CANADA AND THE UNITED NATIONS HUMAN RIGHTS COUNCIL: DISSENT AND DIVISION

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In 2006, a new Human Rights Council came into existence, replacing the former Commission on Human Rights with a restructured intergovernmental body for the global promotion of human rights and fundamental freedoms. Heralded as a turning point for human rights within the UN system, it was hoped that the new 47-member Council would operate with a renewed emphasis on fairness and objectivity, although it must always be remembered that the Council remains a political body governed by and directed by states. As a member of the Council from 2006-2009, Canada became known as the lead voice of opposition, voting against what it viewed as unbalanced resolutions censuring Israel and the adoption of a long-awaited United Nations Declaration on the Rights of Indigenous Peoples. Canada also voted on principle and with the support of its usual allies against a variety of resolutions reflecting an agenda embraced by Asian, African and Islamic states, who can use their Council vote allocations to serve their own political goals at the expense of achieving consensus. More worrisome, however, for the general health of the field of international human rights law is the seemingly unbridgeable gap between developed and developing states concerning the recognition of so-called "third generation" human rights, including collective human rights with an economic dimension, that is revealed by this review of the Council's resolution and decision-making activities from 2006-2009, focusing on those actions which were decided by a recorded vote. While the divisions between rich and poor, and North vs. South, clearly pre-date the Council's establishment, their continuation and impact within a new institution dedicated to renewed cooperation reveals a degree of dysfunction worthy of further discussion during the Council's first review scheduled to take place in 2011.

INTRODUCTION

For those following developments within the field of human rights law and policy, 2006 was an important year since it marked the replacement of what had become

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the widely discredited United Nations (UN) Commission on Human Rights with a new and reinvigorated intergovernmental body. Heralded as a turning point for human rights within the UN system, the creation of the new UN Human Rights Council was greeted with high expectations and the hope that future efforts to foster global action on matters of basic rights and freedoms would be guided by considerations of fairness and objectivity. Eager to play a part within this new institution, Canada successfully ran for membership, and served as one of the Council's 47 member-states from its earliest days of operation in 2006, until June 2009. However, Canada soon became known as the voice of opposition within the new Council, registering a recorded "no" vote on contentious matters with a degree of frequency unequalled by any other Council member-state within the institution's first three years, and establishing a hitherto unexpected reputation within international circles as a voice of dissent. With Canada having now completed its term of membership on the Council, a timely opportunity presents itself for review and reflection on both Canada's experience and the general trends established during the Council's formative years. This assessment is also useful in light of the Council's first review to be conducted in 2011.

The purpose of this article is to lay a foundation for the 2011 appraisal of the Council's promised benefits as well as it's apparent burdens through an objective study of what has happened within the Council from 2006-2009 based on a careful review of the official record. This article also endeavors to undertake the analysis required to understand more fully the motivating factors behind Canada's position as the persistent dissenter within the Council. While others may wish to conduct an assessment of the Council's contributions through a particular analytical perspective, or by focusing on a specific theme within the field of human rights,[2] the aim of this research will be to provide a more foundational and equally valid contribution to the existing literature on institutional design and international human rights promotion by conducting a baseline review of the Council's decision-making activities focusing on the adoption of resolutions and decisions[3] by way of a recorded vote. Actions taken by way of a recorded vote, rather than by consensus, have significance since recorded votes only take place upon request and with the intention of creating a public record of positions taken. As a result, this review will rely upon, and be guided by, the consideration of primary sources generated by the Council itself, focusing in particular

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[2] See, for example, Philip Alston *et al*, "The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflict: Extrajudicial Executions in the 'War on Terror'" (2008) 18:1 Eur. J. Int'l L. 183.

[3] A "resolution" is the formal expression of the opinion or will of a United Nations organ, while the term "decision" is used to designate formal actions, other than resolutions, dealing with less substantive or routine matters. Actions are taken within the Human Rights Council using one of three vehicles: resolutions, decisions, and the self-explanatory President's Statements.

on the Council's reports to the main deliberative body within the UN, the UN General Assembly, as these reports serve as the official record of the Council's activities.[4]

Consideration will also be given to the voting record for each resolution and decision adopted by the Council from 2006-2009, and to any relevant historical antecedents, with a view to determining the key areas of controversy affecting the Council's organizational development and policy contribution potential. Although often overlooked, including by lawyers when citing UN resolutions in submissions before Canadian courts, voting records are themselves significant,[5] especially within the field of human rights where the resort to the act of voting may be viewed as revealing a weakness with the alleged fundamentality of the particular rights in issue. Moreover, the adoption of resolutions and decisions by consensus, and thus by definition without the need to call or record a vote, is thought to add both moral and political weight to the specific terms of an adopted text, while also bolstering arguments to the effect that a mutually-agreed international minimum standard has now emerged from which no state should depart. Resolutions adopted by consensus can also serve as powerful starting points to guide the multilateral negotiation of new legally-binding treaties on matters of human rights, especially when a resolution is used to signify the attainment of an international consensus with respect to a declaratory text of general principles

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[4] The Council's annual reports are published as Supplement No. 53 of the annual General Assembly Official Records (GAOR) and are thus coded with the UN document numbers A/61/53, A/62/53 and A/63/53 (with A indicating Assembly, the second number indicating the applicable annual session, and 53 indicating the supplement.) Copies of UN documents can be located by their document symbols and numbers from the Official Document System of the United Nations, online at: <http://documents.un.org>. Copies of the Council's reports are also made available by the Office of the UN High Commissioner for Human Rights, online at: <http://www2.ohchr.org/english/bodies/hrcouncil/>.

[5] Hence why American law, by statute, requires the U.S. State Department to submit a detailed annual report to Congress on voting practices at the United Nations: see Public Law 101-246, §406. These reports are also made available for public viewing, online at: <http://www.state.gov/p/io/rls/rpt/index.htm>.

and future aspirations.[6] Votes, therefore, do matter. Why else have votes, and an analysis of the voting record for the resolutions and decisions that were not adopted by consensus, given the observer a better sense of the key controversies existing within the particular international organ under discussion?

To assist with the examination of the Council's development in its earliest years, this review of the Council's decision-making activities for 2006-2009 is organized into five parts, beginning with an account of the Council's creation in 2006 and its subsequent refinement in 2007, before embarking on a detailed review of the Council's substantive activities. Part I provides an overview of the Council's creation in June 2006 and its legal mandate, while Part II explains the geopolitical realities of the Council's structure and the distribution of votes. Part III focuses on the agreement brokered in June 2007 to finalize the Council's functions, while Part IV provides a chronological review of the Council's substantive activities for 2006-2009, focusing on actions taken by way of a recorded vote. As will be discussed, division within the Council was evident from its very beginning, with a vote being called soon after its creation on the adoption of a proposed text for a new declaration on the rights of indigenous peoples. Because this division among states continued from within the 47-member Council through to the much larger 192-member UN General Assembly, the eventual adoption of a revised declaration text is discussed in Part V as well as the possible impact of the division on the declaration's normative contributions. This article then concludes with a summation of the key areas of dissent and division within the new Human Rights Council, while also reminding observers that even an intergovernmental body dedicated to human rights promotion is at base a political

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[6] The practice of reaching consensus on the adoption of a general non-binding declaratory text before negotiating a more specific and legally-binding treaty began in the field of human rights with the adoption of the *Universal Declaration of Human Rights*, GA Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), and then the subsequent adoption of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976) and the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976). Subsequent examples of this practice include the adoption of a *Declaration on the Rights of the Child*, GA Res. 1386 (XVI), UN GAOR, 14th Sess., Supp. No. 16 at 19-20, UN Doc. A/4354 (1959), and then, much later, the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3 (entered into force 2 September 1990); the adoption of a *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res. 1904 (XVIII), UN GAOR, 18th Sess., Supp. No. 15 at 35-37, UN Doc. A/5515 (1963), and then the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195, Can. T.S. 1970 No. 28 (entered into force 4 January 1969); and the adoption of a *Declaration on the Elimination of Discrimination Against Women*, GA Res. 2263 (XXII), UN GAOR, 22d Sess., Supp. No. 16, UN Doc. A/6176 (1967), and then, much later, the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31, (entered into force 3 September 1981).

body, directed and controlled by states that share no obligation to pursue the same ideological goals and socio-political objectives.

I. THE CREATION AND MANDATE OF THE NEW HUMAN RIGHTS COUNCIL

The Human Rights Council was created by the UN General Assembly through the adoption of a resolution on 15 March 2006,[7] although the specific details of its functions and procedures were left open for further negotiation during the Council's first year of operation. The resolution was adopted by a recorded vote of 170 states in favour (including Canada), with Israel, the Marshall Islands, Palau and the United States voting against, and Belarus, Iran and Venezuela registering abstentions. According to the terms of the resolution, the Council was created to serve as an intergovernmental body responsible "for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner."[8] The Assembly further directed the Council to address situations of violations of human rights, including gross and systematic violations, through the adoption of recommendations, and made the Council responsible for promoting effective coordination and mainstreaming of human rights within the UN system.[9] The specific text of the resolution also required the Council to be guided in its work by the "principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation ..."[10]

As long-time observers of international human rights developments will recognize, this mandate for the new Council is virtually identical to that of the former, and now abolished,[11] Commission on Human Rights as modified over the years. Despite its successes in standard-setting and the generation of new conceptual understandings of human rights,[12] by 2006, the 60-year-old Commission had become a

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[7] *Human Rights Council*, GA Res. 60/251, UN GAOR, 60th Sess., Supp. No. 49 (vol. III) at 2-5, UN Doc. A/RES/60/251 (2006) [GA Res. 60/251].

[8] GA Res. 60/251, *ibid.* at para. 2, repeating verbatim *2005 World Summit Outcome*, GA Res. 60/1, UN GAOR, 60th Sess., Supp. No. 49 (vol. I) at 3-25, UN Doc. A/RES/60/1 (2005) [GA Res. 60/1].

[9] GA Res. 60/251, *ibid.* at para. 3, repeating verbatim GA Res. 60/1, *ibid.* at para. 158.

[10] GA Res. 60/251, *ibid.* at para. 4.

[11] *Ibid.*, para. 1.

[12] See generally Philip Alston, "The Commission on Human Rights" in Philip Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 1992) at 126-210. See also, Howard Tolley, *The U.N. Commission on Human Rights* (Boulder, Colorado: Westview Press, 1987).

widely discredited body, much criticized for its double standards and selectivity,[13] and whose membership at times allowed "the foxes to guard the henhouse".[14] Of course, there are contrary views, with Professor Marc Bossuyt of the University of Antwerp describing the politicization criticism as one:

> based on a (widespread) misconception: the principal UN human rights organ is not a tribunal of impartial judges, not an academy of specialists in human rights, nor a club of human rights activists. It is a political organ composed of States represented by governments that as such reflect the political forces of the world as it is.[15]

Nevertheless, the text of the Assembly's resolution clearly indicates a desire to strengthen and improve the human rights machinery of the UN by recognizing "the need to preserve and build on [the Commission's] achievements *and to redress its shortcomings*."[16] As Professor Nico Schrijver of the University of Leiden has observed: "Institutionally it is the first time that a UN body has been dismantled and replaced in order to achieve greater effectiveness."[17]

The Council's creation also constitutes a key component of the larger project of UN reform that was endorsed by state representatives at the World Summit held in September 2005, albeit that the Council receives only a sparse four-paragraph mention in the World Summit Outcome Document.[18] For some, the hope had been to create a

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[13] As explained by the former UN High Commissioner for Human Rights: "There is something fundamentally wrong with a system in which the question of the violation of human rights and fundamental freedoms in any part of the world is answered only by reference to four states." See *Statement by Ms. Louise Arbour United Nations High Commissioner for Human Rights on the closure of the 61st session of the Commission on Human Rights* (22 April 2005), online at: <http://www.unhchr.ch/Huricane/Huricane.nsf/60a520ce334aaa77802566100031b4bf/b0848560a2465272c1256feb0052a975?OpenDocument>.

