THE HUMANIZATION OF INTERNATIONAL COURTS[1]

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ABSTRACT

This article considers the contribution of international courts to the humanization of International Law. Several international courts -not only those dedicated to the protection of human rights or humanitarian rights have added a new profile to international law. This paper also deals with three recent case studies that illustrate this change: *the Order of de ICJ (May 24th, 2007) in the *"Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo) Preliminary Objections"*; * the Eleventh Arbitration Award of the Ad Hoc Arbitration Court of the MERCOSUR (September 6th, 2006) in the *"Case Omission of the Argentine State in adopting appropriate measures to come up and/or to make stop the impediments to the free circulation derived from the cuts in Argentine territory of routes of access to the international bridges Gral. San Martín and Gral. Artigas that unite the Argentine Republic with the Eastern Republic of Uruguay"*; * Decision on liability of the ICSID (October 3rd, 2006) in the "*Case of the Proceedings between LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. (Claimants) and Argentine Republic (Respondent)".*

KEY-WORDS: Humanization - International Law - Jurisprudence- International Courts

Introduction

Several international courts -not only those dedicated to the protection of human or humanitarian rights- in the last times, have given a new profile to international law. Those courts have considered individual rights and particular interests.

Since we cannot consider all the existing jurisprudence regarding this matter in such a brief paper, we selected three recent cases that illustrate this new approach to international law: * Order of the International Court of Justice (ICJ) (May 24th, 2007) in the *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo) Preliminary Objections*; * the Eleventh Arbitration Award of the *Ad Hoc* Arbitration Court of MERCOSUR (September 6th, 2006) in the *Case Omission of the Argentine State in adopting appropriate measures to come up and/or to make stop the impediments to the free circulation derived from the cuts in Argentine territory of routes of access to the international bridges Gral. San Martín and Gral. Artigas that unite the Argentine Republic with the Eastern Republic of Uruguay*; and the * Decision on liability of October 3rd, 2006 of the International Centre for Settlement of Investments Disputes (ICSID) in the case of the *Proceedings between LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. (Claimants) and Argentine Republic (Respondent).*

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Humanization of the International Court of Justice

The International Court of Justice (hereinafter ICJ), both in its contentious and advisory jurisdictions, has considered the development of international law, with special reference to the direct rights of the individuals.

Thomas Meron recalls that already in 1928 the Permanent Court of International Justice (PCIJ) (Advisory Opinion of March 3rd, 1928 in the Case of the *Jurisdiction of the Courts of Danzig (PCIJ-Ser. B)*, Nº 15, pp. 17-18) has recognized that states trough treaties may grant direct rights to individuals or impose direct obligations on them, rights that would be enforced by national courts[2]. Nevertheless, for the purposes of our analysis, it is worth noting that the PCIJ Advisory Opinion is based on a different situation. We must emphasize that direct rights (which the Advisory Opinion refers to) were recognized under treaties by the States themselves and not by courts in non compliance with conventional provisions – nowadays, situation more frequent in an increasing number of tribunals.

The ICJ Order of May 24th, 2007 in the *"Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo) Preliminary Objections"*[3] is an example of this new perception of international law.

Guinea exercised diplomatic protection, and alleged that Mr. Diallo's arrest, detention and expulsion were, *inter alia*, violations of the principle that aliens should be treated in accordance with 'a minimum standard of civilization'[4]. Nevertheless, the ICJ has gone beyond that point to consider:

> "39. The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the "ILC"),
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> > 'diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury

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2 "The Humanization of the Humanitarian Law", *American Journal of International Law,* Vol. 94-239, p. 240.

3 Ahmadou Sadio Diallo, a businessman of Guinean nationality, was imprisoned by the authorities of the Democratic Republic of Congo, after being resident in that State for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled. On 28 December 1998, the Government of the Republic of Guinea filed in the Registry of the Court an Application instituting proceedings against the Democratic Republic of Congo.

4 Guinea in the Memorial on the Merits sustained *i.a.* "that in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the [1963] Vienna Convention on Consular Relations; in subjecting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership and management in respect of the companies founded by him in the Democratic Republic of Congo (DRC); in preventing him from pursuing recovery of the numerous debts owed to him - to himself personally and to the said companies - both by the DRC itself and by other contractual partners; in not paying its own debts to him and to his companies, the DRC has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea" (Para 11.(1)).

> caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility' (Article 1 of the draft Articles on Diplomatic Protection adopted by the ILC at its Fifty-eighth Session (2006), ILC Report, doc. A/61/10, p. 24).
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> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, **the scope *ratione materiae* of diplomatic protection**, **originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights**." (Emphasis added)

This statement refers to the posture assumed by the Inter-American Court of Human Rights in its Advisory Opinion OC-16/99 of October 1st, 1999 regarding the following matter: *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Mexico v. USA). The Court considered the request of Mexico *in relation to the Vienna Convention on Consular Relations*: "*Under Article 64 (1) of the American Convention, should Article 36 of the Vienna Convention [on Consular Relations] be interpreted as containing provisions concerning the protection of human rights in the American States?."* The tribunal *i.a.* unanimously decided in Para. 141:

> "1-That Article 36 of the Vienna Convention on Consular Relations **confers rights upon detained foreign nationals**, among them the right to information on consular assistance, and that said rights carry with them correlative obligations for the host State".
> "2-That Article 36 of the Vienna Convention on Consular Relations ***concerns* the protection of the rights of a national of the sending State and is part of the body of international human rights law**." (Emphasis added)

The Inter-American Court of Human Rights considered, in Paragraph 151, that the *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions, and declarations) and that "the Court must adopt the proper approach to c**onsider the question in the context of the evolution of the fundamental rights of the human person in contemporary international law."** (Emphasis added)

In Paragraph 15 of the publication *Time and Law Revisited: The Evolution of Law in Face of New Needs of Protection,* the Court mandated:

> "15.It is **in the context of the evolution of the Law in time, in function of new needs of protection of the human being**, that, in my understanding, ought to be appreciated the **insertion of the right to information on consular notification** (under Article 36(1) (b) of the above-mentioned 1963 Vienna Convention) **into the conceptual universe of human rights**. **Such provision**, despite having preceded in time the general treaties of protection - as the two Covenants on Human Rights of the United Nations (of 1966) and the American Convention on Human Rights (of 1969) - **nowadays can no longer be dissociated from the international norms on human rights concerning the guarantees of the due process of law.** The evolution of the international norms of protection has been, in its turn, fostered by new and constant valuations which emerge and flourish from the basis of human society, are naturally reflected in the process of the interpretation of human rights treaties." (Emphasis added)

In Paragraph 124, the Inter-American Court considered that the individual's right to information, conferred in Article 36(1)(b) of the Vienna Convention on Consular Relations, upholds the right to due process of law contained in Article 14 of the International Covenant on Civil and Political Rights, and that the minimum guarantees

stated in Article 14 of the International Covenant can be broadened in light of other international instruments such as the Vienna Convention on Consular Relations, which widens the scope of the protection of human rights.

In his Concurring Opinion, Judge Cançado Trindade criticized the positivist-voluntarist trend that, centered in the autonomy of the will of the States, conceives (positive) law independently of time. Cançado Trindade emphasized the incapacity of manifest positivism to accompany the constant changes of social structures, and its incapacity to explain the historical development of customary rules of international law. In Paragraph 3, he affirms that the dynamics of contemporary international life have discredited the traditional understanding that international relations are governed by rules entirely derived from free will of the States themselves. The Judge concluded, in Paragraph 15, that "(i)t is **in the context of the evolution of Law in time**, by virtue of new needs for the protection of the human being, that, in my understanding, the **insertion of the right to information on consular notification (under Article 36(1) (b) of the above-mentioned 1963 Vienna Convention) into the conceptual universe of human rights** ought to be appreciated **."** (Emphasis added)

One should consider that the advisory opinion of the Inter-American Court of Human Rights preceded the sentence of the ICJ in the *Case LaGrand (Germany v. USA)* (sentence of June 27th, 2001). However, the ICJ did not quote the opinion of the American court or analyzed the German argument that the breach of Article 36 (of the Vienna Convention) by the United States not only infringed upon the rights of Germany as a State party to the Vienna Convention on Consular Relations, but also entailed a violation of LaGrand brothers' individual rights. Germany also argued that the provision in Article 36, paragraph 1 (b) of the Vienna Convention has the effect of conferring an individual right to the foreign national involved in the dispute. According to Germany, the *travaux préparatoires* of the Vienna Convention lend further support to this interpretation, and the "United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live", adopted by *General Assembly resolution 40/144* on December 13th 1985, asserts the view that the right of access to the home State consultate, as well as the information available on this right, constitute individual rights of foreign nationals and are to be regarded as human rights of aliens.

