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Balakrishnan Rajagopal
Massachusetts Institute of Technology

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LIPSTICK ON A CATERPILLAR? ASSESSING THE NEW U.N. HUMAN RIGHTS COUNCIL THROUGH HISTORICAL REFLECTION

Balakrishnan Rajagopal*

Several months ago, during the finalization of the plan to replace the U.N. Commission on Human Rights with the new U.N. Human Rights Council, the U.S. Ambassador to the U.N., John Bolton said with characteristic flourish, “We want a butterfly. We’re not going to put lipstick on a caterpillar and declare it a success.” Is the new U.N. Human Rights Council, which replaced the Human Rights Commission a butterfly or a caterpillar (with or without lipstick)? Bolton’s pungent remark rests on three underlying assumptions: first, U.N. reform was urgently needed in the human rights field because its predecessor, the U.N. Commission on Human Rights, was a failure; second, the cause of failure was the takeover of the Commission by undemocratic and repressive States and the resultant hijacking of the human rights agenda; third, the best way to make the U.N. effective and legitimate in the human rights field was to restrict the membership of its premier body, i.e., the Council, to a handful of liberal democratic States and have them act as the custodians and enforcers of human rights. Bolton’s critique of the Commission (if not his language) and his vision to go forward have been shared widely by many academics, policy specialists and western international non-governmental organizations (INGOs) that specialize in human rights advocacy. Indeed, now the new Council is being harshly criticized for its failure to act swiftly to condemn the atrocities in Darfur and for what the West sees as its relentless focus on Israel’s human rights violations. The momentum created due to this rare convergence of views between the ‘good, bad and the ugly’ of human rights NGOs, Western States and the likes of John Bolton, ended up making U.N. reform happen rapidly in the human rights field, ahead of U.N. reform urgently needed in so many other domains, including at the Security Council or the Secretariat. While the initiation of any reform at the U.N. could be welcomed, it is useful to ask if the assumptions on which the reform was based are in fact sound. For if they are not, the reform of the Commission and the creation of the Council could well be a ‘caterpillar with lipstick’ and fail to achieve the purpose of the reform, which is to make the U.N.

* Ford International Associate Professor of Law and development and Director, Program on Human Rights and Justice, Massachusetts Institute of Technology, Cambridge, MA. I am grateful to Makau Mutua and Henry Steiner for comments on this draft. I am solely responsible for any errors.
more effective and legitimate in the human rights field. The reform needed depends on the correct diagnosis of the problem with the U.N. Commission.

**DID THE U.N. COMMISSION fail?**

The first assumption that the U.N. Commission failed in the human rights field, is seriously wrong. Much depends on what was expected of it when the Commission on Human Rights began its operation in 1946, when it is safe to say that the Commission was not expected to receive any complaints from human rights victims, discuss grave human rights crises in general, or assess threats to human rights from multiple sources, as it came to do starting in the late 1970s. In one of its earliest official acts, the Commission declared famously that it had no right to receive any complaints relating to any human rights violation committed in any State. The largely Western composition of the Commission did not lead the Commission to act in favor of human rights, contrary to current beliefs that it is the recalcitrant Third World States which prevented the Commission from acting effectively. Indeed, the leading Western countries including the U.S. treated the Commission with utter disdain and ensured that its wings would be clipped right at the start, despite the stellar role played by Eleanor Roosevelt in the drafting of the Universal Declaration of Human Rights. For example, the West consistently voted against any attempt by the Commission to put the most important human rights issues then, of racial discrimination, apartheid and the realization of the right to self-determination of colonized countries. The colonial powers were afraid of the U.N. shining a light on their own violent and repressive rule across the world from Kenya to Malaya, which were witnessing tremendous resistance and repression. They ensured that the U.N. Human Rights Commission would not discuss the human rights issues in any colonial territory. The U.S., for its part, was dominated by conservative Southerners in its foreign policy in general, and did not want the U.N. to focus attention on its own problem of racial discrimination, Jim Crow laws and the generally abusive treatment of its own minorities. Several leading African-Americans such as Walter White, W.E.B. DuBois and Charles Houston of the NAACP, Mordecai Johnson of Howard University, and Mary McLeod Bethune, founder of the National Council of Negro Women, participated as activist-observers at the Dumbarton Oaks and San Francisco conferences that gave birth to the United Nations, and subsequently attempted to use the U.N. Human Rights system to combat racial discrimination. Though this effort was not successful, it led to a serious isolationist backlash from the conservative foreign policy establishment and led the United States to assume an attitude of hostility to international human rights mechanisms and treaties which, barring minor historical deviations has remained consistent.
As a result of the hostility and the lack of support from the West and the politicization of the human rights agenda by the Soviets, the Commission remained paralyzed until the 1960s except for its work in drafting the first human rights treaties. Change began with the entry of newly independent countries of the Third World into the Commission, from 1967, and once again in 1979. The agenda of the Commission began to change, with a direct focus on racial discrimination, colonialism, apartheid in South Africa, and in later years, the Israeli occupation of Arab lands. Once these countries were put on the agenda, it was hard to argue with the logic of introducing more countries, and complaints about them, into the agenda.