[14] The most notorious examples being the widely reported ousting of the United States in 2001, the election of Sudan in 2002 and the Libyan chairmanship in 2003. NGOs certainly viewed the questionable human rights records of Commission members as a central handicap: Nazila Ghanea, "From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?" (2006) 55 Int'l & Comp. L.Q. 695 at 699. See also Philip Alston, "Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council" (2006) 7 Melb. J. Int'l L. 185 at 191-2.

[15] Marc Bossuyt, "The New Human Rights Council: A First Appraisal" (2006) 24:4 Neth. Q. Hum. Rts. 551 at 554.

[16] GA Res. 60/251, *supra* note 6 at preamble, para. 8 [emphasis added].

[17] Nico Schrijver, "The UN Human Rights Council: A New "Society of the Committed" or Just Old Wine in New Bottles?" (2007) 20 Leiden J. Int'l L. 809 at 822.

[18] See further, GA Res. 60/1, *supra* note 7 at paras. 157-60. See also *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, UN Doc. A/59/2005 (21 March 2005), see especially paras. 140-47 and 181-83.

Human Rights "Council" with a standing comparable to other councils within the UN organization, such as the Economic and Social Council (ECOSOC) and the Security Council. In the lead-up to the 2005 World Summit, an independent "High Level Panel on Threats, Challenges and Change" had recommended:

> upgrading the Commission to become a 'Human Rights Council' that is no longer subsidiary to the Economic and Social Council but a Charter body standing alongside it and the Security Council, and reflecting in the process the weight given to human rights, alongside security and economic issues, in the Preamble of the Charter.[19]

This proposal gained added momentum when then UN Secretary-General Kofi Annan, the UN's top civil servant, advised in March 2005 that:

> ... we need to restore the balance, with three Councils covering respectively, (a) international peace and security, (b) economic and social issues, and (c) human rights, the promotion of which has been one of the purposes of the Organization from its beginnings but now clearly requires more effective operational structures. These Councils together should have the task of driving forward the agenda that emerges from summit and other conferences of Member States, and should be the global forms (*sic*) in which the issues of security, development and justice can be properly addressed. The first two Councils, of course, already exist but need to be strengthened. The third requires a far-reaching overhaul and upgrading of our existing human rights machinery.[20]

But to achieve such a change in legal terms requires an amendment to the UN's constitutive treaty, the 1945 *Charter of the United Nations*,[21] which in turn requires the agreement of all 192 UN member states. Pragmatism thus led to the

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[19] *A More Secure World: Our Shared Responsibility: Report of the High Level Panel on Threats, Challenges and Change* (Chair: Anand Panyarachun), UN Doc. A/59/565 (2 December 2004) at para. 291.

[20] *In Larger Freedom*, *supra* note 17 at para. 166. The proposal for a UN human rights body with council status is of long-standing with Sir Hersch Lauterpacht having made the suggestion soon after the Commission's founding in 1946: see Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens and Son, 1950) at 254. Canada's John Humphrey, who served as the first Director of the Division of Human Rights within the UN, also backed such a proposal: see John Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, NY: Transnational Publishers, 1984) at 56.

[21] 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945) [*UN Charter*]. The text of the *UN Charter* is also available online at: <http://www.un.org/en/documents/charter/>.

creation of the Council by resolution as a subsidiary organ of the General Assembly,[22] albeit with an agreement "to review the status of the Council within five years."[23] Paragraph 16 of the resolution further provides that "the Council shall [also] review its work and functioning five years after its establishment and report to the General Assembly,"[24] with this review scheduled to take place in 2011.

In practical terms, or perhaps symbolic terms, the new Council has gained an elevation in institutional standing as a result of its more direct relationship with the Assembly, since the former Commission on Human Rights was one of nine commissions created by and reporting to the 54-member Economic and Social Council, which in turn reports to the Assembly. The new Council is also designed to meet more frequently than the former Commission, with a minimum of three sessions per year and additional special sessions,[25] thus serving more like a standing body on human rights,[26] able to address urgent situations as they arise, than a yearly convention or annual general meeting.[27] In an attempt to address concerns of past politicization, the General Assembly has directed that all "members elected to the Council shall uphold the highest standards in the promotion and protection of human rights" and Council members committing gross and systematic violations of human rights can have their membership suspended by a two-thirds vote of the members of the General Assembly.[28] Admittedly, however, proposals for more specific, and more robust,

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[22] Article 7(1) of the *UN Charter* (*ibid.*) designates the Economic and Social Council, the Security Council, and the General Assembly as three of the six "principal organs" of the UN Organization, while article 7(2) expressly allows for the creation of additional "subsidiary organs". Article 22 of the *UN Charter* further provides that: "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions."

[23] GA Res. 60/251, *supra* note 6 at para. 1.

[24] *Ibid.* at para. 16.

[25] Paragraph 10 of GA Res. 60/251 (*ibid.*) provides "that the Council shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council." Professor Bossuyt, who is also a former chairperson of the Commission, having served as a representative of Belgium, has described these provisions as "undoubtedly the most positive aspect of the reform": Bossuyt, *supra* note 14 at 551. Similar views have been expressed by the then UN High Commissioner for Human Rights, Louise Arbour: see Louise Arbour, "A new dawn for UN and human rights" *The Toronto Star* (19 June 2006) A17.

[26] As had been recommended by the UN Secretary-General in *In Larger Freedom*, *supra* note 17 at para. 183.

[27] The Commission had met annually in Geneva for one hectic six-week session attended by over 3000 people, although it had gained the ability to hold emergency sessions since 1992.

[28] GA Res. 60/251, *supra* note 6 at para. 9. These provisions provide a hook for advocacy efforts against certain states wanting to serve on the Council, and their existence may have contributed to Belarus' failed bid for Council membership in May 2007, as well as Sri Lanka's failed bid for re-election in May 2008.

criteria for membership have not received sufficient state support,[29] and for some, the Council membership of China, Cuba and Saudi Arabia, alongside Canada, for 2006-2009, illustrates the weak nature of the Assembly's exhortations. Nevertheless, while the potential exists for the Council to serve as nothing more than "old wine in new bottles,"[30] the use of the "Council" label was intended to mark a break from the past and a desire to engage in a more constructive international dialogue on the promotion and protection of human rights.

II. THE COUNCIL'S GEOPOLITICAL STRUCTURE

The Council consists of 47 states, elected to serve for three-year terms by a majority vote of the UN membership[31] taking into account certain regional groupings of states in order to achieve the widely-held goal of "equitable geographic distribution." This desire for geographic balance within the Council has resulted in the allocation of 13 seats each to the African and Asian states, six seats for the Eastern European states, eight seats for the Latin American and Caribbean states, and seven seats for the "Western European and Other States" group, which includes Canada, as well as Australia, New Zealand and the United States.[32] Clearly, African and Asian states have the majority within the Council, holding 26 out of 47 states when they work together *en bloc*.

As has been noted by Professor Bossuyt, this re-distribution of seats weakens the position of the Western European and Others group (or "WEOG"), which previously held ten of the 53 seats on the former Commission,[33] or 19% rather

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[29] On the membership criteria debate, see Philip Alston, "Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council" (2005) 15:1 J. Transnat'l L. & Pol'y 49 and Alston (2006), *supra* note 13 at 188-204. See also, *Explanation of Vote by Ambassador John R. Bolton, U.S. Permanent Representative to the United Nations, on the Human Rights Council Draft Resolution, in the General Assembly, March 15, 2006*, online at the United States Mission to the United Nations: <http://www.usunnewyork.usmission.gov/press_releases/20060315_051.html> and recorded in the official records at: UN GAOR, 60th Sess., 72d Plen. Mtg., UN Doc. A/60/PV.72 (15 March 2006) at 6-7.

[30] See Schrijver, *supra* note 16.

[31] Earlier proposals by the UN Secretary-General, and supported by the United States, had recommended election by a two-thirds majority vote: see *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General: Addendum: Human Rights Council*, UN Doc. A/59/2005/Add.1 (23 May 2005) at paras. 12 and 15, and the U.S. explanation of vote recorded in UN GAOR, 60th Sess., 72d Plen. Mtg., UN Doc. A/60/PV.72 (15 March 2006) at 6-7.

[32] GA Res. 60/251, *supra* note 6 at para. 7.

[33] The size of the former Commission expanded over time, from 18 to 21 seats in 1962, 32 in 1967, 43 in 1980, and 53 in 1992: Schrijver, *supra* note 16 at 812.

than 15% of the seats.[34] As noted by Professor Schrijver,[35] however, Western and Eastern European states are becoming increasingly close through their involvement in international organizations such as the Council of Europe and the European Union (EU), and together the two groups have thirteen seats, thus matching the allotment for the African and Asian states. However, actual experience within the Council has shown that two members of the Eastern European group are likely to vote with the African and Asian states on divisive matters, (these two states being Azerbaijan and the Russian Federation), while two members of the Asian group often vote with the remaining Eastern European and WEOG states (Japan and the Republic of Korea). When the African and Asian groups have the support of the Latin American states,[36] Western states can muster no more than thirteen votes on a Council with 47 members. Moreover, from a Canadian perspective, and with due respect to Professor Schrijver's analysis, the increasing closeness of many European states does not necessarily assist the somewhat lonely "others" in WEOG, such as Canada, Australia and New Zealand, (known as "CANZ"), which face an uphill battle to change minds once a position is agreed upon within either the EU or wider European regional bloc. By their very nature, blocs reduce a state's freedom to act in the interests of solidarity with the position of the group.

In any event, the election for members of the first Human Rights Council was held on 9 May 2006, with Canada winning one of the seven WEOG seats,[37] and the United States declining to run. The other WEOG seats were held by member states of the European Union, plus one other European but non-EU state.[38] In March 2009, the Obama Administration reversed the decision of the Bush Administration to shun

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[34] Bossuyt, *supra* note 14 at 552-3, fn. 10.

[35] Schrijver, *supra* note 16 at 815-6.

[36] To date the only Caribbean state to serve on the Council has been Cuba, despite its identification by the leading regional human rights organ within the Western Hemisphere as a state whose practices in the area of human rights deserve special attention and where "restrictions on political rights, freedom of expression and dissemination of ideas have created, over a period of decades, a situation of permanent and systematic violations of the fundamental rights of Cuban citizens, which is made notably worse by the lack of independence of the judiciary." See *Annual Report of the Inter-American Commission on Human Rights*, OAS Doc. OEA/ Ser.L/V/II.134, Doc. 5, rev. 1 (25 February 2009) at paras. 149 and 160. No member states of the Caribbean Community (CARICOM) have served on the Human Rights Council.

[37] Canada completed its term of membership in 2009 and did not run for re-election. The pledges made by Canada in its bid for election in 2006 can be found in Permanent Mission of Canada to the United Nations, Diplomatic Note 0168, dated 10 April 2006, online at the United Nations: <http://www.un.org/ga/60/elect/hrc/canada.pdf>.

[38] The EU members were Finland (later replaced by Italy after one year due to the staggering of the Council's initial terms), France, Germany, Netherlands, and the United Kingdom. The other non-EU member of the WEOG group during Canada's period of membership was Switzerland, which is an associated country with the EU through several bilateral agreements.

the Council,[39] and was successfully elected a Council member in May 2009, although the member states of the European Union continue to dominate the WEOG seats on the Council.[40] Many states supported the U.S. bid for membership, presumably on the belief that there is a need to involve the world's most powerful state for the Council to be effective. However, under the new rules no state can hold more than two consecutive terms on the Council,[41] thus barring both permanent and presumptive membership for "great powers", such as the five permanent members of the Security Council.

