THE CONTROVERSIES OF INTERNATIONAL ORGANIZATIONS IN A MODERN WORLD

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“La Universidad no se hace responsable por los conceptos emitidos por sus alumnos en sus trabajos de tesis. Solo velará por que no se publique nada contrario al dogma y a la moral católica y por que las tesis no contengan ataques personales contra persona alguna, antes bien se vea en ellas el anhelo de buscar la verdad y la justicia”.

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INTRODUCTION

The history of the relations between states is a long one; states have needed other states since their constitution. There are common interests between states, continents, enterprises, private individuals, governments, religions, which make humans associate to accomplish their purposes.

We could say that the establishment of public international organizations as institutions is a development of the late nineteenth century. However, since Greek and Roman times it is possible to find consular relations designed to protect interests in commerce, and diplomatic relations concerned with representation of states; but it was in the fifteenth century these institutions started taking their modern shape.[1]

Now what is relevant is that the nineteenth century was the era of preparation for International Organizations, especially the period between 1815 and 1914. What International Organizations are today is a consequence of the development of such institutions in the nineteenth century; therefore, it is during this period of time where we can find the roots of International organizations.[2] After World War II the proliferation of International Organizations was a fact; many International Organizations, different in nature and size in terms of membership were created.

Men have realized that the easiest way to construct a better world is working together, there is strength in numbers. Because of their nature, International Organizations have the ability to discuss study and resolve different conflicts that the world faces today.

With the growing role of International Organizations under international law, the importance of their actions in the modern world has increased. Nowadays, almost all international conflicts are resolved by International Organizations and also almost every State is a member of an International Organization. Although, the important role of International Organizations nowadays, there are many controversies around them.

Actually, International Organizations don't have a unique regime and there are many theories concerning their principal matters. It is not clear which is the position that should be applied regarding them because of that it is necessary to study the different

[1] Amerasinghe, C. F., *Principles of the Institutional Law of International Organizations*, Second Edition, Cambridge, (2005) page 1. (Ibid)
[2] Amerasinghe, C. F., *Principles of the Institutional Law of International Organizations*, Second Edition, Cambridge, (2005) page 5. (Ibid)

hypothesis of International Organization and try to establish a universal International Organizations position and rules.

In the following work we explore some of the problematic situations that International Organizations face today, such as: the concept of International Organizations, International organizations as subjects of international law, legal personality of International Organizations, responsibility of International Organizations, privileges and immunities of International Organizations, conditions of admission to International Organizations, contribution of International Organizations in the creation of International law, and peaceful dispute settlement of International Organizations.

Since there is not a unique regime regarding International Organizations due to the lack of legislation, there have been many interpretations about the different concerns that International Organizations deal with. For this reason, we have introduced some hypothetical and real cases in which the responsibility of International Organizations might be involved.

We consider that International Organizations are the most important subjects of International Public Law. Thus, this work summarizes the different positions concerning some aspects of International Organizations. We express our point of view about International Organizations and why we consider International Organizations must have legal personality, must have a unified regime, must be responsible of their own acts, must have privileges and immunities, must have their own jurisdiction, must have the capacity to bring international claims, must act as sources of development of International law and must have the same prerogatives of other subjects of International law.

1. INTERNATIONAL ORGANIZATIONS

1.1 Controversies of International Organizations

As mentioned before, there are many questions without a unanimous answer and many theories around International Organizations.

Being a subject of international law implies certain rights, obligations and powers. Additionally, it implies certain consequences. Concerning International Organizations as legal persons and as subjects of international law, there are different aspects that do not have unique resolutions.

There are different questions towards which there are no unanimous positions: Do International Organizations have legal personality? When and how have they acquired it?[3] Are International Organizations subjects of international law?
What is an International Organization? Which are the essential characteristics of an International Organization? How is the responsibility of International Organizations? Do International Organizations enjoy privileges and immunities?

Regarding these questions, there are different views and positions. In the following, we are going to show them and we will establish our own theories

1.2 Definitions of International Organizations

According to the definition provided by the Law Commission in its Report on the work of its fifty-fourth session, "Conventions adopted under the auspices of the United Nations restrict the meaning of the term International Organizations to intergovernmental Organizations, implying by these Organizations that States have established by means of a treaty or exceptionally, as in the case of OSCE, without a treaty."

"…It is to be assumed that international law endows these International Organizations with legal personality because otherwise their conduct would be attributed to their members and no question of an Organization's responsibility under international law would arise."[4]

[3] Amerasinghe, C. F., Supra note. (Ob.cit. Amerasinghe) (Ibid)
[4] Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N.GAOR, 56th Sess., Supp. No. 10, Comment 1, at 43, U.N.Doc.A/56/10 (2001) [hereinafter ILC Draft]; Crawford James, *The international law commission's articles on state responsibility introduction, text and commentaries* 91 (2002).

In addition, according with the definition of doctrinaires, such as G. Fitzmaurice and R.P. Luis Fernando Alvarez Londoño S.J.[5], an International Organisation is defined as a "Collectivity of States established by a treaty, with a Constitution and organs, having a personality from that of its member States, and being a subject of international law with treaty-making capacity" .

As we can see, there are a several definitions of International Organization, all comprising common and different elements. Therefore, in the following section we define an International Organization taking into account its essential characteristics.[6]

1.3 Characteristics of International Organizations

International Organizations have a constitution instrument.[7] They are formed by states, subjects of international law with their own autonomy and sovereignty.[8]

The constitution instrument of International Organizations creates an international legal person, different from the member states that constituted it. Examples are the United Nations (San Francisco Conference 1945), the GATT (Havana 1947), the European Union (European Act 1986), the WEU (Brussels Treaty 1948) or The African Union (2001).

The States may establish the creation of an International Organization under international law, by an international agreement.[9] In that way, they form an International Organization and not a private International Organization, a domestic group or a non-governmental organization -NGO.

In regards to this point, it is important to mention that constituent treaties[10] of most regional International Organizations clearly state the creation of an International Organization.[11]. To mention an example, the Charter of the UN mentions that States "(…) have agreed to the present Charter of the United Nations and do hereby establish an International Organization to be known as the United Nations."[12] The OAS Charter indicates likewise: "The American States establish by this Charter the International Organization (…)."[13]

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[5] Álvarez Londoño Luis Fernando S.J., *Derecho internacional público* 61 (Bogotá, Javegraf).
[6] Diez de Velasco Manuel, *The International Organizations*, 54 (Madrid, Tecnos, 1994).
[7] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations*, 10 (2d ed, Cambridge, 2005).
[8] Álvarez Londoño Luis Fernando S.J., *Derecho internacional público* 63 (Bogotá, Javegraf).
[9] Álvarez Londoño Luis Fernando S.J., *Derecho internacional público* 63 (Bogotá, Javegraf).
[109] Barboza Julio, *International Public Law* 534-535 (Buenos Aires, Zavalía Editor, 1999).
[10] Barboza Julio, *International Public Law* 534-535 (Buenos Aires, Zavalía Editor, 1999).
[1111] Charter of the United Nations, (1945).
[12]
[1312] Charter of the Organization of American States, Washington, D.C., (1997).

The object of the constituent instrument is to create a new subject of law endowed with certain autonomy, to which the parties entrust the task of conducting common goals. This was established by ICJ in its advisory opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict.[14]
The Vienna Convention of the Law of Treaties in Article 31 indicates that international instruments must be understood in their context and in the light of its object and purpose.[15] In order to determine the purpose of the treaty, it would be necessary to go beyond its words.[16] It should be insinuated, even if it is not textually expressed, that the treaty intends to create an International Organization.

The constituent treaty of the European Union does not textually state that this entity is an International Organization,[17] although there is clarity of this intention due to the actions of the signatory parties and of a harmonic interpretation of the whole international text, where record is made, without any doubt, that the European Union is an International Organization.[18]

A question cannot be inferred from the constituent instrument of other international entities because, contrary to the European Union constituent treaty,[19] what can be concluded from the object of the constitutive treaty of those international groups is that the will of the States is just to conform a gathering of States in which their organs are not entrusted with tasks that have to be fulfilled independently of the will of the states.[20]

It is important to note, that it is possible for states to create a small regional association, with the aim of assisting the implementation of a treaty or a conference, with precise functions,[21] even for limited or long periods of time and without conferring it international legal personality.[22] This is exemplified by the debate and growth of concern for the legal status of entities such as the former GATT[23] or the OSCE.

[1413] *Legality of the use by a state of nuclear weapons in armed conflict,* Advisory opinion, I.C.J. 64 July 8, 1996.
[1514] Vienna Convention on the Law of the Treaties, May. 23, 1969.
[1615] May Sorensen, *Manual of International Public Law* 228-232 (Fondo de Cultura Económica 1994).
[1716] The Treaty on European Union, Feb. 7, 1992, in force as of Nov. 1, 1993.
[1817] Gautier, Philippe, *The Reparation for Injuries Revisited: The personality of the European Union 331, 361* (J.A. Froweinan and R. Wolfrum eds. Max Planck Year Book Of U.N. Law).
[1918] The Treaty on European Union, Feb. 7, 1992, in force as of Nov. 1, 1993.
[20] Schermers H. & Blokker N., *International Institutional Law* 21 (3d ed. 1995).
[21] Álvarez Londoño Luis Fernando S.J., *Derecho internacional público* 74, 83 (Bogotá, Javegraf).
[22] Szasz P., *The complexification of the U.N. System* 17 (Max Planck UNYB 3 1999).
[23] Jackson J., *WTO and the Law of Gatt* 119 (1969).

International Organizations are governed by the 'principle of specialty',[24] which means they have limited competence and field of action, and they are invested with powers limited by functions of the common interest whose promotion the creating states entrust on it.

Consequently, taking into consideration what we mentioned in the two chapters above we propose a definition of International Organizations : An international organization is a collectivity of states established by a treaty under International law; created with the competence and field of action that the founding fathers give to it, with a different personality from that of the member states, capable of responding for its own actions and having the capacity to defend its rights as a subject of international law.

Therefore, in our opinion the characteristics of an International Organization are:
1. Is established by states
2. Is a subject of international law
3. Has personality, different from that of its member states
4. Has a constituent instrument
5. Has a limited competence and field of action
6. Has its own rights and obligations
7. Responds under international law and it can defend its rights
8. Is established under international law
9. Has its own authorities and organs

1.4. International Organizations as subjects of International Law

1.4.1 Subjects of international law

The most important effect of being a subject under international law is that such subjects are entities capable of possessing international rights and obligations and have the capacity to maintain their rights by bringing international claims. This consequence was established by the International Court of Justice in its advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations.[25]

In that way, we can see that the concept of being a subject of international law is related to the concept of legal personality. If an entity has the capacities and characteristics

[24] "International Organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them." INTERNATIONAL COURT OF JUSTICE. Advisory opinion. LEGALITY OF THE USE BY A STATE OF NUCLEAR WEAPONS IN ARMED CONFLICT. General List No. 93. 8 July 1996. "As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has power to exercise those functions to their full extent, in so far as the Statute does not impose restrictions on it." (Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J., Series B, No. 14, p. 64.)

[25] Reparation for Injuries Suffered in The Service of The United Nations Apr. 11, 1949.

mentioned above, it is a legal person; however, if it only has some capacities we could say that it has legal personality in a restricted way.

Consequently, subjects of international law have the capacity to make claims concerning breaches of international law, capacity to make treaties and agreements internationally valid and on the enjoyment of privileges and immunities.[26] Such characteristics are relative to and recognized for states. However, there are different theories concerning characteristics of International Organizations as subjects of international law, as some support the idea of International Organizations enjoying such attributes, but other scholars state that in order for them to be applicable, International Organizations must satisfy certain conditions.

In the event of an International Organization not being considered a subject of international law, it would not be able to appear in its own right in legal proceedings, at the international or domestic level. It would not have the capacity in its own right to have rights, obligations and powers, whether implied or expressed at the international and domestic level.[27]

More importantly, if an International Organization were not considered subject of international law, the responsibility of its acts would rely upon its member states and not on the organization itself. This type of International Organization would only be a group of states and these would act and respond for the acts with solidarity.

2. LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS

As some scholars recognize International Organizations as subjects of international law and others do not, some assert that as soon an International Organization starts to exist it has international legal personality, and that under international law it possesses separate legal personality and is independently responsible for its own acts.[28]

Contrary to this, some scholars and specialists think that the acknowledgement of personality depends on the intention of the founding states, the constituent treaty of the organization and its purposes and functions.[29]

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[26] Brownlie Ian., *Principles of public international law* 978, 979 (1998).

[27] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations*, 68 (2d ed, Cambridge, 2005).

[28] OPPENHEIM'S, International law, Robert Jennings & Arthur Watts eds., 9th ed. 1992, 1271-73. The European Union: From an Aggregate of States to a Legal Person? 2 HOFSTRA L. & POL'Y SYMP. 37, 41 (1997); James E. Hickey, Jr., The Source of International Legal Personality in the 21st Century, 2 HOFSTRA L. & POL'Y SYMP. 1, 5 (1997); Finn Seyersted, Objective International Personality of Intergovernmental Organizations.

[29] M. HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES 148 (1995); I. Brownlie, The responsibility of States for the acts of International Organizations in M. RAGAZZI(ED.). (Ob.cit. Hirsch, pp. 148)

The adoption of a certain theory will define the position from which to regard International Organizations and their acts. In the following chapters we show different positions concerning these issues.

Their legal capacity confers International Organizations the ability to acquire rights and contract obligations by themselves at an international level.[30] International Organizations must have the ability and the autonomy to act by themselves. But, how is it possible to determine whether an International Organization has international personality and as thus is a subject of rights and obligations?

Not all arrangements by which two or more states create an international entity will necessarily establish a separate legal personality. For example, in the case concerning certain Phosphate Lands in Nauru, the ICJ stated that the trusteeship agreement concluded between Australia, New Zealand and the United Kingdom constituted the administering authority and that this authority did not have an international legal personality distinct from the member states.

Having legal personality will entail some consequences. The International Organization will, among others, possess rights and obligations and will be able to appear in its own right in legal proceedings whether internationally or nationally.

2.1 The "Contract Theory"

It has been stated by some scholars that the first way to solve this dilemma is the "Contract Theory"[31] which states, again, that the constitutive treaty of the International Organization must be studied. The contract theory indicates that legal capacity of International Organizations is explicitly accredited by the capacity of the Organization in a constituent treaty.[32] This is why there must be an insertion in the constituent treaty of a provision affirming the legal capacity of the International Organization.

M. Fitzmaurice, representative of the UK government in the oral proceedings regarding the Reparation Case, stated that: "Constitutive instrument setting up an International Organization, and containing its constitution, must be primary source of any conclusion as to the status, capacities and power of the Organization concerned."[33] For example the foundation instruments of the FAO, Article 15 no. 1 and also the agreements of the IMF and IBRD.[34]

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[30] Reparation for Injuries Suffered in The Service of The United Nations 30 Apr. 11, 1949.

[31] Brownlie Ian, *Principles of public international law* 978, 979 (1998).

[32] Paasivirta Esa, *The European Union: From an Aggregate of States to a Legal Person?* 42, (Hofstra Law and Policy Symposium 1997).

[33] Fitzmaurice M., *Representative of the UK government in the oral proceeding relating to Reparation case* 116 (Pleading, oral arguments, documents,1949).

[34] IFC Agreement VI(2) and BID Agreement art IX (2).

2.2 Test for determining legal personality of an International Organization

Next, we describe some criteria that doctrinaires have used to determine whether an International Organization has international legal personality. However, it is worth mentioning that such criteria are not exhaustive, but an enumeration of some theories.

a. Constituent instrument.

The question of personality will depend first upon the constituent instrument. If it is not expressed, it may be inferred from the powers and purposes of the organization and its practice. Sometimes the constituent instrument expressly states that an organization has international legal personality; however, others do not. Thus if interpretation of the constituent instrument clearly shows that the International Organization has the elements for having international legal personality it can be concluded that it does.

