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ABSTRACT

This essay deals with social, economic and cultural rights and political and civil rights within the context of international law on human rights. To this end, it reviews the contemporary conception of this issue in the light of the international system of protection, evaluating its profile, its objectives, its logic and its principles, and questioning the feasibility of an integrated vision of human rights. This is followed by an evaluation of the main challenges and prospects for the implementation of these rights, claiming that facing this challenge is essential to ensure that human rights will take on their central role in the contemporary order.

SOCIAL, ECONOMIC AND CULTURAL RIGHTS AND CIVIL AND POLITICAL RIGHTS*

Flavia Piovesan

How to understand the contemporary formulation of human rights

Human rights come into being as and when they are able and required to do so. As Norberto Bobbio emphasizes, human rights do not arise either all at once or for good. To Hannah Arendt, human rights are not given facts, but a construct, a human invention that is subject to an ongoing process of construction and reconstruction.¹ Considering the historicity of these rights, it may be said that the definition of human rights will point to a plurality of meanings. Considering this plurality, the so-called contemporary conception of human rights is a distinctive one, introduced through the Universal Declaration of 1948, and restated in the Vienna Declaration of Human Rights of 1993.

This conception is the result of a movement towards the internationalization of human rights, an extremely recent phenomenon that emerged after World War II as a response to the atrocities and horrors committed during the Nazi regime. Presenting the State as the major violator of human rights, the Hitler Era was characterized by a logic of destruction and expendability of human beings that resulted in the confinement of 18 million individuals in concentration camps, and the death of 11 million, including 6 million Jews, as well as Communists, homosexuals and Gypsies, etc. The legacy of Nazism made entitlement to rights, that is, the condition of qualifying for rights, contingent on membership of a given race: the pure Aryan race. In the words of Ignacy Sachs (1998, p. 149), the 20th Century was marked by two world wars and the absolute horror of genocide formulated as a political and industrial project.

It was in this context that the attempt to reconstruct human rights was formulated as an ethical paradigm and benchmark to guide the contemporary international order. If World War II stood for a breach with human rights, the post-war period had to stand for their reconstruction. The approval of the Universal Declaration of Human Rights on December 10, 1948 was the major landmark in the reconstruction of human rights. This declaration introduces the contemporary conception of human rights, characterized by their universality and indivisibility: universality insofar as it calls for the

universal extension of human rights in the belief that being human is the sole criterion for entitlement to rights, and considering human beings as essentially moral beings that have an existential uniqueness and dignity; indivisibility, since the guarantee of political and civil rights is a pre-condition for the observance of social, economic and cultural rights, and vice-versa. When one of these conditions is violated, so are all the others. Human rights thus comprise an indivisible, interdependent and inter-related unity that is capable of associating the list of civil and political rights to the list of social, economic and cultural rights. In this manner, it enshrines an integrated concept of human rights.

Examining the indivisibility and interdependence of human rights, Hector Gros Espiell (1986, pp. 16-17) notes that:

Only the full recognition of all of these rights can guarantee the real existence of any one of them, since without the effective enjoyment of economic, social and cultural rights, civil and political rights are reduced to merely formal categories. Conversely, without the reality of civil and political rights, without effective liberty understood in its broadest sense, economic, social and cultural rights in turn lack any real significance. This idea of the necessary integrality, interdependence and indivisibility regarding the concept and the reality of the content of human rights that is, in a certain sense, implicit in the Charter of the United Nations, was compiled, expanded and systematized in the 1948 Universal Declaration of Human Rights, definitively reaffirmed in the Universal Covenants on Human Rights approved by the General Assembly in 1966, and in force since 1976, as well as in the Proclamation of Teheran of 1968, and the Resolution of the General Assembly, adopted on December 16, 1977, on the criteria and means for improving the effective enjoyment of fundamental rights and liberties (Resolution n. 32/130).

As the major landmark in the movement towards the internationalization of human rights, the Universal Declaration of 1948 promoted the conversion of these rights into an issue of legitimate interest to the international community. As Kathryn Sikkink (p. 413) observes: “International human rights law assumes that it is legitimate and necessary for governmental and non-governmental actors to be concerned with the way in which the inhabitants of other states are treated. The safety net of international human rights aims to redefine what is exclusively within the domestic jurisdiction of individual states.”²

In this way, the idea that the protection of human rights should not be the exclusive responsibility of the state is strengthened, i.e. it should not be restricted to the national authority or to a domestic jurisdiction, since it evolves an issue of legitimate international interest. In turn, this innovative concept points to two important consequences: (1) The revision of the traditional concept of the absolute sovereignty of the state, which has become a more relative notion, to the degree that international intervention in national affairs is permitted in the cause of protecting human rights; i.e. there has been a shift from a “hobbesian” conception of sovereignty centered on the state to a “kantian” notion of sovereignty centered on universal citizenship.³ (2) The crystallization of the idea that individuals should enjoy the protection of their rights at international level, as a subject of the law.

