THE SHIFT FROM THE HUMAN RIGHTS COMMISSION TO THE HUMAN RIGHTS COUNCIL. A BUTTERFLY OR A CATERPILLAR IN LIPSTICK?

by Irene Martinetti

On March 15th 2006, the General Assembly of the United Nations approved, 170 to 4 votes against (US, Israel, Marshall Islands and Palau) and 3 abstentions (Belarus, Iran and Venezuela), the draft resolution A/60/L.48 creating the Human Rights Council. The newly born Council, which is meeting in Geneva on June 19th, is being constituted to replace the Human Rights Commission, for which reform has been long overdue. The agreement on the constitution of a new UN organism for the promotion of human rights comes with the opposition of UN’s major contributor, the US, who voted against the establishment of the Council. To use the expression of US Ambassador to the UN John Bolton, the reform of the Human Rights Commission should have seen the birth of a butterfly but, instead, the process produced a “caterpillar in lipstick.”

Despite US criticism (the US did not bid for election to the Council), this new organ does represent important progress towards a better and fairer promotion of human rights. Most of all, it allows for a considerably dignified and rather swift replacement of the Human Rights Commission with ample opportunity for revision and reform in the near future. In five years, in fact, the Human Rights Council will be considered for an “upgrading” to principal organism of the UN, potentially rising at the same level as ECOSOC and the Security Council.

The Commission has been an extremely politicized and rather ineffective mechanism but some aspects of its work are very valuable and will hopefully be strengthened by the new Human Rights Council. It has provided an important forum for human rights discourse. During its sessions, more than 3000 participants, between national human rights institutions, UN agencies, and NGOs participate to discuss the situation of human rights protection worldwide. Resolutions of the Commission, even though it is very difficult to establish the efficacy of their impact, are important as statements of the international community’s concerns on relevant issues. In its 60 years of existence, the Commission has carried out the important task of formulating the body of human rights treaties and standards that is available today. A sometime lengthy process, it has nevertheless helped to create a solid legal framework for the protection and promotion of international human rights. A further important contribution introduced by the Commission has been the “Special Procedures” system. Finally, the Commission has also worked towards widening the spectrum of the rights on its agenda to include not only civil and political rights but also economic, social, cultural rights and the right to development. In order to better monitor and help states to implement such rights, the Commission has fostered the creation of “Special Rapporteurs.”

The recently approved Human Rights Council slightly departs from the first intentions of reform as enshrined in Kofi Annan’s “In larger freedom” document. The Council is a smaller body, but not quite as small as originally envisaged, in particular by the US that had hoped for a 20 members body. It has in fact 47 members, as opposed to the Commission’s 53. Members are selected on the basis of regional distribution and representation within the UN. In an attempt to bring oxygen to the body, the members of the Council shall serve for a
period of a maximum of six years when elected in two consecutive terms. Any UN member can be elected, individually and by secret ballot. The proposal of a two third majority election has been abandoned for an absolute majority. No threshold has been put in place to obstruct admission of human rights violators to the Council. Nevertheless, when electing the new members, states need to take into account the human rights records of the candidate countries and the countries elected must undergo severe scrutiny under the periodic review mechanism. The idea of a universal periodic review mechanism envisions that the fulfillment by each State of its human rights obligations and commitments will be monitored in a manner that ensures universality of coverage and equal treatment with respect to all States.\(^5\)

Will the newly constituted Human Rights Council achieve the hard objective of “mainstreaming” human rights? Or will it simply be a slightly improved copy of the politicized Commission? First of all, a very significant and far reaching change brought by the new constitution of the Council is the shift of UN’s main human rights body from functional Commission under the aegis of the ECOSOC to an organ created by, and that will respond directly to, the General Assembly. The importance of this shift lies in the fact that human rights issues will be henceforth brought much closer to the international political and security fora, recognizing that human rights are indeed deeply intertwined with questions of international peace and security.\(^6\) Such an acknowledgment will be crucial in pushing the Human Rights Council right at the centre of UN’s efforts to ensure a more peaceful and just world.

In terms of credibility, the presence of abysmal human rights violators sitting on the Commission has been indeed damaging to its work. Nevertheless, it is not the only reason why the Commission often failed to put forward strong condemnations of human rights abuses. Democratic governments are also often reluctant to condemn other countries when doing so would hurt their own interests. Notwithstanding US criticism, the Council represents a serious attempt to address the problem. First of all, it should be noted that in establishing the Commission there had not been any declaration that a \textit{conditio sine qua non} to be a member of the body should have been good human rights records. In this case, it is set in the draft resolution that countries, in voting for membership, should keep this condition in high consideration. Countries bidding for the council make public pledges during their campaign regarding their human rights records and commitments, such as abiding to treaty obligations and to the Council procedures, thus offering more precise accountability standards once elected. The absolute majority, 96 votes out of 191 of the members and abstentions would count as negative, is not as a high a threshold as a two-third majority but it is still a better guarantee than with the Commission where there is no opportunity to challenge the election of inappropriate states.\(^7\) In addition, even if regional groups may nominate a closed slate, each individual country must win an absolute majority of the full UN membership, hence a regional group will not be able to determine the choice of the members of its region as it was usual with the Commission.