When analyzing the UN case, the International Court of Justice considered relevant, in *Reparation for Injuries Suffered in the Service of the UN*, the following aspect: In the constituent treaty of the Charter of the UN one can see that the intention of the founding fathers is to put into being an autonomous body, capable of occupying a position in certain respects detached from its members.

b. Recognition: The practice of the international community in relation to International Organizations

In an attempt to acknowledge the legal personality of International Organizations beyond the constituent treaty, it is necessary that the International Organization is not only recognized by the member states but by third states belonging to the international community.[35] It is imperative that non-member states recognize the legal international capacity of an International Organization in their national systems as a consequence of a particular agreement, such as a head office agreement, as in the case of the original relationship between the United Nations and Switzerland.[36]

c. Separate function of the organs of an International Organization and of the Member States will

There must be a distinction between decisions of the organs of an International Organization and its members with respect to legal rights, obligations, powers and liabilities.[37] If an International Organization takes most of the decisions in a unanimous way, it is possible to interpret that it does not have legal personality. Knowing that the

[35] Malcolm N. Shaw, *International Law* 534 (Cambridge University Press, 5th ed. 2003).

[36] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations*, 66 (2d ed, Cambridge, 2005).

[37] Cassesse Antonio, *International law* (Oxford University Press. 2d ed. 2005).

personality is beyond the will of the states, the International Organization cannot take decisions unanimously.[38] International Organizations go beyond the concordant expression of the sovereignty of each member state.

These characteristics show that the organization is exercising functions and accounts for organs, aspects which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate internationally.

d. *Sanctions being expressly contemplated in case of a breach of the common principles of the constituent treaty.* [39]

In the constituent treaty of an International Organization there must exist a chapter of sanctions and responsibility of the Organization compelling the entity to take responsibility, as a whole, in case of a breach of international law. One important aspect of endowing legal capacity to the International Organization is the possibility of the member states to create a different subject of international law independent from them. In this case, the capacity means that the Organization itself could and should take responsibility in the event of a violation of their treaties and principles and rules of international law.

e. Legal personality as a requirement for function exercising of the International Organization

Some treaties creating International Organizations give them some faculties such as legislation, negotiation agreements with other states, conclusion of economic, trade, and diplomatic relations with non-Member States and International Organizations. The use of these faculties would not be understandable in the event the International Organization lacks international personality.

International Organizations cannot accomplish the purposes of the founding fathers if they do not have international legal personality. The members of the International Organization, by defining its functions, give the organization the means to effectively discharge these functions. Effective compliance of the organization endeavors, in the case it has these powers and functions, requires the holding of an international personality.

[38] Malcolm N. Shaw, *International Law* 72 (Cambridge University Press, 5th ed. 2003).

[39] Gautier Philippe, *The Reparation for injuries revisited: The personality of the European Union* 361 (J.A. Froweinan and R.Wolfrum eds. Max Planck Year Book Of U.N. Law).

2.3 Objective Legal Personality of International Organizations

2.3.1 Objective personality

Objective legal personality implies that if an organization operates in a sufficiently autonomous manner, it may possess legal personality ipso facto in addition to that conferred by constitutive instruments.[40]

This is especially important in cases where the constituent instrument does not expressly state that an International Organization has or does not have international legal personality.

2.3.2 Objective personality only applies to universal and quasi-universal International Organizations

Legal personality can be opposable by third parties in the case of objective personality. On the other hand, only state parties are ruled by the statements of a treaty and their constituent instruments.[41] The international legal capacity of those Organizations depends on their explicit or implicit recognition by non-member third states.[42] Ergo, personality of International Organizations is not opposable to third non-member states.[43]

As it was said before, exceptional cases in which the international legal personality is erga omnes, involves universal and quasi-universal International Organizations.[44] The exceptional situation of the United Nations was established when the International Court of Justice analyzed the Reparation Case.[45] In terms of the Court: "(…) fifty States, representing the vast majority of the members of the international community had the power, in conformity with international law, to bring into being an entity possessing objective international personality."[46]

But that must not be presumed to apply to all International Organizations.[47] Therefore, only universal or near-universal Organizations do have objective personality. Objective

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[40] Higgins Rosalyn, *Report on the Legal Consequences for Member States of the Non-fulfillment by International Organizations of their Obligations toward Third Parties* (Yearbook of the Institute of International Lember 2006).

[41] Schwarzenberger, *International Law* 128-130 (Vol. 1 3rd ed.1957).

[42] Rolf Lüder Sascha, *The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice* 79 (RICR Mars IRRC March 2002 Vol. 84).

[43] Brownlie Ian, *Principles of public international law* 678,681 (1998).

[44] Jennings R. & Watts A., *International Law I* 16, 22 (9th ed. Longman/ London/New York, 1996).

[45] Higgins Rosalyn, *Report on the Legal Consequences for Member States of the Non-fulfillment by International Organizations of their Obligations toward Third Parties* 252 (Yearbook of the Institute of International Law, Vol. I, 1995).

[46] Reparation for Injuries Suffered in The Service of The United Nations Apr. 11, 1949.

[47] Brownlie Ian, *Principles of public international law* 678-681 (1998).

personality can only exist in those particular circumstances. States not participanting in the constituent treaty are not bound by it.[48]

2.3.3 International Organizations do not need to be universal Organizations in order to have objective personality

However, it is also very important to mention there are other theories contrary to the statement above and explain how it is not crucial for some International Organizations to be Universal Organizations, as the number of states creating an International Organization is also irrelevant for the purpose of holding international objective legal personality. "Organizations will prima facie have objective personality irrespective of the actual universality of their membership."[49]

2.3.4 The recognition or non recognition of other non member states does not affect the objective legal personality

As it has been said, recognition is not relevant concerning the issue of international personality of International Organizations.

There are cases in which an organization has, without encountering difficulty, successfully entered into legal relations with a non-member state, which did not have as such recognized the organization, and where the validity of such legal relations has not been questioned with the recognition of legal personality as an argument, as is the case of the International Tin Council.[50]

If the Organization complies with the criteria defining an International Organization there is no reason for the Organization not to hold International objective legal personality. Recognition of non-member states is irrelevant when acknowledging International legal personality of International Organizations. Analogously with States, if a State complies with the requirements for being a State, there is no reason for denying the status of State. "What is legally important is not how they were established, but that they exist. As soon as an International Organization fulfills the conditions above, it has full objective international personality by virtue of international law, not through its constitution."[51]

2.4 Consequences of the legal personality of International Organizations

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[48] Schwarzenberger, *International Law* 128-130 (Vol. 1 3rd ed.1957).

[49] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations*, 91 (2d ed, Cambridge, 2005).

[50] *International Tin Council v. Amalgamet Inc.* (Supreme Court, New York County, Jan. 25, 1998).

[51] Kunz, Josef L. & Seyersted Finn, *Review of Objective International Personality of Intergovernmental Organizations. Do their Capacities Really Depend upon Their Constitutions?*1042-1044 (American Journal of International Law, Vol. 58, No. 4 Oct. 1964).

It is not possible to make a categorical statement concerning the consequences of legal personality for International Organizations. The issue is complicated because there is disagreement between scholars as to what the consequences are.

According to C.F Amerasinghe, the views taken by theorists may be classified as follows:

(i) "Those that assert broadly that "international personality results in the same inherent capacities for states and International Organizations. The only limitations being (a) those that arise from express prohibition in the constituent instrument and (b) those that are factual. In this position we can find the opinion of Seyersted.

(ii) Those that have concluded that while there are inherent capacities resulting from international personality, only those functions which flow from the constitution expressly or by implication may be exercised. In this position we can find the opinion of Rama-Montaldo.

(iii) Those that diminish all the capacities of International Organizations with international personality on expression or implication of powers in their constitution. In this position we can find the view of Rouyer-Hameray."[52]

It is also very important to mention the position of the International Court of Justice, which recognized these capacities to the United Nations in the Reparations case:

- The right to bring an international claim against member and non-member states of the International Organization, for the breach of its international obligations towards the Organization.
- The right to present claims for reparation of damage caused to its agents or to entitled members of the organization.
- The capacity to have rights and obligations and the capacity to maintain its rights by bringing international claims.

However the Court states that the rights and obligations depend upon the purposes and functions of the organization, as specified or implied in its constituent instrument and developed in practice.

In our opinion, all subjects of international law may have the same rights and obligations; we do not find a reasonable motive to discriminate between subjects of international law. We think that all International Organizations should have the ability to bring international claims in order to protect their rights, should have obligations and obligations of their own and respond by themselves for their acts.

[52]Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 94 (2d ed. Cambridge, 2005).

Being an International Organization may imply certain consequences. If states are not willing to accept such effects, they can always create a mere group of states; but being an International Organization and a subject of international law may imply certain responsibilities. In order to commit to the purposes, rights and obligations of being an International Organization, we think all of them may have international legal personality and that personality may include all of those prerogatives. Consequently, we could state our agreement with the first position presented above, the one defended by Seyestered.

3. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

3.1 Responsibility of and to International Organizations

This is a controversial point; there is not much international judicial precedent or doctrine concerning responsibility of and to International Organizations. However, nowadays its importance is evident. First of all, we are going to recapitulate the different relations between international Organizations and other parties and then we will distinguish between the responsibility to International Organizations and the responsibility of International Organizations. Nonetheless, our goal is not to show all different positions and thoughts concerning this point, thus we are going to explain what we consider relevant.

3.1 .1 Relations between international Organizations and other parties[53]

There are essentially five kinds of relationship between an International Organization and other parties: the organization's relationship with (i) its member states; (ii) its staff; (iii) non-member states and other international Organizations; (iv) private entities under contracts; and (v) other third parties, private individuals and groups. For each category of relationship, different sets of law will apply.[54]

In order to easily understand the responsibility of International Organizations we may see the different laws governing the relations of international Organizations and other parties. In the following paragraphs we will summarize such possibilities.

Laws governing relations between states and International Organizations can be: treaties under international law, headquarter agreements, peacekeeping agreements, national law, and transnational law.

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[53] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 386 (2d ed. Cambridge, 2005).

[54] Suzuki Eisuke & Nanwani Suresh, *Responsibility Of International Organizations: The Accountability Mechanisms Of Multilateral Development Banks.* Michigan Journal of International law, Vol. 27:177, http://students.law.umich.edu/mjil/article-pdfs/v27n1-suzuki-nanwani.pdf

International Organizations also have relations with other entities, such as natural persons and corporations; these relations are governed by national law or transnational law. There are many contracts that International Organizations enter into, such as construction, maintenance, purchase of goods, service contracts, insurance contracts, all governed by national law or laws.[55]

The law applicable to International Organizations varies depending on the circumstances of interaction and the nature of activities, and different kinds of responsibility and legal consequences will ensue.

3.1.2 The Applicability of the Principles of State Responsibility[56]

The notion of responsibility of international Organizations encompasses the responsibility they incur for their wrongful acts under international law. On this respect, the principles of state responsibility are applicable on certain points to international Organizations, with necessary modifications due to the inherent character of such Organizations.[57]

3.1.3 Responsibility to International Organizations

Whenever an International organization has international legal personality, it is a different entity from its member states with its own rights and obligations. There are counterpart obligations owing to it by other entities. If an International organization has obligations, it also has the right to expect and require certain things.

The rights of an international organization may cover an unlimited area, depending on its capacity to participate in treaties and agreements and on the practical circumstances and locations on which they are placed and operate.

We can divide the capacities of International Organizations into groups:

i) Rights regarding staff

Article 100 of the UN charter provides that members of the staff of the UN are not to seek or receive instructions from governments or other authorities, that their responsibility is to the organization they serve, and that the member states are not to seek to influence them in the discharge of this responsibility. The constitutions of many

[55] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 390 (2d ed. Cambridge, 2005).

[56] Suzuki Eisuke & Nanwani Suresh, *Responsibility Of International Organizations: The Accountability Mechanisms Of Multilateral Development Banks.* Michigan Journal of International law, Vol. 27:177, http://students.law.umich.edu/mjil/article-pdfs/v27n1-suzuki-nanwani.pdf

[57] The ILC produced the draft articles on state responsibility in which it was stated that the draft articles on state responsibility do not cover the responsibility of international Organizations. Therefore, the ILC is working on them.

other international Organizations have similar provisions. However, even if such provisions are not in the constituent instruments, they are implicit for the position of staff of international Organizations.[58]

The International Court of Justice stated in the Reparation Case, concerning the relation between staff of an international organization and the organization itself, that the UN is a different person, that the independence of the international organization is important, and depends on the independence of its staff. In that way, Organizations have the right to protect and demand protection of their staff in the performance of their obligations.

ii) The right to bring claims under international law

The International Court of Justice concluded that the bringing of any international claim by an international organization can be made due to a breach of an obligation owed to it at international level by the defendant state. This capacity arises from its purposes and functions, as specified or implied in its constituent instrument and development in practice.

In the Reparation Case, the ICJ stated that the UN could make claims in two different cases:

a) Wrongful act of a State against the organization, if the organization has suffered direct loss or damage to its property, assets, finances or interests.

b) Regarding personnel loss or damage caused to or suffered by a servant or agent of the organization in the course of his/her obligations.[59]

3.1.4 Responsibility of International Organizations

Once an International Organization is recognized as an international legal person, subject of international law, the holding of some rights and obligations is also recognized, and thus it has to respond for its acts.

"In the case of International Organizations, they generally have no control over some of the elements over which states have control but they have a certain amount of control over persons and enter into treaties, agreements and other relations with other international subjects which could give rise to international obligations generating responsibility in the appropriate circumstances."[60]

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[58] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 392 (2d ed. Cambridge, 2005).
[59] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 395 (2d ed. Cambridge, 2005).
[60] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 399 (2d ed. Cambridge, 2005).

Since 2000, the International Law Commission has worked on the topic of Responsibility of International Organizations. In 2002 the ILC appointed Giorgio Gaja as Special Rapporteur for the subject and also established a working group concerning this matter.[61]

Between 2002 and 2005, the Commission worked on the subject, and created and discussed the draft articles on the Responsibility of International Organizations. In our opinion, this is the most important effort concerning the matter, and we consider such draft articles as important source of understanding the responsibility of International Organizations. Furthermore, we think that in the future these are the articles that may govern the subject.

In its fifty-fifth session in 2003, the International Law Commission adopted the general principles concerning responsibility of international Organizations. The draft articles mentioned above are based on the articles on the responsibility of states for international wrongful acts. Draft article 3 provides:

> "(1) Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
>
> (2) There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
>
> > (a) is attributable to the international organization under international law; and
> >
> > (b) constitutes a breach of an international obligation of that international organization."[62]

Analogously with States, two requirements must be complied with for an internationally wrongful act of an international organization to occur: (1) the conduct in question must be attributable to the international organization and (2) the conduct must violate an international obligation of the organization. The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization.[63]

[61] International Law Comission, http://untreaty.un.org/ilc/summaries/9_11.htm.
[62] *Draft articles on responsibility of international Organizations,* International Law Comission.
[63] Talmon Stefan, *Chapter Thirty-Four, Responsibility Of International Organizations: Does The European Community Require Special Treatment?* 405, http://users.ox.ac.uk/~sann2029/TALMON%20405-421.pdf.

