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**HUMAN RIGHTS, THE JUST RULE OF LAW
AND THE ROLE OF LAWYERS**

“Human Rights Should Be Protected by the Rule of Law”

Address by

**Dr Hans Corell
Former Under-Secretary-General for Legal Affairs
and the Legal Counsel of the United Nations**

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Distinguished participants,
 Colleagues and friends,

Thank you very much for inviting me to participate in this Celebration of the Universal Declaration of Human Rights. I am also greatly honoured to appear on this Panel with Fali Nariman and Ted Sorensen.

We have been asked to discuss the Universal Declaration of Human Rights in a historical perspective. For my presentation I have chosen the title "*Human Rights Should Be Protected by the Rule of Law*". It is taken from the third preambular paragraph of the Declaration, which reads, in full:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

I will revert to this sentence at a later stage. My presentation consists of four elements:

- First, a few remarks about the history of the Universal Declaration of Human Rights; as we all know, there are volumes written about the Declaration;
- Second, a discussion of the Declaration's development into customary international law;
- Third, an analysis of the language on the rule of law in the Preamble of the Declaration and where the work to enhance the rule of law stands today;
- Fourth, a few remarks on the Universal Declaration of Human Rights and Shari'a law.

In conclusion, I will make the point that the Universal Declaration of Human Rights still represents a challenge to all of us, irrespective of our cultural, religious or philosophical background.

The History of the Universal Declaration of Human Rights

As I said, there are volumes written about the Universal Declaration of Human Rights.¹ It is of course impossible to give more than a glimpse of the process that led to the adoption of the Declaration by the General Assembly of the United Nations at the Chaillot Palace in Paris on 10 December 1948.

In a historical perspective, the adoption of the Declaration is a remarkable achievement. The duration of the process was a mere two years from when the United Nations Commission on Human Rights received its mandate in December 1946 until the adoption of the Declaration on 10 December 1948.

The United Nations connection stems from the fact that already when the United Nations Charter was negotiated in San Francisco in 1945 there were those who believed that the Charter should contain a Bill of Rights. This was, however, not possible to achieve – understandably, I would suggest.

However, the United Nations Charter contains seven references to human rights and fundamental freedoms, the main provision being the language in Article 1, paragraph 3, in which one of the Purposes of the United Nations is to “achieve international co-operation - - - in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;”

The mandate given to the United Nations Commission on Human Rights could therefore be seen as an extension of the negotiations of the Charter.

The argument is often made that the Declaration reflects Western values. In my opinion this is not true, even if the initiative to elaborate the Declaration was generated by the events during the Second World War.

The values expressed in the Declaration can find their roots in many cultures, religions and philosophies. Furthermore, many personalities from all over the world participated in the drafting of the Declaration. It is true that the initiation of the process can be traced to a message that President Franklin D. Roosevelt gave to the United States Congress in January 1941. He then talked about a future world order, based on four freedoms: freedom of expression, freedom of faith, freedom from want, and freedom from fear.

It is also true that the philosophy in the Declaration has its roots in ideas from the time of the Enlightenment and in documents such as the English Bill of Rights from 1689, the American Declaration of Independence from 1776 and the French Declaration on the Rights of Man and of the Citizen from 1789. A further basis was the thinking of many prominent authors from that time, among them Thomas Jefferson.

It should also be mentioned that the Commission on Human Rights had extensive material at its disposal, such as a worldwide collection of national constitutions and several drafts, among them a voluminous draft prepared by the United Nations Secretariat.

However, the most important basis for the universality of the Declaration is the contribution by those engaged in the drafting exercise. At the time, the Commission was chaired by Mrs. Eleanor Roosevelt, the widow of the late President FDR. The Commission had 18 member States.

We should also bear in mind that the mandate of the Commission was very comprehensive. Not only was the Commission charged with the drafting of a Declaration. It was also mandated to prepare one or more conventions, i.e., binding treaties, on human rights and a system for monitoring compliance. The two latter elements were not completed, and it would take another 18 years before the two Covenants were adopted in 1966.