The Court considered in Paragraph 77 that Article 36 (1) (b), spells out the obligations of the receiving State owed to the detained person and the sending State: the receiving State must inform the consular post of the sending State about the individual's detention without delay; any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State without delay; and the State's right to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action". Nevertheless, the Court understood in Para. 126 that "(g)iven the foregoing ruling by the Court regarding the obligation of the United States under certain circumstances to review and reconsider convictions and sentences, **the Court needs not examine** Germany's further argument which seeks to found a like obligation on the contention that the right of a detained person to be informed without delay pursuant to Article 36, paragraph 1, of the Vienna Convention is not only an individual right but has today assumed the character of a human right." (Emphasis added)

In the *Case Concerning the Vienna Convention on Consular Relations (Request for the Indication of Provisional Measures) (Paraguay v. USA)* (ICJ Order of April 9th, 1998)

the question of the rights of Art. 36 of the Vienna Convention as human rights was not considered by the Court, despite the fact that Paraguay in its request for the indication of provisional measures of protection, stated that, the Circuit Court of Arlington County, Virginia, in February 25th 1998, ordered Mr. Breard to be executed in April 14th 1998; whereas it emphasized that "(t)he importance and sanctity of an individual human life are well established in international law" and "(a)s recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law" (Para. 8).

We observed that in its Order of 24 May 2007 in the *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo) Preliminary Objections* -without considerations- the ICJ did not follow the precedents of the Court itself, but rather those of the Inter-American Court of Human Rights. Paragraph 5 of the Preamble in the *Vienna Convention on Consular Relations*[5] was interpreted in the context of the evolution of Law in time, and considering the progressive preeminence of human rights in the international law legal system.

Humanization in the Arbitration Court *Ad Hoc* of MERCOSUR

The Arbitration Court *Ad Hoc* of MERCOSUR´s last award (6 September 2006), in the Case *"Omission of the Argentine State in adopting appropriate measures to come up and/or to make stop the impediments to the free circulation derived from the cuts in Argentine territory of routes of access to the international bridges Gral. San Martín and Gral. Artigas that unite the Argentine Republic with the Eastern Republic of Uruguay")* has surprisingly considered *i.a.* matters of human rights, environmental rights, and Argentine domestic law. In its considerations, the Court assigned a significant role to the individual and his/her rights, despite the fact that in the *petitum* of its presentation, Uruguay asked the Court to conclude that Argentina has failed to fulfill its obligations derived from articles 1 and 5 of the Treaty of Asunción, contained in articles 1, 2 and 10 para. 2 of the Annex I of this Treaty; from articles II, III, and IV of the Protocol of Montevideo on Commerce of Services as well as from principles and applicable provisions of International law in this regard, all related to the free circulation of goods, services and productive factors.

Although the Arbitration Award issued on September 6th, 2006 concluded that the lack of diligence on the part of the Argentine Government to stop road blocks "is not consisting with the commitment assumed by the States Parties in the original treaty of MERCOSUR, to guarantee the free circulation of goods and services between the respective territories of the countries", Paragraph 144 of the Award states that:

> "This Court considers that the Argentine Government could have had reasons to think that it acted within the legality in tolerating the manifestations of the neighbors who cut the routes, and considers that the use of the violence to stop the activity of the militants **could have implied the violation of fundamental rights** and because those reclamations could have been judged reasonable in regard to the belief (certain or erroneous (...) that the questioned works in the

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"*Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."

> Uruguayan territory **would generate in the Argentine territory a negative repercussion for the quality of life and the economic future of the zone."** (Emphasis added)

In Paragraph 157 of the award, the Tribunal considered that:

> "(...) the fact that in the Uruguayan coast the constructions (that the Argentine coast's population on the considers aggressive of the environment, and that were not prevented by the Uruguayan Government) were not stopped, motivated an attitude of protest on the part of the neighbors of the Argentine shore which, with time derived in the route cuts (...) which motivated the controversy that is ventilated now in this court. Both the threat of a damage that this population perceived as certain and imminent, and the initial lack of attention they attributed to both governments before this requests, make comprehensible that this **population** adopted obvious attitudes for the sake of disclosing, in organized form, through demonstrations of high impact on mass media, the arguments **in defense of its legitimate rights.**" (Emphasis added)