III. THE REFINEMENT OF THE COUNCIL'S MANDATE AND PROCEDURES

During its first year of operation, the Council was required by the General Assembly to "assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure."[42] After a year of intense behind-the-scenes negotiations, a last-minute deal was finally reached on what was to be termed the "Institution-building package"[43] since it added certain refinements to the Council's mandate. Faced with the expiry of the deadline, the President of the Human Rights Council announced that a deal had been reached by consensus, but he never provided the Council with the opportunity to vote directly on the package.[44] However, this procedural maneuver did not ease the dissatisfaction felt by some states with the deal that had been reached, and the package

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[39] "U.S. to Run for Election to the UN Human Rights Council" State Department Press Release (31 March 2009), online at the US State Department: <http://www.state.gov/r/pa/prs/ps/2009/03/121049.htm>. See also, Colum Lynch, "U.S. to join U.N. Human Rights Council, reversing Bush policy" *The Washington Post* (31 March 2009).

[40] United Nations General Assembly Press Release, UN Doc. GA/10826 (12 May 2009), online at the United Nations: <http://www.un.org/News/Press/docs/2009/ga10826.doc.htm>. The other non-EU state member, in addition to the United States, is now Norway (although Norway is an associated country with the EU through membership in the European Economic Area). No member of CANZ currently sits on the Human Rights Council, New Zealand having dropped its planned campaign for election in support of the U.S. bid.

[41] GA Res. 60/251, *supra* note 6 at para. 7. See also Schrijver, *supra* note 16 at 816.

[42] GA Res. 60/251, (*ibid.*) at para. 6.

[43] *Institution-building of the United Nations Human Rights Council*, Human Rights Council resolution 5/1 of 18 June 2007, [HRC Res. 5/1] reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53 at 48-73, UN Doc. A/62/53 (2007). For further discussion, see Claire Callejon, "Developments at the Human Rights Council in 2007: A Reflection of its Ambivalence" (2008) 8:2 Hum. Rts L. Rev. 323.

[44] As explained in Callejon, *ibid.* at 324, fn. 5.

became the focus of a divisive vote when forwarded to the General Assembly for endorsement.[45]

Although Israel and Canada chose not to make statements upon the holding of the final vote at the General Assembly, they had made their views known when the resolution to endorse the package was discussed within the Assembly's Third Committee,[46] and in Canada's case, had also expressed its criticisms within the Canadian House of Commons when events first unfolded within the Council.[47] At the Third Committee, Canada reiterated its disapproval of a package that singled out only one human rights situation in the world for permanent scrutiny, while eliminating the special procedures applicable to other countries of concern. Canada also stated that it "categorically rejected the manner in which the package had been pushed through at the fifth session [of the Council], when procedural maneuvering had taken precedence over the principles at stake, thereby doing a disservice to the Council and the causes it espoused."[48] Canada further stated for the record that: "Canada had been denied its sovereign right to call for a vote on the substance of the package in order to express formally its disagreement with its flawed, politicized elements. Not only had the Council flouted its own rules of procedure and those of the General Assembly, but also those of 60 years of United Nations established practice based on the equality of Member States."[49]

At the final plenary meeting of the Assembly, representatives of the United States and Australia (the latter now led by the Labor Government of Prime Minister Kevin Rudd) took the floor to question the contents of the deal that had been reached, with neither having served as members of the Human Rights Council. Both the United

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[45] See Report of the Human Rights Council, GA Res. 62/219, UN GAOR, 62d Sess., Supp. No. 49 (vol. I) at 434-435, UN Doc. A/RES/62/219 (2007) [GA Res. 62/219], adopted by a recorded vote of 150 to 7 (Australia, Canada, Israel, Marshall Islands, Micronesia, Palau, and the United States), with 1 abstention (Nauru). Note that the verb used in the resolution was changed from "Welcomes" to "Endorses" as the result of an amendment proposed by the member states of the Non-Aligned Movement, led by Cuba, adopted on the basis of a recorded vote when the resolution was discussed within the Assembly's Third Committee: Report of the Human Rights Council: Report of the Third Committee, UN Doc. A/62/434 (3 December 2007).

[46] See UN GAOR, 62d Sess., Third Committee, 47th Mtg., UN Doc. A/C.3/62/SR.47 (2007) at paras. 27-29 (Israel) and paras. 34-35 (Canada).

[47] As explained by the Hon. Peter MacKay, then Minister of Foreign Affairs, when questioned in the House of Commons on why Canada did not agree with the institution-building package: "We cannot, for expedience, accept a permanent agenda item on the Palestinian territories, singling out one situation while at the same time eliminating a special human rights scrutiny of countries of concern, such as Cuba and Belarus. It is a contradiction" [with the Council's founding principles]: *HC Debates*, vol. 141, no. 175 at 10900 (20 June 2007).

[48] UN GAOR, 62d Sess., Third Committee, 47th Mtg., UN Doc. A/C.3/62/SR.47 (2007) at para. 35.

[49] *Ibid.*

States and Australia criticized the termination of past mandates focusing on the human rights situations in Belarus and Cuba,[50] while at the same time, adding the situation in the occupied Palestinian territories as the only permanent item to be included on the Council's agenda. Such a move, in their view, was in contravention of the Council's founding principles of non-selectivity and objectivity.[51] The United States also questioned the tactics that had been deployed at the Council to avoid a vote, noting that "if a Government had announced that the election would be held on a certain day and then told voters who showed up on the appointed day that the election had actually been held at midnight the night before, the world would rightly regard that election as unfree and unfair."[52] The Council's institution-building package was then adopted by an overwhelming majority, with the recorded vote revealing 150 votes in favour and 7 against (Australia, Canada, Israel, Marshall Islands, Micronesia, Palau and the United States), with 1 abstention (Nauru).

As a result, Canada, along with Australia, Israel and the United States, have disassociated themselves from the alleged "consensus" concerning the adoption of the Council's institution-building package. Nevertheless, it remains within this package that one finds the main elements and details of the Council's priorities and future work program, as well as its rules of procedure. These elements include the retention of almost all the "special procedures" that were developed within the former Commission on Human Rights involving the work of various "Special Rapporteurs" and working groups focusing on thematic issues or specific countries,[53] as well as the continuance of the Commission's past procedure for the receipt of complaints of gross

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[50] While many developing states want to drop country-specific mandates altogether, the discontinuation of the mandates for Belarus and China became the bargaining chip for a consensus package that maintained the mandates for the Democratic Republic of the Congo, Haiti, Myanmar (Burma), North Korea, Somalia, and Sudan. A year later, however, the mandate for the Democratic Republic of the Congo was discontinued by the Council.

[51] As recorded in UN GAOR, 62d Sess., 79th Plen. Mtg., UN Doc. A/62/PV.79 (2007) at 10-11. Academic observers have also noted that while the human rights situation in the occupied territories should be addressed, it is unfortunate that a specific agenda item be dedicated to it and not to other human rights situations: Callejon, *supra* note 42 at 337-8. For the Palestinians themselves, there may also be a downside to this separate agenda item as it makes their cause a political one and not a human rights one.

[52] UN GAOR, 62d Sess., 79th Plen. Mtg., UN Doc. A/62/PV.79 (2007) at 10.

[53] HRC Res. 5/1, *supra* note 42, Annex, Part II, at paras. 39-64 and appendices I and II. For background discussion, see Jeroen Gutter, "Special Procedures and the Human Rights Council: Achievements and Challenges Ahead" (2007) 7: 1 Hum. Rts L. Rev. 93 and Hurst Hannum, "Reforming the Special Procedures and Mechanisms of the Commission on Human Rights" (2007) 7:1 Hum. Rts L. Rev. 73 at 74-82.

and systematic violations of human rights.[54] The institution-building package also provides for the creation of a small "think tank" to be known as the "Human Rights Council Advisory Committee" to replace in effect the former Sub-commission on the Promotion and Protection of Human Rights that had served as an active, and often bold, instigator of ideas and proposals within the former Commission.[55] Lastly, the package contains the all-important content for the new "universal periodic review" (UPR) mechanism; the creation of which is viewed by many as the Council's most innovative reform.[56]

Under the UPR, the human rights record of every UN member state will be reviewed and assessed every four years through a process of written reports and interstate dialogue, thus addressing the problem of selectivity that plagued the former Commission. Informed observers with an appreciation for history and the official record have already noted, however, that the former Commission had developed a similar "periodic reporting procedure" in the 1950s and 1960s, which was eventually abolished by 1981 because the reports it generated were considered to be of marginal utility.[57] Nevertheless, there are those that believe that the new UPR mechanism within the Council will foster improvements at the national level of the state being reviewed[58] while also serving as a means to carry out an impartial assessment of every state's performance of its human rights obligations.[59] It is also hoped that the new UPR mechanism will allow for the sharing of best practices among states, support

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[54] HRC Res. 5/1 (*ibid.*), Annex, Part IV, at paras. 85-109. Since 1967, the former Commission had examined information relevant to gross violations of human rights and fundamental freedoms in specific country situations, and since 1970, had also examined communications received by the UN that appeared to reveal a consistent pattern of gross and reliably attested violations. The latter became known as the confidential "1503 procedure", so named after the Economic and Social Council resolution number by which it was created. See further, Nigel S. Rodley and David Weissbrodt, "United Nations Nontreaty Procedures for Dealing with Human Rights Violations" in Hurst Hannum, ed., *Guide to International Human Rights Practice*, 4th ed. (Ardsley, NY: Transnational, 2004) at 65-74. See also, Alston, *supra* note 11 at 145-55 (who views the 1503 procedure as deeply flawed) and Callejon, *supra* note 42 at 332 (who notes that the procedure was of more use in the 1970s and 1980s when fewer states had ratified the treaty-based complaint procedures).

[55] HRC Res. 5/1 (*ibid.*), Annex, Part III, at paras. 65-84.

[56] For an assessment of the universal periodic review mechanism and a discussion of Canada's recent experience, see Joanna Harrington, "Canada, the United Nations Human Rights Council, and Universal Periodic Review" (2009) 18:2 *Constitutional Forum* (forthcoming).

[57] See Bossuyt, *supra* note 14 at 553, fn. 12 and for a full discussion, see Alston (2006), *supra* note 13 at 207-13. See also Felice D. Gaer, "A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System" (2007) 7:1 Hum. Rts L. Rev. 109 at 116-117.

[58] This focus on human rights "on the ground" can be seen in HRC Res. 5/1, *supra* note 42, Annex, Part I, at para. 4(a).

[59] HRC Res. 5/1 (*ibid.*), Annex, Part I, para. 4(b).

interstate cooperation in the promotion of human rights, and facilitate the provision of technical assistance by identifying states in need.[60]

IV. THE COUNCIL'S ACTIVITIES WITH RESPECT TO SUBSTANTIVE MATTERS

(A) The Council's First Year

The new Human Rights Council convened its first session in June 2006, and soon faced its first setback when a proposed text for a long-desired "United Nations Declaration on the Rights of Indigenous Peoples" failed to secure the Council's unanimous approval,[61] as is usually the case with the adoption of such texts in the field of human rights.[62] The resolution concerning the draft Indigenous Rights Declaration was only the second resolution to be considered by the new Council, the first having concerned the promotion of a final text for an "International Convention for the Protection of all Persons from Enforced Disappearance," which by contrast was readily adopted by the Council, and later the General Assembly, by consensus.[63] Nevertheless, Canada felt compelled to deliver a statement of position before the Council to make public its views on the new convention;[64] a practice Canada would follow for each of the

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[60] *Ibid.* at paras. 4(c)-(f).