With this mandate in view, Eleanor Roosevelt appointed a drafting committee consisting of representatives from Australia, Chile, China, France, Lebanon, the Soviet Union, the United Kingdom and the United States. The work of the Committee was presented to the Commission, where after the text was discussed in the Economic and Social Council and the Third Committee of the General Assembly before it reached the Assembly itself.

Certainly, there were differences of opinion among the negotiators. These differences were resolved in different ways. Some issues were not addressed; some matters were resolved by employing general and vague formulations; some clauses were subjected to limitations; references to religion and philosophy were omitted, etc. However, the overarching contribution to the successful outcome of the work was that the drafters of the Declaration managed to maintain a common ground in their deliberations and a common goal, namely respect for fundamental rights and freedoms.

Among the most prominent issues that were not addressed in the Declaration are the rights of minorities and the rights of indigenous peoples. But these matters have since then been regulated.

It is also important to view the drafting exercise in its temporal context. The atrocities of the Second World War were still in fresh memory. At the same time, the Cold War had started to develop with the result that tensions were raising between East and West. Furthermore, the issue of self-determination had emerged as one of the most pressing questions in the post-war period. The process of decolonization was soon to begin.

This latter phenomenon is clearly reflected in the membership of the United Nations General Assembly. Today, the United Nations has 192 members. In December 1948, there were only 58.

On 10 December 1948, the Universal Declaration of Human Rights was adopted by 48 States in favour and 8 abstentions. Two States were not present at the voting. The abstaining States were: the Soviet Union and five other Eastern States, Saudi Arabia and South Africa.

Seen in today's perspective, the Eastern States are in a completely different situation. Some of these States are now members of the European Union and all of them are members of the Council of Europe. They are also parties to the European Convention on Human Rights and under the jurisdiction of the European Court of Human Rights. Also South Africa is in a completely different situation after Nelson Mandela appeared at its President.

The Universal Declaration of Human Rights as Customary International Law

I have now come to my second element: a discussion of the Declaration's development into customary international law.

At the outset it must be said that the Universal Declaration of Human Rights has been criticized by some, who argue that the language is both ambiguous, and, in part, contradictory.

It may be that some of this criticism is warranted. However, in view of what had just transpired in so-called "civilized" countries, there was an urgency to find common ground to develop an instrument on the basis of which it would be possible to argue that there has to be an end to atrocities and violations of human rights. In Europe the need for such an instrument was felt very strongly in many quarters. This also explains why the Council of Europe adopted the European Convention on Human Rights already in 1950.

The question to be asked is also from what perspective the text of the Declaration should be seen: from the relative comfort of an academic research library or from the viewpoint of the many millions of people in the world who still do not have the protection that the Declaration offers. I believe that the answer is obvious.

It is also important to emphasize that a document of this nature, once adopted, takes on a life of its own. The same is often said of the United Nations Charter with the difference, of course, that the Charter is binding treaty law.

Today, the Declaration serves as a model for and is even referred to or quoted in many national constitutions. Furthermore, it forms the platform upon which the two 1966 Covenants, the one on Economic, Social and Cultural Rights, and the one on Civil and Political Rights, are based. Also, the origins of a great number of other human rights treaties – time does not allow for an enumeration – can be traced back to the Universal Declaration of Human Rights.

From a legal perspective, the Declaration is a General Assembly resolution, and as such, at its origin, not legally binding on the States that adopted the

resolution. It is also obvious that, at the time, the ambition of those States was limited to precisely that. However, this does not mean that a resolution of this nature, often referred to as “soft law”, cannot eventually develop into customary international law, binding on all States.

I belong to those who firmly believe that this is what has happened to the Universal Declaration of Human Rights. The Declaration must today be read in light of the development during its 60 years history and in the context of the many human rights treaties that have since then been adopted and ratified by a large majority of States.

It is true that the Declaration does not contain any implementation mechanism, but this has been remedied, at least in part, by the many mechanisms that have been established under treaty law and for which the Declaration serves as a lodestar when they apply the different conventions under which they operate.

Since there are those who might take issue with this standpoint I would like to add the following. The principal aim of the Declaration is “freedom, justice and peace in the world” through among other things the rule of law. If one analyzes conflicts around the world, there is in my view a common denominator. The root causes of the conflicts are: no democracy and no rule of law. Should we not use every means possible to end this deficiency in the world community?