These measures thus predict the end of an era in which the state’s form of treating its citizens was conceived as a problem of domestic jurisdiction, derived from its own sovereignty.

The process of universalizing human rights permitted, in turn, the formation of a normative international system for protecting these rights. According to André Gonçalves Pereira & Fausto de Quadros (p. 661) “in terms of political science, it was merely a question of transposing and adapting to international law the evolution that had already taken place in domestic law at the start of the century, from the police state to the welfare state. It was nevertheless sufficient for international law

to abandon its classical phase, in the form of the law of peace and war, to move on to the new or modern era in its evolution, in the form of an international law of cooperation and solidarity”.⁴

Starting with the Universal Declaration of 1948 and the contemporary conception of human rights that it introduced, International Human Rights Law began to develop through the adoption of many international treaties that aimed to protect fundamental rights. The 1948 Declaration provides axiological support and a unity of values for this area of the law, with an emphasis on the universality, indivisibility and interdependence of human rights. As Norberto Bobbio (p. 30) states, human rights arise as universal natural rights, develop as private positive rights (when every constitution incorporates declarations of rights) and are finally realized in full as universal positive rights.

The process of universalization of human rights has allowed the formation of an international system for protecting these rights. This system has been set up by international protection treaties that above all, reflect a contemporary ethical conscience that is shared among states, to the degree that these invoke the international consensus on minimum protective parameters with regard to human rights (the “irreducible ethical minimum”). In this sense, it should be emphasized that as of August 2002 (See Human Development Report, UNDP), the International Covenant on Civil and Political Rights had 148 signatory countries, while the International Covenant on Economic, Social, and Cultural Rights had 145 signatory countries, the Convention against Torture had 130, the Convention on the Elimination of Racial Discrimination had 162, the Convention on the Elimination of Discrimination against Women had 170, and the Convention on the Rights of the Child had the widest membership, with 191 signatory countries.

Side by side with this global normative system, regional systems of protection have emerged that aim to internationalize human rights at regional level, particularly in Europe, the Americas and Africa. There is also an incipient Arab system and a proposal for the creation of a regional system in Asia. These developments will consolidate the coexistence of the UN’s global system with instruments of a regional system that are in turn integrated by the American, European and African systems of protection for human rights.

The global and regional systems are therefore not divergent, but complementary. Inspired by the values and principles of the Universal Declaration, they comprise a range of instruments for protecting human rights at international level. From this point of view, the various systems for the protection of human rights interact on behalf of protected individuals. The proposal for the coexistence of distinct legal instruments that guarantee the same rights is thus consistent with the expansion and strengthening of the protection of these rights. The crucial issue is the degree of efficiency of the protection afforded, for which reason, in real life cases, the rule to be applied is that which ensures the victim the best protection. In adopting the value of the primacy of the individual, these systems complement each other, interacting with the national protection system in order to provide the greatest possible effectiveness in protecting and promoting fundamental rights. This is also the logic and the underlying set of principles of International Law of Human Rights itself, which is entirely founded on the supreme principle of human dignity.

The contemporary conception of human rights is characterized by the universalization and internationalization of these rights, which are conceived of as indivisible.⁵ It should be noted that the Vienna Declaration of Human Rights, of 1993, reiterates the formulation of the 1948 Declaration, when it affirms in its 5th paragraph that: “All human rights are universal, interdependent and inter-related. The international community should treat human rights globally in a just and equitable way, on an equal basis and with the same emphasis”.

In this way, the Vienna Declaration of 1993, signed by 171 states, endorses the universality and indivisibility of human rights, reinvigorating the legitimacy of the so-called contemporary conception of human rights introduced by the 1948 Declaration. It should be noted that as the “post-war” Consensus, the 1948 Declaration was adopted by 48 states, with 8 abstentions. The Vienna Declaration of 1993 extends, renews and expands the consensus on the universality and

indivisibility of human rights, at the same time as it affirms the interdependence between the values of human rights, democracy and development.

There can be no human rights without democracy, nor democracy without human rights. In other words, the regime that is most compatible with the protection of human rights is the democratic regime. At the present time, 140 states, of the almost 200 states that are part of the international order, hold regular elections. At the same time, only 82 states (representing 57% of the world's population) are considered to be fully democratic. In 1985, this proportion stood at 38%, comprising 44 States.⁶ The full exercise of political rights may imply the “empowerment” of more vulnerable populations as well as an increase in their capacity for lobbying, political coordination and mobilization. Amartya Sen (2003) considers that political rights (including freedom of expression and debate) are not only fundamental for demanding political responses to economic needs, but are central to the very formulation of these economic needs.

In addition, given the indivisibility of human rights, we must abandon for good the erroneous notion that one class of rights (civil and political rights) require full recognition and respect, while another class (social, economic and cultural rights) does not require observance of any kind. From an international normative perspective, the notion that social, economic and cultural rights are not legal rights has been superseded for good. The idea that social rights are non-actionable is purely ideological and not scientific; they stand out as authentic and genuine fundamental rights that are actionable, demandable and that require serious and responsible observance. For this reason, they should be demanded as rights, and not as gestures of charity, generosity or compassion.

