APPLICATION OF EUROPEAN COMMUNITY LAW TO (STAFF MEMBERS OF) THE EUROPEAN PATENT ORGANISATION

Authors:
Simona Constantin
Nikolai Napier Jørgensen

Supervisors:
Dr. Nikos Lavranos
Dr. Annette Schrauwen
Hege Elisabeth Veenstra-Kjos, J.D.

TABLE OF CONTENTS

A. PURPOSE AND BACKGROUND OF THE REPORT

This Report has been requested by the Staff Union of the European Patent Office, the executive body of the European Patent Organisation (EPO). It appears that the protection provided to (applicant) staff members of the EPO is insufficient with respect to standards of protection provided in national contexts, and in particular with respect to matters such as health, safety, and non-discrimination based on disability. The purpose of the Report is to outline the possibilities of remedying such legal *lacunae* through the application of European Community (EC) law to these staff members. The Report will also identify relevant provisions of EC law.

B. INTRODUCTION AND SYNOPSIS

The European Patent Organisation is an international organization set up pursuant to the European Patent Convention (EPC).[1] It has its head office in Munich and sub-offices in Berlin, in The Hague, and in Vienna.[2] The EPO employs more than 6,000 staff members.[3] Their general conditions of employment are set out in the Service Regulations. Next to the employment contract, these Regulations are intended to cover all aspects of the employee-employer relationship, but they do not seem to include adequate references to health and safety at work, or the rights of disabled persons.[4] This lack of protection of basic rights stands in contrast to the EPO's own Mission Statement as set out in the Annual Report of 2005: "In carrying out its mission, the EPO strives to: […] stand out as a model international public-service organisation."[5]

---

[1] *See* European Patent Convention (EPC), *available at* http://www.european-patent-office.org/legal/epc/ (last visited April 14, 2007).

[2] *See* European Patent Office, *Information about the EPO: Location*, *available at* http://www.european-patent-office.org/epo/pubs/brochure/general/e/location_e.htm (last visited April 14, 2007).

[3] *See* EPO Annual Report (2005), *Staff & Resources*, *available at* http://annual-report.european-patent-office.org/2005/staff/index.en.php (last visited April 14, 2007) ("By the end of 2005 the total number of employees at the Office had risen to 6 118.") Cf. European Patent Office, *Working at the EPO*, available at http://www.epo.org/about-us/jobs/working-at-the-epo.html (last visited April 14, 2007) ("the EPO is the second largest European organisation, with more than 6 000 employees from over 30 countries.").

[4] Jacinta Paper.***

[5] *See* EPO, Annual Report (2005), *Mission Statement*, *available at* http://annual-report.european-patent-office.org/2005/mission_statement/index.en.php (last visited April 14, 2007). According to its Annual Report of 2005, the EPO implemented a "policy on the protection of staff dignity" in 2005. There is also a first draft for a code of conduct in preparation. *See* EPO, Annual Report (2005), *Staff & Resources*, *supra*, n. 3.

A few examples illustrate the undesirable, and arguably wrongful, consequences of such omissions: For instance, if an employee injures him-/herself by tripping on unmarked cables lying on the floor in the EPO, this would normally be a clear case of negligence of the employer. In such a case, the staff member may be entitled to medical costs and sick leave[6] from the Organisation; however, s/he is otherwise left without legal redress for the injury. Another example would be that of an employee falling sick from an unexplained cause. The office air conditioning is suspected, but the matter cannot be independently investigated since it cannot be reported to a national safety/inspecting authority without violating the immunity of the Organisation's premises, unless the latter agrees thereto.[7] Thus, once again, the employee is left in a legal vacuum. Similarly, one could envisage the prolonged use of computers[8] leading to the inability of staff members to work. In the EPO, they may receive an invalidity pension,[9] but no compensation for loss of earnings or pain and suffering since this is not provided for in the Service Regulations. Finally, in the case of a disabled person not being hired on the grounds of his/her disability, the applicant is left in a legal void. S/he has no protection via the internal rules of the EPO nor the administrative tribunal,[10] as s/he is not an employee of the EPO, and the immunity of the Organisation prevents access to national courts.

In this Report, the ways in which European Community law may be applied for the benefit of staff members and third parties such as those seeking employment at the EPO, will be explored. It should be noted that the Report does not make a distinction between the rights of European Union (EU) and non-EU citizens (applicant) staff members of the EPO. Further research into this issue is therefore recommended. The Report will first describe the relevant substantive provisions concerning worker protection and equal treatment (Part C). Second, it will examine whether EC law, as part of national and international law, may be said to apply to the EPO as an international organization; and whether it should therefore be heeded by the

[6] *See* EPO Services Regulations, Part 1, arts. 62, 83-92; *id*. art 1C, No. 268; *id*., Part 1B, Rules 2, 5, 6.