The Universal Declaration of Human Rights and Enhancing the Rule of Law

The third element of my presentation is an analysis of the language on the rule of law in the Preamble of the Declaration and where the work of enhancing the rule of law stands today.

I reiterate the language in the Preamble: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,”

This sentence, which deals with the relationship between revolution and order, has been described as ambivalent.² It is suggested that the sentence leaves open the possibility that its goals might sometimes be realized only through “rebellion”. The question is raised of the effectiveness of the remedy itself: “What if tyranny and oppression are produced or at least tolerated by a legal system which uses the open-endedness and conflictual character of rights to buttress special interests?”

For my part, I can agree that the language, which was added to the Declaration at a very late stage, seems ambivalent. However, irrespective of the way in

which the sentence is worded, it reflects a reality, corroborated by historic events. Were not the revolutions in Europe and America expressions of rejection of rulers that were perceived as unjust?

The latter question – whether the remedy is effective – is more serious, at least at first sight. However, without going into the question of how the rule of law (as distinct from “rule *by* law”) should be defined, this concept must in contemporary society be understood as a system where all are subject to a law which is adopted in a democratic process and which reflects international human rights standards. This is also, I believe, why the word “just” was added before “the rule of law” in the title of our present Celebration.

It is also in this light one must understand the declarations on the need for the rule of law by the General Assembly³ in September 2005 and by the Security Council⁴ in June 2006.

All this also explains why enhancing the rule of law and legal technical assistance have become increasingly important ingredients in modern development assistance. And in peacekeeping and peacebuilding operations legal technical assistance has become an indispensable ingredient. The United Nations and other intergovernmental organizations, among them, the World Bank, are now also engaging in such assistance, as do individual States that are in a position to contribute.

The role of the non-governmental organizations should also be highlighted in this connection. There are many who engage very actively in this work, among them the International Bar Association and the American Bar Association.

It should also be emphasized that in discussing the rule of law, one must focus not only on the obvious ingredients, namely an independent and impartial judiciary and the rights of defendants in criminal proceedings; there is a tendency to do so. Of equal importance is the need for the rule of law in the more general context of public administration.⁵

In my view, there is interdependence between the rule of law and human rights: neither can exist without the other. The role of lawyers is to explain this and to assist in bringing the two together.

The Universal Declaration of Human Rights and Shari’a Law

I have now come to the fourth element: the Universal Declaration of Human Rights and Shari’a law.

The reason that I have included this element in my presentation in spite of the fact that the Second panel is to address the compatibility of the Universal Declaration of Human Rights and religion, is that a couple of weeks ago I participated in a Salzburg Seminar entitled “Islamic and International Law: Searching for Common Ground”.

Since this matter will certainly be discussed in the Second panel, I will limit myself to two very brief observations.

First, I would like to point to the 1990 Cairo Declaration on Human Rights in Islam. Without going into detail, I believe that it would be very unfortunate indeed if this Declaration would drive a wedge between the Muslim community and the rest of the world.

I had the occasion to discuss this dilemma in Tehran in the early 1990s with one of the authors of the Declaration, Ayatollah Jaafari.

Much could be said about the difference between the two documents. Let me simply state for the record that the Universal Declaration of Human Rights was elaborated with the active participation of countries like Afghanistan, Egypt, Iran, Iraq, Lebanon, Pakistan, Syria and Turkey, who all voted in favour of the Declaration. I have already mentioned that Saudi Arabia abstained.

Second, in one of the workshops in the Seminar, we engaged in a comparison between the Quran and the Universal Declaration of Human Rights. This exercise has of course been conducted by many in the past, but for a non-Muslim it was extremely interesting to hear our Muslim friends discuss and produce quotes from the Quran that supported provisions of the Universal Declaration of Human Rights.

When the result of our informal effort in the working group was presented to the plenary it was met with the remark that it may be that the quotes from the Quran could be understood as suggested. But there could also be other schools of Islam that would read the Quran differently. This is of course one of the reasons why reservations to treaties by way of general references to the Shari’a are objected to by other parties to the treaty in question.

