

POVERTY AS A VIOLATION OF HUMAN RIGHTS

Flavia Piovesan¹

1. Introduction

The aim of this article is to propose a reflection on poverty as a human rights violation, within an International Human Rights Law perspective. To do this, one will focus initially on the contemporary conception of human rights in the light of the international protection system, evaluating its profile, objectives, logic and principles. The international human rights protection system is the greatest legacy of the so-called 'Age of Rights' which has permitted the internationalization of human rights and the humanization of contemporary International Law, as Thomas Buergenthal has pointed out.² Considering this conception, one asks: would poverty constitute a form of human rights violation?

At a second stage, the main challenges and perspectives for the implementation of the right to social inclusion will be evaluated, so that the value of human rights may become the central point of reference guiding the contemporary international order.

2. How to understand the contemporary conception of human rights? In the light of this conception, would poverty constitute a form of violation

¹ Professor of Constitutional Law and Human Rights at the São Paulo Catholic University, Professor of Human Rights of the post-graduate programs at the São Paulo Catholic University and the Paraná Catholic University, visiting fellow of the Human Rights Program at the Harvard Law School (1995 and 2000), São Paulo state attorney, member of the National Council in Defence of Human Rights, of SUR – Human Rights University Network – and of CLADEM – Latin American and Caribbean Committee for the Defence of Women's Rights.

² Thomas Buergenthal, prologue to the book by Antônio Augusto Cançado Trindade, *A Proteção Internacional dos Direitos Humanos: fundamentos jurídicos e instrumentos básicos*, São Paulo, Saraiva, 1991, p.XXXI. Along the same lines, Louis Henkin states: "International law divides meaningfully between the law before and the law after the Second World War. In 1945, the Allied victory introduced a new order with important changes in international law (...)" (Louis Henkin et al., *International Law: Cases and materials*, third edition, Minnesota, West Publishing, 1993, p.3)

of human rights?

As moral demands, human rights are born when they can and should be born. As pointed out by Norberto Bobbio, human rights are not born all at once or once and for all.³ Hannah Arendt sees human rights not as a given but as a construct, a human invention undergoing a constant process of construction and reconstruction.⁴ Considering the historicity of these rights, one may state that the definition of human rights points to a plurality of meanings. Given such plurality, this study focuses on the so-called contemporary conception of human rights brought about by the advent of the 1948 Universal Declaration and reiterated by the 1993 Vienna Declaration of Human Rights.

This conception is the fruit of the movement for internationalization of human rights. This is an extremely recent movement, having emerged in the post-war period as a response to the horrors and atrocities committed by the Nazi regime. The Hitler era had the State as the great violator of human rights and was marked by the logic of destruction and of disposability of human beings, which resulted in 18 million people being sent to concentration camps. Of these, 11 million died, 6 million of whom were Jews, the others being communists, homosexuals, Romanis etc. The legacy of Nazism was the conditioning of the entitlement to rights, that is, of being the subject of rights, to belonging to a particular 'race' – the pure Aryan race. As Ignacy Sachs put it, the twentieth century was marked by two world wars and by the absolute horror of genocide

³ Norberto Bobbio, *Era dos Direitos*, translated by Carlos Nelson Coutinho, Rio de Janeiro, Campus, 1988, p. 30.

⁴ Hannah Arendt, *As Origens do Totalitarismo*, translated by Roberto Raposo, Rio de Janeiro, 1979. On this, see also Celso Lafer, *A Reconstrução dos Direitos Humanos: Um diálogo com o pensamento de Hannah Arendt*, Cia das Letras, São Paulo, 1988, p. 134. Along the same lines, Ignacy Sachs states: "One can never insist enough on the fact that the rise of rights is the fruit of struggles, that rights are conquered, sometimes with barricades, in a historical process full of vicissitudes, by means of which needs and aspirations articulate themselves into demands and banners of struggle before being recognized as rights." (Ignacy Sachs, 'Desenvolvimento, Direitos Humanos e Cidadania'. In: *Direitos Humanos no Século XXI*, 1998, p. 156). To Allan Rosas: "The concept of human rights is always progressive. (...) The debate on what human rights are and how they should be defined is part and parcel of our history, of our past and our present." (Allan Rosas, 'So-Called Rights of the Third Generation'. In: Asbjorn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Dordrecht, Boston and London, 1995, p. 243).

conceived as a political and industrial project.⁵

In this setting, there comes about the effort of human rights reconstruction as a paradigm and ethical point of reference guiding the contemporary international order. If the Second World War meant a break with human rights, the postwar period should mean their reconstruction.

It is, then, as the major watershed in the process of reconstruction of human rights that on December 10, 1948, the Universal Declaration of Human Rights was passed. It introduced the contemporary conception of human rights, characterized by their universality and indivisibility. Universality, because the Declaration calls for the universal extension of human rights in the belief that the human condition is the only pre-requisite for entitlement to them, considering humans as essentially moral beings with existential uniqueness and dignity. Indivisibility, because ensuring that civil and political rights are respected is a precondition for the observance of social, economic and cultural rights and vice-versa. When one of them is violated, the others are as well. Hence, human rights make up an indivisible, interdependent and inter-related unit, capable of bringing together the whole range of civil and political rights and that of social, economic and cultural rights.