In Paragraph 158, the tribunal recognized that road blocks were legitimate, and stated that:

> "(...) these manifestations/demonstrations **were losing their original legitimacy** as long as (...) they **accumulated aggressions to the right of other people** who saw themselves finally disabled to travel and to exert the commerce through the international routes by virtue of the cut of the same ones, without prediction nor precise temporary limit, (...) for out of proportion extensive periods and during the time of greater commercial and tourist interchange between both countries." (Emphasis added)

As shown in the quotes above, the Tribunal "understood" the reaction of people in the Argentine side and considered the demonstrations to be "legitimate". Only the "disproportion" in the duration and timing of road blocks (increasing during commercial and touristic high season) turned them illicit. However, it is unknown what the Tribunal did in relation to those blocks in order to determine their proportionality/ disproportionality.

The Tribunal expressed feelings of personal nature that had no direct relation to the dispute. Thus, in Paragraph 126, it stated that:

> "The members of the Tribunal belong to countries in which the **subjugation of the denominated human rights has been experienced (...), (**t)his is why this question is of **great sensitivity for them."** (Emphasis added)

In Paragraph 133, the Tribunal considered juridical values:

> "(...) In cases in which the **harmonization of the rights** (human rights *i.a.)* under consideration are extremely difficult or impossible, it is inevitable choosing **to protect** in grater measure **the interests and values of a greater hierarchy**, because " legal interests" are the most valuable goods, and they are susceptible to be hierarchically classified preferring the most valuable respect to less valuable ones (17)." (Emphasis added)

In Note 17, the Arbitral Tribunal has indicated

> The values are in hierarchic relation to each other. There are species of values that worth more than other classes - for example, the **ethical values worth more than the utilitarian ones** (...)." (Emphasis added)

In a previous article,[6] we have considered this award to be a postmodern judgment based on sociological, psychological, and ethical considerations, and it was pronounced as a successful answer to a conflict perceived as a complex legal phenomenon. In this statement, human rights, human perceptions, and multi-actor relations were at the core of the Tribunal's reasoning.

Humanization in the International Centre for Settlement of Investments Disputes (ICSID)

Even the *Panel of Arbitrators of the ICSID,* in its *Decision on liability* on the case *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. (Claimants) and Argentine Republic (Respondent)*[7]*,* (Decision of October 3rd, 2006), has humanized its perception of the conflict, taking into account the overall situation of the human beings involved.

The ICSID, an autonomous international organization, closely linked to the World Bank, and established for the purpose of providing facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States, neither has objectives related to individual nor collective human rights.

Nevertheless, as reference point the ICSID does consider situations related to severe economic, political, and social crises, unemployment, poverty and indigence levels, the collapse of the healthcare system, the ability of the population to afford the minimum amount of food required to ensure their survival, etc.

On December 28th 2001, the ICSID received from LG&E[8] an arbitration claim against the Argentine Republic, dated on December 21st, 2001. In that Claim, the Claimants argued that they had invested in licenses for gas-distribution in Argentina and that the Respondent unilaterally decided to freeze certain automatic semi-annual adjustments to the tariffs for distribution of natural gas in Argentina, which were based on changes in the U.S. Producer Price Index ("PPI"). The Respondent pleaded its defense *i.a.* as a "state of necessity" under Argentine domestic law, and by virtue of Articles XI[9] and IV (3)[10] of the relevant Bilateral Treaty, as well as under customary international law. The

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DRNAS DE CLÉMENT, Z. "Un Fallo Postmoderno (Laudo de 06/09/06 del TAH del MERCOSUR), *DeCITA* Vol. 7, Ed. Boiteaux/Zavalía, Brasil-Argentina, 2007.

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ICSID Case Nº ARB/02/1

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LG&E, three corporations created and existing in the United States of America, with domestic and foreign operations has a shareholding interest in three local, gas distributing companies in Argentina created and existing under the laws of Argentina by commandment of the Argentine Government.

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Article XI of the Bilateral Treaty: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

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Article IV(3) of the Treaty: "Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, *state of national*

Claimants rejected the Respondent's arguments regarding the alleged state of necessity defense. The Claimants contended that Article XI was not applicable in the case of an economic crisis, because the elements of public order and essential security interests were intentionally narrow in scope, and were limited to security threats of physical nature.