[61] *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994*, Human Rights Council resolution 1/2 of 29 June 2006, reprinted in *Report of the Human Rights Council*, UN GAOR, 61st Sess., Supp. No. 53, UN Doc. A/61/53 (2006) at 18-27. This resolution was adopted by a recorded vote of 30 votes to 2 (Canada and the Russian Federation), with 12 abstentions. Canada's explanation of vote can be found online at: <http://www.international.gc.ca/genev/new-nouveau/2006/20060629.aspx>. Further explanation of Canada's position with respect to the version of the text promoted at the Human Rights Council can be found online at: <http://www.ainc-inac.gc.ca/ap/ia/pubs/ddr/ddr-eng.asp>.

[62] See *supra* note 5.

[63] *International Convention for the Protection of All Persons from Enforced Disappearance*, Human Rights Council resolution 1/1 of 29 June 2006, reprinted in *Report of the Human Rights Council*, UN GAOR, 61st Sess., Supp. No. 53, UN Doc. A/61/53 (2006) at 3-17; *International Convention for the Protection of All Persons from Enforced Disappearance*, GA Res. 61/177, UN GAOR, 61st Sess., Supp. No. 49 (vol. 1) at 408-417, UN Doc. A/RES/61/177 (2006). In keeping with the practice identified in note 5, the drafting of this treaty was preceded by the earlier adoption of a *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res. 47/133, UN GAOR, 47th Sess., Supp. No. 49 (vol. 1) at 207-210, UN Doc. A/RES/47/133 (1992).

[64] As recorded in *Report of the Human Rights Council*, UN GAOR, 61st Sess., Supp. No. 53, UN Doc. A/61/53 (2006) at para. 66.

five substantive resolutions adopted by the Council during its very first session.[65] It also appears that even at this early stage in the Council's proceedings, Canada was feeling isolated with a review of the official record indicating that for three of the five resolutions, Canada was the only state that felt the need to put on record a public statement of position. However, it must be noted at the outset of this discussion that Canada's desire to express certain views that were not held by those within the room may have been shared by other UN member states that were not part of the 47-member Council. This is a fact often overlooked by media commentators and non-governmental organizations wanting to tout the Council as an authoritative body. Moreover, regional blocs, by their nature, can make non-bloc states, such as Canada, appear as outliers. It is also what makes Canada unique and a focal-point for this study, given the role played by bloc politics and the negotiations between groupings of states in determining the output of UN bodies.

It has been said by Professor Schrijver that "during its first year the Council faced more confrontations and politicization than even its discredited predecessor was used to experiencing in hot seasons,"[66] and a review of the official record clearly supports this statement. Canada was also not left out of this debacle. In addition to its public statements of position concerning the Council's first five resolutions, Canada also found itself voting against the texts of Council decisions 1/106 on the "Human rights situation in Palestine and other occupied Arab territories" and 1/107 on "Incitement to racial and religious hatred and the promotion of tolerance", the latter concerning what was termed "an increasing trend of defamation of religions."[67] These texts had both been sponsored by Pakistan, on behalf of the member states of the Organization of the Islamic Conference (OIC), a cross-regional bloc of 56 Muslim majority countries holding approximately 30% of the Council's seats. Canada voted against the adoption of these texts "in good company," to use the phrase used within diplomatic circles to refer to voting alongside one's allies. Later, during the first two "special sessions" of the Council, held in July and August 2006 respectively, Canada, along with both Western and Eastern European states and Japan, felt compelled to vote against the adoption of resolution texts on the "Human rights situation in the Occupied Palestinian Territory" and "the grave situation of human rights in Lebanon caused by Israeli military operations."[68] Canada and its allies took the view that these texts did

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[65] See *Report of the Human Rights Council*, UN GAOR, 61st Sess., Supp. No. 53, UN Doc. A/61/53 (2006) at para. 70 (concerning the proposed Indigenous Rights Declaration), at para. 79 (concerning a proposed individual complaints mechanism for economic, social and cultural rights), at para. 83 (concerning the right to development), and at para. 101 (concerning the implementation of the Durban Declaration and Plan of Action).

[66] Schrijver, *supra* note 16 at 809-10.

[67] See *Report of the Human Rights Council*, UN GAOR, 61st Sess., Supp. No. 53, UN Doc. A/61/53 (2006) at 38-39 and 62-63.

[68] See *Report of the Human Rights Council*, UN GAOR, 61st Sess., Supp. No. 53, UN Doc. A/61/53 (2006) at 96-97 and 108-111 with reference to resolutions S-1/1 of 6 July 2006 and S-2/1 of 11 August 2006 respectively.

not go far enough to represent a constructive and balanced approach to the human rights situations with which they were concerned. The old days of politicization had returned, with a relentless focus on one particular human rights situation at a time when egregious human rights abuses were taking place elsewhere, including a major humanitarian crisis in the Darfur region of Sudan.[69]

By November and December 2006, during which time the Council held its second and third regular sessions, as well as a third special session, Canada had become the first Council member to vote "no" in isolation, voting as the sole opposition voice to resolutions concerning the "Human rights in the occupied Syrian Golan," the "Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan," and the "Human rights situation in the Occupied Palestinian Territory: follow-up to Human Rights Council resolution S-1/1."[70] Canada also voted "no," but "in good company," against a fourth resolution concerning the situation in the occupied territories,[71] and against two more decision texts. One decision text concerned the drafting of guidelines to address the human rights impact of economic reform and foreign debt repayment[72] that had unbudgeted financial obligations,[73] while the other concerned the situation in Darfur but made no reference to ensuring

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[69] As former UN Secretary-General Kofi Annan was quoted as saying, "When you focus on the Palestinian issue, without even discussing Darfur and other issues, some wonder what is this council doing?": Olivia Ward, "UN rights body off to a bad start" *The Toronto Star* (9 December 2006) A20.

[70] See *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 4-6, 6-9 and 20 with reference to resolutions 2/3 and 2/4 of 27 November 2006, and resolution 3/1 of 8 December 2006 respectively. Resolution 2/4 is especially noteworthy in that it was adopted by 45 votes to 1 (Canada), with 1 abstention (Cameroon).

[71] *Human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, including the recent one in northern Gaza and the assault on Beit Hanoun*, Human Rights Council resolution S-3/1 of 15 November 2006, reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 85-86, adopted by a vote of 32 to 8, with 6 abstentions.

[72] *Effects of economic reform policies and foreign debt on the full enjoyment of all human rights*, Human Rights Council decision 2/109 of 27 November 2006, reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 15.

[73] As acknowledged in *Report to the General Assembly on the Second Session of the Human Rights Council*, UN Doc. A/HRC/2/9 (22 March 2007) at 56, at para. 196 and at 65-66, annex II.

accountability for those responsible for the commission of mass atrocities.[74] Canada also voted, in good company, against a resolution related to the negotiations then taking place concerning the Council's future activities,[75] as well as one resolution and one decision relating to the planned "Durban Review Conference" which aimed to encourage implementation of the controversial 2001 Durban Declaration on "racism, racial discrimination, xenophobia and related intolerance."[76] Many states feared that the Durban Review Conference planned for 2009 would become another platform for attacks against Israel, with memories still fresh of the fervent anti-Israel and anti-American statements made at the first Durban conference in 2001 that had prompted then U.S. Secretary of State Colin Powell, the first black American foreign minister, to order his delegation to walk out. Canada was the first to announce it would boycott the Durban Review Conference, dubbed "Durban II" but held at the UN offices in Geneva, and was later joined by Australia, Israel, Italy, Germany, Netherlands, New Zealand, Poland, and the United States.[77]

The first Durban conference in 2001 had also seen a revival of the old "Zionism equals racism" controversy within the UN – a controversy dating back to at least 1975 and the adoption of a General Assembly resolution on the "Elimination of racism and racial discrimination" which expressly "determin(ed) that Zionism is a form of racism and racial discrimination."[78] As one can imagine, this resolution was not adopted

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[74] *Darfur*, Human Rights Council decision 2/115 of 28 November 2006, reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 17-18. On the Canadian and EU attempt to amend this text, see *Report to the General Assembly on the Second Session of the Human Rights Council*, UN Doc. A/HRC/2/9 (22 March 2007) at 61-62, paras. 243-248. By contrast, the decision to dispatch a High-Level Mission to assess the situation in Darfur was adopted at the Council's fourth special session without a vote: *Situation of human rights in Darfur*, Human Rights Council resolution S-4/1 of 13 December 2006, reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 87.

[75] *Intergovernmental Working Group on the Review of Mandates*, Human Rights Council resolution 2/1 of 27 November 2006, reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 2-3.

[76] See *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 20-2 and 25-6 with reference to resolution 3/2 and decision 3/103 respectively, both adopted on 8 December 2006. See also *Durban Declaration and Programme of Action*, adopted on 7 September 2001 by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/CONF.189/12 and Corr.1 (2001).

[77] Canada's position gained justification when an anti-Semitic speech by Iranian President Mahmoud Ahmadinejad dominated the conference's opening on 20 April 2009 and prompted a walkout by remaining European diplomats: Bruno Waterfield, "Iranian attack on Israel leads to UN walkout" *The Daily Telegraph* (21 April 2009) 16; "UN walkout as Iran leader calls Israel racist" *The Times* (London) (21 April 2009) n.p.

[78] See *Elimination of all forms of racial discrimination*, GA Res. 3379 (XXX), UN GAOR, 30th Sess., Supp. No. 34 at 83-84, UN Doc. A/10034 (1975) (quoting the unnumbered last paragraph).

by consensus, but by a divisive vote of 72 in favour, 35 against and 32 abstentions (illustrating the importance of checking voting records when citing the product of UN organs such as the UN General Assembly). It was also a "determination" that many had feared would cause the UN's own self-destruction, as noted in a noted in a telegram sent at the time by the U.S. Mission to the United Nations to the U.S. Department of State, that has now been declassified.[79] "Resolution 3379 (XXX)" (as it was widely known) remained on the books until 1991, and the adoption of another resolution to provide for its express revocation.[80] The revocation resolution was also adopted by a divisive vote,[81] notwithstanding the efforts of then U.S. President George H.W. Bush who had argued at the high-level segment of that year's Assembly proceedings that "to equate Zionism with the intolerable sin of racism is to twist history and forget the terrible plight of Jews in World War II and, indeed, throughout history."[82]

(B) Continuing the Trend of Division and the Key Areas of Controversy

The trend of division established during the Council's inaugural sessions in 2006 has continued throughout the eleven regular sessions and eleven special sessions held by the Council during Canada's term of membership. Although it must be noted that there were many resolutions and decisions adopted by consensus during this period, as well as draft texts that were tried and then abandoned, a review of the resolutions and decisions that were subjected to a recorded vote for their adoption reveals the Council's key areas of controversy. This record also shows that Canada was the only state to vote "no" in isolation with some regularity, although some other states may have had some sympathy for Canada's critique as signified by a vote of abstention.[83] (The only other state to vote "no" in isolation during Canada's term on the Council was South

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[79] See *Document 82: Telegram 5150 From the Mission to the United Nations to the Department of State, October 18, 1975, 1818Z* in *Foreign Relations of the United States, 1969-1976*, Vol. E-14, Part 1, "Documents on the United Nations, 1973-1976" (Washington, D.C.: U.S. Government Printing Office, 2008), also made available by the Office of the Historian of the U.S. State Department online at: <http://history.state.gov/historicaldocuments/frus1969-76ve14p1/d82>.

[80] See *Elimination of racism and racial discrimination*, GA Res. 46/86, UN GAOR, 46th Sess., Supp. No. 49 (vol. 1) at 39, UN Doc. A/RES/46/86 (1991) [GA Res. 46/86].