But for the Third World countries, the U.N. Commission was no failure; rather it provided a very important forum for leveling a moral critique of the world order based on a rejection of colonialism, racial discrimination and a struggle for equality. Such struggles for self-determination and equality, Michael Ignatieff once noted, form the roots of the modern human rights movement, and the U.N. Human Rights Commission was an important venue in that struggle. Having said that, it should also be noted that the Third World countries gradually began to abuse their dominance at the Commission, especially starting in the 1970s when North-South politics was quite intense, to hide their own increasingly bad human rights records. But it does not take anything away from the simple fact that it was the Third World bloc that initially made the Commission active on the biggest human rights issues of the day. One must give credit where it is due.

In addition, as most students of human rights know, the Commission also played a central role during those early years, in standard-setting for the world through the drafting of major human rights treaties, and several declarations, principles and other forms of soft-law which had a major impact on national legal systems around the world. On the whole it is very hard to conclude that the Commission was a failure until the 1970s, judged from the perspective of those who needed it the most – the abused people of the Third World. Indeed, one could say that the Commission had contributed significantly to the resolution of the major political questions until the 1970s, which revolved around the end of colonialism and the emergence of new nation-States in the Third World, and the subsequent competition between the U.S. and the Soviets for their affiliation – and was the principal mechanism for the elaboration of human rights standards.

The major political question of the 1980s was not colonialism anymore, but the Cold War: how to end it and how to handle its aftermath. The Commission’s record during this period was mixed. At the Commission, the 1980s proved to be more contentious; established coalitions of States at the Commission began to break down, while the Commission began to be more pro-active by examining the individual records of more countries, and
adopted measures of censure. Going beyond the usual targets of South Africa and Israel, the Commission censured countries like Chile, Kampuchea (as it was then called), Iran and Afghanistan. There was a hardening of the East-West and North-South divide, as seen in the voting on issues (such as right to development) as well as on countries (such as Iran). Meanwhile, the U.S. attitude to the U.N. also hardened, as exemplified by the attitude of Jeanne Kirkpatrick, President Reagan’s ambassador to the Commission, who called the Universal Declaration of Human Rights a “letter to Santa Claus.” While the Commission continued its standard-setting role, its handling of individual complaints and its increasing use of ‘targeted resolutions’ criticizing specific countries began to be arbitrary and inconsistent, and politicized by the Cold War. This, coupled with an increasing ‘thematic’ focus on Third World-friendly issues such as the ‘right to development’ led many American scholars and policy makers to conclude that the Commission was biased against the West. This belief was strengthened by the hostility of the Reagan administration towards the U.N. in general, and towards the Commission in particular. However, in the eyes of the Third World, which had come to include not only States but transnationally active liberation and democracy movements in places such as South Africa, the Commission began to appear to have a Western and anti-Third World bias. The Commission passed almost no country-specific resolution against any Western country, as all of its attention was focused on small, repressive Third World countries that had the misfortune of being caught up in the maelstrom of the formal end of the Cold War – countries such as Cambodia or El Salvador. Indeed, countries like these remained continuously on the Commission’s agenda during the 1990s. The question of whether the U.N. Commission failed during the 1980s in turn depended on the political views of who was asked, but unlike the 1960s and 1970s, the Third World countries no longer looked at the U.N. Commission as a weapon of the weak, but other non-State actors including transnational social movements in fields such as women’s rights, were beginning to influence the work of the Commission.