The InternationalLaw Commission, in its report (A/58/10),[64] made some commentaries that we consider relevant to understand the general principles of the Responsibility of International Organizations. Below we show the ones we consider most important:

> 1. "The statement of general principles in article 3 is without prejudice to the existence of cases in which an organization's international responsibility may be established for conduct of a State or of another organization.
> 2. The term "conduct" is intended to cover both acts and omissions on the part of the international organization.
> 3. The attribution of conduct to an international organization is one of the two essential elements for an internationally wrongful act to occur.
> 4. The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization.
> 5. As in the case of States, damage does not appear to be an element necessary for international responsibility of an International Organization to arise.
> 6. Neither for States nor for International Organizations is the legal relationship arising out of an internationally wrongful act necessarily bilateral. The breach of the obligation may well affect more than one subject of international law or the international community as a whole. Thus in appropriate circumstances more than one subject may invoke, as an injured subject or otherwise, the international responsibility of an international organization.
> 7. The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances.
> 8. When an international organization commits an internationally wrongful act, its international responsibility is entailed."[65]

Moreover, the commission worked on other special aspects of the responsibility of International Organizations such as: article 4 "General rule on attribution of conduct to an international organization", article 5 "Conduct of organs placed at the disposal of an international organization by a State or another International Organization", article 6 "Excess of authority or contravention of instructions", article 7 "Conduct acknowledged and adopted by an international organization as its own", article 8 "Existence of a breach of an international obligation", article 9 "International obligation in force for an international organization", article 10 "Extension in time of the breach of an international obligation", article 11 "Breach consisting of a composite act", article 12 "Aid or assistance in the commission of an internationally wrongful act", article 13 "Direction and control exercise over the commission of an internationally wrongful act",

[64] *Report on the work of its fifty-fifth session,* International Law Commission General Assembly, Official Records, Fifty-eighth Session, Supplement No. 10 (A/58/10) (2003) .
[65] ILC Report (A/58/10) International Law Comission (2003).

article 14 "Coercion of a State or another international organization", article 15 "Effects of the preceding articles", and article 16 "Decisions, recommendations and authorizations addressed to member States and International Organizations."

Consequently, we consider that the draft articles on International Organizations Responsibility and its commentaries are the most important documents concerning this subject and a great effort to summarize the rules that may govern this issue. We are conscious of the necessity of unifying views on the matter due to the relevance it has nowadays. In the following chapters we discuss other aspects relating this subject.

3.2 Responsibility Of International Organizations And Conditions Of Admission

Responsibility may arise out of acts and omissions which constitute a breach of international law.[66] Once states join an international entity, there is a conventional obligation, or customary obligation, or an obligation under general rules of international law, for member states to ensure through adequate supervision that the international entity acts within the constraints of international law,[67] independently of whether it has international legal personality or not.

When an International Organization is required to take some positive action and fails to do so, it may prove difficult to entail responsibility of the organization, when this non-action presupposes the lawful exercise of their powers by its member states. Nevertheless, this view was not supported by the Special Rapporteur on Responsibility of International Organizations in his 5th report, by asserting that it will be unusual to assume that International Organizations could not possess obligations to take positive actions.

On the subject of human rights, it has been asserted by decisions of human rights bodies and scholars that states cannot evade their obligations under customary or general principles of law, by creating international entities that will not be bound by the limits imposed upon its members.[68] Therefore, states must use their influence to ensure that violations do not result from the programs and policies of the entities of which they are members.[69]

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[66] Crawford James, *The International Law Commission's Articles on State Responsibility* 81 (Cambridge University Press, 2003).

[67] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 37 ICJ, (1980); *Accountability of International Organizations*, final report, International Law Association, Berlin conference (2004).

[68] Richard Waite & Terry Kennedy v. Germany, ECHR. 18 February 1999, para 67; Danka Victor, Flinterman Cees, Leckie Scott, *Commentary to The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* 725 (Human Rights Quarterly 1998).

[69] Hopkins Johns, *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 20 Human Rights Quarterly*, guideline 19 (University Press 1998).

Considering the development of international law and its bodies of laws, it is clear that there is not a definite position on the subject of whether the conditions contained in a treaty are the basic ones, or if those conditions are restrictive.[70] Admission of a state depends on a political decision and therefore the organization is legally entitled to make its consent to the admission dependent on any political considerations which seem relevant, with good faith as the only limitation.[71]

International Organizations have to include the protection of minorities in establishing admission conditions. For instance, International Organizations must never forget, when discussing membership, concerns about minorities, and must also take into account one of the principles of the international law: to protect Minorities and the enforcement of good governance.
Scholars have noted that issues concerning membership depend primarily on the provisions establishing an international entity [72] and on the provisions of admission agreements. Even if it is not easy to identify general principles relevant to the interpretation of these documents, there is international practice that can still be useful.[73]

In the advisory opinion of *Conditions of Admission of a State to Membership in the United Nations,*[74] the International Court of Justice held that because there was an enumeration of the conditions, it was clearly demonstrated that the authors wanted to establish a legal rule, that fixes the conditions for admission and determines the reasons for which admission may be refused and that the natural meaning of the words used led to the conclusion that the conditions constituted an exhaustive enumeration.[75]

Furthermore, if the Member States are parties to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, they are not only obliged to ensure the protection of minorities, but also to provide the minorities with the means to enable them to preserve their culture and identity.[76]

3.2.1 Minority Rights are a legal framework

[70] *Conditions of Admission of a State to membership in the United Nations, Advisory Opinion,* (International Court of Justice 1948).
[71] *Conditions of Admission of a State to membership in the United Nations, Advisory Opinion,* (International Court of Justice 1948).

[72] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 105 (2d ed. Cambridge, 2005).
[73] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 105 (2d ed. Cambridge, 2005).
[74] *Conditions of Admission of a State to membership in the United Nations, Advisory Opinion,* (International Court of Justice 1948).
[75] *Conditions of Admission of a State to membership in the United Nations, Advisory Opinion 62* (International Court of Justice 1948).
[76] *Advisory Opinion on Minority Schools in Albania, 1935 P.I.J.C. (Ser. A/B) No. 64 (April 6); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess*., Supp. No. 49, at 210-12, U.N. Doc. A/47/49 (1992).

Minority Rights are a legal framework designed to ensure that a specific group which is in a vulnerable, disadvantaged or marginalized position in society, is able to achieve equality and is protected from persecution.[77] This compound of rights that aim to protect the national groups as ethnic, religious or linguistic ones, started developing after World War II with the U.N. Convention on the Prevention and Punishment of the Crime of Genocide which states in article 2 for the first time a special protection for minorities: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group…"

After this first U.N. convention, other international instruments have agreed on protection of minorities as an important part of the cultural richness of a nation. In this sense, the International Covenant on Civil and Political Rights stated that "those States in which ethnic, religious or linguistic minorities exist, individuals belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[78]

Additionally, there are international instruments as the document of the Copenhagen meeting of the conference on the human dimension of the CSCE of 1990 that show the concern of governments and of the international community to improve the quality of the life of minorities and to extend the rights and privileges of the whole community to these national groups ending discrimination. "The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights. And as such falls within the scope of international co-operation."[79]

As a result of the development of minority rights, International Organizations started taking into account minority conditions in order to accept the admission of a country into the organization. This is the case of the European Union (hereinafter EU) that considers conditions of minorities as relevant when accepting a new country. However, many scholars have criticized the EU asserting that it lacks the authority to impose those conditions (minorities' rights) on candidate states[80] and to force them to improve minorities´ quality life and rights in order to fulfill admission agreement conditions.

Additionally, scholars have stated that the treaty on the EU does not mention the protection of minorities as one of the EU's principles, objectives or competences.[81] And

[77] http://en.wikipedia.org/wiki/Minority_rights

[78] International covenant on civil and political rights article 27

[79] Framework Convention for the Protection of National Minorities article 1

[80] Kline Carol L., *EU inconsistencies Regarding Human Rights Treatment: Can the EU Require Czech Action as a Criterion for Accession?* 35 (23 International and Comparative Law Review, 1999); Rangelov Iavor, *Bulgaria's Struggle to Make Sense of EU Human Rights Criteria*, http://www.eumap.org/journal/features/2001/oct/bulgariastr.

[81] Hillion Christophe, *On enlargement of the European Union: the Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities* 728 (27 Fordham

the International Organization does not take into account the minorities in any institution or legal prescription; in fact, this is the real situation that occurred with Bulgaria, Turkey and other states when they requested memberships to the EU.

This is the case of Turkey, which has not yet been able to become member of the EU due to the Roma minority conditions. In January 1996, the Czech Republic took a significant step towards European integration when it submitted its formal request for membership to the EU. For this reason, the Czech Republic started working with Human rights groups, worked relatively unencumbered, with one notable exception, which was to bring attention to various abuses and to improve the situation of the Roma minority.[82] Although the EU has grown from a coalition for economic cooperation to an entity whose scope has begun to include political and social issues, the EU has yet to adopt a treaty provision that would authorize EU institutions to enact human rights legislation.
If the EU continues to focus on the treatment of the Roma minority in the Czech Republic as criteria for membership, the EU should also take steps to authorize EU institutions to require Member States to comply with similar guidelines regarding protection of human rights.[83] This has not yet occurred because member states cannot fulfill the requirements and/or are not interested.[84]

Currently, the EU treaties contain no provisions that authorize EU institutions to act directly on the subject of human rights. Therefore, the EU cannot require Member State to take actions focusing solely on human rights. Although the ECJ has required Member States and EU institutions to conform to human rights standards, those requirements were only imposed when the Member State action or EU legislation fell within the scope of the EU treaties. Because of treaty limitations, EU actions concerning human rights have been severely curtailed.[85]

The 1997 Amsterdam Treaty added a new open clause to Article 6 of the treaty on European Union, explicitly appointing human rights as a "founding principle" of the European Union. As such, strict adherence to the same principles must be required of any state seeking EU membership - and indeed human rights "conditionality" for admission is formally stipulated.[86]

The other important case on minority rights conditions on admission agreements is the Bulgaria case. Bulgaria requested to be a member state of the EU. Since beginning negotiations for EU membership in 1998, Bulgaria has taken numerous steps to

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International Law Journal, 2004).

[82] http://www.hrw.org/wr2k/Eca-08.htm

[83] Kline Carol L., *EU inconsistencies Regarding Human Rights Treatment: Can the EU Require Czech Action as a Criterion for Accession?* 1 (23 International and Comparative Law Review, 1999)

[84] For example, Northern Ireland's political situation has exacerbated several human rights issues.

[85] http://www.lexis.com/research/home?_m=12e4dad2fad1176e73e5bab4bfb79279&wchp=dGLbVtb-zSkAl&_md5=530ecdfbd188cd3b6e458628fe9e2730#n127#n127

[86] Rangelov Iavor, *Bulgaria's Struggle to Make Sense of EU Human Rights Criteria*, http://www.eumap.org/journal/features/2001/oct/bulgariastr.

demonstrate its commitment to human rights principles. The European Commission in its 1997 “Opinion on Bulgaria's membership request” considered that the country was "on the way" to fulfilling stipulated criteria.

Despite all this, the harshest criticism Bulgaria has suffered in the negotiating process relates to discrimination against the country's Roma minority. The "Minority rights and protection of minorities" section of the Commission's reports has traditionally been Bulgaria's weakest aspect. And the situation is intolerable: the Roma minority is almost completely excluded from participation in local and national government; the educational system segregates Roma children in separate elementary, middle, and high schools; health care infrastructure and utilities in Roma neighborhoods are by far the worst in the country.

All statements in the Commission's criticism are justified, except the fact that similar conditions in Member States suffer no reprimand.[87] As a result, new member states are held on an inequitable condition, and are made to comply with new requirements that are probably more political than a truthful position of the EU to improve minorities’ conditions. The EU needs to take a defined position concerning minorities’ conditions, with real institutions that could compel member states to fulfill the same requirements that future members have to comply with.

3.2.2 Economic Organizations And Human Rights

Nowadays, there many International Organization that were started as mere Economic Unions or with simple economic interests. General principles of international law oriented these Organizations to transform into groups of states with worries beyond the economic scope. It is clear that International Organizations are concerned about human rights, far beyond regular economic issues; thereby, it is reasonable to think that International Organizations would not tolerate mistreatments of minorities, understanding that minorities need special treatment.[88]

When a state mistreats its minorities under the pretense of becoming part of an International Organization, admission can be denied due to compliment with international law rules. It is not possible to avoid acknowledgement of a breach of international human rights obligations on behalf of a state, when, for example, it stops water supply to their minorities.[89] In this sense, if an Organization admits as a member a

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[87] Rangelov Iavor, *Bulgaria’s Struggle to Make Sense of EU Human Rights Criteria*, http://www.eumap.org/journal/features/2001/oct/bulgariastr.

[88] *Launch of the United Nations Guide for Minorities*, , 10:30, Room 3, Durban Exhibition Centre, South Africa (September 1, 2001).

[89] Committee on Economic, Social and Cultural Rights. *Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights.*; *Commentary to the Maastricht Guidelines*. Human rights quarterly, gu*id*eline 19. (Twenty-ninth session, Geneva, November 11-29, 2002).

State with its known minorities' condition, it would be encouraging all States to spare the rights of the most vulnerable.

International Organizations have to take into account aspects concerning minorities' protection when establishing conditions for admission. International Organizations must also never forget these aspects when discussing conferring membership, and thus bearing in mind that one of the principles of international law is to protect Minorities, and the enforcement of good governance.

3.2.3 Special Protection of Human Rights as a non-obligatory established objective in the Constituent Treaty

International Organizations consider human rights issues as most relevant. In this sense, member states and states wishing to become members shall develop economic relations always taking into account international human rights.[90] For this reason, there must be binds from International Organizations to any state wishing to be admitted as a member, and they must reject any violation of human rights of minorities. The IMF adopted this same principle for admission of the successor states of Yugoslavia in connection with the issue of succession.[91]

Even though there is not a clear definition of accountability, the close relation with the term responsibility in a broader scope is well known.[92] In this sense, the accountability of an organization is a concern of the international community, as is that International Organizations be proponent for good governance.[93]

Also, it is the responsibility of International Organizations to reject conducts held against minorities or human rights. When a country sacrifices its minorities in order to comply with admission conditions without clear goals, the admission should be denied. Furthermore, this approach was characterized by the World Bank and scholars as "at best legally questionable," as it led to subjectivity and was intended to exclude in a disguised manner Serbia and Montenegro from entering the IMF.[94]

3.2.4 Clauses That Stipulate Limitation of Responsibility

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[90] Amnesty National USA, http://www.amnestyusa.org/business/index.do.

[91] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 110 (2d ed. Cambridge, 2005).

[92] Hafner Gerhard, "*Can International Organizations be controlled? Accountability and responsibility*" (American Society of International law proceedings, April 2-5, 2003).

[93] Burall Simon & Neligan Caroline, "*The accountability of International Organizations*" 5, 7 (Global public policy institute, Berlin, Germany); Wilde Ralph, "*Advancing the effectiveness for international law: Is U.N reformed necessary?*" 8 (ILSA Journal of international law and comparative law, 2006).

[94] Williams Paul R., *State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations* 801 (43 International and Comparative Law Quarterly, 1994); Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 110 (2d ed. Cambridge, 2005).