[81] GA Res. 46/86 (*ibid.*) was adopted by a vote of 111 to 25, with 13 abstentions. The texts of both resolutions, and their voting records, are reproduced together on the website of Israel's Ministry of Foreign Affairs online at: <http://www.mfa.gov.il/MFA/Foreign%20Relations/Israels%20Foreign%20Relations%20since%201947/1988-1992/260%20General%20Assembly%20Resolution%2046-86-%20Revocation>.

[82] *Address to the 46th Session of the United Nations General Assembly in New York City*, (23 September 1991), made available by The American Presidency Project online at: <http://www.presidency.ucsb.edu/ws/index.php?pid=20012>.

[83] Commentators, including the Standing Senate Committee on Human Rights, often overlook the presence of abstentions when drawing attention to a "no" vote by Canada, burying these details in footnotes without further analysis: see Standing Senate Committee on Human Rights, *Canada and the United Nations Human Rights Council: A Time for Serious Re-Evaluation* (Chair: Raynell Andreychuk) (June 2008) at 10, fn. 14 and 12, fn. 18.

Africa, which did so once during the tenth session.[84]) The twelve resolutions to which Canada gave an isolated "no" vote were all concerned with the human rights situation in the occupied territories in the Middle East, with the texts viewed by Canada as being unbalanced and solely focused on Israeli actions or inadequately acknowledging Israel's security concerns.[85] For many of these resolutions, Canada's usual allies abstained, rather than registering a vote in favour or against, but for two of the twelve occasions, Canada's "no" vote was cast in splendid isolation, with even the WEOG states voting in favour of what were presumably viewed by instructing capitals as balanced texts.[86] In addition to the twelve resolutions mentioned above, and an earlier

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[84] See *Discrimination based on religion or belief and its impact on the enjoyment of economic, social and cultural rights*, Human Rights Council resolution 10/25 of 27 March 2009, reprinted in *Report of the Human Rights Council at its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 95-98, adopted by a vote of 22 (including Canada) to 1 (South Africa), with 24 abstentions.

[85] In addition to Council resolutions 2/3, 2/4 and 3/1 mentioned above (see note 69), see *Religious and cultural rights in the Occupied Palestinian Territory, including East Jerusalem*, Human Rights Council resolution 6/19 of 28 September 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 33-34; *Human rights violations emanating from Israeli military attacks and incursions in the Occupied Palestinian Territory, particularly in the occupied Gaza Strip*, Human Rights Council resolution S-6/1 of 24 January 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 242-243; *Human rights violations emanating from Israeli military attacks and incursions in the Occupied Palestinian Territory, particularly the recent ones in the occupied Gaza Strip*, Human Rights Council resolution 7/1 of 6 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 81-82; *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, Human Rights Council resolution 7/18 of 27 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 123-126; *Human rights in the occupied Syrian Golan*, Human Rights Council resolution 7/30 of 27 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 161-163; *The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip*, Human Rights Council resolution S-9/1 of 12 January 2009, reprinted in *Report of the Human Rights Council on its Ninth Special Session*, UN Doc. A/HRC/S-9/2 (27 February 2009) at 3-6; *Human rights in the occupied Syrian Golan*, Human Rights Council resolution 10/17 of 26 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 67-70; *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*, Human Rights Council resolution 10/18 of 26 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 70-75; *Follow-up to Council resolution S-9/1 on the grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip*, Human Rights Council resolution 10/21 of 26 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 79-80.

[86] HRC Res. 7/18 and HRC Res. 10/18, *supra* note 84.

resolution adopted at the Council's third special session,[87] two more resolutions on the occupied territories in the Middle East (for a total of 15) were adopted by a recorded vote during Canada's term of membership on the Council, but on these occasions, Canada's "no" vote received some support from its usual allies. Specifically, Canada was joined by France, Germany, Italy, Japan, Netherlands, Slovakia, Slovenia and the United Kingdom in voting against the adoption of Council resolution 9/18 in September 2008,[88] and by Germany, Italy and Netherlands in voting against Council resolution 10/19 in March 2009.[89]

But putting aside the resolutions concerning Israel, a review of the official records of the Council's activities for its first eleven sessions also reveals a persistent and continuing division among Council states that has been evident within various UN fora since decolonization produced a change in the voting weight of Asian and African states, and developing states in general.[90] From 2006-2009, Canada and other wealthy and developed states were often pushed by the actions of poorer developing states to vote against resolutions that reflected a desire embraced by many developing countries to recognize and develop further so-called "third generation" human rights,[91]

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[87] See HRC Res. S-3/1, *supra* note 70 (with Canada joined by the Czech Republic, Finland, Germany, Netherlands, Poland, Romania, and the United Kingdom in voting no).

[88] See *Follow-up to resolution S-3/1: human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory and the shelling of Beit Hanoun*, Human Rights Council resolution 9/18 of 24 September 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, Addendum, UN Doc. A/63/53/Add.1 (2008) at 46.

[89] See *Human rights violations emanating from the Israeli military attacks and operations in the Occupied Palestinian Territory*, Human Rights Council resolution 10/19 of 26 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 75-77.

[90] At the time of its creation in 1945, the UN consisted of 51 states, with mostly European and Latin American states playing a predominant role. Gradually, and over time, Asian and African states have assumed a more dominant position in an organization now consisting of 192 states.

[91] A concept popularized by the Czech-French international lawyer and former UNESCO legal adviser, Karel Vasak, who viewed third generation human rights as a response to the phenomenon of global interdependence, requiring states to work together, in solidarity, for the maintenance of peace, protection of the environment, and the encouragement of development: Karal Vasak, "A Thirty Year Struggle – the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights" *UNESCO Courier* (November 1977) at 29, aptly summarized in Roland Rich, "The Right to Development: A Right of Peoples?" in James Crawford, ed., *The Rights of Peoples* (Oxford: Oxford University Press, 1988) 39 at 41. See also Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003) at 24 and Philip Alston, "Peoples' Rights: Their Rise and Fall" in Philip Alston, ed., *Peoples' Rights* (Oxford: Oxford University Press, 2001) 259 at fn. 1 (who describes Karel Vasak as "the most persistent proponent of the concept of peoples' rights").

or what are termed "peoples' rights," including a peoples' right to peace[92] and a right to international solidarity.[93] This push for recognition took place within the Council despite past difficulties in reaching consensus, and with respect to the seemingly paradoxical "right to peace," a degree of past ambivalence.[94] Developing states, however, viewed the recognition of such rights as part of a wider campaign to create a more equitable (in their view) international order,[95] with the hope that this new order would also address such concerns as the special impact of globalization on developing countries[96] and the human rights' impact of foreign debt and other international

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[92] *Promotion of the right of peoples to peace*, Human Rights Council resolution 8/9 of 18 June 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 205-208, adopted by a vote of 32 to 13 (including Canada), with 2 abstentions. See also *Promotion of the right of peoples to peace*, Human Rights Council resolution 11/4 of 17 June 2009, reprinted in *Report of the Human Rights Council on its Eleventh Session*, UN Doc. A/HRC/11/37 (29 June 2009) at 20-24, adopted by a recorded vote of 32 to 13 (including Canada), with 1 abstention.

[93] *Human rights and international solidarity*, Human Rights Council resolution 6/3 of 27 September 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 5-8, adopted by a vote 34 to 12, with 1 abstention. See also *Mandate of the independent expert on human rights and international solidarity*, Human Rights Council resolution 7/5 of 27 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 89-90, adopted by a vote 34 to 13, and *Human Rights and Solidarity*, Human Rights Council resolution 9/2 of 24 September 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, Addendum, UN Doc. A/63/53/Add.1 (2008) at 3-6, adopted by a vote 33 to 13. Canada voted against the adoption of all three resolutions.

[94] The campaign to recognize a peoples' right to peace culminated in the adoption of a *Declaration on the Right of Peoples to Peace*, GA Res. 39/11, UN GAOR, 39th Sess., Supp. No. 51 at 22, UN Doc. A/RES/39/11 (1984), but with 34 abstentions: Tomuschat, *supra* note 90 at 49. The promotion of a "right to peace" then became the pet project of UNESCO Director-General Federico Mayor in the late 1990s, without much success: Alston (2001), *supra* note 90 at 279-81. The issue was revived in 2002, with the adoption of *Promotion of the right of peoples to peace*, GA Res. 57/216, UN GAOR, 57th Sess., Supp. No. 49 (vol. 1) at 421-422, UN Doc. A/RES/57/216 (2002), adopted by a recorded vote of 116 to 53 (including Canada), with 14 abstentions.

[95] See *Promotion of a democratic and equitable international order*, Human Rights Council resolution 8/5 of 18 June 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 193-196, adopted by a vote of 33 to 13, with 1 abstention.

[96] *Globalization and its impact on the full enjoyment of all human rights*, Human Rights Council resolution 4/5 of 30 March 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 35-36, adopted by a vote of 34 to 13.

financial obligations.[97] There remains, however, a fundamental difference of opinion among many states as to how, and whether, to address such issues through a human rights lens and thus for some, these matters are not viewed as appropriate subject matters for action within the Council.

There also remains a deeper conceptual division between many developed and developing states on the appropriateness of recognizing what may be called collective human rights, with many developed states expressing far more comfort with the traditional view of human rights as rights that we hold on an inherent basis as human beings. In this conception, human rights are for the benefit of individuals rather than collectivities. Of course, many developing states criticize international law for its Western bias, as revealed by this focus on the individual's role in society, with African and Asian states placing more emphasis on the welfare of the family, tribe or clan. Nevertheless, while some individual rights and freedoms can be exercised with others, such as freedom of religion and association, and some human rights, such as minority rights, the right to respect for family life, and the prohibition on genocide,[98] clearly have a collective dimension, many developed states are concerned with the conceptualization of peoples' rights as human rights given the lack of a precise or generally accepted definition of the collectivity or "people." While it is true that African states have chosen, as a matter of their own free will, to recognize some third generation rights within their regional human rights regime,[99] as explained in the writings of German international law professor Christian Tomuschat, "all human rights of the third generation are surrounded by deep-going uncertainties regarding their holders, their duty-bearers, and their substance."[100] For many observers, the difficulty in determining who holds a collective human right gives rise to a fear that the most plausible "person" to exercise a people's human right will be the state, which in turn, leads to fears among developed states that the recognition of collective human

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[97] *Mandate of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, Human Rights Council resolution 7/4 of 27 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 86-88, adopted by a vote of 34 to 13 (including Canada); *The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, Human Rights Council resolution 11/5 of 17 June 2009, reprinted in *Report of the Human Rights Council on its Eleventh Session*, UN Doc. A/HRC/11/37 (2009) at 25-31, adopted by a vote of 31 to 13 (including Canada), with 2 abstentions.

[98] Also encapsulated as a group's right to physical existence: James Crawford, "The Rights of Peoples: 'Peoples' or 'Governments'" in *The Rights of Peoples*, *supra* note 90 at 57 and 59-60.

[99] The *African Charter of Human and Peoples' Rights*, 27 June 1981, 1520 U.N.T.S. 217, (1982) 21 I.L.M. 58 (entered into force 21 October 1986), recognizes a right to development (art. 22), a right to peace and security (art. 23), and a right to a "generally satisfactory environment" (art. 24).

[100] Tomuschat, *supra* note 90 at 50.

rights will be used by some states to justify or excuse infringements of individual human rights for the benefit of state goals such as development.