As Asbjorn Eide & Allan Rosas (pp. 17-18) note: “Taking economic, social and cultural rights seriously implies a simultaneous commitment to social integration, solidarity and equality, including the issue of income distribution. Social, economic and cultural rights include protection for vulnerable groups as a central concern. ... Fundamental needs must not be made contingent on charity from state programs and policies, but must be defined as rights”.

An understanding of economic, social and cultural rights also demands recourse to the right to development. In order to reveal the reach of the right to development, it is important to highlight, as Celso Lafer (1999) does, that in the field of values, the consequence for human rights of an international system of defined polarities – East/West, North/South – has been an ideological battle between civil and political rights (the liberal heritage sponsored by the USA) and economic, social and cultural rights (the social heritage sponsored by the former Soviet Union). It was in this context that “an effort by the Third World to elaborate its own cultural identity, proposing collective rights of cultural identity, such as the right to development”, emerged.

In this sense, the UN adopted the Declaration of the Right to Development in 1986, with 146 states voting in favor, 1 against (USA) and 8 abstaining. For Allan Rosas (1995, pp. 254-255): “With regard to the content of the right to development, three aspects deserve mention: firstly, the 1986 Declaration endorses the importance of participation. ... Secondly, the Declaration should be conceived in the context of the basic needs of social justice. ... Thirdly, the Declaration emphasizes both the need to adopt national programs and policies and international cooperation ...”. The 2nd article of the Declaration of the Right to Development of 1986 enshrines the principle that: “Human beings are the central subject of development and should be active participants in and the beneficiaries of this right”. The 4th article of the Declaration adds that states have a duty to adopt measures, whether individually or collectively, that aim to formulate international development policies, with a view to facilitating the full realization of rights, adding that effective international cooperation is essential for providing developing countries with the means to encourage the right to development.

The right to development demands a form of globalization that is both ethical and sympathetic. In the understanding of Mohammed Bedjaoui (p. 182): “In reality, the international dimension of the right to development is nothing more than an equitable distribution with regard to global social and economic well being. This reflects a crucial question of our age, in so far as four fifths of the

world's population no longer accept the fact that a fifth of the world's population continues to build its wealth on the basis of the remainder's poverty". Global asymmetries reveal that the income of the richest 1% exceeds the income of the poorest 57% (UNDP, p. 19).

As Joseph E. Stiglitz (p. 6) points out: "The actual number of people living in poverty has actually increased by almost 100 million. This has occurred at the same time that total world income increased by an average of 2.5% percent annually".⁷ For the World Health Organization: "poverty is the world's greatest killer. Poverty wields its destructive influence at every stage of human life, from the moment of conception to the grave. It conspires with the most deadly and painful diseases to bring a wretched existence to all those who suffer from it" (Farmer, p. 50).⁸

To adopt Amartya Sen's conception, development must in turn be imagined as a process of expanding real liberties that individuals can make use of.⁹ One may also add that the Vienna Declaration of 1993 emphasizes that the right to development is a universal and inalienable right that forms an integral part of fundamental human rights. We would reiterate that the Vienna Declaration recognizes the interdependence between democracy, development and human rights. We thus move to the final reflection.

What are the challenges and prospects for the implementation of human rights within the contemporary order?

This question entails six challenges:

1. Consolidating and strengthening the process of affirming the integral and indivisible vision of human rights, through the conjugation of civil and political rights with economic, social and cultural rights

Human rights as an "acquired set of values" are undergoing constant elaboration and redefinition.

If, traditionally, the human rights agenda focused on the protection of civil and political rights, under the heavy impact of the "voice of the North", we are currently witnessing the expansion of this traditional agenda, which is incorporating new rights, with an emphasis on economic, social and cultural rights, the right to development, the right to social inclusion, and on poverty as a violation of rights. This process has allowed an echo for "the South's own voice" that is capable of revealing the concerns, demands and priorities of this region.

These are necessary advances in the continuous expansion of the conceptual reach of human rights that contemplate the basic needs of social justice. In such a context, it is fundamental to consolidate and strengthen the process of affirming human rights from this integral, indivisible and interdependent perspective.

2. Incorporating gender, race and ethnicity approaches in the conception of human rights, as well as creating specific policies to protect socially vulnerable groups

The effective protection of human rights demands not only universalistic policies, but also specific, those that target socially vulnerable groups, as the major victims of exclusion. In other words, the implementation of human rights demands the universality and indivisibility of these rights as well as the respect for diversity.

To the process of expanding human rights, we may add the process of specifying the subjects of these rights.

The first phase of protection of human rights was characterized by a general protection, which expressed a fear of difference (which under Nazism had been directed towards extermination), based on formal equality.