In examining the indivisibility and interdependence of human rights, Hector Gros Espiell teaches us: "Only the full recognition of all these rights can ensure the real existence of each one of them, since without the actual enjoyment of the economic, social and cultural rights, the civil and political rights are reduced to mere formal categories. Conversely, without the reality of the civil and political rights, without the actuality of freedom understood in its broadest sense, the economic, social and cultural rights lack true meaning. This idea of the necessary integrity, interdependence and indivisibility as to the concept and reality of the content of human rights, which in a way is implicit in the UN Charter, gets compiled, broadened and systematized in 1948 in the Universal Declaration of Human Rights, and re-asserts itself in the Universal Human Rights Covenants

⁵ Ignacy Sachs, 'O Desenvolvimento Enquanto Apropriação dos Direitos Humanos', in *Estudos Avançados*, 12 (33), 1998, p.149.

passed by the General Assembly in 1966, and in force since 1976, in the 1968 Tehran Proclamation and in the General Assembly Resolution passed on December 16, 1977, on the criteria and means to improve the actual enjoyment of the fundamental rights and freedoms (Resolution 32/130)."⁶

The 1948 Universal Declaration, in its capacity as the main watershed in the movement of internationalization of human rights, acted as an incentive to the transformation of these rights into an issue of legitimate interest on the part of the international community. As Kathryn Sikkink observes: "International Human Rights Law pre-supposes as legitimate and necessary the concern of State and non-State actors with the way in which the inhabitants of other States are treated. The international human rights safety net seeks to redefine what is a matter for exclusive domestic jurisdiction of States."⁷

Hence, the idea that human rights protection should not be reduced to a reserved domain of the State, is gaining strength. In other words, it should not be restricted to an exclusive national remit or an exclusive national jurisdiction because it has become a theme of legitimate international interest. In turn, this innovative conception has two important consequences:

1) a review of the traditional notion of absolute State sovereignty, which begins to be thought of as relative, inasmuch as interventions at a national level in favor of the protection of human rights become admissible; one moves from a 'Hobbesian' conception of sovereignty centered on the State to a 'Kantian' conception of sovereignty centered on universal citizenship;⁸

⁶. Hector Gros Espiell, *Los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano*, San José, Libro Libre, 1986, p. 16-17.

⁷. Kathryn Sikkink, 'Human Rights, Principled Issue-Networks and Sovereignty in Latin America'. In: *International Organizations*, Boston, IO Foundation and Massachusetts Institute of Technology, 1993, p. 413. The same author adds: "Basic individual rights are not within the State's exclusive domain, but constitute a legitimate concern of the international community (op. cit., p. 441.)"

⁸ In Celso Lafer's opinion, from an *ex parte principe* view, based on the duties of the subjects in relation to the State, one passes to an *ex parte populi* view, based on the promotion of the notion of citizen's rights. (Celso Lafer, *Comércio, Desarmamento, Direitos Humanos: Reflexões sobre uma experiência diplomática*, São Paulo, Paz e Terra, 1999, p.145).

2) a crystallization of the idea that the individual should have his/her rights protected in the international sphere, as a subject of rights.

This suggests the end of the era when the way the State treated its nationals was conceived as a problem of domestic jurisdiction as a consequence of its sovereignty.

The process of universalization of human rights in turn allowed the formation of an international normative system for the protection of these rights. André Gonçalves Pereira and Fausto de Quadros teach us: "In terms of Political Science, all it amounted to was 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. But it was enough for International Law to abandon the classical phase, as the Law of Peace and War, and pass to the new or modern age of its evolution as the Law of International Cooperation and Solidarity".⁹

Starting with the passing of the 1948 Universal Declaration and with the contemporary conception of human rights introduced by it, International Human Rights Law began developing by means of the adoption of several international treaties geared to the protection of fundamental rights. The 1948 Universal Declaration lends axiological backing and a unity of values to this field of Law, with an emphasis on the universality, indivisibility and interdependence of human rights. As Norberto Bobbio taught us, human rights are born as natural universal rights, develop as positive particular rights (when each constitution incorporates a bill of rights) and finally find their full expression as positive universal rights.¹⁰

⁹ André Gonçalves Pereira and Fausto Quadros, *Manual de Direito Internacional Público*, 3a edição, Coimbra, Livraria Almedina, 1993, p. 661. The authors add: "The new fields that International Law has come to absorb are of various types: political, economic, social, cultural, scientific, technical etc. But among them, the book has shown that three must be highlighted: the protection and guarantee of Human Rights, development and economic and political integration." (op. cit., p. 661.) Hector Fix-Zamudio believes, "the establishment of international human rights protection bodies, which the prominent Italian treatise writer Mauro Cappelletti has classified as transnational constitutional jurisdiction inasmuch as it controls the constitutionality of legislative acts and concrete acts of authority, has reached domestic Law, particularly in the field of human rights and projected itself onto the international and community plane." (*Protección Jurídica de los Derechos Humanos*, Mexico, Comisión Nacional de Derechos Humanos, 1991, p. 184.)

¹⁰ Norberto Bobbio, *Era dos Direitos*, translated by Carlos Nelson Coutinho, Rio de Janeiro,

The process of internationalization of human rights made for the formation of an international protection system for these rights. This system is made up of international protection treaties that reflect, above all, the contemporary ethical conscience shared by States inasmuch as they invoke the international consensus on minimum protective parameters regarding human rights (the "irreducible ethical minimum"). In this sense, it is worth pointing out that by 2003, the International Covenant on Civil and Political Rights had 149 States-parties; the International Covenant on Economic, Social and Cultural Rights had 146 States-parties; the Convention Against Torture had 132 States-parties; the Convention on the Elimination of Racial Discrimination had 167 States-parties; the Convention on the Elimination of Discrimination Against Women had 170 States-parties and the Convention on the Rights of Children had the largest support, with 191 States-parties.¹¹

Side-by-side with the global normative system, there emerge regional protection systems that seek to internationalize human rights at a regional level, particularly in Europe, America and Africa. Additionally, there is a fledgling Arab system and the proposal for creating an Asian regional system. Hence, one sees the consolidating coexistence between the UN global system and regional instruments of the American, European and African systems of human rights protection.