The major political question during the 1990s was globalization, including the institutionalization of the WTO, and the political backlash against it from below in many Third World countries. The Commission’s agenda continued to suffer from the politicization that characterized its work during the 1980s, and continued to focus only on small Third World countries such as El Salvador and Cambodia which lacked the power to stop the Commission from censuring them. But simultaneously, the Commission began to address the human rights implications of globalization more actively, by resorting to special mechanisms to investigate a range of issues from housing rights to education. The Sub-Commission on Human
Rights, a subsidiary body of the Commission, consisting of independent experts, also began to address the human rights impact of global economic instruments (such as the proposed Multilateral Agreement for Investment, which was stopped by a global grassroots campaign assisted by critical reports from the Sub-Commission) and institutions (such as the WTO). Increasingly, it was clear that the U.N. Commission was once again becoming a terrain of contestation between the losers and winners in the global order, but who were no longer strictly organized according to earlier statist classifications such as the West, East or the Third World. For the U.S., this proved to be a dilemma; on the one hand, human rights (and democracy) had emerged as key terms in the political vocabulary of the post-Cold War order; on the other hand, the Commission was seen to be out of control, and opposing the key doctrines and institutions of newly hegemonic neoliberal economic order after the collapse of the Soviet regime, using the very language of human rights.

In recent years, before the formal replacement of the Commission, the major political question had enlarged to include the war against terror since 9/11. The Commission’s formal response to the war on terror launched by the US and its allies was quite toothless, as it did not handle complaints or pass any resolution cautioning the US against rolling human rights back. The Commission and the U.N. Commissioner for Human Rights had very little input into new security bodies that were functioning in virtual secret, violating human rights with impunity, such as the U.N. Security Council’s Counter-Terrorism Committee. Even though the Commission’s subsidiary bodies and special mechanisms were contributing to a criticism of the war against terror, it was too little and too late and the Commission had lost its sources of support. For the U.S., the Commission was a source of deep annoyance, contributing to a global critique of the U.S. strategies in the war against terror and on globalization, while allowing too much political space for so-called Third World issues, such as economic and social rights. For its close allies such as Israel, the Commission had always been its nemesis, where a condemnation of Israel for its practices and policies had long been on the agenda. It was ready to see the Commission disappear. For the Third World States, the Commission had proved to be less useful as earlier Third World coalitions and the political solidarity on which they rested, had melted away. Indeed, with their own internal problems, growing democratization and globalization of dissent, states like India which are in fact liberal democracies, had come to see the Commission as a source of problems. This was a turn around for India, which had initiated the human rights revolution by putting the issue of the treatment of Indian nationals in apartheid South Africa on the U.N. agenda in 1946.
But an analysis that focuses solely on State perceptions of the Commission to judge if the U.N. Commission failed, and one that focuses on the Commission and ignores its multiple mechanisms, will miss important and tectonic shifts in the politics of human rights. The politics of human rights went far beyond formal State politics by the 1990s, and for most non-State actors including social movements, the U.N. Commission's mechanisms including the Sub-Commission provided important arenas of politics.