In Paragraph 226, the Tribunal held that between December 1st, 2001 and April 26th, 2003 Argentina was in a period of crisis, during which it was necessary to enact measures aimed at preserving public order and protecting its essential security interests.

Thus, Argentina was excused under Article XI from liability for any breaches of the Treaty between December 1st, 2001 and April 26th, 2003. The reasons of the Tribunal *i.a.* were the following:

> "These dates coincide, on the one hand, with the Government's announcement of the **measure of funds freezing, which prohibited bank account owners to withdraw more than one thousand pesos a month** and, on the other hand, with the election of President Kirchner. The Tribunal highlights/indicates these dates as the beginning and end of the period of extreme crisis in view of the notorious events that occurred during this period." (Para. 230) (Emphasis added)
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> "Evidence has been put before the Tribunal that conditions as the ones in December 2001 constituted the **highest degree of public disorder** and threatened Argentina's essential security interests. This was not merely a period of "economic problems" or of "business cycle fluctuation" as the Claimants described (Claimants' Post-Hearing Brief). Extremely **severe crises in the economic, political, and social sectors** reached their apex and converged in December 2001, threatening total collapse of the Government and the Argentine State." (Para. 231) (Emphasis added)
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> "All of the major economic indicators reached catastrophic proportions in December 2001. An accelerated deterioration of Argentina's Gross Domestic Product (GDP) began in December 2001, falling 10 to 15 percent faster than the previous year. **Private consumption dramatically dropped in the fourth quarter of 2001, accompanied by a severe drop in domestic prices** (...)." (Para. 232) (Emphasis added)
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> "While **unemployment, poverty, and indigence rates gradually increased** from the beginning of 1998, they reached **intolerable levels** by December 2001. Unemployment reached almost 25%, and almost half of the Argentine population was living below poverty. The **entire healthcare system teetered on the brink of collapse**. **Prices of medicines soared** as the country plunged deeper into the deflationary period, **becoming unavailable for low income people**. Hospitals suffered a severe shortage of basic supplies. Investments in infrastructure and equipment for public hospitals declined as never before. These conditions prompted the Government to declare a nationwide **health emergency to ensure the population's access to basic health care goods and services**. At the time, **one quart of the population could not afford the minimum amount of food required to ensure their subsistence**. Given the level of poverty and lack of access to healthcare and proper nutrition, disease followed. Facing increased pressure to provide social services and security to the masses of indigent and poor people, the Government was forced to decrease its per capita spending on social services by 74%." (Para. 234) (Emphasis added)
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> "By December 2001, there was a widespread **fear among the population** that the Government would default on its debt and seize bank deposits to prevent the bankruptcy of the banking system. Faced with a possible run on banks, the Government issued Decree of Necessity and Emergency No. 1570/01 on 1 December 2001. The law triggered **widespread social discontent**.

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emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses."

> **Widespread violent demonstrations and protests** brought the economy to a halt, including effectively shutting down transportation systems. **Looting and rioting, followed, in which tens of people were killed as the conditions in the country approached anarchy**. A curfew was imposed to curb lootings." (Para. 235) (Emphasis added)

The Tribunal considered these devastating -economic, political, social- conditions, and rejected the notion that Article XI was applicable only in cases of military action and war. It stated that the conditions in Argentina in December 2001 called for immediate, decisive action to restore civil order and stop the economic decline. The Tribunal concluded "that such a severe economic crisis could not constitute an essential security interest as to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. **When a State's economic foundations are under siege, the severity of the problem can equal that of any military invasion**." (Para. 238) (Emphasis added).

The Claimants contended that the defense of necessity should not apply to this case because the measures implemented by Argentina were not the only means available to respond to the crisis. The Tribunal rejected this assertion and stated that "(...) Article XI refers to situations in which a State has no choice but to act. A State may have several responses to maintain public order or protect its essential security interests at its disposal. In this sense, the Tribunal recognized that Argentina's suspension of the calculation of tariffs in U.S. dollars and the PPI adjustment of tariffs was a **legitimate way of protecting its social and economic system**." (Para. 239) (Emphasis added).

It must be taken into account that in the decision of May 12th, 2005 in the Case of *CMS Gas Transmission Company (Claimant) and the Argentine Republic (Respondent)*[11] the Tribunal decided in a different way.