Although the legal bureau of Canada's Department of Foreign Affairs and International Trade had expressed concern with the conceptualization of collective human rights in 1985 and allowed for this concern to be published,[101] by 1989, Canada's position on collective human rights, according to the legal bureau, was to recognize that "the existence and expansion of collective rights have gradually gained broader international acceptance."[102] The legal bureau further explained that it was Canada's position that "[t]he specific rights emerging in this area have generally not posed difficulties for Canada," although Canada also wanted such rights to be "as clearly defined as possible" and "not be elaborated as 'prerequisites' for the enjoyment of other human rights."[103] In this way, collective human rights, such as a right to development, should, in Canada's view, be regarded as indivisible from other human rights and interdependent with them, and thus the "underdevelopment of a state should not be used as an excuse to justify abuses of human rights."[104] The legal bureau, however, also recognized that "care must be exercised in the discussion of newly emerging rights," noting "that the focus remains centred on human rights and not on subjects such as toxic wastes and external debt, which are more appropriately addressed in other fora ..."[105] It is telling that the essence of this sentence, written in 1989, explains the opposition of Canada and many of its allies, at least in part, to some of the resolutions adopted by the Human Rights Council almost 20 year
Canada also continued to vote, in good company, against Council resolutions relating

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[101] Excerpt from a memorandum dated 9 September 1985, reprinted in Edward G. Lee, ed., "Canadian Practice in International Law during 1985 at the Department of External Affairs" [1986] 24 Can. Yrbk Int'l L. 386 at 389-390.

[102] Excerpt from a document dated 22 March 1989, reprinted in Edward G. Lee, ed., "Canadian Practice in International Law at the Department of External Affairs in 1988-1989" [1989] 27 Can. Yrbk Int'l L. 373 at 375-376.

[103] *Ibid.* at 376.

[104] *Ibid.*

[105] *Ibid.*

to the Durban review conference,[106] (introduced by Egypt on behalf of the African group); the continuing "defamation" of religions (introduced by Pakistan on behalf of the OIC and also furthering a campaign to add religion, especially Islamophobia, to the racism agenda at the Durban review conference);[107] and thirdly, the somewhat cryptic "negative effects of unilateral coercive measures,"[108] (which was introduced by Cuba on behalf of the Non-Aligned Movement).[109] I have explained above Canada's opposition with respect to the Durban review conference held in April 2009. As for the "defamation of religions" effort, the problem here is that such resolutions represent a move away from the traditional understanding of human rights as protections for individuals and a move towards the protection of concepts, ideas and ideology, with consequences for the protection of freedom of speech. Opponents to the "defamation of religions" project worry that this approach establishes "a right not to be offended" that could provide cover for states to suppress peaceful speech. It is also worth noting that the vote counts in 2008 and 2009 concerning this topic add support to Canada's

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[106] *Elaboration of international complementary standards to the International Convention on the Elimination of All Forms of Racial Discrimination*, Human Rights Council resolution 6/21 of 28 September 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 35-37; *From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance*, Human Rights Council resolution 6/22 of 28 September 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 37-38; *Preparations for the Durban Review Conference*, Human Rights Council resolution 6/23 of 28 September 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 39-40; *Elaboration of complementary standards to the International Convention on the Elimination of All Forms of Racial Discrimination*, Human Rights Council resolution 10/30 of 27 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 111-113.

[107] *Combating defamation of religions*, Human Rights Council resolution 4/9 of 30 March 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 40-45, adopted by a vote of 24 to 14 (including Canada), with 9 abstentions.

[108] See *Human rights and unilateral coercive measures*, Human Rights Council resolution 6/7 of 28 September 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 14-16 and *Human rights and unilateral coercive measures*, Human Rights Council resolution 9/4 of 24 September 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, Addendum, UN Doc. A/63/53/Add.1 (2008) at 8-10. See also *Human rights and unilateral coercive measures*, Human Rights Council decision 4/103 of 30 March 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 46, which was also adopted by a divided vote.

[109] The Non-Aligned Movement (or "NAM") is a cross-regional grouping of 117 states originally unaligned to the West or the Soviet Union during the Cold War.

position, with the states voting no or abstaining now outnumbering those in support of the "defamation of religion" resolutions.[110]

As for the topic of "unilateral coercive measures," the focus here is on actions allegedly taken by (mostly developed) states to obtain the alleged subordination of (mostly developing) states, including measures of an extraterritorial nature and actions taken by one state resulting in economic pressures on another state or states. This is a controversial topic of historical division, dating back to the first United Nations Conference on Trade and Development (UNCTAD) held in 1964, which in turn led to the birth of the bloc known as the "Group of 77" and its goal of gaining greater leverage for developing states within multilateral fora.[111] During UNCTAD I, many developed nations had felt compelled to vote no or abstain, but the efforts of UNCTAD I and a working group that it created eventually led to the adoption of a proposed "Charter of Economic Rights and Duties of States" by an overwhelming vote of developing states at the General Assembly in 1974.[112] Article 32 of this declaratory Charter provides that: "No State may use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights,"[113] thus solidifying the topic of "unilateral coercive measures" as a subject matter for further attention. Ironically, however, after the adoption (by a divided vote) of the Council's most recent resolution on "Human rights and unilateral coercive measures,"[114] which tasked the UN Secretary-General with

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[110] See *Combating defamation of religions*, Human Rights Council resolution 7/19 of 27 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 126-129, adopted by a vote of 21 to 10 (including Canada), with 14 abstentions; *Combating defamation of religions*, Human Rights Council resolution 10/22 of 26 March 2009, reprinted in *Report of the Human Rights Council at its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 81-86, adopted by a vote of 23 to 11 (including Canada), with 13 abstentions.

[111] As acknowledged in the Group of 77's own website at: <http://www.g77.org/doc/>. The Group of 77 now has 130 members, all of which are developing states.

[112] See *Charter of Economic Rights and Duties of States*, General Assembly resolution 3281 (XXIX) of 12 December 1974, UN Doc. A/RES/29/3281 (1974), (1975) 14 I.L.M. 251, adopted by a vote of 120 to 6, with 10 abstentions (including Canada) (as noted in S.K. Chatterjee, "The Charter of Economic Rights and Duties of States: An Evaluation After 15 Years" (1991) 40 Int'l & Comp. L.Q. 669 at 672). Soon after its adoption, the Charter was invoked by Libya as justification for its nationalization of foreign owned property without compensation, leading Professor René-Jean Dupry of the University of Nice to conclude in a 1977 arbitral award that "the conditions under which ... [the Charter] ... was adopted show unambiguously that there was no general consensus of the States with respect to the most important provisions." Dupuy also identified the Charter as one of several resolutions "supported by a majority of states but not by any of the developed countries with market economies which carry on the largest part of international trade": *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, translated and reprinted in (1978) 17 I.L.M. 1 at 29-30, (1979) 53 I.L.R. 389 at 489 and 491.

[113] An express link to article 32 is made in paragraph 6 of HRC Res. 6/7, *supra* note 107.

[114] HRC Res. 9/4, *supra* note 107.

seeking the views and information of member-states on the implication and negative effects of unilateral coercive measures on their populations, only five states felt the need to respond.[115]

Unilateral coercive measures are also viewed by developing states as a significant barrier to the implementation of the "right to development;"[116] another third generation human right of an economic nature held in high regard by developing states. As with other new human rights, the recognition of this right has been fostered by the adoption of a General Assembly resolution containing a declaratory text, although the *Declaration on the Right to Development*[117] was not adopted by consensus, but by a recorded vote revealing 146 states in favour, 1 against (the United States), and 8 abstentions (Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden, and the United Kingdom).[118] As Australian diplomat Roland Rich has written, in an essay collection edited by Professor James Crawford, then of the University of Sydney: "The absence of consensus raises questions about the authority in which the Declaration should be held,"[119] especially when the world's largest donor, in monetary terms, felt compelled to vote against this declaration, and many of the abstaining states were significant aid donors. The main concern for these states, apart from the conceptual difficulty with recognizing collective human rights, is a fear that the provision of developmental assistance (from developed to developing state) will be seen as an obligation or legal duty under international law.[120] It has also been argued historically by several states that issues of trade, monetary policy, and multilateral development assistance should be addressed within the bodies established for these purposes, such as the World Trade Organization, the International Monetary Fund, and the World Bank.

To complete the story, it must be noted that Canada also voted, in good company, against resolutions concerning the dissatisfaction of developing countries with the geographical balance of staff hired by the Office of the High Commissioner

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[115] *Human Rights and Unilateral Coercive Measures: Report of the Secretary-General*, UN Doc. A/HRC/30 (3 July 2009). Those five states were Belarus, Costa Rica, Iraq, Spain and Ukraine, with only Ukraine having been a member of the Council, although Ukraine had voted against the adoption of resolution 9/4.

[116] See the ninth preambular paragraph of HRC Res. 6/7, *supra* note 107, to this effect.

[117] *Declaration on the Right to Development*, GA Res. 41/128, UN GAOR, 41st Sess., Supp. No. 53 at 186-187, UN Doc. A/RES/41/128 (1986). On the emergence of the right to development, see Anne Orford, "Globalization and the Right to Development" in *Peoples' Rights*, *supra* note 90 at 129-135.

[118] UN GAOR, 41st Sess., 97th Plen. Mtg., UN Doc. A/41/PV.97 (4 December 1986).

[119] Rich, *supra* note 90 at 52.

[120] After all, Hohfeldian theory has long posited that with a right, there must be a correlative duty: Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Conn.: Yale University Press, 1920) at 35-38.

of Human Rights,[121] and on resolutions concerning the use of mercenaries and private military companies,[122] and the human rights situation in Sri Lanka.[123] On only five occasions during its three-year period of membership did Canada register a vote of abstention, albeit in good company on each occasion.[124] However, a review of the official record also reveals that by the Council's sixth session in the fall of 2007, WEOG states, along with their allies in the Eastern European group, were tactically "fighting back" by promoting resolution texts on topics of interest to all members,

[121] *Composition of the staff of the Office of the United Nations High Commissioner for Human Rights*, Human Rights Council resolution 7/2 of 27 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 82-84; *Composition of the staff of the Office of the United Nations High Commissioner for Human Rights*, Human Rights Council resolution 10/5 of 26 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 19-22.

[122] *Mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, Human Rights Council resolution 7/21 of 27 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 132-134; *The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, Human Rights Council resolution 10/11 of 26 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 37-42.

[123] *Assistance to Sri Lanka in the promotion and protection of human rights*, Human Rights Council resolution S-11/1 of 27 May 2009, reprinted in *Report of the Human Rights Council on its Eleventh Special Session*, UN Doc. A/HRC/S-11/2 (2 June 2009) at 3-7.

[124] *Strengthening of the Office of the United Nations High Commissioner for Human Rights*, Human Rights Council resolution 4/6 of 30 March 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53, UN Doc. A/62/53 (2007) at 36-40; *From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance*, Human Rights Council resolution 7/33 of 28 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 166-167; *Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Human Rights Council resolution 7/36 of 28 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 173-176; *The impact of the global economic and financial crises on the universal realization and effective enjoyment of human rights*, Human Rights Council resolution S-10/1 of 23 February 2009, reprinted in *Report of the Human Rights Council on its Tenth Special Session*, UN Doc. A/HRC/S-10/2 (30 March 2009) at 3-6; *Situation of human rights in the Democratic Republic of the Congo and the strengthening of technical cooperation and consultative services*, Human Rights Council resolution 10/33 of 27 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 116-119. On the latter, the focus on technical assistance was likely the difficulty since it must be noted that a resolution concerning the serious human rights situation in the Democratic Republic of the Congo had been adopted without a vote three months prior: see *Situation of human rights in the east of the Democratic Republic of the Congo*, Human Rights Council resolution S-8/1 of 1 December 2008, reprinted in *Report of the Human Rights Council on its Eighth Special Session*, UN Doc. A/HRC/S-8/2 (16 January 2009) at 3-5.