Even though an International Organization has the possibility to set up clauses to limit its responsibility, it cannot in fact set up a discriminatory clause aiming to or that could harm a minority or a special group within a State. Furthermore, when analyzing responsibility of an International Organization it is imperative to study its constituent treaty. For instance, a treaty that states in a clause that a country "Shall be eligible for admission" does not constitute an obligation itself on behalf of the International Organization to actually grant membership to a state. In that case, the conjunction *eligible* implies the possibility of being suitable for a position when there is fulfillment of conditions.[95] In this sense, the word eligible does not imply a certainty of being elected, even if there is a fulfillment of conditions.
Another model of limitation of responsibility of an International Organization could be the situation in which an internal organ of the Organization determines "in its sole discretion", that the State has timely satisfied all conditions for accession described in the accession agreement, "the organ shall consider the application." This means that for a State that entirely fulfills the requirements contained in the accession agreement, the only obligation of the Organization is to consider, in "its sole discretion", the request. The Organization could request the state to comply with additional conditions that derive from the constituent treaty, and this itself could not be entitled as an unlawful act,[96] but as the simple exercise of the right of the Organization, to discretionary establish whether a State is suitable for membership or not.[97] According to the state practice on State Succession, the IMF (International Monetary Fund) and the World Bank, the IMF has the "implicit authority to require that a state be capable of carrying out its obligations to the IMF before membership is granted."[98]

On the other hand, when a State is rejected by an organ of an International Organization due to non fulfillment of certain requirements, the state may argue that such organ of the IO must have the power to impose these same requirements on its present Member States. This situation occurred with Bulgaria, Turkey and other states when they tried to become members of the EU. Many scholars criticized the EU asserting that it lacked the authority to impose those conditions (minorities' rights) on candidate states.[99] Additionally, they noted that the EU treaty did not mention protection of minorities as one of EU's principles, objectives or competences.[100]

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[95] *International Dictionary of English* 447 (ed. Cambridge).
[96] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations* 107 (2d ed. Cambridge, 2005).
[97] *Conditions of Admission of a State to membership in the United Nations, Advisory Opinion* (International Court of Justice 1948).
[98] *State Succession and the international financial institutions: political criteria v. protection of outstanding financial obligations*. State Succession: IMF and World Bank. 25 1994.
[99] Kline Carol L., *EU inconsistencies Regarding Human Rights Treatment: Can the EU Require Czech Action as a Criterion for Accession?* 35 (23 International and Comparative Law Review, 1999); Rangelov Iavor, *Bulgaria's Struggle to Make Sense of EU Human Rights Criteria*, http://www.eumap.org/journal/features/2001/oct/bulgariastr.
[100] Hillion Christophe, *On enlargement of the European Union: the Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities* 728 (27 Fordham International Law Journal, 2004).

Furthermore, in the *Admissions case,* the ICJ mentioned that good faith had to be a factor when voting for admission.[101] When an organ states that the application is denied based on issues related to protection of minorities' rights, the organization must be careful not to breach the principle of good faith by imposing conditions that are totally outside their field of competence, conditions that cannot even be imposed on Member States.
It should be noted that some scholars have asserted that countries having weak economies are left at the mercy of international entities. These countries do not have the ability to resist the prescriptions of international bodies, even if they may negatively affect the protection of economic, social and cultural rights.[102]

3.3 Privileges and immunities of International Organizations

There are theories that support the idea that International Organizations enjoy privileges and immunities, however, there are others that support the opposite point of view. At this point we show different positions concerning this subject.

3.3.1 Why is it possible to establish that International Organizations enjoy privileges and immunities?

First, we show the positions that support the idea that International Organizations do enjoy privileges and immunities.

3.3.2 Privileges and Immunities as a necessity for the fulfillment of purposes and functions of International Organizations

It is widely accepted that International Organizations enjoy privileges and immunities entirely because they are necessary for the fulfillment of their purposes and functions.
The basis of those privileges and immunities are functional. Immunities are necessary for their functions, for the correct accomplishment of their purposes; they are needed for the effective exercise of their functions.

International Organizations' privileges and immunities are not based on the principle of reciprocity like the diplomatic privileges and immunities of states. States recognize privileges and immunities of International Organizations because of their interest in the efficient and independent functioning of the Organizations, without any interference. Also these privileges and immunities are based on the principle of good faith "that is, provision of what is necessary for an organization to perform its functions."

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[101] *Advisory Opinion on the Admission of a State to the United Nations* (U.N. Charter art. 4), 57, (individual opinion of Judge Alvarez), 76 (individual Opinion of Judge Azevedo), 91 Joint Dissenting Opinion of Judges Basdevant, Winiarski, McNair, Read), 103 (Dissenting Opinion of Judge Zoricic), 115 (Dissenting Opinion of Judge Krylov) 1948, I.C.J,.

[102] Danka Victor, Flinterman Cees, Leckie Scott, *Commentary to The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* 725 (Human Rights Quarterly 1998).

At this point, one should mention the case of the UN that recognizes this situation in Article 105 of the UN charter. "Under international law, an International Organization generally enjoys such privileges and immunities from the jurisdiction of a member state, as a necessity for the fulfillment of the purposes of the organization, including immunity from legal process, and from financial controls, taxes, and obligations."

Furthermore, there are international and national cases that have emphasized on the importance of the immunities and privileges of the Organizations for the fulfillment of their functions. In *Mazilu case* the International Court of Justice decided that Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations was applicable in the case of Mr. Dumitru Mazilu as a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Also, it is worth mentioning the Italian Court of Cassation in FAO v. INPDAI, the employment appeal tribunal in Mukuro v. European Bank for reconstruction and development, the Swiss labor court in ZM v. Permanente delegation of the league of Arab States to the UN and in The European Court of human rights in Waite and Kennedy v. Germany.

3.3.3 Privileges and Immunities as a necessity for the independence of International Organizations

International Organizations require certain minimum freedom and legal security for their assets, premises, properties and for their personnel and representatives of member states accredited by the Organization.

For instance, in the Mendaro v. World Bank case, the US court of appeals stated that the cause for the granting of immunities to International Organizations was to facilitate them to pursue their functions more effectively and in particular to permit Organizations to operate free from unilateral control by a member state over their activities within its territory[103].

Other cases that emphasized on the importance of the immunities and privileges of the Organizations for the fulfillment of their functions are: The Italian Court of Cassation in FAO v. INPDAI, The employment appeal tribunal in Mukuro v. European Bank for reconstruction and development, The Swiss Labor Court in ZM v. Permanent delegation of the league of Arab States to the UN and in The European Court of human rights in Waite and Kennedy v. Germany.[104] In all these cases it was established that immunities and principles of International Organizations are necessary for the free and independent functioning of the Organizations, without interference of the individual governments or host states.

[103] Barrister Tureen Afroz, *Legal Immunity to World Bank: Indulging the 'Wolf in Sheep's Clothing'* (2004 Bangladesh), www.tureenafroz.com/articles/newsart15.doc
[104] European Court of Human rights, (February 18, 1999).

In that way, it is possible to see that immunities and privileges of International Organizations are a way to guarantee the independence and autonomous functioning of International Organizations.

There are many cases in which immunities and privileges of International Organizations are recognized. With the proliferation of International Organizations an international tendency has been growing to recognize that at least certain international privileges and immunities are necessary for the efficient and independent functioning of the International Organizations, even in the absence of applicable conventional law.
According to customary law, the range of privileges usually includes immunity from jurisdiction, inviolability of premises and archives, currency and fiscal privileges, and freedom of communication.

For instance, when the United States and the United Kingdom withdrew themselves from UNESCO in the 1980s, there was no attempt on their behalf to terminate relevant privileges and immunities of the concerned organization and its officials. That shows an implicit recognition that UNESCO was entitled to immunity under customary law.

3.3.4 Privileges and Immunities of the personnel of International Organizations

There are some scholars that support the idea that the personnel of International Organizations enjoy privileges and immunities and there are others that support the opposite point of view. Here, we summarize both positions.

For exercising the functions entrusted by the International Organization to which they belong, personnel of these Organizations enjoy privileges and immunities.

For instance, in the UN General Convention (1946), the immunity and privileges of personnel and its property is specifically stated. It is mentioned that the representatives of member states to the principal and subsidiary organs enjoy immunity from personal arrest or detention, from seizure of their personal baggage, and, regarding words spoken or written and all acts done by them in their capacity as representatives, immunity from legal processes of every kind; inviolability concerning all papers and documents. Furthermore, in the draft articles on the Representation of States in their Relations with International Organizations, it is established in article 28 that the persons of the head of mission and the members of the diplomatic staff of the mission shall be inviolable; they shall not be liable to any form of arrest or detention, host State shall treat them with due respect and shall take all appropriate steps to prevent any attack to their persons, freedom or dignity.

Also, in headquarters agreements between International Organizations and host states, it is clear that such privileges are recognized. “Article V, section 15 of the UN headquarters agreement, states that representatives are entitled in the territory of the US

to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it."
We see that there is at least a minimum agreement on immunity of officials of International Organizations, regarding legal processes that may rise from all acts performed in their official capacity.
In that way, the consent that emerges from the many agreements is that the personnel of International Organizations enjoy privileges and immunities for the purpose of exercising the functions entrusted by to the organization.

3.4 Other views that do not support that idea: International Organizations have no immunities under international law

3.4.1 Immunities provided to the International Organization only by International Agreements

International law ensures that Organizations have no immunities under international law unless provided by international agreements. The Restatement 3d of the Foreign Relations Law of the U.S.,[105] indicates that International Organizations, other than the United Nations and its Specialized Agencies, "*enjoy specified privileges and immunities by international agreement and therefore only in relation to parties to those agreements, or under state legislation such as that of the United States (...) an International Organization might be considered a grouping of individual states entitled to the privileges and immunities of the constituent states*." [106]

The privileges and immunities of International Organizations have been largely accorded through treaties and conventions as constitutive treaties and "host agreements". For this reason, immunities and privileges cannot be compared to those of States. The issue is restricted by the constitution documents of International Organizations as for example Articles 104 and 105 of the UN Charter[107] and Articles 132 and 135 of the OAS Charter,[108] and bilateral agreements like the OAS Agreement with the US; also, multilateral conventions as the Specialized Agencies Convention of the UN of 1947.
Likewise, most International Organizations, that might work on different subjects and accomplish diverse tasks, have provisions in their constituent treaties aiming for the enjoyment of privileges and immunities. For example, just to mention a few of them, the ILO constitution, in its Article 40[109] mentions that: "*1. The International Labor Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes (...)".* The same occurs in the IAEA constitution: "*ARTICLE XV: Privileges and immunities A. The Agency shall*

[105] *Restatement 3rd of the Foreign Relations Law of the U.S. Rules and Principles*. Part 4 - Jurisdiction and Judgments. Chapter 6 - Immunities of Diplomats, Consuls, and International Organisations at 1.
[106] Lauterpacht,C. J. Greenwood,A. G. Oppenheimer. *International Law Reports.* Pg 423
[107] *The Charter of the United Nations,* Art 104, 105 (1945).
[108] *Charter OAS*, Art 132, 135 (1997).
[109] *International Labor Organization constitution* 40, adopted at Philadelphia on May 10, 1944 .

enjoy in the territory of each member such legal capacity and such privileges and immunities as are necessary for the exercise of its functions."[110]

Concluding from the above statement, the United Nations and its Specialized Agencies have international legal capacity, with objective personality, and these Organizations enjoy privileges and immunities, relating non-member states.[111] But this is not the case of other similar entities that lack legal capacity. Concerning International Organizations, immunities are opposable only by member states, because they are the ones that benefit from these privileges.[112]

Non-member States must define their own policy concerning International Organizations.[113] However, the constituent treaty does not create any obligation for non-member states except when they assent to the obligation. Therefore, non-member states can ignore the obligation.[114]

Finally, as functional necessity offers the foundation for immunities of International Organizations, it is possible to presume that if a non-member state does not care whether the International Organization achieves its purposes or not, or if it is still dynamically disparate to those purposes, then it could refuse the immunity.[115]

3.4.2 Absence of Customary Law

The ICJ Statue[116] indicates that: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: b. international custom, as evidence of a general practice accepted as law". That is why customary international law must come into sight[117] since it also includes matters on International Organization.

According to article 38 of the Statute of this Court and the international decisions, the fundamental elements that constitute custom are:

- State practice (usus or diuturnitas) or,

[110] Constitution. 23 October 1956 by the Conference on the Statute of the International Atomic Energy Agency. Art XV IAEA
[111] *Restatement 3d of the Foreign Relations Law of the U.S. Rules and Principles*. Part 4, 1.
[112] Restatement 3d of the Foreign Relations Law of the U.S. Rules and Principles. Part 4, 28.
[113] Singer Michael, *Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns* 31 (Virginia Journal of International Law Association).
[114] Vienna Convention on the Law of the Treaties, 34 May. 23, 1969.
[115] Singer Michael, *Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns* 31 (Virginia Journal of International Law Association).
[116] International Court of Justice Statute article 38.
[117] North Sea Continental Shelf Case (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 43 (Feb. 20, 1969).

- Corresponding views of states (opinion juris or opinion necessitatis)[118]

There is no reiterative practice concerning immunities and privileges of International Organizations. Even though customary law on immunities and privileges of the United Nations is advance[119], there is no convincing evidence of customary norms of immunities of other International Organizations.[120] The debate is essentially indecisive and indefinite.[121]

To establish a customary law, it is important to observe the existence of state practice. In order to show an illustration of the inexistence of custom related to privileges and immunities of International Organization, it is important to mention the *Tin Council V. Amalgamet Inc Case*[122] in which the New York Court rejected the immunities of the ITC to suit in the United States by virtue of its status as an International Organization.

As Rosalyn Higgings asserted, the Fifth Report of the Special Rapporteur on Relations between States and International Organizations[123] between States and International Organizations affirms the possibility of customary law of diplomatic missions of International Organizations by simply asserting that the principle is equal between states and International Organizations.[124] Thus, the Rapporteur did not prove the existence of customary law and it was not even discussed by the Commission "*due to lack of time."*[125]

3.4.3 Functions of Privileges and Immunities in presence of Customary Law

An International Organization generally enjoys such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfillment of the purposes of the Organization.[126] For this reason, immunity can only be claimed if it is required for the

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[118] Cassesse Antonio, *International law* 156 (Oxford University Press. 2d ed. 2005).
[119] Y. Jennings Robert, *What is International Law and how do we tell it when we see it?* 8 (The Cambridge Tilburg Law Lectures).
[120] Higgins Rosalyn, *Problems and Process: International Law and How We Use It* 92 (Oxford Clarendon Press 1994).
[121] Singer Michael, *Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns* 38 (Virginia Journal of International Law Association).
[122] *Tin Council V. Amalgamet Inc case*, Supreme Court, New York County, January 25, 1988.
[123] Fifth Report of the *Special Rapporteur*, Mr. Leonardo Diaz Gonzalez (42nd session of the ILC (1990). *Considered the question of archives of International Organizations and submitted draft articles* 12-17.
[124] Higgins Rosalyn, *Problems and Process: International Law and How We Use It* 92 (Oxford Clarendon Press 1994).
[125] Report of the International Law Commission on the work of its forty-second session, 1 May-20 July 1990, Official Records of the General Assembly, Forty-fifth session, Supplement No. 10, U.N. Doc. A/45/10, at 1-9, 84-89.
[126] Restatement 3rd of the Foreign Relations Law of the U.S. Rules and Principles. Part 4, 1.

accomplishment of the objectives of the organization.[127] The declaration of purposes of an International Organizations usually appears in its constituent instrument.[128]

A privilege or immunity given against these circumstances becomes an *abus de droit* and, consequently a breach of international law. Then, the law of retaliation or *inter alia,* can come into action. The best way to exercise this right is by not recognizing the immunity, whether by an administrative act or judicial decision.[129] This is a principle of self-defense that continues to exist side by side with the Convention of Diplomatic Protection, allowing authorities of the receiving state to take certain actions against an embassy, when the ambassador abuses his/her immunity.[130]

3.5 EXPROPRIATION

We have consider that expropriation, is a measure that eventually the International Organizations might take under the capacity that the founding States gave to the Organization. For this reason, we have study a hypothetical case in which an International Organization expropriate an individual, and we have tried to present a legal regime applicable to International Organizations.

3.5.1 Classification of expropriation

Expropriation is the act of removing the owner of an item of property from its control.[131] Under International law, expropriation cases can be more accurately classified in three ways: (i) direct or indirect appropriations; (ii) arbitrary deprivations that cannot be justified by the exercise of state police powers to protect public order or morals, human health or the environment; or (iii) cases where the state has abrogated a previously granted permission and the investor is deprived of its investment.[132]

3.5.2 Indirect expropriation

The primary distinction in international expropriation law is between: (i) direct forms of expropriation where the government directs the transfer of private property to the state

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[127] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations*, 315 (2d ed, Cambridge, 2005).