It has nevertheless proven insufficient to treat individuals in a generic, general and abstract form, rendering it necessary to specify the subjects of law, which must be seen in all of their peculiarity and singularity. From this point of view, certain subjects of law, or certain violations of law, require a specific and differentiated response. From this perspective, among other vulnerable categories, women, children, populations of African descent, migrants and physically disadvantaged individuals must be seen in terms of the specificities and peculiarities of their social condition. Together with the right to equality, the right to difference also arises as a fundamental right. Respect for difference and diversity, guaranteeing these special treatment, are equally important.

According to Paul Farmer (p. 212), “The concept of human rights may at times be brandished as an all-purpose and universal tonic, but it was developed to protect the vulnerable. The true value of the human rights movement’s central documents is revealed only when they serve to protect the rights of those who are most likely to have their rights violated. The proper beneficiaries of the Universal Declaration of Human Rights ... are the poor and otherwise disempowered”.

For Nancy Fraser (pp. 55-56), justice simultaneously demands redistribution and the recognition of identities. “Recognition cannot be reduced to distribution, since social status is not simply a function of class. Let us take the example of an African-American banker on Wall Street who cannot find a taxi. In this case, the injustice of a lack of recognition has little to do with poor distribution. ... Conversely, distribution cannot be reduced to recognition, since access to resources does not merely derive from status. We may consider the example of a specialized industrial worker who becomes unemployed due to the closure of the factory in which he or she works as the result of a speculative corporate merger. In this case, the injustice of poor distribution has little to do with the lack of recognition”. Justice has thus a two-dimensional character: redistribution plus recognition. In the same sense, Boaventura de Souza Santos (2003, pp. 56 and 429-461) states that only a demand for recognition and redistribution permits the realization of equality.

Boaventura (p. 458) adds that: “we have the right to be equal when our difference makes us inferior; and we have the right to be different when our equality jeopardizes our identity. This entails the need for an equality that acknowledges differences and a difference that does not produce, promote or reproduce inequalities”.

If we consider the processes of “feminization” and “ethnicization” of poverty, we perceive that, in Brazil, the main victims of the violation of economic, social and cultural rights are women and populations of African descent (on this subject, see Flavia Piovesan & Silvia Pimentel). This entails the need to adopt, in tandem with universalist policies, specific policies that are capable of providing visibility to individuals that are more vulnerable and that allow these to exercise their right to social inclusion in full.

We should also add the democratic component in order to guide the formulation of such public policies; i.e. there is a need to ensure the right to effective participation of social groups in the formulation of policies that affect them directly. Civil society is clamoring for greater transparency and democratic accountability in the management of public sector budgets and the construction and implementation of public policies.

3. Optimizing the justiciability and enforceability of economic, social and cultural rights

As the Vienna Declaration of 1993 recommended, it is fundamental to adopt measures to ensure greater justiciability and enforceability for economic, social and cultural rights, such as the elaboration of a Facultative Protocol to the International Covenant on Economic, Social, and Cultural Rights (which introduces the system of individual petitions), as well as of technical/scientific indicators capable of measuring the advances in the implementation of these rights.

Within the global system, the International Covenant on Economic, Social, and Cultural Rights merely considers the mechanism for states to submit reports, as a way of monitoring the rights that it expresses. Already within the interamerican system, there are plans for a system of petitions to the Interamerican Commission on Human Rights to denounce violations of the right to education and union rights, expressed in the San Salvador Protocol. In addition to introducing a system for lobbying at global level, through the adoption of the Facultative Protocol, it is also essential to optimize the use of this regional mechanism, in whatever form the right of petition takes, in order to protect rights to education and union rights. In addition, there is a need to extend the ability to bring actions in defense of other economic, social and cultural rights, such as the violation of civil rights as an “entry door” for demands deriving from economic, social and cultural rights. By way of illustration, the following cases deserve highlighting: (a) the provision of drugs to carriers of the HIV virus (on the basis of the violation of the 4th article of the American Convention – right to life); and (b) summary dismissal of workers (on the basis of the violation of due legal process – *Baena Ricardo vs. Panama*).

The potential of international litigation in securing internal advances in the regime of protecting human rights is obvious. This is the most important contribution that the use of the international system of protection can offer: promoting progress and internal advances in the protection of human rights within a given state.

The incorporation of the system of individual petitions is also the result of a process of recognition of new actors among the international players, with the consequent democratization of international instruments. If, over the course of a long period, states have been the central protagonists of the international order, today we are experiencing the emergence of new international actors, such as international organizations, regional economic blocs, individuals and international civil society. The strengthening of international civil society through a network that promotes communication between local, regional and global entities,¹⁰ as well as the consolidation of the individual as the subject of international law, demand the democratization of international instruments, as well as access to international mechanisms and international justice itself.

The emergence of new international actors requires the democratization of the international system for the protection of human rights. An example of this is Protocol n. 11 of the European regional system, which has allowed direct access by individuals to the European Court of Human Rights. To this may be added the recent approval of the 1999 Facultative Protocol to the Convention on the Elimination of Discrimination against Women, which incorporates the system of individual petition. Also worthy of mention is the Facultative Protocol to the International Covenant on Economic, Social, and Cultural Rights, which introduces the right of individual petition in the same way.