The global and regional systems are not dichotomous but complementary. Inspired by the values and principles of the Universal Declaration, they make up the instrumental universe of human rights protection at international level. Seen from this angle, the various human rights protection systems interact to the benefit of the individuals protected. The purpose of the coexistence of different legal instruments which guarantee the same rights is to widen and strengthen the protection of human rights. What matters is the degree of effectiveness of the protection and, as a consequence, the norm that best protects the victim in the

Campus, 1988, p. 30.

¹¹ Regarding this, consult: *Human Development Report 2003*, UNDP, New York/Oxford, Oxford University Press, 2003.

concrete case at hand must be the one applied. By adopting the value of the primacy of the human being, these systems complement one another and interact with national systems to provide the most effective possible protection and promotion of fundamental rights. This, incidentally, is the logic of International Human Rights Law, founded as it is on the higher principle of human dignity.

The contemporary conception of human rights is characterized by the processes of universalization and internationalization of these rights in their indivisibility.¹²

It is worth emphasizing that the 1993 Vienna Human Rights Declaration reiterates the conception of the 1948 Declaration when it states in paragraph 5: "All human rights are universal, indivisible, interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

Therefore, the 1993 Vienna Declaration, of which there are 171 signatories, 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. Note that as a post-war consensus, the 1948 Declaration was adopted by 48 States, with 8 abstentions. Hence, the 1993 Vienna Declaration extends, renews and enlarges the consensus on the universality and indivisibility of human rights. The Vienna Declaration also affirms the interdependence between the values of human rights, democracy and development.

There are no human rights without democracy and there is no democracy without human rights. It is worth mentioning that the regime most compatible with the protection of human rights is the democratic regime. Currently, 140 out of the nearly 200 States that are part of the international order hold elections at regular

¹² Note that the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of Children contemplate not only civil and political rights but also social, economic and cultural rights, which reinforces the idea of the indivisibility of human rights.

intervals. However, only 82 States with 57% of the world's population are considered fully democratic, up from 44 States with 38% of the world's population, in 1985.¹³ The full exercising of political rights may imply the empowerment of more vulnerable populations, with more lobbying power, articulation and political mobilization. In Amartya Sen's view, political rights (including freedom of expression and discussion) are not only fundamental to demand political responses to economic needs, but are central for the very formulation of these economic needs.¹⁴

Beyond this, and in the face of the indivisibility of human rights, one must move away definitively from the mistaken notion that a class of rights (civil and political) deserves full recognition and respect, while another (that of social, economic and cultural rights) does not deserve any observance whatsoever. From an international normative point of view, the conception that social, economic and cultural rights are not legal rights has been definitively overcome. The idea that social rights cannot be demanded through legal channels is merely ideological and not scientific. They are truly authentic fundamental rights, legally pursuable, demandable and worthy of serious and responsible observance. Thus, they must be demanded as rights and not as charity, generosity or compassion.

As Asbjorn Eide and Allan Rosas put it: "Taking economic, social and cultural rights seriously implies, at the same time, a commitment to social integration, solidarity and equality, including the issue of income distribution. Economic, social and cultural rights include, as a central concern, the protection of vulnerable groups. (...) Fundamental needs should not be conditioned to the charity of State programs and policies, but must be defined as rights."¹⁵

¹³ Consult: *Human Development Report 2002: Deepening democracy in a fragmented world*, UNDP, New York/Oxford, Oxford University Press, 2002.

¹⁴ Amartya Sen's foreword to Paul Farmer, *Pathologies of Power*, University of California Press, Berkeley, 2003.

¹⁵ Asbjorn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A universal challenge'. In: Asbjorn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Dordrecht, Boston and London, 1995, p. 17-18.

Note that in May 2001, the Committee on Economic, Social and Cultural Rights recognized poverty as a human rights violation, defining it as "a human condition characterized by the deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights".¹⁶

Understanding the right to social inclusion, or poverty as a violation of human rights, means one must also resort to the right to development to be able to pin down its reach. It is important to emphasize, as does Celso Lafer, that in the field of values regarding human rights, the consequence of an international system with clear-cut polarities – East/West, North/South – was the ideological battle between civil and political rights (the liberal heritage championed by the USA) and economic, social and cultural rights (the social heritage championed by the then USSR). In this setting, there emerges the "Third World's effort to formulate its own cultural identity, proposing collective cultural identity rights, such as the right to development."¹⁷

Thus, in 1986, the UN adopted the Declaration on the Right to Development with 146 States in favor, one against (the USA) and 8 abstentions. In the words of Allan Rosas: "With regard to the content of the right to development, three aspects should be mentioned. Firstly, the 1986 Declaration endorses the importance of participation. (...) Secondly, the Declaration must be conceived in the context of the basic needs of social justice. Thirdly, the Declaration emphasizes as much the need for the adoption of national programs and policies, as for international cooperation."¹⁸

Article 2 of the 1986 Declaration on the Right to Development establishes that: "The human person is the central subject of development and should be the

¹⁶ See Committee on Economic, Social and Cultural Rights, E/C.12/2001/10.