[128] Magistris Paula, *Immunities of International Organizations* (Special reference to Mercosur and ALADI) http://www.geocities.com/enriquearamburu/ETE/alumn4.html

[129] Amerasinghe C. F., *Principles of the Institutional Law of International Organizations*, 351(2d ed, Cambridge, 2005).

[130] Higgins Rosalyn, *Editorial Comment: The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience* 615 (July 1985, American Journal of International Law, 79 Am. J. Int'l L. 641 reproduced with permission from (c) The American Society of International Law).

[131] http://en.wikipedia.org/wiki/Expropriation

[132] Newcombe Andrew Paul, "*The Boundaries of Regulatory Expropriation in International Law*" http://ssrn.com/abstract=703244

or a state-mandated third party; and (ii) indirect forms of expropriation where a government measure, while not on its face expropriatory, results in the deprivation of a foreign investor's property. An array of adjectives is used to describe indirect expropriation: equivalent, tantamount, de facto, creeping, constructive, disguised.[133]

For example, in Starrett Housing Corporation v. Islamic Republic of Iran, the tribunal held that "[it] is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner."[134]

Despite a number of decisions of international tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated and depends on the specific facts and circumstances of the case. However, while case-by-case consideration remains necessary, there are some criteria emerging from the examination of some international agreements and arbitral decisions for determining whether an indirect expropriation requiring compensation has occurred.[135]

Article 1110 of NAFTA[136] protects foreign investments against expropriation with the following language:

> "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or *take a measure tantamount to* nationalization or expropriation of such an investment, except:
>
> (a) For a public purpose;
> (b) On a non-discriminatory basis;
> (c) In accordance with due process of law and Article 1105 (1)15 and
> (d) On payment of compensation in accordance with [subsequent paragraphs specifying valuation of expropriations and form and procedure of payment]."

It is a well recognized rule of international customary law that all States have the right to adopt regulatory measures, within their territory, as "an ordinary expression of the exercise of the State's police power that entails a decrease in assets or rights."[137]

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[133] Newcombe Andrew Paul, *"The Boundaries of Regulatory Expropriation in International Law"* http://ssrn.com/abstract=703244

[134] Starrett Housing Corporation v. Islamic Republic of Iran, 154 Iran-U.S. C.T.R. 122 per Lagergren (1983).

[135] *"Indirect expropriation" and the "right to regulate" in international investment law"* 3 http://www.oecd.org/dataoecd/22/54/33776546.pdf

[136] NAFTA Chapter 11 article 10

[137] Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID, Case No. ARB (AF)/00/2, 43 I.L.M. 133, para 115 (May. 29, 2003).

Moreover, expropriation involves the taking of property.[138] However, the term expropriation is not limited to the taking of property as such. It also involves a deprivation by a state organ of the right of property.[139] On the other hand, there are the so called regulatory measures aimed at protecting a public interest; they are considered as being within the police powers of the state and therefore not requiring compensation.[140]

Article 3 of the 1967 OECD Draft Convention on the Protection of Foreign Property[141] states that "no Party shall take any measures depriving, directly or indirectly, of his property a national of another Party" unless four conditions are met, according to recognized rules of international law. (The measures in question must be taken: (i) in the public interest, (ii) under due process of law; (iii) shall not be discriminatory; and furthermore, (iv) just and effective compensation must be paid).
"Article 3 acknowledges, by implication, the sovereign right of a State, under international law, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social or economic ends. To deny such a right would be an attempt to interfere with its powers to regulate – by virtue of its independence and autonomy, equally recognized by international law – its political and social existence. The right is reconciled with the obligation of the State to respect and protect the property of aliens by the existing requirements for its exercise – before all, the requirement to pay the alien compensation if his property is taken."

Additionally, the Third Restatement of the Foreign Relations of the United States[142] states that "the governmental regulation is aimed to protect a public interest, not discriminatory and not designed to cause the alien to abandon the property or to sell it at a distressed price;" therefore a legal expropriation has to fulfill these requirements.
In order to protect the public interest, an independent state has the "sovereign right" to deprive owners, including aliens, of property in the pursuit of its political, social or economic ends through governmental regulations. This right has been recognized, among others, by the Article 1, paragraph 2 of Protocol 1 of the European Convention on Human Rights, concluded in 1952 and entered into force in 1954, which establishes that "Every natural or legal person is entitled to the peaceful enjoyment of its possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law."[143] Additionally, it should be noted that in determining what constitutes a public interest, it is commonly accepted that the state is the one that has a

[138] Malcolm N. Shaw, *International Law* 283 (Cambridge University Press, 5th ed. 2003).
[139] Hober Kay, *Investment Arbitration in Eastern Europe: Recent Cases on Expropriation* 381 (14 American Review of International Law Arbitration, 2003); Brownlie Ian., *Principles of public international law* (1998); Starret Housing Corp.v.Iran, 4 Iran-United States Cl.Trib.Rep.1222, 154 (1983).
[140] Aldrich George H., *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal* 605 (88 American Journal of International Law 1994).
[141] OECD Draft Convention on Foreign Property, pp. 23-25 (October 12, 1967).
[142] Restatement Third of the Foreign Relations of the United States, Section 712; Sohn Louis B. & Baxter R.R., *Responsibility of States for Injuries to the Economic Interest of Aliens* 554 (55 American Journal of International Law).

wide margin of appreciation in making the initial assessment of the existence of a public concern warranting measures.[144]

Additionally, a governmental measure will be discriminatory when a state treats foreigners or foreign nationals of a particular nationality, or particular foreigners in a manner less favorable than the state's treatment of its own nationals.[145] The measure, in order for it to be considered discriminatory, should also imply an unreasonable distinction.[146] The Restatement has stated: "classifications, even if based on nationality, that are *rationally related* to the state's security or economic policies might not be unreasonable."[147]

If the governmental measure makes the person abandon the property or sell it at a distressed price, it could be considered an illegal expropriation, because the measure causes interference with the use, enjoyment or disposal of property, and the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time,[148] or change it for another property due to inadequate compensation. Actually, there is not a clear defined line of what constitutes an indirect expropriation and a regulatory governmental measure.[149]

Nevertheless, an examination of international expropriation jurisprudence reveals that there is an element of consistency among courts and tribunals as to the line between legitimate regulation and indirect expropriation.[150] This element of consistency can be described as the identification of some factors that, combined with the relevant circumstances of the case, will have a particular implication[151] in determining whether a taking has occurred. Furthermore, it should be noted that international tribunals have not

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[143] Draft Convention on the Protection of Foreign Property, October 1967, http://www.olis.oecd.org/horizontal/oecdacts.nsf/0/F686D58B131532ADC125708800580D5F?OpenDocument; OCDE, Organization for Economic Co-operation and Development, *Indirect expropriation and the right to regulate in international law investment* 8 (2004).

[144] *James v. United Kingdom*, 9 European Court of Human Rights, (1986).; *Amoco International Finance Corp. v. Iran, U.S v. Iran*, 145 (15 Iran-U.S. Cl. Trib. Rep. 189.)

[145] Hober Kay, *Investment Arbitration in Eastern Europe: Recent Cases on Expropriation* 386 (14 American Review of International Law Arbitration, 2003)

[146] Restatement 3rd of the Foreign Relations Law of the U.S. Rules and Principles. Part 4, 1. Section 712

[147] Restatement 3rd of the Foreign Relations Law of the U.S. Rules and Principles. Part 4, 1. Section 712

[148] Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens

[149] OECD Draft Convention on the Protection of Foreign Property 3 (Oct. 12 1967), http://webdomino1.oecd.org/horizontal/oecdacts.nsf/0/f686d58b131532adc125708800580d5f?OpenDocument&Click=.

[150] Stanley Jon A., *Comment: Keeping Big Brother Out of the Backyard: Regulatory Takings as defined in International Law and Compared to American Fifth Amendment Jurisprudence* 371 (14 Emory International Law Review).

[151] OECD, Organization for Economic Co-operation and Development, *Indirect expropriation and the right to regulate in international law investment*, (2004); *Penn Central Transportation Co. v. New York City, 438 U.S 104, 124, (*1978).

gave predominance to one sole factor.[152] On the contrary, tribunals have used a multifactor test or a balancing test.[153]
The first factor that is commonly used is the interference of the measure on the property right; in this sense, it is widely accepted by internationals tribunals that in order to assert that a deprivation has occurred, the investor has to prove that the interference in his property right is substantial enough to be characterized as an expropriation in international law.[154]

For example, in the case of *Pope and Talbolt, Inc. v. Canada,* the Tribunal found that the measures adopted by Canada did not constitute "an interference with the investment's business activities were substantial enough to be characterized as an expropriation under international law."[155] In supporting this conclusion, the Tribunal asserted that "the investor remains in control of the investment; it directs the day-to-day operations of the investment, Canada does not control the work of the officers or employees of the investment and does not take any part of the proceeds of the company sales."[156] For that reason, the tribunal considered that the measures that Canada took were of police powers.

3.5.3 Justification for non-compensation

Sometimes there are justifications for non-compensation when an expropriation occurs and International law recognizes two broad categories of police power regulation that might justify non-compensation where there is a deprivation. These are: (i) public order and morality; and (ii) protection of human health and the environment. In addition, state taxation is another well recognized form of non-compensable appropriation.[157]

However, like all powers, expropriation powers have its limits, and when expropriation under customary international law falls under the more general rubric of international minimum standards, states can only rely on police powers justification for non-compensation if the exercise of the police powers is otherwise consistent with the

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[152] Dolzer Rudolf, *Indirect Expropriations: New Developments?* 79 (11 N.Y.U. Environmental Law Journal, 2002).
[153] Dolzer Rudolf, *Indirect Expropriations: New Developments?* 79 (11 N.Y.U. Environmental Law Journal, 2002); OECD, Organization for Economic Co-operation and Development, *Indirect expropriation and the right to regulate in international law investment* 22 (2004).
[154] OECD, Organization for Economic Co-operation and Development, *Indirect expropriation and the right to regulate in international law investment* 11 (2004).
[155] *Pope and Talbolt, Inc. v. Canada*, 100 (2001), www.dfait-maeci.gc.ca/tna-nac/gov-en.asp; Gantz David A., *International Decision: Pope and Talbolt, Inc. v. Canada,* www.dfait-maeci.gc.ca/tna-nac/gov-en.asp.; Nafta Chapter 11 Arbitration Tribunal, 2000-2002 at 940; *Fredin v. Sweden, European Court of Human Rights* 43; *Sporrong and Lönnroth v. Sweden*, European Court of Human Rights 63 (1982).
[156] *Sporrong and Lönnroth v. Sweden*, European Court of Human Rights 100 (1982).

[157] Newcombe Andrew Paul, "*The Boundaries of Regulatory Expropriation in International Law"* http://ssrn.com/abstract=703244

international minimum standard. A complete prohibition on a business activity does not meet the international minimum standard if it is arbitrary or discriminatory.

Customary international standards of treatment of foreign investment is infringed by conducts that are: attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic; discriminatory and expose the claimant to sectional or racial prejudice; or involve a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State, which was reasonably relied on by the claimant.[158]

To assess a police powers justification, it is necessary to look at the character, object or purpose of the government measure. In cases where the government is acting for economic purposes—to create local industry or protect domestic production—, police power cannot be used to justify non-compensation.

Property might be destroyed for reasons of public health. General taxation is not expropriation. In all these cases, a state does not incur responsibility for the legitimate and bona fide exercise of certain types of sovereign police powers. The thorny question is: what is a legitimate and bona fide exercise of state police powers that justifies a complete deprivation of property with no corresponding obligation to pay compensation?[159]

3.5.4 Expropriation of foreign investors

Under international law, expropriation provides a minimum level of protection from state appropriations and arbitrary conduct. Expropriation occurs when a foreign investor is deprived of the use, benefit, management or enjoyment of all or substantially all of its investment, except where deprivation results from a bona fide and legitimate use of state police powers.

The classic international decisions on expropriation refer to the principle of respect for acquired rights. Respect for acquired rights finds expression in the principles of corrective justice and unjust enrichment. As International Law Commission Special Rapporteur, García-Amador highlighted in his Fourth report: “the very raison d’être of compensation for expropriation ordered in the public interest is the idea that the State, i.e. the community, must not benefit unduly at the expense of private individuals.”[160]

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[158] Waste Management II, Waste Management Inc. Vs. United Mexican States, 2000.

[159] Newcombe Andrew Paul, "*The Boundaries of Regulatory Expropriation in International Law*" http://ssrn.com/abstract=703244

[160] F.V. García-Amador, *“Fourth Report of the Special Rapporteur - Responsibility of the State for Injuries Caused in its Territory to the Persons or Property of Aliens - Measures Affecting Acquired Rights”* 5 (1959, 2 Y.B. Int'l Law Comm. 1).

3.5.5 The police powers and regulation powers of the States and expropriation

It is well known that property is an international recognized right; however it is not an absolute right in the light that Governments have the power to regulate this right taking into account principles of international law such as: national treatment taking considering protection of foreign nationals within their territory,[161] trade without discrimination,[162] peaceful enjoyment of property[163] and due process. States have no absolute, divine, power to generate rights. Thus, "the state can acquire nothing by simple declaration of its will but must justify its claims in terms of the rights of the individuals whom it protects; a state, by ipse dixit, may not transform private property into public property without compensation"[164]

It is clear that any State has the power to regulate property in the search of the welfare of its society. It is generally accepted that a state uses its powers for *bona fide* general taxation, regulation, forfeiture for crime; nonetheless, the state cannot disregard the individual's fundamental rights when it is exercising this power[165] and it can never exercise this power in a discriminatory manner. It this sense, the state must have in mind, at all times, several factors such as: The economic impact of the measure, interference with the investment-backed expectations, among others.[166]

It has been said that the expropriation is a well based right of the State, settled on the general benefit of the community and the sacrifice of the individuals; however, it is forbidden to expropriate an individual with no compensation or with no general benefit proposed. This general rule is well recognized by States.
Additionally, according to what has been stated, International Organizations must be capable of expropriating the property of individuals with the same requisites and objectives as States; this is one of the characteristics of a legal capacity personality.