Having said this, it should be pointed out that one finds a marked resistance by many states to accept the democratization of the international system of protection of human rights, especially with regard to the system of individual petitions.¹¹ This system crystallizes the capacity of the individual to bring actions at international level, “constituting” according to Antônio Augusto Cançado Trindade (p. 8), “a protection mechanism of notable significance, as well as a conquest of historic proportions”.

It is also fundamental to ensure that treaties protecting economic, social and cultural rights can depend on an effective system of monitoring that includes reports, individual petitions, and communications between states. It is important to add the system of *in loco* investigations, which are only considered in the Convention against Torture and the Facultative Protocol to the CEDAW.

From this point of view, it is fundamental to encourage states to accept these mechanisms, as it is no longer admissible that states accept rights but renege on their guarantees of protection.

In addition to these mechanisms, it is crucial to promote the elaboration of technical/scientific indicators to evaluate the implementation and observance of economic, social and cultural rights, particularly with regard to their necessary advancement and the prevention of social regression.

Another strategy is to promote visits by special UN and OAS investigators regarding issues related to economic, social and cultural rights. Thematic reports represent an effective way of catalyzing attention and providing visibility of given violations of human rights, as well as of making recommendations. More than symbolizing an appraisal of the human rights situation in a given country, the greatest contribution that such investigators can make in drawing up reports is the use of these reports as instruments for securing internal advances in the regime that protects human rights in the country in question. On this point, we may observe the positive impact on Brazil of the visit by the UN investigator of torture in 2000. To this, we may add the impact of the visit to Brazil in 2002 of the investigator into food rights.

We may also highlight the unprecedented experience in Brazil of adopting thematic reports on economic, social and cultural rights, inspired by the UN investigations on the following issues: (a) health; (b) housing; (c) education; (d) food; (e) work and (f) the environment. As in the UN system, the proposal is that such investigations appraise the situation of these rights and highlight recommendations for ensuring the full exercise of the same.

In short, efforts are necessary to optimize the justiciability and enforceability of economic, social and cultural rights, so as to strengthen the implementation of the right to social inclusion.

4. Incorporating the social human rights agenda into the agenda of international financial institutions, regional economic organizations and of the private sector

In order to meet the challenges of implementing human rights, it is not sufficient merely to concentrate on the state. The Declaration on the Right to Development and the International Covenant on Economic, Social, and Cultural Rights themselves emphasize both the need to adopt national programs and policies and for international cooperation. The 4th article of the Declaration highlights the fact that effective international cooperation is essential for providing developing countries with the means to promote the right to development.

Within the context of economic globalization, there is a pressing need for non-governmental agents to incorporate human rights into their agendas. Three fundamental types of actor have emerged: (a) international financial agencies, (b) regional economic groupings and (c) the private sector.

With regard to the international financial agencies, there is the challenge of ensuring that human rights permeate macroeconomic policy in such a way as to involve fiscal, monetary and exchange rate policies. International economic institutions should focus their attention on the human dimension of their activities, and the heavy impact that their policies can have on local economies, especially in an increasingly globalized world (Cf. Mary Robinson).¹²

While the international financial agencies are linked to the United Nations system as specialized agencies, the World Bank and the International Monetary Fund, for instance, have so far failed to formulate a specific human rights policy. Such a policy is an imperative for achieving the propositions of the UN, and above all, for achieving the coherent ethics and set of principles that are required to guide their activity.

There is a need to supersede the paradoxes arising from the conflict between the inclusion principle that aims to promote human rights and that is enshrined in the relevant UN treaties that protect human rights (notably the International Covenant on Economic, Social, and Cultural Rights), and the exclusion effects of the actions dictated particularly by the International Monetary Fund, in so far as its policy, within the framework of the so-called “conditionality” clauses, in actual fact

submits developing countries to structural adjustment models that are incompatible with human rights.¹³ In addition, there is a need to strengthen democratization, transparency and accountability of these institutions.¹⁴ It may be noted that 48% of the IMF's voting rights are concentrated in the hands of 7 states (US, Japan, France, UK, Saudi Arabia, China and Russia), while at the World Bank, 46% of the voting rights are concentrated in the hands of the same states (see Human Development Report 2002). In the critical view of Joseph E. Stiglitz (pp. 21-22): "... we have a system that might be called global governance without global government, one in which a few institutions – the World Bank, the IMF, the WTO – and a few players – the finance, commerce, and trade ministries, closely linked to certain financial and commercial interests – dominate the scene, but in which many of those affected by their decisions are left almost voiceless. It's time to change some of the rules governing the international economic order ...".