Let us hope that the Second panel can shed some light on these two questions. With respect to the first issue, I feel confident that my comment to Ayatollah Jaafari is still valid. If you take the Universal Declaration of Human Rights and go to any country in the world, to any city or place in that country and ask the first person you meet if that person would not like to have these rights and freedoms, the answer would be the same: Yes, of course!

The Universal Declaration of Human Rights Still Represents a Challenge to All of Us

Looking at the state of affairs in the world today, it is obvious that the Universal Declaration of Human Rights still represents a challenge to all of us, irrespective of our cultural, religious or philosophical background.

At the Salzburg Seminar, we discussed how to find common ground in respecting human rights. The title of the Seminar could be understood as requiring adjustments to international human rights law to meet the concerns of one particular community.

However, looking at today's world and the Universal Declaration of Human Rights at 60, my conclusion is that the Declaration is the common ground that we are looking for. It is not only one particular community that must adjust to the Declaration. We must all adjust to it!

Even if we have come a long way in strengthening respect for human rights, we must regrettably conclude that these rights are violated, sometimes flagrantly violated, on a daily basis in countries from East to West, from North to South.

At the same time, humankind is experiencing unprecedented challenges: a major geopolitical shift is under way, the world population is growing exponentially, and climate change is threatening our habitat in a way that can have very serious consequences – also for international peace and security. We should therefore all join hands and address these phenomena and other challenges like poverty, disease, terrorism, transboundary crime and corruption. This will require tremendous efforts, and we simply cannot afford to argue over the application of the Universal Declaration of Human Rights.

Therefore, the main actors in this field, the sovereign States, must adjust their behaviour and do better. In particular, there must be an end to the double standards in the application of international law. Here, the UN Security Council has a special role to play.

There were great hopes that things would change for the better when the Berlin Wall came down in 1989. They did, but the performance is still not up to the standards required by the UN Charter. If the members of the Security Council, the organ entrusted with the primary responsibility for the maintenance of international peace and security, do not themselves live by the law, it undermines the very platform on which we attempt to build our future world community.

The standard must be set by the five permanent members of the Council. My conclusion after 10 years as the United Nations Legal Counsel is that if these States do not fully respect international law and if they do not always apply the law justly in matters on the Council's agenda, they prejudice the efforts to enhance respect for human rights and the rule of law.

It is often said that the Security Council is a political organ. So it is. But this does not mean that the Council is not bound by the law. In a State under the rule of law also political organs must bow to the law. So it must be also at the international level. An obvious example is that the members of the Security Council must respect the UN Charter, in particular the rules relating to the use of force, and observe human rights standards. I regret that I do not have the time to develop this reasoning further now but I intend to revert to this question in another context.

Also other actors should contribute to enhancing respect for human rights: the non-governmental organizations, civil society, the business community. Business can advance human rights standards through joining the Global Compact and respecting Corporate Social Responsibility standards.

We must also not forget that the Universal Declaration of Human Rights was proclaimed "to the end that every individual and every organ of society - - - shall strive by teaching and education to promote respect for these rights and freedoms and - - - to secure their universal and effective recognition and observance". So we all have a responsibility here.

A common denominator in all these domains is that lawyers are involved in different capacities. Obviously, the role of lawyers irrespective of their function must be to stand up for and speak up in defence of human rights and the rule of law.

Thank you for your attention!

¹ Numerous publications exist on the Universal Declaration of Human Rights. In this context reference is made to *The Universal Declaration of Human Right – A Common Standard of Achievement*. Ed. Gudmundur Alfredsson and Asbjørn Eide. Martinus Nijhoff Publishers. The Hague/Boston/London 1999. Some 800 pages, including a Consolidated Bibliography of 22 pages.

² See e.g. Martti Koskenniemi in *op. cit.* in note 1.

³ See General Assembly resolution A/RES/60/1 and in particular paragraphs 11, 16, 21, 24 (b), 25 (a), 119 and 134.

⁴ See S/PRST/2006/28.

⁵ Here reference can be made to a recent Research Report by the Folke Bernadotte Academy "*Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development*". Folke Bernadotte Academy Publications, 2008.