4. PEACEFUL DISPUTE SETTLEMENT BY INTERNATIONAL ORGANIZATIONS

Peaceful dispute settlement by International Organizations has its foundation in the Charter of the United Nations.[167] For example, from its first article, it is possible to establish that one of the purposes of the biggest international organization is "(…) the

[161] "International Covenant on Civil and Political Rights" art. 3 and Customary International Law.
[162] GATT art. 3, 17 (1947).
[163] "European Convention of Human rights", art. 1 (1954).
[164] Stanley Jon, *Keeping big brother out of our backyard* 2 (2001 Emory University School of Law Emory International Law Review).
[165] OECD Draft Convention on the protection of foreign property, article 3 (1967).
[166] 438, U.S. 104 The supreme Court of the United States of America (1978).

adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[168]

But it is in its article 33 that the Charter institutes the peaceful dispute settlement in the orbit of International Organization. The article states that "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[169]
However, the peaceful dispute settlement has become an important principle in the scope of international law. Subjects of International Law, such as International Organizations and States, must solve their affairs in a peaceful manner, avoiding the use of force and also with cooperation.[170] This has been stated, not also in the UN Charter, but in the Manila Declaration of Peaceful Settlement.[171]

The most basic method of dispute resolution is negotiation. With this method, the parties in divergence discuss about their tribulations and attempt to find a solution to them. It is characterized by the "direct engagement" of the parties.[172] They solve their own issues by exposing their different points of view. It is not a very common system for solving disputes, given that a "successful negotiation requires a certain degree of mutual goodwill, flexibility, and sensitivity."[173]
This is the reason why parties involve third-party participants to assist the endeavor of peacefully solving disputes, thus creating methods such as good offices and mediation. "Good offices normally consist primarily of providing logistical support to help the parties negotiate in a productive atmosphere. (…) In a mediation process, the mediator does not only participate in and contribute to the discussions and negotiations, but may

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[167] "In recent years, the Council has used Chapter VI in various ways. It has entered into direct dialogue with the parties to a conflict, for example through its discussions with the Political Committee of the Lusaka Agreement. It has tried to work more closely with the Economic and Social Council, and with other regional and sub-regional Organizations, to prevent and resolve conflicts in Africa." 14 May 2003. UN Charter Provisions on Peaceful Dispute Settlement at Heart of Collective Security System Says Secretary-General. http://www.unis.unvienna.org/unis/pressrels/2003/sgsm8697.html (March 23, 2008).
[168] Charter of the United Nations, art 1 (1945)
[169] Charter of the United Nations, art 33 (1945)
[170] *Handbook on Peaceful Settlement of Disputes between States*. Out of Print. (Released in October 1992 English).
[171] Amerasinghe Felix Chittharanjan, *Jurisdiction of International Tribunals* 17 (2008), http://books.google.com.co/books?id=MHm-T5Kqcw8C&pg=PA16&lpg=PA16&dq=peaceful+dispute+settlement&source=web&ots=wZx6g9O1ko&sig=DHTIdKDdAqkXZoV7yw8Iw_QU8A0&hl=es#PPA17,M1
[172] *Diplomatic methods of dispute settlement – negotiation* 9 (2008) http://ir.emu.edu.tr/portal/files/lecturenotes/3bW9.BwAUtcV6The%20Peaceful%20Settlement%20of%20Disputes.ppt#261.
[173] *Diplomatic methods of dispute settlement – negotiation* 9 (2008) http://ir.emu.edu.tr/portal/files/lecturenotes/3bW9.BwAUtcV6The%20Peaceful%20Settlement%20of%20Disputes.ppt#261.

also propose a solution to the parties. The parties would not be obliged to accept this proposal."[174]

As is possible to notice, the good offices method implies that the third party tries to convince the disagreeing parties to go through a negotiation. When the parties agree to discuss their problems, the activity of the good offices ends because it does not have a role in the debate.[175] There are different examples of good offices among the history of international law,[176] where International Organizations have developed the good office endeavor. This was the case of the UN General Secretary in 1988, when the Cyprus problem was straightened out.

On the other hand, mediation is "One of the procedures for the peaceful settlement of international disputes that involves the direct participation of a third country, individual, or organization in resolving a controversy between states. The mediating state may become involved at the request of the parties to the dispute or on its own initiative. In its role as mediator, the intervening state will take part in the discussions between the other states and may propose possible solutions."[177] For example, in 1979, the UN acted as a mediator between Egypt and Israel in Camp David.
One can conclude that the role of the third party is a more dynamic one when it acts as a mediator, than when it is involved as a good office, as it can propose stipulations and arrangements to solve the disagreement in an impartial way; being these arrangements not compulsory to the parties.[178]

The inquiry is another method of peaceful settlement. Various international conflicts depend on investigations related to facts. For instance, in the Dogger Bank incident of 1904, states decided to assign an independent ad hoc body to create a verdict of the debated issue and to set up a consultant agreement.[179]

Another of the peaceful dispute settlement instruments is conciliation. "The purpose of International Conciliation is to present factual statements and analyses of problems in the field of international relations. Subjects include international law, international economics, scientific cooperation, and issues before the General Assembly"[180]

[174] http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s1p2_e.htm last visit march 24 2008
[175] *The American Journal of International Law* 64-66 Vol. 31, No. 2, Supplement: Official Documents (Apr., 1937).
[176] 1906 end Russian.- Japanese War, 1965 India-Pakistan dispute over Kashmir, 1970 Vietman War
[177] Internacional Law Encyclopedia, http://www.answers.com/topic/mediation-international-law?cat=biz-fin
[178] *Diplomatic methods of dispute settlement – negotiation* 9 (2008) http://ir.emu.edu.tr/portal/files/lecturenotes/3bW9.BwAUtcV6The%20Peaceful%20Settlement%20of%20Disputes.ppt#261.
[179] *Diplomatic methods of dispute settlement – negotiation* 9 (2008) http://ir.emu.edu.tr/portal/files/lecturenotes/3bW9.BwAUtcV6The%20Peaceful%20Settlement%20of%20Disputes.ppt#261.
[180] http://lists.washlaw.edu/pipermail/marketing/Week-of-Mon-20020527/000294.html last visit March 24 2008

Conciliation is the procedure in which the parties ask for a third person or persons to help them in achieving a cordial arrangement to their disagreement, arising from a contractual or any legal correlation. The conciliator does not have the power to oblige the parties to agree with its solution to the problem.[181] This means that the conciliation could be understood as a mixture between mediation and inquiry. The conciliator examines the facts of a controversy and presents a report containing optional provisions of a decision.

Also, one of the most important disputes settlement instruments of International Organizations or an international entity is the Arbitration. In 1899, in The Hague Convention for Pacific Settlement of international controversy, the Permanent Court of Arbitration was established. In Arbitration, the parties arrange an ad hoc tribunal to solve their disagreements.

Peaceful dispute settlement must be established in international treaties. It can also be instituted in the constituent treaty of an International Organization. Arbitration is one of the adjudicatory methods of dispute settlement. With this method, parties have the faculty to select all affairs of the dispute, and they can establish the type of tribunal, the procedure of the ad hoc tribunal and settle on the applicable law.

5. INTERNATIONAL ORGANIZATIONS AS SOURCES OF INTERNATIONAL LAW

Different authorities avowed Article 38 of the Statute of the International Court of Justice, which instructs that the different sources of international law created by states are exhaustive and are the mere tools that international judges are able to use to solve any possible cases,[182] as the article stipulates that:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[183]

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[181] UNCITRAL Model Law on International Commercial Conciliation (2002)

[182]

[183] Statute of the Intemational Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1031, 1060, http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm (last visited Ab 2, 2008)

Many scholars have asserted that these interpretation rules compose international regulation. They affirm that "the general consent of states creates rules of general application."[184] However, law is changing and nowadays, International Organizations have already become very important subjects in law making processes.

Numerous authors these days are recognizing the idea of different applicable sources of international law. For this reason, they have criticized the traditional suggestion of understanding international law; they had affirmed that the classic classification of the sources of imitational law, such as treaties, custom, and recognized general principles created by States, is not an "exhaustive list."[185] Authors are proposing new sources of law such as "the results of treaty negotiating conferences as well as the decisions and recommendations of International Organizations."[186]
Nowadays, International Organizations contribute actively in the construction of new international law regulations.[187] For example, International Organizations are capable of signing international agreements. But they are not only able to create treaties; International Organizations actually do exercise this faculty in many occasions.[188]

There is also an important progress of construction of customary law by the organs of International Organizations, such as the United Nations.[189] The submission of customary law produced by the organs of the international organization, guide to the development of fresh international law.[190] Organs have created different practices, guided by the principle *lex posterior derogat priori,* derogating statements in treaty law.[191]

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[184] Henkin Louis, *General Course on Public Intemational Law* in IV RECUEIL DES COURS 46 (1989).

[185] Duncan B. Hollis, *Berkeley Journal of International Law* 137–174 (2005, Vol. 23 Issue1), http://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=17104279&loginpage=Login.asp&lang=es&site=ehost-live.

[186] Jennings Robert Y., *What is Intemational Law and How Do We Tell It When We See It?* 59, 61, 70-73 (1981 *reprinted in* SOURCES OF INTERNATIONAL LAW 28 Martti Koskenniemi ed., 2000)

[187] Forms of Participation of International Organizations in the Lawmaking Processes Krzysztof Skubiszewski *International Organization*, 790-805 Vol. 18, No. 4. (Autumn, 1964): http://links.jstor.org/sici?sici=0020- 83%28196423%2918%3A4%3C790%3AFOPOIO%3E2.0.CO%3B2-2

[188] Schneider J. W., *The Treaty-Ma4ing Power of International Organizations* (Geneva: Librairie Droz 1959)

[189] Higgins Rosalyn, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press, 1963).

[190] Higgins Rosalyn, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press, 1963).

[191] Forms of Participation of International Organizations in the Lawmaking Processes Krzysztof Skubiszewski *International Organization* pp. 790-805, Vol. 18, No. 4. (Autumn, 1964), http://links.jstor.org/sici?sici=0020- 83%28196423%2918%3A4%3C790%3AFOPOIO%3E2.0.CO%3B2-2

6. IMPORTANCE OF TREATY LAW WRITING PROCEDURE BY INTERNATIONAL ORGANIZATIONS

As we have asserted before, International Organizations have legal personality. Founding states transmit a special power to the organization for it to represent their decisions, which is why supranational subjects must have self-determination and independent capacity from its member states.[192]

Treaty law has been understood as the main source of international law. For its relevance, treaty law has been called the "source of obligation."[193] Supranational actors have shown authority to discuss and conclude treaties by themselves.
The European Union is the model illustration of an extra-national subject of international law.[194] Nevertheless, its members are the ones that have carried out the process of agreement law making. "The European Community ("EC") and the European Atomic Energy Community ("Euratom") have traditionally performed such functions. The EC now has an extensive network of international agreements; as of May 2002, it has roughly concluded 600 bilateral agreements." Moreover, as of April 2003, the EC has joined approximately 90 multilateral treaty regimes ranging from the Food and Agriculture Organization ("FAO") to the WTO."[195]

The capacity of International Organizations to create treaty law is bonded to the fact that member states agreed to loose sovereignty. For instance, in the treaty establishing the EC, the member states gave it the capacity to sign different international agreements in diverse subjects.[196]

In the scope of the EC, there are two different kinds of capacity. The first one is the complete personality, with which the EC and not its member states, can negotiate international agreements. With mixed capacity, member states hold the personality to end specific treaties.[197] "For example, Member States have transferred to the EC all of their competence with respect to fisheries. In this context, therefore, the EC now joins fish treaties in lieu of its Member States and participates in those treaties with a single vote."[198]

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[192] Schbrmers Henry G. & Blokker Niels M., *International Institutional Law 52* 41 (3d ed. 1995).

[193] Schachter Oscar, *Towards a Theory of Intemational Obligation, in The Effectiveness Of International Decisions* 9-10 (Stephen Schwebel ed., 1971)

[194] Capotorti Francesco, *Supranational Organizations, in 4 Encyclopedia Of Public International Law* 737.

[195] Duncan B. Hollis, *Berkeley Journal of International Law* 137–174 (2005, Vol. 23 Issue1), http://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=17104279&loginpage=Login.asp&lang=es&site=ehost-live.

[196] Mcgoldrick Dominic, *International Relations Law Of The European Union* 43-66 (1997).

[197] Mcgoldrick Dominic, *International Relations Law Of The European Union* 78 (1997).

[198] Duncan B. Hollis, *Berkeley Journal of International Law* 137–174 (2005, Vol. 23 Issue1), http://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=17104279&loginpage=Login.asp&lang=es&site=ehost-live.

In contrast, organs of Mercosur and ASEAN have shown a restricted agreement making personality, thus showing an overcoming of the ability of supranational entities to negotiate treaties on their own. The regulations for those agreements are placed in the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations.[199]

[199] Duncan B. Hollis, *Berkeley Journal of International Law* 137–174 (2005, Vol. 23 Issue1), http://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=17104279&loginpage=Login.asp&lang=es&site=ehost-live.

7. CONCLUSIONS

With the growing role of International Organizations under international law, the necessity to determine the rules, principles and laws that govern such entities is increasing. The way they act, the way they respond under international and national law, their responsibility concerning important aspects of international law, their functions, obligations and rights must be clarified.

As we have shown in this work, the subject of International Organizations is problematic because there are many theories and ideas, and almost their entire regime is on discussion. In this work, we summarized different opinions concerning International Organizations and the following are our conclusions.

These conclusions are based on a thorough analysis of the problematic of International Organizations and we suggest them as guidelines to the understanding of International Organizations.

CONCLUSION 1

The definition of International Organizations we propose is the following:

An international organization is a collectivity of states established by a treaty under International law; created with the competence and field of action that the founding fathers give to it, with a different personality from that of the member states, capable of responding for its own actions and having the capacity to defend its rights as a subject of international law.

CONCLUSION 2

Since the Peace of Westphalia, subjects of international law have been the same ones, and the latest introduction to the narrow scope of subjects is the individual in cases dealing with human rights. However, one can see that in the last decades International Organizations have been acquiring power, that some of them are even more powerful than some states, and that they are playing an immense and interesting role in the new economy and social order. For these reasons, we consider that keeping the classic narrow classification of subjects of international law is not advisable today, because it leaves International Organizations in a confusing perspective, with their rights and responsibilities, and their capability to suit or act in some tribunals like the International Court of Justice undefined.

CONCLUSION 3

The principle characteristics of an International Organization are the following. It:

1. is established by states
2. is a subject of international law
3. has personality, different from that of its member states
4. has a constituent instrument
5. has a limited competence and field of action
6. has its own rights and obligations
7. responds under international law and it can defend its rights
8. is established under international law
9. has its own authorities and organs

CONCLUSION 4

Concerning International Organizations as legal persons and as subjects of international law, there are different aspects that do not have a unique answer. Depending on the theory adopted, there will be different consequences regarding International Organizations and their acts.

CONCLUSION 5

International Organizations, as subjects of International law, are entities capable of possessing international rights and obligations and of having the capacity to maintain their rights by bringing international claims.

In our opinion, we think that all subjects of international law may have the same rights and obligations. We do not find a reasonable motive to discriminate between subjects of international law; we think that all International Organizations may have the possibility to bring international claims to protect their rights, and may have the possibility to possess obligations of their own and respond accordingly.

In order to commit to the purposes, rights and obligations of being an International Organization, we think that all of them may have international legal personality and that personality may include all these prerogatives.

CONCLUSION 6

If International Organizations are subjects of international law, capable of having their own rights and obligations and having the capacity to defend their rights and respond for their acts, therefore, International Organizations enjoy privileges and immunities, given the fact that they are necessary for the fulfillment of the purposes and functions and for the independence of their institutions.

CONCLUSION 7

International Organizations as subjects of International Law with legal personality need the creation of a new jurisdiction that can judge each International Organization as a unity and not their members as separate states.

CONCLUSION 8

The international tribunals have to deal with expropiation cases. However, sometimes there are regulatory measures taken by the State organs according to the police powers which could be an expropriation measure more than a regulatory one. For this reason the expropriation measures need to fulfill some requirements in order to protect the rights of the individuals, specially the rights of non-nationals that could be victims of xenophobic hatred. Among this expropriation measures disguised as regulatory measures, one can find the nationalization cases, where the State decides to forbid private investment in some economic sector and monopolizes that industry, depriving the individual rights of people who had already invested in such a sector, with any compensation and sometimes with a minimum one.

CONCLUSION 9

Due to concerns about rights and responsibilities of International Organizations, we consider that the constituent treaty cannot be applied restrictively because an International Organization needs to respond as different subject from its member states. For this reason, the International Organization could be suited for the violation of minority rights and the breach of International obligations.

CONCLUSION 10

Some International Organizations have started trying to comply with minority rights and promoting them. Such is the case of the European Union, which decided to establish a requirement in the accession agreement for states wanting to join the Organization, consisting on the verification of some basic conditions for the countries' minorities as the Roma's for the Bulgarian membership. However, one can see that discrimination in the member states is even worse. So it has to be a holistic policy that covers all members.

CONCLUSION 11

International Organizations started taking into account minorities' conditions when granting membership to the organization. However, we criticized that theory asserting that member states do not have the authority to impose severe conditions (minorities' rights) on candidate states. In our opinion, human rights protection and minority protection must be an important concern when accepting or denying admission of a future member state. It is not possible to admit that a state abuses its own vulnerable groups to enter an organization.

CONCLUSION 12

One could think that the mere economic organization would not be dealing with minority rights or human rights. Nevertheless, Economic Organizations are involved with individual rights and especially with minorities' rights, because of the macroeconomic impact and influence. The effects of this sort of International Organization can be on a whole region and sometimes worldwide.