¹⁷ Celso Lafer, *Comércio, Desarmamento, Direitos Humanos: Reflexões sobre uma experiência diplomática*, São Paulo, Paz e Terra, 1999.

¹⁸ Allan Rosas, 'The Right to Development'. In: Asbjorn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Dordrecht, Boston and London, 1995, p. 254-255.

active participant and beneficiary of the right to development." Article 4 states that States have the duty to adopt measures, individually or collectively, geared at formulating international development policies with a view to the full enjoyment of rights. Further, that effective international cooperation is essential to provide developing countries with means to encourage the right to development.

The right to development demands an ethical globalization with solidarity. In the words of Mohammed Bedjaoui: "In actual fact, the international dimension of the right to development is no more than the right to an equitable distribution, corresponding to the world's social and economic welfare. It reflects a crucial demand of our time, inasmuch as four fifths of the world population no longer accept the fact that one fifth of the world population continues to build its wealth based on their poverty."¹⁹ Global asymmetries are such that the income of the 1% richest people surpasses that of the 57% poorest.²⁰

As Joseph E. Stiglitz points out: "The actual number of people living in poverty has actually increased by almost 100 million. This occurred at the same time that total world income increased by an average of 2.5 percent annually."²¹ 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."²²

¹⁹ Mohammed Bedjaoui, 'The Right to Development'. In M. Bedjaoui (ed.), *International Law: Achievements and prospects*, 1991, p. 1182.

²⁰ Consult: *Human Development Report 2002*, UNDP, New York/Oxford, OUP, 2002, p. 19.

²¹ Joseph E. Stiglitz, *Globalization and its Discontents*, New York/London, WW Norton Company, 2003, p. 06. 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." (op. cit., p. 252.)

²² Paul Farmer, *Pathologies of Power*, Berkeley, University of California Press, 2003, p. 50. According to data from the 'Vital Signs' report by the Worldwatch Institute (2003), income inequality is reflected in health indicators: infant mortality in poor countries is 13 times higher than in rich countries; maternal mortality is 150 times higher. The absence of clean water and basic sanitation kills 1.7 million people per year (90% children), while 1.6 million people die of diseases resulting from the use of fossil fuels for heating and cooking. The report also calls attention to the fact that nearly all armed conflicts take place in the developing world and that these produced 86% of the refugees of the last decade.

Development, in turn, must be conceived as a process of expansion of real liberties that people can enjoy, to use Amartya Sen's conception²³. Further, the 1993 Vienna Declaration emphasizes that the right to development is a universal and inalienable right, an integral part of fundamental human rights. Finally, it must be reiterated that the Vienna Declaration recognizes the interdependence between democracy, development and human rights.

Hence, one moves on to the final reflection:

3. What are the challenges and perspectives for the implementation of the right to social inclusion in the contemporary order?

To deal with this question one must consider five challenges:

1) Consolidating and strengthening the conception of the right to social inclusion as an inalienable human right, with poverty constituting a violation of human rights.

Human rights as an 'axiological acquisition' are constantly being elaborated and redefined.

If, traditionally, the human rights agenda was centered on support for civil and political rights under the strong impact of the 'voice of the North', one currently witnesses a widening of this agenda with the incorporation of new rights and an emphasis on economic, social and cultural rights, on the right to

²³ In conceiving development as freedom, Amartya Sen says: "(...) an attempt to see development as a process of expanding the real freedoms that people enjoy. In this approach, expansion of freedom is viewed as both: 1) the primary end and 2) the principal means of development. They can be called respectively the "constitutive role" and the "instrumental role" of freedom in development. The constitutive role of freedom relates to the importance of substantive freedom in enriching human life. The substantive freedoms include elementary capabilities like being able to avoid such deprivations such as starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on. In this constitutive perspective, development involves expansion of these and other basic freedoms. Development, in this view, is the process of expanding human freedoms, and the assessment of development has to be informed by this consideration." (Amartya Sen, *Development as Freedom*, Alfred A. Knopf, New York, 1999, p. 36 and p. 297). On the right to development, see also Karel Vasak, *For the Third Generation of Human Rights: The rights of solidarity*, International Institute of Human Rights, 1979.

development, on the right to social inclusion and on poverty as a human rights violation. This process allows the 'South's own voice' to echo, so revealing the concerns, demands and priorities of the region.

It is therefore necessary to advance continuously in the expansion of the conceptual reach of human rights, hence meeting basic social justice needs. In this setting, it is fundamental to consolidate and strengthen the process by means of which the right to social inclusion asserts itself as an inalienable human right and poverty is considered a violation of human rights.

2) Incorporating a gender, racial and ethnic approach to the conception of the right to social inclusion and of poverty as a violation of human rights, as well as creating specific policies in support of socially vulnerable groups.

The effective protection of the right to social inclusion demands not only universal policies but also specific ones, aimed at socially vulnerable groups who are the chief victims of poverty. In other words, the right to social inclusion requires the universality and indivisibility of human rights, with the added value of diversity.

Added to the process of expansion of human rights, there is the process of specification of subjects of rights.

The first phase of human rights protection was characterized by an emphasis on general protection. This was based on formal equality and expressed the fear of difference which, under Nazism, had been geared to extermination.

