before the unanimous passing of the *Universal Declaration of Human Rights* in the General Assembly, Canada abstained, with then-United Nations Ambassador Lester B. Pearson citing s.92. Thankfully, and after much discussion, Canada changed its vote in favour of this historic document.

Similarly, when the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights* were opened for signature in 1966, although Canada signed them almost immediately, the consent of the provinces was first sought before their ratification by the Parliament of Canada in May 1976. However, on occasion, the ratification of a

treaty that encroaches upon the powers of provincial legislatures has been held up on account of the reservations of a province or provinces. An example of this is the non-ratification of the Organization of American States' *American Convention on Human Rights*, to which the provinces have multiple objections, more of which I would like to discuss in due course.

Categories of Human Rights

In referencing the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights*, it is important to note the oft-highlighted distinction that has been made between positive and negative rights. The latter, typically concerned with civil and political rights, sets limits by describing what governments may not do: they may not deprive individuals of life, liberty and security of the person, except in accordance with the principles of fundamental justice; they may not interfere with an individual's freedom of expression; they may not subject an individual to unreasonable search and seizure; and so on. Negative rights may be asserted in the courts, and have been routinely done so in Canada.

Positive rights, on the other hand, generally express broad social policy goals and the obligation of governments to work toward these goals by political means through legislation, funding and other appropriate measures. The degree to which governments can implement these goals depends on the level of resources available. For this reason, some argue that 'second generation rights' are inherently political, and typically too general to be justiciable in the traditional sense; that is, subject to adjudication and enforcement by the courts. Despite this distinction, in a 1991 Discussion Paper published by the province of Ontario, it was noted that

some social policy standards are capable of being expressed as negative, enforceable rights, with the right to portability and the right to universality cited as examples. Nonetheless, in consideration of the perceived difficulty in adjudicating positive or second generation rights, the role of parliaments and their members is crucial in ensuring that the actions of the executive are proportionate to the needs of the people. Indeed, it is an obligation of parliamentarians, in their capacities as legislators and representatives of the people that they investigate, highlight and advocate for those rights prescribed by a country's domestic and international human rights obligations.

Parliaments and Human Rights

Parliamentary democracy and respect for human rights are intimately linked and have been strengthened by both the impressive tradition of parliamentary law and by the common international standards of human rights embraced by the world community since the adoption of the *Universal Declaration of Human Rights*. And while it is considered that human rights can, in theory, be respected through various forms of political systems, history has illustrated that they can invariably only be adequately guaranteed in conditions of the greatest possible transparency of political and juridical decision-making.

The *International Bill of Rights*, to which Canada adheres, sets clear standards of human rights to which parliament must be sensitive. Given the different categories of human rights outlined previously, it must be underscored that certain rights can be realized only through direct measures undertaken by parliament, and in other cases, by parliament refraining from actions which might infringe upon or abuse people's rights.

However, essentially, parliament is an institution that serves as a vital defender of the human rights and liberties of the people it represents. In this effort, some of the most significant work of Parliament is that undertaken by its committees. For the Senate of Canada, the right to undertake inquiries or studies is provided for by *Section 18* of the *Constitution Act* and by *Section 4* of the *Senate and House of Commons Act*. A given Senate Committee therefore derives its existence and authority from the Senate itself. In turn, a Senate committee has the authority to inquire into any matter referred to it by the Senate.

Parliamentarians as Legislators of Human Rights

As the institution which embodies the right of the people to partake in the conduct of public affairs, as enshrined in *Article 21* of the *Universal Declaration of Human Rights*, parliaments not only codify the legal framework for human rights at the national level; they also set relevant priorities, *inter alia*, through the budget approval process. Moreover, parliamentarians are important leaders within their respective communities through influencing laws and policies at that level.[1]

In reality, respecting and fulfilling human rights standards represents a unique challenge as governments, whether federal or provincial, attempt to turn the provisions of a treaty into factual reality. In this effort, parliaments are duty-bound to scrutinise government action and to adopt laws that will generate the right environment for strong and equitable growth. Moreover, parliamentarians are in