With regard to the regional economic groupings, one will here also encounter the paradoxes that arise from the tensions between the exclusive character of the process of economic globalization and the movements that attempt to reinforce democracy and human rights as parameters which provide an ethical and moral backing to the creation of a new international order. On the side, stands the exclusion process of economic globalization; and on the other, one is witness to the emergence of the inclusive process of internationalization of human rights, in addition to the process of incorporation of democratic clauses and human rights by regional economic groupings. While the formation of economic groupings with a regional reach, such as the European Union and Mercosur, has attempted to promote not only economic integration and cooperation, but also, subsequently and gradually, the consolidation of democracy and the implementation of human rights in the respective regions (which is more evident in the European Union, but still only incipient in Mercosur), it will be observed that democratic and human rights clauses have not been incorporated into the agenda of the economic globalization process.

With regard to the private sector, there is also a need to emphasize its social responsibility, especially within multinational companies, in so far as these constitute the major beneficiaries of the globalization process, it being sufficient to cite the fact that of the 100 largest economies in the world, 51 are multinational companies and 49 are national states. It is important, for example, to encourage companies to adopt codes of human rights with regard to their commercial activity; and to impose commercial sanctions on companies that violate social rights, adopting the "Tobin tax" on international financial investments, as well as imposing other measures.

5. Strengthening the responsibility of the state in the implementation of economic, social and cultural rights, as well as the right to social inclusion, and poverty as a violation of human rights

Given the serious risks of dismantling the public sector social policies, there is a need to redefine the role of the state in order to take account of the impact of economic globalization. There is a need to strengthen the responsibility of the state with regard to the implementation of economic, social and cultural rights.

As Asbjorn Eide (p. 383) warns: "Paths can and must be found that enable the state to ensure that it guarantees respect and protection for economic, social and cultural rights, so as to preserve the conditions for a relatively free market economy. Government action must promote social equality, confront social inequalities, compensate the imbalances created by markets and guarantee sustainable human development. Governments and markets must complement each other".¹⁵

In the same sense, Jack Donnelly (1998, p. 160) points out that: "Free markets are analogous in economic terms to political systems based on majority rule, without, however, observing the rights of minorities. From this point of view, social policies are essential for ensuring that minorities,

which are deprived or disadvantaged by the market, receive a minimum level of respect in the economic sphere. ... Markets seek efficiency and not social justice or human rights for all”.¹⁶

We may also add that the enforcement of economic, social and cultural rights is not only a moral obligation of states, but also a legal obligation, based on international treaties that protect human rights, particularly the International Covenant on Economic, Social, and Cultural Rights. States have thus a duty to respect, protect and implement the economic, social and cultural rights determined in the Covenant. The same Covenant, which currently has 145 signatory countries, establishes an extensive catalog of rights, including the right to work and just wages, the right to form and join unions, the right to an adequate standard of living, the right to housing, the right to education, to social security, to health, etc. In the terms established in the Covenant, these rights are to be realized progressively, being dependent on the actions of the state, which must adopt all measures, to the extent of its available resources,¹⁷ with a view to the progressive realization in full of these rights (Article 2, Paragraph 1 of the Covenant).¹⁸ As David Trubek affirms: “Social rights as social welfare rights imply a view according to which the government has the obligation of guaranteeing such conditions for all individuals in an adequate manner”.

Here again it should be stressed that, due to the indivisibility of human rights, the violation of economic, social and cultural rights entails the violation of civil and political rights, which explains why economic and social vulnerability leads to the vulnerability of civil and political rights. In the words of Amartya Sen (1999, p. 8): “The negation of economic liberty, in the form of extreme poverty, makes individuals vulnerable to violations of other forms of liberty. ... The negation of economic liberty implies the negation of social and political liberty”.

If civil and political rights maintain governments within reasonable democratic limits, economic and social rights establish adequate limits for the markets. Markets and elections are not sufficient in themselves to ensure human rights for all (Donnelly, 1998, p. 160).

6. Strengthening the State of Law and the construction of peace in global/regional/local spheres, through a culture of human rights

Finally, it should be emphasized that in a post-September 11 and post-Iraq War context, the challenge has emerged of sustaining the efforts to build a “state of international law” in an arena that is promoting an international “police state”, fundamentally guided by the principle of international force and security. The risk is that the fight against terror will jeopardize the civilizing function of rights, liberties and guarantees, given the clamor for maximum security. It is enough to note the new security doctrine adopted by the USA based on: (a) unilateralism; (b) preventive strikes and (c) the hegemony of US military power. We may observe the nefarious consequences for the international order if each one of the almost two hundred states were to invoke for itself the right to carry out “preventive strikes” on the basis of unilateralism. This would be tantamount to the demise of International Law, resurrecting the hobbesian “state of nature” in its very essence, in which war is the dominant expression, and peace is limited to be the absence of war.

The pretext of waging war on the so-called “empire of evil” has above all promoted the “evil of empire”. Surveys demonstrate the perverse impact of the post-September 11 era in the formation of a global agenda that tends to impose restrictions on rights and liberties. By way of example, we may cite the survey published by *The Economist*¹⁹ on legislation approved in a number of countries that expands the application of capital punishment and other penalties, permits indefensible discrimination, undermines due legal process and the right to a public and just trial, allows extradition without guaranteeing rights, and imposes restrictions on freedom of assembly and freedom of expression.