However, treating the individual in a generic, general and abstract way has become insufficient. It has become necessary to specify the subject of the right and to see it in its peculiarity and particularity. Within this perspective, certain subjects of rights, or certain violations of rights, demand different specific responses. In this setting, women, children, the afro-descendent population, migrants, people with disabilities, among other vulnerable categories, must be

looked at in the specificities and peculiarities of their social condition. Side-by-side with the right to equality, there arises, also as a fundamental right, the right to difference. Respecting difference and diversity, and the special treatment that goes with them, does matter.

As Paul Farmer has taught us: "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".²⁴

In Nancy Fraser's eyes, justice demands redistribution and recognition of identities, simultaneously. As she points out: "Recognition cannot be reduced to distribution because status in society is not only a function of class. (...) Conversely, distribution cannot be reduced to recognition because access to resources is not simply a function of status."²⁵ There is, hence, a two-dimensional character to justice: redistribution plus recognition.

Along the same lines, Boaventura de Souza Santos states that only through the demand for redistribution and recognition can equality be realized.²⁶ He adds: "We have the right to be equal when our difference makes us inferior; and we have the right to be different when our equality de-characterizes us.

²⁴ Paul Farmer, op. cit., p. 212.

²⁵ Nancy Fraser states: "Recognition cannot be reduced to distribution because status in society is not only a function of class. Let us take the example of an Afro-American Wall Street banker who cannot get a taxi. In this case, the injustice of the lack of recognition has little to do with bad distribution. (...) Conversely, distribution cannot be reduced to recognition because access to resources is not simply a function of status. Let us take the example of a skilled industrial worker who becomes unemployed due to the closure of the factory he worked in as a result of a speculative corporate merger. In this case, the injustice of the bad distribution has little to do with a lack of recognition. (...) I propose to develop what I call the two-dimensional conception of justice. This conception deals with redistribution and recognition as different perspectives and dimensions of justice. Without reducing one to the other, it includes both in a wider framework." (Nancy Fraser, 'Redistribución, Reconocimiento y Participación: Hacia un concepto integrado de la justicia'. In: *Informe Mundial sobre la Cultura – 2000-2001*, Unesco, p. 55-56.)

²⁶ Regarding this, see Boaventura de Souza Santos, 'Introdução: Para ampliar o cânone do reconhecimento, da diferença e da igualdade'. In: *Reconhecer para Libertar: Os caminhos do cosmopolitanismo multicultural*, Rio de Janeiro, Civilização Brasileira, 2003, p. 56. See also by the same author, 'Por uma Concepção Multicultural de Direitos Humanos'. In: op. cit. p. 429-461.

Hence the need for an equality that recognizes the differences and for a difference that does not produce, feed or reproduce inequalities."²⁷

In the Brazilian experience one notices that the main victims of violations of economic, social and cultural rights are women and the afro-descendent population, which denotes processes of 'feminization' and 'ethnicization' of poverty²⁸. Hence the need to adopt specific policies, side-by-side with universal ones, which can give visibility to the more vulnerable subjects of rights, with a view to their full enjoyment of the right to social inclusion.

One must also add the democratic component that should guide the formulation of such public policies. That is, the right of social groups to actual participation in the formulation of the policies that will affect them must be ensured. Civil society is clamoring for greater transparency, democratization and accountability in the management of public funds and implementation of public policies.

3) Optimizing the justiciability of economic, social and cultural rights, strengthening the actualization of the right to social inclusion.

As recommended by the 1993 Vienna Convention, it is fundamental to adopt measures that ensure greater justiciability to economic, social and cultural rights. These might include the formulation of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (which introduces a system of individual suits) and of technical-scientific indicators capable of measuring advances in the implementation of these rights.

In the global system, the International Covenant on Economic, Social and Cultural Rights only has the mechanism of reports to be forwarded by States as a form of monitoring the rights it spells out. In the inter-American system, there is mention of a system of petitioning to the Inter-American Commission on Human Rights in cases of violation of the right to education or of trade union rights, as

²⁷ See Boaventura de Souza Santos, op. cit..

²⁸ Regarding this, consult Flavia Piovesan and Silvia Pimentel, 'Contribuição a partir da perspectiva de gênero ao Relatório Alternativo sobre o PIDESC', Brasil, CLADEM, 2002.

spelled out in the San Salvador Protocol. As well as instituting a petitioning system on a global level by means of an Optional Protocol, it is also essential to optimize the use of this regional mechanism with the right to petition in order to protect the right to education and trade union rights. Furthermore, one must potentiate the litigation of the other economic, social and cultural rights, if need be by using civil rights violations as a 'gateway' for demands tied to economic, social and cultural rights. To illustrate this, the following cases are worthy of mention: a) the supply of medication to people with HIV (based on the violation of the right to life contained in article 4 of the American Convention); b) the summary dismissal of workers (based on the violation of article 8 of the American Convention, which spells out due legal process – Baena Ricardo X Panama case).

The potential of international litigation for promoting advances in domestic human rights protection regimes is clear. This is the greatest contribution that the international protection system can make: spurring on domestic progress and advances in human rights protection in a particular State.

Further, the incorporation of an individual petitioning system reflects the process of recognition of new actors in the international arena, with the resulting democratization of international instruments. If States have for a long time been the protagonists of the international order, nowadays one experiences the emergence of new international actors, such as international organizations, regional economic blocs, individuals and international civil society (e.g.: international non-governmental organizations). The strengthening of international civil society by means of a communication and advocacy network made up of local, regional and global organizations,²⁹ and of the consolidation of the individual as a subject of international rights, demands a democratization of international instruments. It also demands greater access to international mechanisms and to international justice itself.