[1] Inter-Parliamentary Union and the United Nations Development Program, *Seminar for Chairpersons and Members of Parliamentary Human Rights Bodies*, Geneva, Switzerland 15-17 March 2004, Reports and Documents No. 48 (2004), 17

the privileged position of being able to raise human rights related issues in public debate and to help forge a national consensus to uphold human rights.[2]

Of course, one of the central roles of a parliament is to give assent to laws. In the field of human rights, this can have both a positive and negative effect. For example, legislative activity is positive when it helps to recognize, reaffirm or develop human rights; negative when it attempts to limit, distort or disregard the protection of human rights.[3] However, a parliament's assent to a law or treaty does not signify an end to its role. Parliaments have, in fact, an essential function of oversight to play upon the passing of a law or the ratification of a treaty. This translates into monitoring the activities of the executive, as parliament is empowered to critically analyse government policy; to influence it; and even to shape it.[4] This monitoring activity must be carried out to its fullest extent in the field of human rights if society as a whole, and minorities in particular, are to be protected against any possible infringement of their rights.[5]

Civil Society

Nevertheless, this responsibility does not fall exclusively on the shoulders of parliamentarians, as civil society also has a significant role to play in both informing and aiding parliamentarians on the primary human rights concerns afflicting populations or segments of populations. For example, in addition to a mandate to provide direct assistance, NGO's also regularly engage in public education; they inform the legislative process by testifying before parliamentary committees; and they lobby parliamentarians on a given issue. Moreover, non-

[2] Ibid, 23
[3] *Inter-Parliamentary Symposium on "Parliament: Guardian of Human Rights"*, Budapest, 19-22 May 1993, Bulletin 3/15 of the Inter-Parliamentary Union, 73rd year, Third Quarter, No. 3 (1993), 156
[4] Ibid
[5] Ibid, 157

governmental organizations can also submit shadow reports to supplement state parties' submissions to United Nations treaty bodies, thereby facilitating the committee's deliberations. Parliamentarians should therefore avail themselves of the expert knowledge that civil society possesses and use this information to challenge gaps in the state machinery of human rights protection and promotion.

The Canadian Context

Canada, like many other countries around the world today, is facing difficult economic conditions due to a global recession that began beyond our borders. Although nothing like the Great Depression of the 1930s, the impact has been severe in many sectors. It is in times such as these that second generation human rights are clearly threatened on both an individual and a collective basis, with whole communities, or sections of communities, finding it more difficult to maintain an adequate standard of living. In responding to such conditions and challenges, governments will typically direct financial resources towards social programmes. However, in attempting to meet their obligations under the *Covenant*, governments need to be aware that success is not necessarily measured in expenditures, but rather in outcomes. Nevertheless, it must also be noted that while expenditures do not necessarily lead to outcomes, most outcomes will not occur without expenditures.

For example, healthcare rights are measured in quantifiable terms such as life expectancy and infant mortality; post-secondary education is to become "progressively freer" to the point of being of limited or no cost to the student. In these cases, it matters not how much the government does or does not spend; if increasing numbers of citizens are not reaching the average life expectancy of their

society, or university tuition continues to rise, Canada, or any other country for that matter, will be seen to be in violation of its obligations under the *Covenant*.

However, Canada has undertaken steps to the maximum of its available resources to progressively realize the economic, social and cultural rights recognized in the *Covenant*, guided domestically by *Section 36* of the *Constitution Act of 1982*, which provides that Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to: promoting equal opportunities for the well-being of Canadians; furthering economic development to reduce disparity in opportunities; and providing essential public services of reasonable quality to all Canadians. The intention of *Section 36* in obligating the federal and provincial governments to provide those services we consider social rights appears rather self-evident, even if some may argue that the details and justiciability are still lacking.