Against the risk of state terrorism and the confrontation of terror with the instruments of terror itself, there is only one way forward – the constructive path of consolidating the boundaries of an international “state of law”. An international state of law will only prevail under the primacy of legality, with an “empire of law” that has the power of the word and the legitimacy of the consensus.

In this context, marked by the end of defined bipolarities (since the end of the Cold War), by the uncertain fate of international organizations and by the power of a single global superpower, the equilibrium of the international order will require the revival of multilateralism and the strengthening of international civil society based on cosmopolitan solidarity. These are the only forces capable of detaining the high level of discretionary power within the empire, and of civilizing this reckless “state of nature”, so as to allow the empire of law to tame its destructive and irrational tendencies.

Faced with these challenges, we shall end by affirming our belief in the implementation of human rights as the rationality of resistance and the only liberating platform in our time. Today, more than ever, there is a clear need to invent a new order that is more democratic and egalitarian, capable of celebrating the interdependence between democracy, development and human rights, and which, above all, is centered on the value of the absolute prevalence of human dignity.

Notes

This text is based on the lecture “Social, Economic and Cultural Rights and Civil and Political Rights” presented at the 3rd International Conference on Human Rights, whose central theme was “The State of Law and the Construction of Peace”, held in São Paulo on May 27, 2003.

NOTES

1. On the same subject see also: Celso Lafer, 1988, p. 134. Likewise, Ignacy Sachs (1998a, p. 156) claims that “it can never be too strongly emphasized that the emergence of rights is the outcome of struggle, that rights are conquered, sometimes on the barricades, within a historical process full of vicissitudes, by means of which, needs and aspirations are articulated as demands and banners of struggle, before they are recognized as rights”. According to Allan Rosas (1995, p. 243), “The concept of human rights is always a progressive one. ... The debate on what are human rights and how they should be defined is part and parcel of our history, past and present”.
2. The same author adds (p. 441): “Basic individual rights are not the exclusive domain of the state, but constitute a legitimate concern of the international community”.
3. For Celso Lafer (1999, p. 145), from an *ex parte principe* view founded on the rights of subjects in relation to the state, there has been a shift to an *ex parte populi* view, based on promoting the notion of the rights of citizens.
4. The authors add: “There is a variety of new subjects that international law has absorbed under the conditions mentioned above: political, economic, social, cultural, scientific, technical, etc. This book nevertheless shows that three of them deserve highlighting: the protection and guaranteeing of the Rights of Man, development and economic and political integration”. In the view of Hector Fix-Zamudio (p. 184) “... the establishment of international organizations to protect human rights that the noted Italian treaty writer, Mauro Cappelletti has termed, ‘transnational constitutional jurisdiction’, has, as a judicial check on the constitutionality of legislative clauses and on concrete acts of authority, influenced Internal Law, particularly in the sphere of human rights, and has projected itself into an international and also community context”.

5. It may be noted that the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child consider not only civil and political rights, but also social, economic and cultural rights, endorsing the idea of the indivisibility of human rights.

6. See “Deepening Democracy in a Fragmented World”. In: *Human Development Report*, UNDP, 2002.

7. The author adds: “Development is about transforming societies, improving the lives of the poor, enabling everyone to have a chance at success and access to health care and education” (p. 252).

8. According to data from the “Vital Signs” report by the Worldwatch Institute (2003), income inequalities are reflected in health indicators: infant mortality in poor countries is 13 times that of rich countries; maternal mortality is 150 times higher in LDCs than in industrialized countries. Lack of clean water and basic sanitation kills 1.7 million individuals per year (of which 90% are children), while 1.6 million individuals die from diseases arising from the use of fossil fuels for heating and the preparation of food. The report also highlights the fact that almost all armed conflicts are concentrated in the developing world, which has produced 80% of all refugees over the last decade.

9. In conceiving development as freedom, Amartya Sen (pp. 35-36; 297) maintains that: “In this sense, the expansion of liberties is seen both as 1) an end in itself and 2) the main meaning of development. Such ends may be respectively termed the constitutive and the instrumental function of liberty with regard to development. The constitutive function of liberty is related to the importance of substantive liberty for the elevation of human life. Substantive liberties include elementary capacities such as avoiding privation due to hunger, malnutrition, avoidable mortality, premature death and liberties associated with education, political participation, prohibition of censorship, etc. From this constitutive perspective, development involves the expansion of human liberties”. On the right to development see also Karel Vasak.

10. With regard to international civil society, it should be noted that of the 738 NGOs registered at the 1999 Seattle conference, 87% were from industrialized countries. This statistic reveals the asymmetries that still exist with regard to the composition of international civil society itself on the issue of North-South relations.