²⁹ As for international civil society, note that of the 738 NGOs accredited at the Seattle conference (1999), 87% were from industrialized countries. Such data reveals the asymmetries that still exist regarding the very makeup of international civil society, in terms of North/South relations.

The emergence of new international actors requires a democratization of the international human rights protection system. For example, Protocol 11 of the European regional system deserves a mention, since it opened up to individuals the possibility of direct access to the European Court of Human Rights. Additionally, there is the recent passing of the Optional Protocol to the Convention on the Elimination of Discrimination against Women (1999), which includes an individual petitioning system. Also worthy of mention is the draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which also introduces an individual petitioning system.

However, one must highlight the fact that many States resist accepting the democratization of the international human rights protection system, especially as regards individual petitioning systems.³⁰ Such systems cement the individual's capacity to sue on the international level, "constituting a protection mechanism of marked significance, as well as a victory of historical transcendence," as Antônio Augusto Cançado Trindade has taught us.³¹

It is therefore fundamental that economic, social and cultural rights protection treaties have effective monitoring systems with provisions for reports, individual petitioning and inter-State communications. Also important would be *in loco* investigation systems such those provided for only in the Convention against Torture and in the Optional Protocol of the Convention on the Elimination of Discrimination against Women. In this setting, it is fundamental to encourage States to accept these mechanisms. It is no longer admissible for States to accept rights and deny the guarantees of their protection.

³⁰ Actually, many States still resist accepting the optional clauses referring to individual petitions and inter-state communications. Suffice it to say that according to 2001 data: a) out of 147 States-parties to the International Covenant on Civil and Political Rights, only 97 accepted the individual petitioning mechanism (having ratified the Optional Protocol with this purpose); b) out of 124 States-parties to the Convention against Torture, only 43 accepted the inter-State communication and individual petitioning mechanisms (under the terms of articles 21 and 22 of the Convention); c) of the 157 States-parties to the Convention on the Elimination of All Forms of Racial Discrimination, only 34 accepted the individual petitioning mechanism (under the terms of article 14 of the Convention); d) out of 168 States-parties to the Convention on the Elimination of All Forms of Discrimination against Women, only 21 accepted the individual petitioning mechanism, despite having ratified the corresponding Optional Protocol.

Beyond these mechanisms, it is crucial that the formulation of technical-scientific indicators be encouraged, so that compliance and the observance of economic, social and cultural rights can be evaluated, in particular with regards to their progressiveness.

Another strategy is facilitating the visits by UN or OAS special rapporteurs about issues relating to economic, social and cultural rights. Their work constitutes an effective means of focusing attention on and giving visibility to a certain human rights violation, as well as of making recommendations. More than just symbolizing a diagnosis of the human rights situation, the greatest contribution the special rapporteurs make through the compilation of their reports lies in the fact that these act as a tool for obtaining advances in the domestic human rights protection regime of a particular country.

Also worthy of note is the innovative experiment in Brazil of adopting economic, social and cultural rights themes to be reported on along UN lines. Themes include: a) health; b) housing; c) education; d) food; e) work; f) environment. As with the UN system, the idea is to formulate a diagnosis of the situation of these rights and make recommendations to ensure their full enjoyment.

In short, efforts to optimize the justiciability of economic, social and cultural rights are urgently needed, hence strengthening the actualization of the right to social inclusion.

4) Putting social human rights on the agenda of international financial institutions, regional economic organizations and the private sector.

To tackle poverty as a form of violation of human rights and to reinforce the right to social inclusion, it is not enough for the State to implement human rights. The Declaration on the Right to Development and the International Covenant on Economic, Social and Cultural Rights emphasize as much the need for national policies and programs, as for international cooperation. Article 4 of

³¹ Antônio Augusto Cançado Trindade, *A Proteção Internacional dos Direitos Humanos: Fundamentos jurídicos e instrumentos básicos*, São Paulo, Ed. Saraiva, p. 8.

the Declaration highlights the fact that effective international cooperation is essential to provide developing countries with the means to spur on the right to development.

In the context of economic globalization, it becomes pressing for non-State actors to incorporate the human rights agenda. In this sense, there are three crucial actors: a) international financial agencies; b) regional economic blocs; c) the private sector.

In relation to the international financial agencies, there is the challenge of human rights coming to permeate macro-economic policy in the broad sense (fiscal, monetary and exchange rate policies). International economic institutions must seriously take into account the human dimension of their activities and the strong impact that economic policies may have on local economies, especially in an ever-more globalized world.³²

Although the international financial agencies are linked to the UN system as specialized agencies, the World Bank and the International Monetary Fund, for example, lack a human-rights-driven policy. Such a policy would be imperative for the attainment of UN goals and, above all, for the ethical coherence and principles that must guide their actions. Thus, the human rights agenda should be incorporated into the mandate of these agencies.