(such as discrimination on the basis of religion and belief), with the voting records suggesting that the language of these texts reflected a more balanced approach than those that had been previously promoted.[125] This group also secured the adoption of resolution texts on the issues of good governance and anti-corruption,[126] topics for which a "no" vote by an African or Asian state should create some embarrassment, as well as resolution texts on the human rights situation in North Korea[127] and (by a close vote) Sudan[128] and on medical ethics and humane treatment.[129] Through these efforts, Canada was able to register a recorded "yes" vote in good company for the adoption of seven resolutions and one decision[130] among the 55 resolutions and seven decisions adopted by a recorded vote during Canada's three-year term on the Council. This tally also includes seven of the eleven resolutions adopted at the eleven special sessions held from 2006-2009 to address urgent situations of human rights, notwithstanding the hope expressed in the institution-building package that the texts of such resolutions be drafted "with a view to achieving the widest participation in their consideration and, if possible, achieving consensus on them."[131]

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[125] See *Elimination of all forms of intolerance and of discrimination based on religion or belief*, Human Rights Council resolution 6/37 of 14 December 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 69-74 (adopted by a vote of 29 to 0, with 18 abstentions), and HRC Res. 10/25, *supra* note 83.

[126] *The role of good governance in the promotion and protection of human rights*, Human Rights Council resolution 7/11 of 27 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 103-105, adopted by a vote of 41 to 0, with 6 abstentions.

[127] Although, on the first foray, the combined total of the opposing and abstaining states outweighed the votes in favour. See *Situation of human rights in the Democratic People's Republic of Korea*, Human Rights Council resolution 7/15 of 27 March 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53, UN Doc. A/63/53 (2008) at 118-119, adopted by a vote of 22 to 7, with 18 abstentions; *Situation of human rights in the Democratic People's Republic of Korea*, Human Rights Council resolution 10/16 of 26 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 64-67, adopted by a vote of 26 to 6, with 15 abstentions.

[128] *Situation of human rights in Sudan*, Human Rights Council resolution 11/10 of 18 June 2009, reprinted in *Report of the Human Rights Council at its Eleventh Session*, UN Doc. A/HRC/11/37 (29 June 2009) at 72-76, adopted by a vote of 20 (including Canada) to 18, with 9 abstentions.

[129] *Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of medical and other health personnel*, Human Rights Council resolution 10/24 of 27 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 90-94, adopted by a vote of 34 to 0, with 13 abstentions.

[130] *Publication of reports completed by the Sub-commission on the Promotion and Protection of Human Rights*, Human Rights Council decision 10/117 of 27 March 2009, reprinted in *Report of the Human Rights Council on its Tenth Session*, UN Doc. A/HRC/10/29 (20 April 2009) at 128, adopted by a vote of 29 to 3, with 15 abstentions.

[131] HRC Res. 5/1, *supra* note 42 at para. 127.

V. THE EVENTUAL FATE OF THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

As for the Indigenous Rights Declaration, the disagreement concerning this text that was evident at the Council's first meeting in June 2006 did not assuage concerns within the larger 192-member General Assembly, which subsequently voted in December 2006 "to defer consideration of and action" on the draft text to allow for further consultations,[132] and ultimately amended the Council's recommended text. A comparison of the declaration text as promoted by the Council in 2006 with that adopted by the Assembly in 2007[133] reveals notable revisions to articles 3 and 46 to emphasize the intended non-impairment of the territorial integrity and political unity of sovereign and independent states, and thus address concerns about the extension of self-determination rights to indigenous peoples.[134] Additional text was also added to the declaration's preamble concerning this desired respect for the territorial integrity and political unity of sovereign states,[135] while also requiring respect for regional variations as well as national, historical and cultural particularities.[136] Several grammatical tweaks were also made to the preamble and to several articles.

The altered text was eventually adopted as the Indigenous Rights Declaration in the final days of the 61st annual session of the General Assembly in September 2007,

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[132] See *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994*, GA Res. 61/178, UN GAOR, 61st Sess., Supp. No. 49 (vol. 1) at 417-424, UN Doc. A/RES/61/178 (2006) at para. 2, adopted by a recorded vote of 85 (including Canada) to none, with 89 abstentions.

[133] The declaration text is found in the annex to *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 (vol. III) at 15-25, UN Doc. A/RES/61/295 (2007) [GA Res. 61/295].

[134] These concerns were so strongly felt by African states that the African Commission on Human and Peoples' Rights felt the need to issue a non-binding "Advisory opinion on the United Nations Declaration on the Rights of Indigenous Peoples" in May 2007 in an attempt to reassure them. The Advisory Opinion is available online at: <http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf>.

[135] Those unfamiliar with the subtleties of international human rights developments may overlook the importance of the reference now found in the sixteenth preambular paragraph of the declaration to the 1993 *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 (1993), with paragraph 2 of this declaration making it clear that the right of self-determination "shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."

[136] Paragraph 23 of the declaration's preamble reads: "*Recognizing* also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration."

but again without the all-important consensus that gives strength and moral force to these kinds of non-binding political texts.[137] Canada, along with Australia, New Zealand and the United States - all four being highly developed democratic regimes with significant indigenous populations - voted against the declaration's adoption,[138] with Canada stating for the record that it continued to have:

> ... significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as a veto; on self government without recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, Member States and third parties.[139]

Note that Canada did not mention the right of self-determination, which is understandable given Canada's public acknowledgement of the right's evolving extension to indigenous peoples.[140] Canada did, however, emphasize its "understanding that this Declaration is not a legally binding instrument" and also concluded that: "It has no legal effect in Canada, and its provisions do not represent customary international law."[141] Similar understandings were expressed by Australia, New Zealand and Colombia, with the United Kingdom, Bangladesh, Guyana and Suriname also stating

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[137] GA Res. 61/295, *supra* note 132, was adopted by a recorded vote of 143 votes to 4, with 11 abstentions: UN GAOR, 61st Sess., 107th Plen. Mtg., UN Doc. A/61/PV.107 (13 September 2007) at 18-19.

[138] The texts of their explanations of vote, as well as the explanations of position and expressions of reservation provided by other states, can be found in UN GAOR, 61st Sess., 107th Plen. Mtg., UN Doc. A/61/PV.107 (13 September 2007) at 11-27. In April 2009, Australia announced that it had reversed its position and now endorsed the declaration, in keeping with a promise made during the November 2007 election which had resulted in a change of government: "Australia backs U.N. on indigenous rights" *The Age* (Melbourne) (3 April 2009).

[139] Statement of Ambassador John McNee (Canada) recorded in the verbatim record of the 107th plenary meeting of the Assembly's 61st session held on 13 September 2007: UN GAOR, 61st Sess., 107th Plen. Mtg., UN Doc. A/61/PV.107 (13 September 2007) at 12-13.

[140] See Canada's response to a request for such information posed by the Human Rights Committee in July 2005 (UN Doc. CCPR/C/85/L/CAN), during the Committee's consideration of Canada's fifth periodic report made pursuant to its reporting obligations under the *International Covenant on Civil and Political Rights* (ICCPR), *supra* note 33. The response has been made available to the public via the website of the Department of Canadian Heritage online at: <http://pch.gc.ca/pgm/pdp-hrp/docs/reponses-responses/101-eng.cfm> (unfortunately without a date, but this statement was likely provided to the Committee in October 2005). Note that the Human Rights Committee is a treaty monitoring body established by article 28 of its constitutive treaty, the ICCPR, consisting of independent experts. It is not the same body as the former Commission on Human Rights, nor the Human Rights Council.

[141] UN GAOR, 61st Sess., 107th Plen. Mtg., UN Doc. A/61/PV.107 (13 September 2007) at 13.

clearly that the Declaration is a political document and not a legally binding text.[142] I mention these matters since members of the bar have a professional and ethical obligation to avoid misleading a court (and by extension other interested persons) by omitting reference to the voting record and official explanations of vote and position (known "in the trade" as "EOVs" and "EOPs") relating to the adoption of a resolution text. Unfortunately, it is too often the case, that the political output of the UN is cited to a Canadian court as if a source of international law.

It is also interesting to note, given my earlier discussion of collective human rights, that Japan used its explanation of position to state for the record that: "While the Declaration stipulates that some rights are collective rights, it seems that the concept of collective human rights is not widely recognized as a well-established concept in general international law, and most States do not accept it."[143] This position was echoed by the United Kingdom, which stated for the record that:

> With the exception of the right to self-determination, we therefore do not accept the concept of collective human rights in international law. Of course, certain individual human rights can often be exercised collectively, in community with others. Examples would include freedom of association, freedom of religion or a collective title to property. That remains a long-standing and well-established position of my Government. It is one we consider to be important in ensuring that individuals within groups are not left vulnerable or unprotected by allowing rights of the groups to supersede the human rights of the individual.[144]

Others expressed their reservations in more nuanced and qualified terms, with Sweden stating that: "The Swedish Government has no difficulty in recognizing collective rights outside the framework of human rights law. However, it is the firm opinion of the Swedish Government that individual human rights prevail over the collective rights mentioned in the Declaration."[145] All three states voted for the Declaration's adoption, but they made these statements to express their reservations on instructions from their capitals presumably in hope that their successors, and any future users of the declaration text, would check the official record concerning its adoption.

These events also illustrate why judicial citations to earlier draft versions of political texts adopted by international bodies should be considered unwise or imprudent. An earlier draft of the proposed Indigenous Rights Declaration was indeed cited by one member of Canada's highest court, with the concurrence of another, in

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[142] *Ibid.* at 12 (Australia), 14 (New Zealand), 17 (Columbia), 22 (United Kingdom), 22 (Bangladesh), 26 (Guyana) and 27 (Suriname).

[143] *Ibid.* at 20 (Japan).

[144] *Ibid.* at 21 (United Kingdom).

[145] *Ibid.* at 24 (Sweden).

Mitchell v. M.N.R., some six years prior to the Declaration's finalization.[146] The draft at that time had been written by a sub-group of professors and experts as a proposal to states, and the specific provision cited by the judges has since undergone revision (and expansion).[147] Judicial citations to draft declarations, much like citations to draft statutes, can cause consternation among members of the bar, who rightly wonder about the message sent regarding the required extent of their legal research efforts (and the consequential impacts on the costs of legal services). For many a government lawyer, well-meaning but cautious by nature, who is tasked with giving advice to their client on the use, if any, by a Canadian court of a UN declaratory text, the *Mitchell* citation to a draft version, let alone a finalized declaration, may well have had a chilling effect. It certainly provides no comfort to a government lawyer tasked with providing a risk assessment, notwithstanding the accepted fact that the General Assembly is not a legislature and a declaration is not a recognized source of law. Canada's "citation incident" in *Mitchell* was also a factor not faced by other states that were confident that their domestic courts would recognize that declarations are statements of aspiration and political commitment, and thus faced no risk that the declaration would be used by domestic courts to interpret, alter or influence domestic law, even from a contextual perspective.[148]

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[146] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 81 per Binnie J. with the concurrence of Major J.

[147] The specific provision cited in *Mitchell* (*ibid.*) at para. 81, then numbered as article 35, provided that: "Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders." The final text of what became article 36(1) of the declaration, as found in GA Res. 61/295, *supra* note 135, provides that: "Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders" [emphasis added]. Article 36(2) further provides that: □States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right."

[148] Sadly, the Ontario Court of Appeal has demonstrated the risk of confusion in Canada, referring to the declaration as "a convention, which Canada voted against and has not ratified" (even though the declaration is clearly not a convention and cannot be ratified), but then after recognizing that "international law often is of assistance in the interpretation of domestic legal and constitutional norms," the Court holds that the general language of this political text does not "provide any meaningful assistance to the resolution of the specific issue of Canadian constitutional law presented:" *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [2008] 1 C.N.L.R. 71 at para. 46 (Ont. C.A). Such contortions could have been avoided if the court had simply recognized that the declaration is not a source of law, but a source of policy and aspiration, adopted by a political organ of the UN to guide the actions of those states that voted in favour.