CONCLUSION 13

Peaceful dispute settlement of International Organizations has its foundation in the Charter of the United Nations. International Law subjects, such as the International Organizations and States must solve their affairs in a peaceful manner, avoiding the use of force and also with cooperation. The peaceful methods are negotiation, good offices, inquiry, conciliation and arbitration.

CONCLUSION 14

International Organizations have legal personality and they can sign treaties. States give special powers to the Organizations in order to represent their decisions. The capacity of International Organizations to create treaty law is given by the member states. For example, in the EC, the member states gave it the capacity to sign different international agreements in diverse economical areas.

8. ANNEX
(JURISPRUDENCE LAW CARDS)

The following material pretends to be a student's tool for an easier understanding of some of the most relevant cases concerning International Organizations. Synopses are completely based on the international law jurisprudence of the different international and national courts. Some of them have quotations of the original texts.

A. BANKOVIĆ AND OTHERS V. BELGIUM AND 16 OTHER CONTRACTING STATES

The European Court of Human Rights
Registered on 28 October 1999. Final decision 19 December 2001.

Facts:

Applicants:

The application was brought by six Yugoslav nationals, living in Belgrade, the Federal Republic of Yugoslavia ("FRY").

The case concerned the bombing by the North Atlantic Treaty Organization ("NATO") of the Radio Televizije Srbije (Radio-Television Serbia, "RTS") headquarters in Belgrade as part of NATO's campaign of air strikes against the FRY during the Kosovo conflict. In the early hours of 23 April 1999, one of the RTS buildings at Takovska Street was hit by a missile launched from a NATO aircraft. Two of the four floors of the building collapsed and the master control room was destroyed. Sixteen people were killed, including Ksenija Banković, Nebojsa Stojanović, Darko Stoimenovski and Milan Joksimović and another 16 were seriously injured, including Dragan Suković.

The case is brought against the 17 NATO member States which are also Contracting States to the European Convention on Human Rights: Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom.

Complaints
The applicants complained that the bombardment of the RTS headquarters by NATO violated Articles 2 (right to life), 10 (freedom of expression) and 13 (right to an effective remedy) of the European Convention on Human Rights.

Article 1
The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Question of the case:

1. The essential question to be examined was whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States.

Decision of the council:

1. As to the "ordinary meaning" of the term jurisdiction in Article 1 of the Convention, the Court was satisfied that, from the standpoint of public international law, the jurisdictional competence of a State was primarily territorial. The Court considered that Article 1 of the Convention must be considered to reflect this being exceptional and requiring special justification in the particular circumstances of each case.
2. The Court found State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on behalf of the Contracting States of their extra-territorial responsibility in contexts similar to the present case.
3. The Court also observed that there had to be recognition only exceptionally, of extra-territorial acts as constituting an exercise of jurisdiction, when the respondent State, through the effective control of the relevant territory and its inhabitants abroad, as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercised all or some of the public powers normally exercised by that Government.
4. The Convention was a multi-lateral treaty operating, subject to Article 56 (territorial application) of the Convention, in an essentially regional context and notably in the legal space of the Contracting States. The FRY clearly did not fall within this legal space. The Convention was not designed to be applied throughout the world, even with respect to the conduct of Contracting States.
5. The Court was not therefore persuaded that there was any jurisdictional link between the persons who were victims and on the complaint and the respondent States. Accordingly, it was not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question.

Finally, the Court concluded that the impugned action of the respondent States did not engage their Convention responsibility and that it was not therefore necessary to consider the other admissibility issues raised by the parties. The application had therefore to be declared inadmissible.

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http://www.echr.coe.int/eng/Press/2001/Dec/Bankovicadmissibilitydecisionepress.htm

B. YERODIA – ARREST WARRANT
Congo V. Belgium
International Court of Justice
February 14, 2002

Facts:

1. Abdulaye Yerodia Ndombasi is accused of war crimes and crimes against the humanity commission, because of his racial speeches against the Tutsi residents in Kinshasa, when exercising as secretary of external affairs of the government of Congo.
2. On August 4th and 27th, 1998, Mr. Yerodia pronounced speeches promoting racial hate and the subsequent attack to the Tutsi population in Kinshasa. Additionally, in these speeches he spoke about a hundred murders, illegal arrests and unfair trials.
3. On June 16th, 1993, the law enacted by the Belgium government, and then modified by one toss on February 10th, 1993, established the possibility for judges to start a criminal process against people who violated humanity rights, especially regarding the violating of the Geneva conventions of 1949 and its additional protocols I and II.
4. Twelve Belgium residents denounced in Belgium, where an instruction judge enacted on April 11th, 2000, an international arrest warrant in absentia order, the same that the INTERPOL transmitted to make the detention of Mr. Yerodia effective, who at the moment was the secretary of Foreign Affairs.
5. Based on this international arrest warrant in absentia order, Congo claimed to the International Court of Justice against Belgium.

Question of the case:

1. Can a State exercising its universal jurisdiction call to trial non-nationals that have committed an unlawful act out of the nation's boundaries by denouncing other people?

In the case *sub judice,* the International Court of Justice said nothing about the universal jurisdiction because the Court focused on diplomatic immunities; nevertheless, nothing forbids coexistence of universal jurisdiction and diplomatic immunities. In this sense the Respondents argued that in the Human Rights protection scope, States have tried to process in trial non-nationals with their own laws and jurisdiction.

A) There is no such a diplomatic immunities violations because the felonies that Belgium was trying to prosecute were not committed when Yerodia was exercising diplomatic functions; in fact these violations were committed before.

B) Respondents (Belgium) argued that because of the "new circumstances", the case dealt with diplomatic protection, therefore the individual needed to exhaust local remedies.

Belgium argued matters related with the precedence of the suit. First of all, that Mr. Yerodia did not have any diplomatic immunity, and there was no legal dispute between the party states. Additionally, Mr. Yerodia should have exhausted local remedies in his country and therefore the suit was inadmissible.[200]

Decision:

1.The court reviewed the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963. However, the Court found these conventions do not have any regulations for Chancellors; therefore, the Court remitted to the international law custom, and the Court concluded that chancellors have complete immunity for criminal processes. In this sense, the international arrest warrant in absentia order was *ab initio* wrong because it did not consider Congo's Chancellor immunity.[201]

a.February 14th, 2002, the International Court of Justice resolved that Belgium could not toss an international arrest warrant in absentia order against Mr. Abdulaye Yerodia Ndombasi, the Congo Democratic Republic Secretary of Foreign Affairs because the Court, based on the international law costume, concluded that chancellors have immunities against detention ordered by non-national tribunals for any charge that they could claim for.

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C. GABCIKOVO-NAGYMAROS PROJECT
Danube Dam River
Hungary V. Eslovakia

Facts:

1. Hungary and Eslovakia ratified a bilateral treaty to build a dam system with hydroelectric and Canals over the Danube river.
2. While the construction was in progress, Hungary experimented a series of pressures from environmental groups to drop the project because of the high ecological impact that the project was causing.
3. On May 13, 1989, Hungary suspended building operations.
4. Hungary and Eslovakia, due to the treaty that they signed, tried to negotiate the dispute to continue or definitively stop construction.
5. Hungary alleged the project was causing irreversible environmental damages on Hungarian territory. Nevertheless, after the technical studies that Eslovakia did, they concluded that the damages were not so, and did not have scientific support.
6. In May 1992, Hungary formally dropped the project, and cancelled the treaty alleging Eslovakia had breached the treaty trying to change the course of the river.
7. In October 1992, Eslovakia tossed a temporal measure, consisting on changing the course of the river, so the water would flow inside its boundaries and be able to keep the project going.

Question of the Case:

- When an international wrongful act is committed by a state to a second one, is the second one in the capacity to adopt countermeasures?
- Can responsibility of the state invoke for the cease of a treaty?

Decision:

- The Court found environmental damage alleged by Hungary was not sufficient reason to cease the 1977 treaty.
- The Court found the countermeasure taken by Eslovakia was illegal and indicated that the countermeasures must be proportional to the damage caused by the first State, which was not the case when Eslovakia tried to change the course of the Danube River.

- The Court concluded that State Responsibility and law of the treaties are different subjects, even if they are mixed together several times. And for this reason, they must be spared and judged one by one according to each regulation. In this case, the Court said that the treaty was still in force, although both parts had not fulfilled their obligations because there had not been a legal cease of the treaty.
- On the other hand, concerning State responsibility, the Court established both parties should compensate for caused damages.
- About the State of Necessity invoked by Hungary, the Court argued it was wrong to invoke this exclusion of responsibility cause because according to paragraph 2 b of article 25 of the project of the CDI, a state cannot invoke state of necessity if the State that is invoking has contributed to the creation of that state of necessity.

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D. **LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA**

Advisory Opinion of 21 June 1971

What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?

a) The continued presence of South Africa in Namibia being illegal, South Africa is under the obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of Namibian Territory.

b) That States Members of the United Nations are under the obligation to recognize the illegality of South African presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.

History of the Mandate.

ARTICLE 22. League of Nations

"To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatory on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave

trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatory and to advise the Council on all matters relating to the observance of the mandates."

The mandates system established by Article 22 of the Covenant of the League of Nations was based on two principles of paramount importance: the principle of non-annexation. The principle by which the well-being and development of the concerned formed a sacred trust of civilization. With the dissolution of the League, Members had not declared, or accepted even by implication, that the mandates would be cancelled or lapsed. The last resolution of the League Assembly and Article 80, paragraph 1, of the United Nations Charter maintained the obligations of mandate. The International Court of Justice has consistently recognized that the Mandate survived the demise of the League, and South Africa also admitted at least for a number of years. The United Nations suggested a system of supervision which would not exceed that which applied under the mandates system, but this proposal was rejected by South Africa.

Resolutions by the General Assembly and the Security Council

In 1966, the General Assembly of the United Nations adopted resolution 2145. It decided that the Mandate was terminated and that South Africa had no right to administer the Territory. The Security Council adopted various resolutions including resolution 276 (1970), declaring the continued presence of South Africa in Namibia illegal. Objections challenging the validity of these resolutions having been raised, The Court, in the exercise of its judicial function, and since these objections have been advanced, considers them in the course of its reasoning before determining the legal consequences arising from these resolutions.

The Court observes:

(a) that, according to a general principle of international law (incorporated in the Vienna Convention on the Law of Treaties), the right to terminate a treaty on account of breach must be presumed to exist with respect to all treaties, even if unexpressed; (b) that the consent of the wrongdoer to such a form of termination cannot be required; (c) that the United Nations, as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution competent to pronounce on the conduct of the Mandate, and that to comply with the obligation to submit to supervision cannot be disputed; (e) that the General Assembly was not making a finding on facts, but formulating a legal situation; it would not be correct to assume that, because it is in principle vested with recommendatory powers, it is debarred from adopting, in special cases within the framework of its competence, resolutions which make determinations or have operative design.

Legal Consequences for States of the Continued Presence of South Africa in Namibia
South Africa, being responsible for having created and maintained this situation, has the obligation to put an end to it and withdraw its administration from Namibian Territory. By occupying the Territory without title, South Africa incurs in international responsibilities arising from a continuing violation of an international obligation. Court confines itself to giving advice on those dealings with the Government of South Africa

a) Member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, the same rule cannot be applied to certain general conventions such as those with humanitarian character, the non-performance of which may adversely affect the people of Namibia: it will be for the competent international organs to take specific measures in this respect.
(b) Member States are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction of the territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there; and to make it clear to South Africa that the maintenance of diplomatic or consular relations does not imply any recognition of its authority with regards to Namibia.
(c) Member States are under obligation to abstain from entering into economic and other forms of relations with South Africa on behalf of or concerning Namibia which may entrench its authority over the territory.
(d) Non-recognition should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, the illegality or invalidity of acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate cannot be extended to such acts as the registration of births, deaths and marriages.

States not members of the United Nations, the termination of the Mandate and the declaration of the illegality of South African presence in Namibia are opposable to all States in the sense of barring erga omnes the legality of the situation which is maintained in violation of international law. No State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of any such relationship.

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E. THE REPUBLIC OF NICARAGUA V. THE UNITED STATES OF AMERICA
1986
International Court of Justice

Historical, social, political and economical context:

The Nicaraguan dictator Anastasio Somoza Debayle left the country on July 17th, 1979, leaving behind a hole on the government; consequently, Urcuyo Maliaños who was the Congress President, was raised to the country's Presidency according to the Nicaraguan Constitution. The "Junta de Reconstrucción Nacional" was a sort of political party that ruled the country between 1979 and 1985; this "junta" was created just after the dictator Anastasio Somosa Debayle resigned. The "junta" established a transition government integrated by independent politicians. However, several years later, people started discovering the power was not on the side of the government, but it was held by nine Sandinista commanders that were the members of the FSLN National Directory.

This happened at the same time that Ronald Reagan was elected President of the United States, whose main purpose was the fight against Communism, supported in the U.S foreign politics against the U.R.S.S. and Cuba.

Facts:

Nicaragua attributes to the direct action of the United States personnel operations helping the contra force with combat support for its military operations *also infringement of Nicaragua's air space, *operations against oil installations and a naval base and the mining of Nicaragua's port.

The Court ruled in favor of Nicaragua, but the United States refused to accept the Court's decision, on the basis that the court erred in finding that it had jurisdiction to carry out the case.

The court stated that the United States had been involved in the unlawful use of force, in the violation of the sovereignty of another State and the violation to the customary international law, which implies not to intervene in the affairs of another State.
The United States argued that they were acting in self defense of El Salvador because Nicaragua was supporting armed groups operating in neighboring countries.

The Court rejected the United States defense, asserting its USE OF FORCE COULD NOT BE CONSTRUED AS collective self-defense. The Court also considered the United States' claim to be acting in collective self-defense of El Salvador FALSE BECAUSE El Salvador never requested the assistance of the United States on the grounds of self-defense.
The United States also accused Nicaragua of being responsible for cross-border military attacks on Honduras and Costa Rica.

After the Court's decision, the United States withdrew its declaration accepting the Court's compulsory jurisdiction. The Court found the US refusal did not prevent it from deciding the case.
The United States had signed the treaty accepting the Court's decision as binding, but with the exception that the court would not have the power to hear cases based on multilateral treaty obligations unless it involved all parties to the treaty or United States specially agrees to jurisdiction. The court found that it was obliged to apply this exception and refused to take on claims by Nicaragua based on the United Nations Charter and Organization of American States Charter, but concluded that it could still decide the case based on customary international law obligations.

On November 3, 1986, the United Nations General Assembly passed a non-binding resolution in order to press the U.S. to pay the fine. Only El Salvador, which also had disputes with Nicaragua, and Israel voted with the U.S. In spite of this resolution, the U.S. still elected not to pay the fine.
The court held that the USA was responsible for the planning, direction and support given by the United States to Nicaragua operatives. But it rejected the broader claim of Nicaragua that all of the conduct of the contras was attributable to the USA by reason of its control over them.
To reach its decisions, the court distinguished three kinds of individuals in this case:

1. United States military personnel (CIA)
2. National individuals of Latin American countries (UCLAS)
3. The Contras

The United States of America, by training, arming, equipping, financing and supplying the Contras forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.

Question of the case:

Was the United States responsible for violation of international law by supporting Contra guerrillas in their war against the Nicaraguan government and by mining Nicaragua's harbors?
Did the Sandinistas demand support from the United States, and did in fact agents of the United States caused these situations?