It is necessary to break with the paradoxes resulting from the stress on inclusion when the promotion of human rights is at issue (enshrined in the relevant treaties, in particular the International Covenant on Economic, Social and Cultural Rights) and, on the other hand, the excluding logic of international financial agencies, especially the International Monetary Fund, which, with its 'conditionalities', submits developing countries to structural adjustment programs

³² Mary Robinson, *Constructing an International Financial, Trade and Development Architecture: The Human Rights Dimension*, Zurich, 1 July 1999, www.unhchr.org. She adds: "As an example, an economist has warned that trade and exchange rate policy may have a greater impact on the development of children's rights than the actual health and education budgets. An incompetent Central Bank director may be more prejudicial to children's rights than an incompetent Minister of Education." (op. cit..)

that are incompatible with human rights.³³ Further, these institutions must become more democratic, transparent and accountable.³⁴ Note that 48% of IMF voting rights and 46% of World Bank voting rights are in the hands of seven States (USA, Japan, France, UK, Saudi Arabia, China and Russia).³⁵ In Joseph E. Stiglitz's critical perception, "(...) 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

³³ According to Jeffrey Sachs: "About 700 million people – the very poorest – are held in debt bondage by the rich countries. The so-called Highly Indebted Poor Countries are a group of 42 financially bankrupt and largely destitute economies. They owe more than \$100 million in unpayable debt to the World Bank, the International Monetary Fund development banks and governments, often reflecting the failures of past loans. Many of those loans were made to tyrannical regimes to suit Cold War aims. Many simply reflect misguided ideas of the past. The moral and practical case for freeing those countries from their debt bondage is overwhelming. Jubille 2000, an organization supported by people as diverse as Pope John Paul II, Jesse Jackson and Bono, the rock star, has called for outright elimination of the debt burden of many of the world's poorest countries. This idea is often scoffed at as unrealistic, but it is the realists who fail to understand the economic opportunities facing the world today.

The financial bankruptcy of the poorest countries has been evident for at least 15 years, but the IMF, the World Bank and the rich countries have delayed real solutions to the chronic problem...

In 1996... the IMF and World Bank announced a relief program with great fanfare, but without including any true dialogue with the affected countries. Three years later, these plans have failed. Just two countries (Bolivia and Uganda) were given about \$200 million, while 40 others continue to wait in line.

In this same period, the stock market wealth of the rich countries has grown by more than \$5 trillion, more than 50 times the debt owed by the 42 poor countries.

So it is a cruel joke for the world's wealthy governments to protest that they cannot afford to cancel the debts...." (Jeffrey Sachs, 'Release the Poorest Countries from Debt Bondage', *International Herald Tribune*, June 12 and 13, p. 8, from Henry Steiner and Philip Alston, *International Human Rights in Context: Law, politics and morals*, second edition, Oxford, Oxford University Press, 2000, p. 1329-1330).

³⁴ Regarding this, consult Joseph E. Stiglitz, *Globalization and its Discontents*, New York/London, WW Norton Company, 2003. In the author's view, "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." (op. cit., p. XIV.)

³⁵ Regarding this, consult: *Human Development Report 2002*, UNDP, New York/Oxford, Oxford University Press, 2002.

left almost voiceless. It's time to change some of the rules governing the international economic order."³⁶

As for the regional economic blocs, one notices similar paradoxes resulting from tensions between the excluding thrust of the process of economic globalization and the movements that are trying to strengthen democracy and human rights as parameters offering ethical and moral grounding for the creation of a new world order.

So, on one side one has the excluding nature of economic globalization and on the other, there emerges the including logic of the process of internationalization of human rights plus the process of incorporation of democratic and human rights clauses by regional economic blocs. Although regional blocs such as the European Union and the Mercosur have sought not only economic cooperation and integration but also the gradual consolidation of democracy and implementation of human rights — more notably in the case of the European Union —, one observes that democratic and human rights clauses have not been put on the globalization agenda.

As for the private sector, especially multinational corporations, there is also a need to deepen social responsibility inasmuch as they are the main beneficiaries of globalization. Suffice it to say that of the world's 100 biggest economies, 51 are multinational corporations and 49 are States. It would be important to urge corporations to adopt trade-related human rights codes, demand trade sanctions against corporations that violate social rights and adopt the 'Tobin tax' on international capital flows, among other measures.

5) Reaffirming the State's responsibility for the implementation of economic, social and cultural rights, for the right to social inclusion and for poverty as a violation of human rights.

Lastly, considering the grave risks of the scrapping of public social policies, a redefinition of the role of the State under the impact of economic

³⁶ Joseph E. Stiglitz, op. cit., p. 21-22.

globalization is badly needed. The State's responsibility must be restated with regards to the implementation of economic, social and cultural rights. In the words of Amartya Sen: "Poverty persists because poor countries have too little government (public schools, hospitals, infrastructure)."

As Asbjorn Eide warns: "Paths can and should be found for the State to ensure respect and protection for economic, social and cultural rights, so as to preserve the conditions for a relatively free market economy. Government action should promote social equality, tackle social inequalities, compensate the imbalances created by markets and ensure sustainable human development. The relation between governments and markets should be complementary. (...) Where income is equally distributed and opportunities are reasonably equitable, individuals are in better conditions of going about their interests and there is less of a need for public expenditure on the part of the State. When, on the other hand, income is unjustly distributed, the demand for equal opportunities and equal exercising of economic, social and cultural rights require greater State expenditure based on progressive taxation and other measures."³⁷

Along the same lines, Jack Donnelly states: "Free markets are an economic analogue to a political system of majority rule without minority rights. The welfare state, from this perspective, is a device to ensure that a minority who are disadvantaged in or deprived by markets are treated with minimum economic concern and respect. (...) Markets foster efficiency, not social equity or the enjoyment of individual rights for all".³⁸

³⁷ Asbjorn Eide, 'Obstacles and Goals to be Pursued'. In: Asbjorn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Dordrecht, Boston and London, 1995, p. 383. The author adds: "Where income is equally distributed and opportunities are reasonably equitable, individuals are in better conditions of going about their interests and there is less of a need for public expenditure on the part of the State. When, on the other hand, income is unjustly distributed, the demand for equal opportunities and equal exercising of economic, social and cultural rights require greater State expenditure based on progressive taxation and other measures. Paradoxically, however, taxation for public expenditure in egalitarian societies seems more welcome than in societies where income is unjustly distributed." (Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights'. In: Asbjorn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Dordrecht, Boston and London, 1995, p. 40).