To sum up, the question of whether the U.N. Commission failed is a complicated one, which can yield many answers depending on who is asked, and what was expected of the Commission from the many actors who were its members and users.

**WAS THE U.N. COMMISSION HIJACKED?**

Since the early 1980s, the U.S. has alleged that the Commission is biased against it and in favor of the Third World. As 'proof', the U.S. and the various defenders of this position have pointed to two factors: an agenda bias, which shows an excessive tilt in favor of Third World issues such as right to development; and an enforcement bias which focused excessively on the record of Israel in particular. As noted in the beginning of this essay, the same charges are being leveled against the new Human Rights Council now. The Commission's ‘targeted’ resolutions against countries had indeed focused on Israel and South Africa over the years, but that was a reflection of the terrible human rights records of those countries, and the expansion of the Commission to admit Third World States from 1967 who began introducing issues that the previous West-dominated Commission had seemed unable or unwilling to do. During its lifetime, almost 30% of the Commission’s resolutions had reportedly concerned the human rights in Palestine and occupied territories of Israel. This figure is often cited as proof that the U.N. Commission had indeed been hijacked by a hostile Third World. The hijacking of the Commission by an undemocratic and repressive alliance of the Third World States is then seen by many in the U.S. as a cause for the failure of the Commission.

There are several problems with this analysis. First, as we have seen, there are serious questions about how to judge the ‘success’ or ‘failure’ of the Commission. Estimations of both depend on the politics of human rights during particular historical moments in the evolution of the Commission, and on the changing nature of the expectations of member-States and the NGOs and others who filed complaints and interacted with the Commission. From this perspective, the Commission can only be as successful as the majority of its members intend it to be. That in turn depends on the issues and countries against which the Commission’s majority of members are willing to proceed, which is a matter of power as well.
Strong States have usually avoided condemnation at the Commission, and this pattern can be seen during all of the Commission’s history, and this pattern is unlikely to change in the new Council. The five permanent members of the Security Council have never had a resolution adopted against them in the U.N. Commission, despite the lack of a formal ‘veto’ mechanism at the Commission. Almost none of the other major middle powers such as Japan or India have been condemned either. As we have seen above, the Commission has responded differently in addressing the politics of human rights during its different stages of evolution. The focus on South Africa and Israel came out of the simple fact that the Commission – along with the ECOSOC and the General Assembly – was one of the arenas where the Third World could bring in issues of racial discrimination and self-determination, as the most powerful U.N. organ, the Security Council, was unavailable due to the veto powers of the U.S. and other allies of Israel and South Africa.

In other words, the agenda of the Commission depended in part on what was on the agenda of other U.N. organs such as the Security Council. Indeed, it is for this reason that it is very doubtful whether the reform of the Commission would lead to its improvement – in the absence of parallel reforms of other U.N. organs. The new Council is likely to operate in much the same way as the Commission, unless the numerical superiority of Third World States in the world is neutralized by drastically cutting down the size of the Commission. In its absence, the new Council may not be any less ‘biased’ against Israel – indeed, one of the earliest acts of the Council in June 2006 was to pass a critical resolution on Israel and ensure that Israel will continue to remain on its agenda in every meeting in the future, thus continuing the practice of the Commission which had a similar procedure against Israel.

Thus, the question of whether the Commission had been hijacked by the Third World is to bark up the wrong tree. The politics of human rights at the Commission is tied to the numerical superiority of Third World States and the politics of the international system elsewhere, including at the Security Council. The agenda of the Commission simply reflected the moral demand for the political recognition of multiple forms of human suffering, which were not being recognized elsewhere. In that sense, the Commission was always a weapon of the weak, either for newly-independent countries in the 1960s, or the global women’s movement of the 1980s. In the absence of other venues such as the Security Council, where the search for justice could go on, the Commission provided one of the few remaining global venues for the weak. So long as Third World States remain numerically superior, it is not possible for an international organization – whether
the Commission or the new Council – to entirely escape from the politics of the majority.