As per its obligations under Part IV of the *Covenant*, the Government of Canada submits regular reports, typically in five-year intervals, to the *United Nations Committee on Economic, Social and Cultural Rights* on its compliance with its obligations under the *Covenant*. These reports are analyzed or audited by the Committee, which proceeds to address its concerns with recommendations in the form of concluding statements. This process has served Canada well as it has been instrumental in the identification of, for example, child poverty – an area where Canada has been negligent in its obligations.

Essential Rights in Times of Austerity

In times of economic uncertainty, it is important to have concrete programmes that promote social cohesion. On February 20th, 2009, at the United

Nations office in Geneva, the Human Rights Council opened its tenth Special Session to consider the impact of the global economic and financial crisis on the universal realization and effective enjoyment of human rights. Marius Grinius, Canada's Permanent Representative and Ambassador Extraordinary and Plenipotentiary to the Office of the United Nations emphasized Canada's position that, while the current situation posed challenges for all states, respect for human rights was not dependent, nor are states relieved of their obligations in times of economic recession. In fact, states have an added responsibility to undertake renewed efforts to respect the rights of the most vulnerable.

As noted during this same session of the Human Rights Council by Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights:

> A human rights framework offers the appropriate context, legal rationale and ground to guide policies and programmes countering the negative effects of the financial crisis at the national, regional and international levels. Indeed, States are not relieved of their human rights obligations in times of crisis. Rather, measures to protect not only the economic and social rights but also the civil and political rights of those groups and individuals most adversely affected and marginalized by the crises must be put in place as matters of both urgency and priority.

Based on the understanding that all human rights are of equal importance, it is crucial that second generation rights are respected according to the *Covenant*, and most particularly when citizens are experiencing greater economic difficulty. Parliamentarians have a central role to play in ensuring that the executive continues to meet the economic, social and cultural needs of its citizens, and most particularly in times of austerity.

Organisation of American States

Thus far, I have discussed Canada's domestic and international human rights commitments, while making passing reference to Canada's hemispheric obligations. In this regard, Canada has been a member of the Organisation of American States since January 1990. We have developed strong relationships with the Americas and have been active in promoting human rights issues in the region. However, Canada has not yet ratified its principal treaty with respect to the protection of human rights: the *American Convention on Human Rights*. And while legitimate concerns exist concerning the compatibility of Canadian law with some provisions of the Convention, these concerns would not appear to constitute insurmountable obstacles. In many ways, because Canada has not yet ratified the treaty, we sit on the sidelines with respect to our obligations in the Americas.

In truth, Canada's on-going inability to ratify the *Convention* reveals an odd disconnect between our hemispheric and our United Nations human rights policies. Making the government accountable to an external authority, irrespective of the existence of a robust *Charter of Rights and Freedoms*, provides an additional check on government. We have done this to some extent through the United Nations system, for example, *Lovelace v. Canada*. However, the Inter-American system differs in the important aspect that it provides for the final resolution of human rights matters in a proceeding before the Inter-American Court of Human Rights.

The reasons advanced for Canada's non-ratification rely on assertions that there are too many federal-provincial issues upon which disagreement remains, the complexities of which I discussed earlier. Yet, if the political will to ratify exists, Canada could do so through the insertion of "reservations" or "statements of understanding" with respect to certain sections. In the meantime, non-ratification of the Convention excludes Canadians from the machinery for the protection of human rights in the Americas and impedes our ability to effectively exercise the legal and moral authority we believe we can in the hemisphere.

Conclusion

Human rights are, essentially, the conditions wherein people respect one another because we are people. In terms of specificity, they are those rights as proclaimed by the international community in the *Universal Declaration of Human Rights*. Indeed, notwithstanding the plurality of political ideologies, philosophies and systems of state represented in Paris on December 10, 1948; irrespective of the various schools of thought in the world today concerning the source of human rights; the international community has recognized the rights of the individual as the basis of social, economic, cultural and civic achievements. Moving forward, while I have emphasised the crucial role that parliamentarians have to play in protecting human rights, ultimately, we all have a critical function in ensuring that dignity and equality is afforded to all the citizens of the world.