Subsequent events, however, have suggested that a state's vote in favour of a declaration within the General Assembly can encourage some domestic courts to cite the text, depending on that court's willingness (or unwillingness) to distinguish between international law and policy, as illustrated by the judicial citation to the Indigenous Rights Declaration in a significant Mayan land rights ruling released by the Supreme Court of Belize only a month after the declaration's adoption.[149] In this judgment, Belize's Chief Justice Abdulai Conteh (a former Sierra Leonean politician with international ambitions)[150] writes:

> Also, importantly in this regard is the recent Declaration on the Rights of Indigenous Peoples adopted by the General Assembly of the United Nations on 13 September 2007. Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them. This Declaration – GA Res 61/295, was adopted by an overwhelming number of 143 states in favour with only four States against with eleven abstentions. *It is of some signal importance, in my view, that Belize voted in favour of this Declaration.*[151]

The Chief Justice then goes on to cite the very provision of the declaration causing the greatest consternation among states, namely article 26 on lands, territories and resources, describing this provision as being "of especial resonance and relevance in the context of this case, reflecting, as I think it does, the growing consensus and the general principles of international law on indigenous peoples and their lands

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[149] See Cal et al v. Attorney-General of Belize and Minister of Natural Resources and Environment; Coy et al v. Attorney-General of Belize and Minister of Natural Resources and Environment, Judgment of 17 October 2007, Claims Nos. 171 and 172 of 2007 (Supreme Court of Belize), available through the University of Arizona College of Law, online at: <http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf>.

[150] Conteh is a former Member of Parliament, Minister of Foreign Affairs, Minister of Finance, Attorney-General and Minister of Justice, First Vice-President and Minister of Rural Development of the Republic of Sierra Leone. He was part of the Siaka Stevens government (1971-1985), which was criticized for corruption, dictatorial methods, and the deaths of political opponents, and served as Attorney General and Minister of Justice during the treason trials of the late 1980s concerning a failed coup against Stevens' successor. Conteh later fled Sierra Leone and unsuccessfully sought asylum in Britain: Michael Durham, "African leader's asylum plea fails" *The Independent* (31 July 1992) n.p.; "Conteh to go; Abdulai Conteh" *The Times* (London) (25 July 1992) 3. He later settled in The Gambia, but after conflict with the Yahyah Jammeh government, he went to live in exile in the United States. He has served as Chief Justice of the Supreme Court of Belize since 2000. Information on his background and career highlights can be found circulating on African websites as a result of his unsuccessful campaign for the chairmanship of the Commission of the African Union in early 2008.

[151] *Cal v. Attorney-General of Belize*, *supra* note 148 at para. 131 [emphasis added].

and resources,"[152] but citing no authority to support this conclusion.[153] Chief Justice Conteh then concludes by stating: "I am therefore, of the view that this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. *Belize, it should be remembered, voted for it.*"[154]

These statements help explain why University of Arizona law professor S. James Anaya, who assisted with the Belize case and currently serves as the Human Rights Council's Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, has stated that "this seminal judgment constitutes the most far reaching application of international law by a domestic court to recognize the rights of indigenous groups to their traditional lands and resources."[155] Ironically, this "far reaching" judgment also helps explain why, with hindsight, four common law countries with democratic regimes and significant indigenous populations may have felt compelled to vote against the Declaration (although given the debate raging within the United States concerning judicial citation to foreign and international law sources,[156] we are unlikely to see a Justice of the U.S. Supreme Court cite a mere declaration). But if a trend develops of domestic judges citing UN resolutions in lawsuits brought against governments in domestic courts, whether or not with reference to voting records, statements of understanding and explanations of vote, more governments will feel the need to subject the annual onslaught of UN resolutions

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[152] *Ibid.*

[153] For evidence of state concern and opposition to article 26, one can refer to the explanations of vote and explanations of position delivered by state representatives on the day of the declaration's adoption: UN GAOR, 61st Sess., 107th Plen. Mtg., UN Doc. A/61/PV.107 (13 September 2007). With respect to opposition to article 26, note the statements of Australia (at 11), Canada (at 12-13), New Zealand (at 14) and the United States (at 15), and with respect to concerns, note the clarifications provided by Norway (at 22), Mexico (at 23), Sweden (at 25), and Thailand (at 25). Such statements indicate the absence of actual state practice to support the conclusion that a rule of law exists.

[154] *Cal v. Attorney-General of Belize*, *supra* note 148 at para. 132 [emphasis added].

[155] See the University of Arizona College of Law, online at: <http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/index.cfm?page=advoc>. Professor Anaya is the James J. Lenoir Professor of Human Rights Law and Policy at the Rogers College of Law at the University of Arizona, and actively involved in several prominent indigenous rights cases, brought against states, through his direction of a legal clinical program for students and affiliated attorneys. He is also a widely-respected scholar on international indigenous rights: see, for example, S. James Anaya, Indigenous Peoples in International Law, 2nd ed. (Oxford: Oxford University Press, 2004).

[156] See further James Allan & Grant Huscroft, "Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts" (2006) 43 San Diego L. Rev. 1.

to greater legal scrutiny and an intense "legal scrub."[157] As one who trains law students interested in international law careers, perhaps I should endorse such a trend as a job-creation technique, but I fear that over-lawyering the annual proceedings of an international organ such as the UN General Assembly overlooks the cooperation to be achieved from a diplomatic perspective through the use of looser language and intentional vagaries within international texts that are designed to engender consensus, widen the tent, or simply "save face."

CONCLUSIONS

The UN Human Rights Council remains a new institution, and conclusions about its future prospects at this time are by necessity premature. Nevertheless, one can note that having spent much of its first year attempting to reach a consensus with respect to the Council's functions and future priorities, the Council remains guided by an "institution-building package" that was eventually adopted over the objections of several states, including Australia, Canada, Israel and the United States. It also appears from this review of the Council's substantive activities for its first three years that the goal to create a new, reinvigorated and objectively-principled body distinct from the former Commission remains unmet, although it must be remembered that the General Assembly resolution providing for the Council's creation also provides for a five-year review to take place in 2011.[158] In preparation for this review, assessments of the Council's activities in its formative years are both useful and timely, with this particular assessment seeking to provide an additional perspective by combining a review of the Council's activities with a parallel review of Canada's experience as a Council member from 2006-2009 in light of Canada's role as the great dissenter throughout this period.

It is true that much of the discussion within the popular media and among non-governmental organizations concerning Canada's activities within the Council have focused on Canada's opposition to a tranche of resolutions focused on Israeli actions in the occupied territories in the Middle East. These resolutions have been sponsored by state members of the Arab League and the Organization of the Islamic Conference, who have worked with the benefits offered by bloc politics to focus on Israel at a time when other serious human rights situations in the world were also deserving of Council attention. But this focus on Israel also deflects attention from a deeper and a seemingly unbridgeable divide between member states of the Council, and between developed and developing countries in general in various multilateral fora, concerning the very nature of human rights and the balance between individual rights and the rights of the collective, whether those rights be of an economic or religious nature.

[157] Treaty texts are subjected to an intensive, line-by-line, legal "scrub" because they are intended to be legally binding, while resolutions are reviewed by lawyers guided by a legal risk assessment that takes into account the fact that resolutions, including those containing declaratory texts in an annex, are non-binding political texts.

[158] As noted above, *supra* notes 22 and 23.

From this review of the official record for the Council's activities for 2006-2009, it appears that the underlying issue at stake is whether an intergovernmental body, such as the former Commission or the present Council, should focus its efforts on the bedding-down of the rights that we have, thus focusing on implementation, country-specific action and accountability for non-performance, or should the Council, now re-constituted to reflect the greater geopolitical weight of Asian and African states, continue with the standard-setting activities of the past by pushing for the development of new rights to address perceived gaps in a system viewed as over-focused on individual rights at the expense of rights of a collective nature? The continuing division of views on this underlying question can be seen reflected in the recorded vote tallies for the Council's activities, with the voting pattern of 33 or 34 votes to an opposing group of 11, 12 or 13 votes demonstrating the geopolitical realities at play within both the Council and likely the UN as a whole. Today, developing countries, supported by China and Russia, are able to use their numbers and cross-regional appeal to counter the weakening influence of European states[159] and that of the "Others" in their attempt to focus global action on their priorities and objectives. A question for future research is whether the membership of the United States on the Council from 2009 on will make a difference.Some commentators have placed much emphasis on the Council being established as the premier human rights body within the UN, with some observers leaving the impression that this may be reason alone for Canadian engagement at the highest levels.[160] However, one must never lose sight of the plain fact that the Council is not (to borrow the words of Professor Bossuyt) "a tribunal of impartial judges, not an academy of specialists in human rights, nor a club of human rights activists,"[161] but rather a body of government representatives instructed

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159 See further, Richard Gowan & Franziska Brantner, *Global Force for Human Rights? An Audit of European Power at the UN* (London: European Council on Foreign Relations, 2008).

160 This view is reflected in the reports of Canada's Standing Senate Committee on Human Rights, which views the Council as "the UN's primary forum for cooperation on human rights issues" and has recommended the appointment of a Canadian ambassador on human rights to serve as a high-profile "bridge-builder": Standing Senate Committee on Human Rights, *Canada and the United Nations Human Rights Council: At the Crossroads: Interim Report* (Chair: Raynell Andreychuk) (May 2007) at 12 and 51, repeated in *A Time for Serious Evaluation*, *supra* note 82 at 2, 21 and 38. However, on building bridges, Gowan & Brantner point out that "trying to be all things to all men rarely proves to be a successful strategy" (*ibid.* at 7) and efforts at "bridging" risks reduces the bridge-builder "to amiable impotence, emphasizing consensus over substance – and courting irrelevance" (*ibid.* at 55), especially when the two opposing sides decide to marginalize the bridge-builder and deal directly with each other's demands in negotiations. It has also been noted that EU countries are working hard to cultivate cross-regional relationships, but "for some, this is a sign of weakness, a reaction by western countries to a weakening of their position in the Council": Allehone Mulugeta Abebe, "Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council" (2009) 9:1 Hum. Rts L. Rev. 1 at 21.

161 *Supra* note 14.

by capitals that "makes recommendations" and "serves as a forum for dialogue."[162] It is also likely to remain a political body controlled by states with very different political agendas, thus making hopes for consensus and universality on contentious matters impossible, particularly as polarization between "the West and the Rest" sets in. The Council is a body mandated to promote the protection of human rights, but one should not oversell this role at the expense of recognizing its innate institutional inabilities to serve as a credible and coherent voice for holding all states accountable for the domestic enforcement of internationally-agreed minimum standards.

As for the legal dimension and the message to be shared with lawyers and judges, it should be clear from this review of the Council's and Canada's activities for 2006-2009 that caution needs to be exercised before placing unbridled reliance on the various end-products of a UN body. Such caution is demonstrated when lawyers check the voting records, the explanations of position provided by state representatives, and the wider context in which the matter arose, as well as any relevant historical antecedents, before making reference to a UN resolution as if all UN output was a source of international legal obligation or even evidence of world opinion. International law is a discipline that, like others, has rules to ensure rigour, with these rules evidencing a need for a distinction to be drawn between a source of legal obligation and a source of policy development and political commitment. Neither the General Assembly nor the Human Rights Council serve as law-making bodies, and neither is mandated by Canada's domestic constitutional order to make law for Canada. Legal and judicial citation to either the Council's or the Assembly's output, should therefore evoke caution and demands for further analysis, whether this output be in the form of resolutions, decisions, statements, or declarations, with arguments that the contents of a declaratory text represent rules of customary international law requiring more than simply the circular citation to that declaratory text. Evidence of state practice remains necessary within an international legal system still dominated by states, notwithstanding the influence of non-governmental forces on the making of international law and policy.

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162 See GA 60/251, *supra* note 6 at paras. 3 and 5.