**Small is Beautiful?**

To deal with this problem, the U.S. administration had tried to ensure that the new Council would consist of a much smaller number of States (“around 20”, according to Ambassador Bolton), who would be further subjected to elimination by a strict application of the criterion of liberal democracy, so that the member-States would be either from West or be pliant allies of the West. It failed to do so, and this, among other reasons, was why the U.S. voted against the U.N. resolution that established the new Council. The Commission’s membership had been 53 States, selected on the basis of geographical representation. The new Council’s membership has been reduced to 47, done mainly by reducing the European States and increasing the African and Asian States, but it is still based on the principle of geographical representation. Indeed, for some critics of the Commission, the basic problem lies in the very membership of undemocratic States, which in their view, do not protect human rights, and therefore are not eligible to sit on the Commission to pass judgment on the performance of other States.

But this view sits at odds with another equally persuasive view that the membership of the Council needs to draw on all civilizational systems of the world so that the human rights body can truly aspire to universality in form. This argument supports a geographical representation. In the end, a compromise of sorts was achieved, combining geographical representation with some conditions about adherence to human rights treaties, as a proxy for liberal democracy. For the West, especially for the U.S., the basic problem seems to be a human rights body it cannot control. When the post Cold War order has come to rest on the idea of human rights, and its concomitant doctrine of democracy in so many fields of policy from security to development, the West plausibly needs the human rights organ of the U.N. to act in ways that provides legitimacy and moral cover for their actions elsewhere from globalization to the war against Iraq and the war on terror. For John Bolton and others like him, the new Council may not go far enough towards this goal – and that largely explains why the U.S. voted against the Council and refused to stand for election during last year and this year. The impatience exhibited by the U.S. towards the Council is also symptomatic of the U.S. attitude towards any international organization which can, even often only in theory, serve as a source of critique of its hegemonic policies and imperial design. Whenever the U.S. had encountered an international institution which criticized its policies, it has attempted to kill it, often successfully. Examples that come to mind include the U.N. Center for Transnational Corporations which was closed in the early 1990s due to U.S.
opposition, and even the Sub-Commission on Human Rights which many expect not to survive the reform process due to U.S. opposition. That the ‘people at the periphery’, whether they are newly independent Third World States criticizing colonialism or apartheid during the 1960s or 1970s, or a global housing rights movement of the poor critiquing neoliberal economic policies and violent evictions in recent years, may have other expectations of the Commission and may want to use the Commission to deal with what they see as the major moral and political questions of the day, is of course ignored. In the light of this history, the attempt by the U.S. to restrict membership to a small number of liberal States from the West or those friendly to the West, is unrealistic and fundamentally misunderstands the politics of human rights at the U.N.

There is some truth that the Council may in fact be only a ‘caterpillar with lipstick’ but not for the reasons that Bolton may identify. There are some significant changes in the criteria for election of members but it is too early to tell if the Council design in fact represents a significant shift from that of the Commission; first, the shift from a regional slate to individual country election, which technically prevents countries with bad human rights records from being rammed through on regional election slates, may prove to be a myth as long as there is geographical representation and a legitimate disagreement about what constitutes a ‘good human rights record’; second, the new commitment required from members to ratify human rights treaties and abide by the guidelines of U.N. mechanisms looks like a weak and wrong-headed approach to select the best performers, given much empirical evidence that countries continue to violate human rights even as they ratify treaties; third, an agreement by members to be subjected to a ‘periodic review’ of their own performances; and a theoretical possibility of being voted out of the Council by the General Assembly in the event of gross human rights violations could be a real weeding-out mechanism but is likely to be hopelessly lost in the stampede of power politics. Most other indications are that the Commission’s design faults are continuing with the Council.