11. Many states are still presenting heavy resistance to accepting facultative clauses that refer to individual petitions and communications between states. According to 2001 data, it is sufficient to highlight the fact that: (a) of the 147 states that signed the International Covenant on Civil and Political Rights, only 97 accepted the mechanism of individual petitions (having ratified the Facultative Protocol to this end); (b) of the 124 states that signed the Convention against Torture, only 43 states accepted the mechanism of communications between states and individual petitions (in the terms of articles 21 and 22 of the Convention); (c) of the 157 states that signed the Convention on the Elimination of all forms of Racial Discrimination, only 34 states accepted the mechanism of individual petitions (in the terms of article 14 of the Convention); and finally; (d) of the 168 states signing the Convention on Eliminating all forms of Discrimination against Women, only 21 states accepted the mechanism of individual petitions, having ratified the Facultative Protocol to the Convention on the Elimination of all forms of Discrimination against Women, only 21 accepted the mechanism of individual petitioning, and ratified the Facultative Protocol to this end.

12. Mary Robinson adds: “By way of example, an economist has already warned that trade and exchange rate policy can have a greater impact on the development of children’s rights than the reach of the budget dedicated to health and education. An incompetent central bank director can do more harm to children’s rights than an incompetent minister of education”.

13. Jeffrey Sachs notes (pp. 1329-30): “Some 700 million individuals – the poorest – are in debt to the rich countries. The so-called ‘highly indebted poor countries’ form a group of 42 financially

bankrupt and largely disorganized economies. These owe more than US\$ 100 billion in unpaid debts to the World Bank, the International Monetary Fund, other development banks and governments Many of these loans were made to tyrannical regimes to respond to the propositions of the Cold War. Many reflect erroneous ideas of the past. ... Jubilee 2000, an organization supported by individuals as varied as Pope John Paul II, Jesse Jackson and the rock singer Bono, have called for the elimination of the foreign debt of the world's poorest countries. The idea is frequently viewed as unrealistic, but it is the realists who fail to understand the economic opportunities of today's world. ... In 1996, the IMF and the World Bank announced a program of major impact, albeit without establishing a genuine dialog with the affected countries. Three years later, these plans failed. Only two countries, Bolivia and Uganda, received US\$ 200 million, while 40 countries are still waiting in line. Over the same period, the stock markets of the rich countries grew by over US\$ 5 trillion, more than 50 times the debt of the 42 poor countries. It is thus a cruel game that the richest countries play in protesting that they have no way of canceling the debts".

14. On this subject, see Joseph E. Stiglitz. According to the author: "When crises hit, the IMF prescribed outmoded, inappropriate, if standard solutions, without considering the effects they would have on the people in the countries told to follow these policies. Rarely did I see forecasts about what the policies would do to poverty. Rarely did I see thoughtful discussions and analyses of the consequences of alternative policies. There was a single prescription. Alternative opinions were not sought. Open, frank discussion was discouraged – there is no room for it. Ideology guided policy prescription and countries were expected to follow the IMF guidelines without debate. These attitudes made me cringe. It was not that they often produced poor results; they were antidemocratic" (p. xiv).

15. The author adds: "Where income is distributed equally and opportunities are reasonably similar, individuals are in a stronger position to negotiate their interests and there is less need for public expenditure by the state. Where, on the other hand, income is inequitably distributed, the demand for equal opportunities and the equal exercise of economic, social and cultural rights requires greater public expenditure, based on progressive taxation and other measures. Paradoxically, however, taxation for public expenditure appears to be more welcome in egalitarian societies than in societies where wealth is unequally distributed" (p. 40).

16. Jack Donnelly (2001, p. 153): "The relief of poverty and the adoption of compensatory policies are functions of the state and not of the market. These are demands related to justice, rights and obligations, and not to efficiency. ... Markets are simply unable to deal with them – because they have no vocation for this".

17. It should be highlighted that both social, civic and political rights require both negative and positive services by the state, the view being simplistic and erroneous that social rights merely require positive services, while civic and political rights require negative ones, or merely the inactivity of the state. By way of example, we should enquire as to the cost of the security apparatus through which classical civil rights are guaranteed, such as the right to liberty and the right to property, or the cost of the electoral apparatus that makes political rights possible, or the justice apparatus that guarantees the right of access to the Judiciary. That is, civil and political rights are not restricted to demanding the mere inactivity of the state, since their implementation requires guided public sector policies that also entail a cost.

18. The expression "progressive application" has frequently been wrongly interpreted. In its "General Comment n. 3" (1990), on the nature of the state's obligations relating to Article 2, Paragraph 1, the Commission on Economic, Social and Cultural Rights (UN Doc. E/1991/23) affirmed that if the expression "progressive realization" constitutes a recognition of the fact that the full realization of social, economic and cultural rights cannot be achieved in a short period of time, this expression should be interpreted in the light of its central objective, which is to establish clear

obligations for participating states, in the sense of adopting measures as rapidly as possible in order to realize these rights.

19. “For Whom the Liberty Bell Tolls”, *The Economist*, August 31, 2002, pp. 18-20.

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