³⁸ Jack Donnelly, *International Human Rights*, Westview Press, Boulder, 1998, p. 160. "Assuaging short-term suffering and assuring long-term recompense are the work of the (welfare)

The following consideration must be added: the actualization of economic, social and cultural rights is not only a moral, but also a juridical obligation of States. This has grounding in international human rights protection treaties, in particular the International Covenant on Economic, Social and Cultural Rights. States have the duty to respect, protect and implement the rights spelled out in the Covenant, which currently has 145 States-parties. It lists a wide range of rights, including the right to work and fair remuneration, the right to form and join trade unions, the right to a decent standard of living, the right to housing, the right to education, health, social security etc. Under the terms of the Covenant, these rights must be progressively implemented and are conditioned to the actions of the State, which must adopt all measures, to the limit of available resources,³⁹ to achieve their full actualization (article 2, paragraph 1).⁴⁰

It is worth reiterating that, given the indivisibility of human rights, the violation of economic, social and cultural rights facilitates the violation of civil and political rights. Put differently, socio-economic vulnerability leads to the vulnerability of civil and political rights. In Amartya Sen's words: "(...) the

state, not the market. These are matters of justice, rights and obligations, not efficiency. They raise issues of individual rights. Markets simply cannot address them – because they are not designed to." (Jack Donnelly, 'Ethics and International Human Rights'. In: *Ethics and International Affairs*, Japan, United Nations University Press, 2001, p. 153).

³⁹ It is worth pointing out that social rights, as much as civil and political rights, demand from the State both positive and negative measures. The view that social rights only demand positive measures, while civil and political rights demand either negative measures or mere abstention on the part of the State, is simplistic and mistaken. As an example, one might ask what is the cost of the security apparatus by means of which classic civil rights, such as the right to freedom or to property, are ensured; or, what is the cost of the electoral apparatus, by means of which political rights are exercised; or even, what is the cost of the Judiciary, by means of which people have the right to access justice. Hence, ensuring civil and political rights cannot be restricted to demanding mere omission on the part of the State, since their implementation requires focused public policies which also entail costs.

⁴⁰ The expression 'progressive application' has often been misinterpreted. In its 'General Comment n. 3' (1990) on the nature of State obligations concerning article 2, paragraph 1 of the Covenant, the Committee on Economic, Social and Cultural Rights stated 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 must be interpreted in the light of its central objective, which is to lay down clear obligations for States-parties, in the sense of adopting measures as swiftly as possible towards the realization of these rights. (General Comment n. 3, UN doc. E/1991/23.)

economic unfreedom, in the form of extreme poverty, can make a person a helpless prey in the violation of other kinds of freedom. (...) Economic unfreedom can breed social unfreedom, just as social unfreedom, just as social and political unfreedom can also foster economic unfreedom."⁴¹

If civil and political rights keep democracy within reasonable limits, then economic and social rights establish the adequate limits for markets. Markets and elections are not sufficient to ensure human rights for all.⁴²

4. Conclusion

The right to social inclusion and the consequent characterization of poverty as a human rights violation derive from the contemporary conception of human rights, with its values of universality and indivisibility.

The right to social inclusion and poverty as a human rights violation must be understood with the integral view of human rights as the starting point. This view stresses the indivisibility, interdependence and inter-relatedness of the different categories of rights, meaning that social, economic and cultural rights constitute authentic and true rights, subject to demandability, justiciability and worthy of serious and responsible observance.

In this context, the affirmation of the right to social inclusion and of poverty as a human rights violation implies five challenges:

- a) mapping out the field of economic, social and cultural rights and establishing the reach and bounds of these rights, which would identify the right to social inclusion and poverty as a human rights violation;
- b) creating special protection for socially vulnerable groups, being they the chief victims of violations of these rights inasmuch as the right to social inclusion requires the universality and indivisibility of human rights, with the added value of diversity;
- c) strengthening the mechanisms for the actualization of the right to social

⁴¹ Amartya Sen, *Development as Freedom*, Alfred A. Knopf, New York, 1999, p. 8.

⁴² Jack Donnelly, *International Human Rights*, Colorado, Westview Press, 1998, p. 160.

inclusion and for tackling poverty as a violation of human rights, adopting measures to offer more justiciability and demandability to economic, social and cultural rights.

d) identifying the field of responsibility in the face of the violation of the right to social inclusion, within a perspective that correlates rights and duties;

e) evaluating which agents are responsible for these violations so as to understand the extent of the duties of States and of the responsibilities of non-State actors such as international financial agencies and the private sector, among others.

In the face of these challenges, the following conclusion remains: one must believe in the implementation of human rights as the single emancipatory platform of our time, as the rationality of resistance, capable of lending sustainability to the right to social inclusion and of overcoming poverty as a violation of rights.

Today, more than ever, one must invent a new order, a more democratic and egalitarian order, one able to celebrate the interdependence between democracy, development and human rights and, above all, one whose centrality lies in the value of the absolute prevalence of human dignity.