A primary problem with the Commission was its legalistic assumption that only States could participate as members. The paradox of asking States, who are violators of human rights, to be the sole enforcers against themselves, has never been resolved. In theory, this problem might be overcome if the dividing line between violators and enforcers is a constant one, but when it keeps shifting, as yesterday’s enforcers become today’s violators, the Commission (and now the Council) opens itself to horse-trading. States acquire an incentive to protect each other’s dirty secrets. There is evidence that States did strike ‘deals’ to protect and watch out for each other at the Commission, thus preventing resolutions against themselves,
and there is reason why the same pattern of behavior will not continue at the Commission. There is no easy answer to this problem since the alternative of anointing some States to be on the Council forever, is politically and morally akin to neocolonialism.

As a partial attempt to lessen the power of Statism over human rights, the Commission established the Sub-Commission (a body of independent experts) and myriad other mechanisms consisting of more independent experts not representing their States. Indeed, these independent experts and bodies often proved themselves far more capable of 'speaking truth to power' and attempted to focus attention on neglected aspects of human suffering. As the Commission became more divided and leading human rights experts stopped participating as heads of State delegations, as was the case during the early years of the Commission, the independent bodies and the Sub-Commission proved to be the friends of the weak and critics of the powerful such as hegemonic States and international organizations more often. Now, after the establishment of the Council, it is not yet clear if the Sub-Commission and other mechanisms of the Commission will survive. For the U.S. administration has made its impatience clear with the Sub-Commission and several other mechanisms of the Commission.

The Statist dominance at the Commission, and the problems arising from a selective membership, whether they are 20, 47 or 53 States, was identified implicitly as a major stumbling block towards more credible and effective human rights work by the U.N., including in major reports like the U.N. High-Level Panel Report, released in December 2004. That report recommended universal membership of the Commission (i.e., all States), and a body of 15 independent experts acting as an advisory council to the Commission, who'll do the actual work and set the agenda. Dramatically at odds with the premise for establishment of the Council, the High-Level Panel Report argued that membership criteria have little chance of changing the negative political dynamics at the Commission and therefore must be dispensed with. Universal membership may, that Report seemed to reason, underscore that all States are committed by the U.N. Charter to promote and protect human rights, and thereby recreate a new moral consensus about the universality of human rights at a time of deep political and cultural divisions.

A second problem with the Commission was the lack of clarity about its relationship to other international organizations or even other U.N. organs, when their work had a negative impact on human rights. This emerged as a contentious issue in relation to the WTO and the Security Council, when both bodies began engaging in policies and practices that invited condemnation from the various mechanisms attached to the Com-
mission. The new Council’s role is not any more clarified, and it could be expected that more conflicts are in the offing.

CONCLUSION

It may be too early to tell if the new Council is an improvement over the Commission. But from the foregoing analysis, it is clear that the right lessons have not been learned from the performance of the Commission. On the one hand, the Commission’s best moments came as a result of its contribution to the resolution of the most important political questions of the day, from colonialism, and apartheid, racial discrimination and women’s rights. It contributed both by its ‘politicized agenda’ that left no State unclear what its political proclivities were, and through its technical work performed through standard setting. On the other hand, the basic problems with the Commission really have not been addressed during this reform process. The Council continues as a Statist body, excluding other kinds of politics to enter the human rights domain. It maintains a weak and subsidiary relationship to other powerful U.N. bodies like the Security Council or other agencies like the WTO. It attempts to confine its membership to liberal democratic States, when there are open questions about whether the membership ought to be universal, or extended beyond States. The future of independent bodies including the Sub-Commission remains uncertain under the Council. For the West, especially the U.S., the Commission remained frustratingly and inadequately uncooperative to their grand projects, whether of colonialism, globalization or the imperial war on terror. The question is whether the new Council will also remain out of their reach, or turn into a pliant instrument for the hegemonic consolidation of the imperial vision of the U.S. Its credibility and legitimacy may well rest on the extent to which it continues to be a weapon of the weak, much like the Commission, inadequate and inconsistent as it was.