The Council will be then taken to “revision” in five years and, if agreed, made a principal organ of the UN, and elected with a two-third majority. As a last resort, the draft resolution also provides that “the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member that commits gross and systematic violations of human rights,” thus ensuring that states continue
promoting and protecting human rights during their time on the Council. The resolution also contains provisions that should dissuade countries with poor human rights records from bidding. Unlike with the Commission, it requires as a positive obligation that members of the Council actively cooperate with the Council and its Special Rapporteurs. Council members are the first to be put under scrutiny under the system of universal review, thus discouraging the practice of double standards.

The results of the election of the Human Rights Council on May 9th confirm that its electoral process and the new provisions aimed at discouraging abysmal human rights violators from accessing to the Council have indeed proven effective but only to some extent. The new Council will in fact be composed of a prevalence of states professing a solid commitment to democracy. The percentage of member states on the Council belonging to the Community of Democracies (CD) has risen to 79 per cent as opposed to 62 per cent of the Human Rights Commission membership in 2005. The majority of the Council members have been declared “free” by Washington based non-partisan Freedom House. Most of the countries with very poor human rights records, which had contributed to discrediting the Human Rights Commission in the past, such as Sudan, Zimbabwe, Syria and Nepal, were discouraged from bidding by the new provisions along with other infamous human rights violators, North Korea, Burma or Turkmenistan. The election also saw the defeat of Iran and Venezuela. Nevertheless, such a defeat should not be seen as a merit of the election system but rather of unsuccessful campaigning by the two countries. In fact, the election system did not prevent the successful accession to the Council of countries that, according to Freedom House, exhibit disputable human rights records such as Cuba, China, Saudi Arabia, Tunisia, Pakistan, Algeria, Cameroon, Azerbaijan and the Russian Federation. Provisions for secret ballots shield governments from accountability for their votes, giving rise to opportunities for horse-trading and vote negotiations.

This Council is making a considerable effort to neutralize the politicization and double standards of the Commission but much will depend on to what extent the democratic countries will be able to prevent likely blocking of action by the poor human rights record countries elected to the Council. The election outcome notwithstanding, the Human Rights Council still has a good chance to become an effective mechanism if vital issues such as the shaping of an efficient universal periodic review system and the promotion of civil society engagement will be addressed promptly. The universal periodic review system should be formulated and put in practice as soon as possible and, in order to address the presence on the Council of countries with disputable human rights reputation, a strong mechanism of accountability for member countries should be put in place swiftly as this will allow for the Council to become a platform of engagement and betterment of its members’ human rights records rather than a forum to fight political battles, as it was the case with the Commission. It is imperative that members with the shortest terms (one year) be reviewed as soon as possible. Most of the short-term members on the Council are human rights abiding countries and reviewing them first will contribute to setting higher standards for the remaining members.

In the United Nations universal membership system, the objective of an instrument such as the Human Rights Council should be to promote the election of countries with better-than-average records so that they themselves can improve and be an example and
encouragement to other countries in their regions.\footnote{7} The UN Human Rights Council seems to be moving towards a better direction than its disputed predecessor, the Human Rights Commission. However, a great deal more needs to be initiated at the upcoming meeting on June 19th to ensure effectiveness, accountability and to prevent likely spoilers from transforming it into a feeble institution.

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The Human Rights Council is composed of 47 members (listed with year of term end) \\
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Western European & Other States: Canada (2009), Finland (2007), France (2008), Germany (2009), Netherlands (2007), Switzerland (2009) and United Kingdom (2008). \\
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\footnote{2}{“United States: A caterpillar in lipstick?; The UN’s Human Rights Council,” The Economist, Vol. 378, Iss. 8467, 4 March 2006.}
\footnote{3}{“Meeting the challenge: Transforming the Commission on Human Rights into a Human Rights Council,” Amnesty International, April 2005.}
\footnote{4}{Kofi, Annan, “In Larger Freedom: towards Security, Development and Human Rights for All,” report of the Secretary General of the United Nations for decisions of all Heads of States and Governments in September 2005.}
\footnote{5}{United Nations GA A/RES/60/251, Sixtieth session, “Resolution adopted by the General Assembly [without reference to a Main Committee (A/60/L.48)] 60/251. Human Rights Council,” 3 April 2006.}
\footnote{6}{John, Pace, “The UN Human Rights Council: Opportunities and Challenges,” Jurist, 3 April 2006.}
\footnote{7}{Mary, Robinson, “Human Rights: A Needed UN Reform,” International Herald Tribune, 2 March 2006.}
\footnote{8}{John, Pace, “The UN Human Rights Council: Opportunities and Challenges,” Jurist, 3 April 2006.}
\footnote{9}{See table for a complete list of the newly elected members of the Human Rights Council.}
\footnote{11}{Lawrence, C. Moss, “Will Human Rights Council Have Better Membership?” Human Rights Watch, April 21, 2006.}