Decision:

1. The Court examined the allegations of Nicaragua claiming mining of Nicaraguan ports or waters carried out by United States military personnel or national individuals of Latin American countries paid by the United States. After examining the facts, the Court established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States Government agency to lay mines in Nicaraguan ports, that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents, and further, by those acts of intervention referred to [above] which involve the use of force, has acted against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State, not to violate the sovereignty of another State, and not to interrupt peaceful maritime commerce.
2. Nicaragua attributed the actions to United States direct personnel, or persons in its pay, as well as the operations against oil installations, and the establishment of a naval base, etc., The Court found all these incidents, except three, to be established. Although it was not proved that any United States military personnel took a direct part in the operations, United States agents participated in planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established.
3. Nicaragua complains of infringement of its air space by United States military aircraft. The Court finds that the only violations of Nicaraguan air space imputable to the United States on the basis of the evidence are high altitude reconnaissance flights and low altitude flights on 7 to 11 November 1984 causing "sonic booms".
4. The Court then examined the genesis, development and activities of the contra force, and the role of the United States in relation to it. According to Nicaragua, the United States "conceived, created and organized a mercenary army, the contra force". On the basis of the available information, the Court is not able to

satisfy if the Respondent State itself "created" the contra force in Nicaragua, but held as a fact that it largely financed, trained, equipped, armed and organized the FDN, one element of the force. It is claimed by Nicaragua that the United States Government devised the strategy and directed the tactics of the contra force, and provided direct combat support for its military operations. In the light of the evidence and material available to it, the Court was not assured that all the operations launched by the contra force, at every stage of the conflict, reflected strategy and tactics solely devised by the United States. Therefore, it could not uphold the contention of Nicaragua on this point. The Court however found it clear that a number of operations were decided and planned, if not actually by the United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer. It was also established in the Court's view that the support of the United States for the activities of the contras took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, etc. The evidence did not however warrant a finding that the United States gave direct combat support, if that is taken to mean direct intervention by United States combat forces. The Court considered that the evidence available to it was insufficient to demonstrate the total dependence of the contras on United States aid.

5. Having reached the above conclusion, in the Court's opinion the contras remain responsible for their acts, in particular the alleged violations of humanitarian law. For the United States to be legally responsible, it would have to be proved that that State had effective control of the operations in the course of which the alleged violations were committed.
6. The United States of America had to pay reparation for the damage.

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F. OSCAR CHINN CASE

Permanent court of justice
Britain V. Belgium
December 12th, 1934

Facts:

1. The river transport company "Union nationale des transports fluviaux" (Unatra), with a majority of capital held by the State, was set up in 1925 in the Belgian Congo (now Zaire, at Leopoldville). Four years later, in 1929, a British national, Oscar Chinn also established a river transport company in the Belgian Congo. As a result of the depression of 1930/31, the prices of raw materials of tropical origin fell, and the Belgian Government, by decision of 20 June 1931, ordered the lowering of the transport companies' rates to a nominal level. Any loss would be reimbursed. Other private transporters, both Belgian and foreign, including Chinn, were excluded from this régime on the grounds of its temporary character.
2. In October 1932, the Belgian Government offered refunds to private companies. Oscar Chinn however was not beneficiary of this provision because he had gone out of business in July 1931. Instead, he sought the protection of the British Government, pleading he had been forced to go out of business following the decision of 20 June 1931 by which the Belgian Government had established a de facto monopoly in favor of Unatra.
3. According to the British Government, this decision violated the provisions of the Convention of Saint-Germain of 10 September 1919 on the Status of the Congo, claiming on these grounds reparation by the Belgian Government to Oscar Chinn for losses suffered.
4. The matter was brought before the Permanent Court of International Justice by a special agreement signed at Brussels on 13 April, 1934, between the two Governments (British and Belgian).

Question of the case:

The United Kingdom asked the Court to declare that the Belgian Government, by its decision of 20 June, 1931, violated obligations toward the Government of the United Kingdom under the Convention of Saint-Germain and general international law and that the Belgian Government should pay reparation for the damage suffered by Chinn.

Decision:

First, the Court analyzed the basis on which these obligations arose, namely the Convention of Saint-Germain of 1919, and the general principles of international law.

Article 1 of the Convention of Saint-Germain reads:

"The signatory powers undertake to maintain between their respective nationals and those of States, Members of the League of Nations, which may adhere to the present Convention a complete commercial equality in the territories under their authority within the area defined by Article 1 of the General Act of Berlin of 26 February 1885, set out in the Annex hereto, but subject to the reservation specified in the final paragraph of that Article."

The law applicable to this issue was the Convention of Saint-Germain, which confirmed the principle of free navigation and the principle of freedom of trade. But, for the Court, freedom of trade "does not mean the abolition of commercial competition; it presupposes the existence of such competition."
Taking into account the temporary character of the measures taken by the Belgian Government and the special circumstances (the depression of 1930/31), the Court did not consider this a violation of the Convention of Saint-Germain.

As for any violation of general international law to the effect that all States have an obligation to respect the vested rights of foreigners, the Court could not accept this argument, since no vested right was violated by the Belgian Government.
The Court held that the de facto monopoly was not prohibited in the case in question and therefore did not have to rule on the existence of a state of necessity as grounds for excluding wrongfulness.

"No enterprise - least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates - can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State."

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G. FREDIN V. SWEEDEN
1991
Expropriation

Facts:

1. The extraction of gravel had required a permit since 1963 and, in an amendment to nature conservation legislation in 1973, permits over 10 years old could be revoked without paying compensation.
2. Fredin's parents were given a permit for their land in 1963. The extraction rights having already been granted to two companies. Those rights were never exercised and, following their acquisition of the property, the permit was transferred to Fredin and his wife in 1979.
3. They then began to extract gravel, were given permission to build a quay for loading ships (valid for as long as they had a gravel pit) and lodged financial security for the restoration of the land after extraction.
4. In 1984 they were notified that, in the interests of nature conservation, gravel extraction should cease, a further financial security for restoration should be lodged and the land should be restored by the end of 1987.
5. Appeals to the government against the revocation of the permit and the refusal of a special permit allowing extraction as part of a restoration plan were unsuccessful, although they were allowed an extra 11 months to comply.

Question of the case:
Mr. and Mrs. Fredin complained that the revocation was a deprivation of their property, had discriminated against them as the sole independent operators in the area, and that they were unable to challenge the government's decisions in a court.

Decision:

1. The Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose. However, the rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property.
2. Consequently, interference must achieve a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental right (ibid.). There must be a reasonable relationship of proportionality between the means employed and the aim pursued

(ibid.). In determining whether this requirement is met, the Court recognizes that the State enjoys a wide margin of appreciation with regards to both choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.

The Court held:

- that, while the revocation interfered with Mr. and Mrs. Fredin's right to the peaceful possession of their possessions, its consequences were not so serious as to amount to a de facto deprivation of property since it had not taken away all meaningful use of their property and the income from the gravel extraction had become uncertain once the permit was 10 years old;
- that the interference was not contrary to Prot 1 Art 1 since (a) the power of revocation served a legitimate aim, namely, the protection of the environment, (b) the revocation decision had not been unlawful or arbitrary, (c) the power had been framed with such precision as to its scope and manner of exercise for its effects to be sufficiently foreseeable and (d) the decision was not disproportionate in striking a balance between the general and individual interests as Mr. and Mrs. Fredin had no legitimate expectation of being able to continue extraction for a long period of time and had been allowed nearly 4 years to close down their operation.

H. DUSKO TADIC TRIAL

Ad Hoc Tribunal for the Former Yugoslavia

Facts:

The Accused, Dusko Tadic, (citizen of the former Yugoslavia, of Serb ethnic descent, and a resident of the Republic of Bosnia and Herzegovina at the time of the alleged crimes) was indicted on 34 counts of crimes within the jurisdiction of the International Tribunal. At his initial appearance he pleaded not guilty to all counts. Three of the counts were subsequently withdrawn at trial. Of the remaining 31 counts, the Trial Chamber found the accused guilty on 9 counts, guilty in part on 2 counts, and not guilty on 20 counts. Judgment was handed down on 7 May, 1997. The related Sentencing Judgment was delivered on 14 July, 1997.

They were charging him on the basis of individual criminal responsibility (Article 7(1) of the Statute) with crimes against humanity (Article 5 of the Statute), namely, persecution on political, racial and/or religious grounds, and inhumane acts; and violations of the laws or customs of war (Article 3 of the Statute), namely, cruel treatment two further requests by the Appellant **for leave** to admit additional evidence were made on 8 January and 19 April, 1999 respectively. They were disposed of on 25 January and 19 April 1999, respectively. Oral argument on the three appeals was heard

by the Appeals Chamber from 19 to 21 April, 1999. On 21 April, 1999, the Appeals Chamber reserved its judgment.

Question of the case:
The Appeals Chamber considered that a conflict is international if it takes place between two or more States. Furthermore, an internal armed conflict may become international if another State intervenes through its troops or if some of the participants to the conflict act on behalf of another State.

Decision:

The Appeals Chamber finds that there is sufficient evidence to justify the Trial Chamber's finding that until 19 May, 1992 the conflict between Bosnia and Herzegovina (BH) and the Federal Republic of Yugoslavia (FRY) was international in nature.

The question was whether, after that date, Bosnian Serb forces, in whose hands the Bosnian victims found themselves, could be considered *de jure* or *de facto* organs of the FRY.

Approaching the issue from the viewpoint of international humanitarian law, the Appeals Chamber's discussion started with Article 4 of the Third Geneva Convention of 1949 according to which paramilitary and other irregular troops may be regarded as lawful combatants if they "belong to a party to the conflict".
International rules and State practice require both control over such troops by a party to an international armed conflict and a relationship of dependence and allegiance. International humanitarian law further holds accountable not only those having formal positions of authority but also those with *de facto* power or control over perpetrators of serious violations of its provisions.
However, international humanitarian law does not provide the criteria for determining when a group or individuals may be regarded as being under the control of a State, that is, acting as *de facto* State officials.

There were some Bosnian Serbs that lived in Bosnia Herzegovina and they were fighting against the Bosnia Herzegovina authorities, so the court had to establish if those Bosnian Serbs were acting in the name of the Federal Republic of Yugoslavia (Serbia and Montenegro), because if that was the case the conflict would be an International conflict instead of an Internal conflict or a civil war.

I. COMPARISON BETWEEN NICARAGUA AND TADIC CASES

	NICARAGUA	TADIC
QUESTION	Whether or not the 'contras' had acted as the de facto organs of the United States	Whether or not Tadic had acted as the de facto agent of the Serb community.
Legal conditions for individuals to be considered de facto state officials	High degree of control: a party not only being in effective control of a military or paramilitary group, but that the control is exercised with respect to the specific operation in the course of which breaches may have been committed, directed or enforced the perpetration of those acts. There are two tests to determine the type of control: Agency relationship test and Effective control test: dependence and control (the acts of the 'contras' were not imputable to the United States); this one was used in this case. Dependence and support by itself would be insufficient to justify attribution of the conduct to the state. Effective control is necessary.	Lower degree of control: The requirements of law I for the attribution to states of acts performed by private individuals is that the state exercises over all other forms of control. The degree of control may vary according to the factual circumstances of each state. The state is internationally accountable for ultra vile acts or transactions of its organs. States entrusting some functions to individuals must answer for their actions, even when they are contrary to their directives.

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J. THE FACTORY AT CHORZÓW

Germany v. Poland

Historical, political and social context:

Between 1914 and 1918, the mayor hostility known by human kind motivated by imperialist European powers developed in Europe. World War I involved all the European population and colonies.

World War I started, among other reasons, because of the assassination of Austria-Hungarian Archduke, Franz Ferdinand, in Sarajevo, Serbia, located in Former Yugoslavia.

At the end of WWI, a peace agreement called the Treaty of Versailles (July 28, 1919) was signed, and some territorial, military clauses and a reparation and insemination agreement were determined herein.

Facts:

1. In March, 1915, a contract between Germany's chancellor and Bayerische to build a factory for the nitrate production at Charzow was signed. Bayerische would have remained with the control of the factory until March 31, 1941. However, Germany had the right to cancel the contract after March 31, 1926, at any time.
2. On December 24, 1919, Oberschlesische Stickstoffwerke was created and Germany sold the factory at Charzow to this new company. However, the manager of this factory would be Bayerische.
3. The companies sued in the Poland-German tribunal of arbitration located in Paris to oblige the Polish government to return the factory, pay for the damages caused and the prohibition of lime nitrate and ammonium exportation to the United States, Germany, France and Italy until June 30, 1931, because the Treaty of Versailles obliged Germany to return the territory acquired during the war, and the factory was built on Poland boundaries.

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Question of the case:

- Does international responsibility exist for International Organizations as it exists for States?
- Is the International Court of Justice competent to judge in this case, where an organization sues a country?

Decision:

Due to the attitude of bad faith of Poland, which was against Article 6 of the Geneva Convention, the court decided that Poland was in the obligation of paying for the damages to the German government.

The Court rejected Germany's petition of forbidding exportation of lime nitrate and ammonium to the United States, France and Italy.

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K. S.S WIMBLEDON
France v. Germany

Historical, social and political context:

1. World War I was over and the world's economy was a mayor concern.
2. Germany and some other allied countries had signed the treaty of Versailles.
3. The Society of Nations was weak.
4. Poland and Russia were at war, Germany declared itself neutral to this conflict on July 25, 1920.

Facts:

1. The English ship "Wimbledon" was managed by a French company named "Les Affréteurs réunis" based in Paris.
2. The S.S. Wimbledon was navigating towards Danzig with 4,200 tons of munitions and artillery to the Polish Naval Base. The ship's route included passing through the "English Channel" in the North Sea and the Kiel Channel.
3. In the morning of March 21, 1921, the English ship arrived at the Kiel Channel, but the manager denied passage through the channel based on the German government declaration of neutrality in the Poland-Russian conflict,

because the ship carried ammunition on board and it would supply one of the States in conflict.

4. On March 23, 1921, the French ambassador in Berlin ordered the German government to withdraw this ban and allow the ship to continue its voyage along the Kiel Channel, according to the Article 380 of the Treaty of Versailles.

5. In March 26, the German government answered the ambassador's petition, declaring that the government would not be able to let the ship pass through the channel because it would be contradictory to the neutral declarations already made by the government in 1920, arguing that for this reason Article 380 of the Treaty of Versailles could not be applied, because the national law predominates over the treaty.

6. In March 30 the "Les Affréteurs réunis" society established communication with the ship's captain and ordered him to continue with the journey.

7. In April 1, the ship continued the voyage and arrived at the port (Danzig) in April 6. The ship was retained for 11 days and it had to go through another route because of the closure of the canal.
8. Great Britain, French, Italy and Japan using the faculty established in the article 386 of the Treaty of Versailles, made claims against Germany in the International Court of Justice because of the breach of an international law.

Question of the case:

Can one state breach an International Law because of Local Remedies or national law?

—

Decision:

The International Court of Justice decides that:

1. The German government on March 21, 1921, breached a disposition contained in Title XII of the Treaty of Versailles (docks, railroads and waterways) signed in 1919. When the government decided not to allow the Wimbledon ship to cross the Kiel Channel, since the Treaty of Versailles recognized the freedom of navigation to every ship of all nations (articles 380 to 386).
2. Although Germany alleged its rights as a sovereign state, the courts decides that when Germany signed the Treaty of Versailles, the member states of this Treaty must lose some privileges of the sovereignty of the state in order to achieve the purposes of the treaty.
3. Germany defended its position alleging that the war status of Poland and Russia was inconvenient and for this reason, the German government made a declaration of neutrality, and thus the crossing of ships through the canal with ammunition or any good for war use was forbidden. Nevertheless, the court decided that according to the international law sources such as the international

costume it is well recognized that when a country declares itself as neutral in a conflict between other states, the countries with a channel must let the war ships and the ammunition cargo go across the channel. For this reason the court denied the German response.

4. Additionally, it is a well recognized rule of international law that the treaties come over national law. In this sense, Article 380 of the Treaty of Versailles establishes that "The Kiel Channel and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."
5. The Court finally decided and imposed an indemnity to Germany.

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