The Respondent also contended that no compensation was due in a state of necessity, under the rule contained in Article XI of the Bilateral Investment Treaty. However, the Tribunal concluded that the Respondent should pay the Claimant compensation, understanding that the Respondent's argument was in tantamount to the assertion that a Party to this kind of treaty, or its subjects, is supposed to bear the entire costs of the plea to protect the other Party's essential interests. The Tribunal held that "(t)his is, however, not the meaning of international law or of the principles governing most domestic legal systems." (Para 389)

Final Considerations

This brief overview on the latest development of the approach adopted by three international tribunals to the nature of international law, shows the evolution from an interstate perspective to an individual-rights standpoint.

Cotler well states that the "explosion in human rights has been inspired in human rights law, in international human rights standard-setting as representative of the common language of the humanity."[12] The evolution of human rights law and humanitarian law provisions has triggered a revolution in the interpretation of international law in other

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areas. We understand that, since there is no area of law that is not related to human rights, these rights have penetrated into all legal approaches (*i.a.* fight against terrorism, racial discrimination, economic, social, and cultural situations, indigenous peoples, investments, integration, etc.). Furthermore, with the gradual increase of human rights protections, a greater explicit presence of such interests is observed both in national and international legal systems. Increasingly, individuals strive to play a more active role in the implementation and enforcement of human rights standards, rather than a passive one as beneficiaries of rights and freedoms guaranteed by States. The individual becomes a sort of political power, with new a legal capacity for the independent realization of the rights and duties established by international law. This trend is emerging and is moving away from a purely state-centered approach to international law.[13]

This article is concerned with one particular issue: how tribunals currently perceive the fundamental nature of international law. In the cases considered above, tribunals have made their contribution by infusing humanistic ethos into international law.

Changes in the world as a whole, the development of international law and international cooperation in the area of human rights and humanitarian law are constantly introducing new elements for the solution of general problems related to international law.[14]

By centralizing the human being as a point of concern and calling for the humanization of international relationships, new international thinking gives relevance to the human being and the role of the individual in the fulfillment of international law principles.

This type of jurisprudence allows the opportunity of reconciling the precepts of state sovereignty positivism and the mandate of natural law to respect human dignity. This is a renovation in the line of Grotius and Vattel's thought, who represented the best attempts of a naturalist and positivist synthesis of rules. Bederman recalls the words of Chief Justice, Marshall:

> "This argument (advancing a particular rule of international custom) must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. (...) The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign (...)." (Brown v. United States, 12 U.S. (8 Cranch) 110,128 (1814)[15]

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[12] COTLER, I. "Human Rights Revolution and Counter-Revolution: Dance of the Dialectic", *19 Hum. Rts. Q.* (1997), p. 722.

[13] For example, the final document of the Vienna meeting in the *Conference on Security and Cooperation in Europe (CSCE)* obliges states to respect "the right of their citizens to contribute actively, individually or in association with others, to the promotion and protection of human rights and fundamental freedoms" and "**the right of persons** to observe and promote the implementation of CSCE provisions and to associate with others for this purpose." (Emphasis added)

[14] V. GARDAM, J. *The Contribution of the International Court of Justice to International Humanitarian Law*, (http://journals.cambridge.org/action/display/Gardam).

[15] V. BEDERMAN, D.J. "World Law Transcendent", *54 Emory L.J.* 77 (2005), pp. 59-77.

At present, the humanization of international law demands the imposition of limits to actions even in the area of international peace and security developed within the framework of Chapter VII of the United Nations Charter.

As regards the question: "who will guard the guardians?", Wellens deals with the abandonment of absolute immunity of International Organizations in domestic and international courts. He asserts that the new approach involves an evolving interpretation of immunity rules. The precedent is the human right component.[16]

The cases analyzed above -among many others- put in evidence a shift from international law based on *institutional generals state values* to one with prevalence of the *individual values founded on particular human rights* with a postmodern, critical, reflective, and constructivist perception. It means the weakening of fundamental principles of the previous stage. Among others, the preeminence of the States' will in the construction of international law.

[16] V. WELLENS, K. "Fragmentation of International Law and Establishing an Accountability Regime for International organizations: The Role of the Judiciary in Closing the Gap", *25 Mich. J. Int'l L.* (2003-2004), p. 1180.