[7] Protocol on Privileges and Immunities of the European Patent Organisation, art. 1(1), *available at* http://www.european-patent-office.org/legal/epc/e/ma5.html#IMM (last visited April 14, 2007).

[8] *See* NRC Handelsblad, *RSI Because of Thousands of Patents, Ex-Employees Summon EPO Because of Working Conditions*, January 18, 2006.

[9] *See* EPO Services Regulations: Part 1, arts. 62, 83-92; Part 1C: Rule No.268; Part 1B: Rules 2, 5, 6. *See also* K.K. v. EPO, [2004] ILOAT, Judgment No. 2355, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2355.htm (last visited April 14, 2007); N.F. v. EPO, [2004] ILOAT, Judgment No. 2358, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2358.htm (last visited April 14, 2007).

[10] The European Patent Convention provides for the jurisdiction of the International Labour Organization Administrative Tribunal in staff disputes. *See* EPC, *supra*, n. 1, art. 13.

Organisation, including its internal appeals committee when handling staff complaints (Part D).

Part E discusses the application of European Community law by organs external[11] to the EPO. The European Patent Convention makes provision to refer disputes between staff members and the EPO to the International Labour Organization Administrative Tribunal (ILOAT).[12] In Section E.1, the Report will explore whether EC law can be applied directly or indirectly (via general principles of law) by the ILOAT, and whether the Tribunal may request a preliminary ruling on issues of EC law to the European Court of Justice (ECJ).

Section E.2 continues with a discussion of the possibility of EPO employees to enforce EC law through national courts where the Organisation is seated, that is, Germany, the Netherlands, and Austria. In so doing, it will examine the possibility of circumventing the immunity that EPO enjoys where this leads to a violation of the rights of staff.

In Section E.3, the Report discusses the State responsibility that these States may be said to incur at the EC and the international level for any decision by their national courts to uphold the EPO's immunity, and the relevant mechanism and fora to invoke such responsibility: the infringement procedure by the European Commission, the non-judicial remedy of sending a request for review to the European Ombudsman, and the European Court of Human Rights.

Part F sets out the general conclusions.

[11] The ILOAT has also been referred to as "internal" to the EPO. We use the term "external" in order to separate the ILOAT from the internal appeals process operating within the EPO itself. *Cf*. Gilbert Bertrand v. Europese Octrooi Organisatie (EPO), Rechtbank 's-Gravenhage, Sector kanton, Case No. 555094 RL EXPL 06-1802, para. 4.7, Aug. 3, 2006 (the Applicant, a former employee of the EPO requested compensation from the EPO for Repetitive Strain Injuries (RSI) contracted during the course of his employment).

[12] EPC, *supra*, n. 1, art. 13.

C. MATERIAL EUROPEAN COMMUNITY LAW

1. General Legal Framework

One of the most distinctive features of European Community law is the impact it has on the national legal orders of the Member States. The Community constitutes an autonomous "new legal order," and EC law has supremacy over the national legislation of the Member States.[13]

The EC Treaty represents the primary EC legislation, and it is the guiding source for Community law. In order to develop and implement its policies, the EC uses a series of legal instruments through which EC law gains legal status. These instruments, which form the secondary legislation, include regulations, directives, decisions, recommendations and opinions.[14] In addition, there are legally non-binding instruments, also referred to as "soft law."[15] Of relevance for the legal issues to be discussed in this Report, are regulations and directives.[16] Regulations have general application and the EC Member States have the duty to apply them directly.[17] Directives, on the other hand, are usually used to harmonize the laws within a particular area or to bring complex legislative changes, and they create an obligation on the Member States to implement them through their own choice of form and methods.[18] Both regulations and directives override any inconsistent national law.[19]

---

[13] *See* Nikolaos Lavranos, *Mox Plant Dispute: Court of Justice of the European Communities*, 2 European Constitutional Law Review 456, 464 (2006) (noting that since the judgments in *Van Gend & Loos* and *Costa v. ENEL*, Community law is a new, *sui generis*, legal order of international law, with supremacy and direct effect in the national legal orders of the Member States, irrespective of their various existing constitutional systems).

[14] *See* Consolidated Version of the Treaty Establishing the European Community (EC Treaty), art. 249, *available at* http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.html (last visited July 14, 2007).

[15] These instruments include guidelines, policy statements and declarations by the European Council.

[16] Decisions are only binding on those to whom they are addressed, while recommendations and opinions have no binding force. *See* EC Treaty, *supra*, n. 13, art. 249.

[17] *See id*., art. 249 ("[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States").

[18] *See id*., art. 249 ("[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."). *Cf.* Case C-159/99, Commission v. Italy [2001] ECR I-4007 ("the provisions of directives must be implemented with unquestionable binding force, and with the specificity, precision and clarity necessary to satisfy that principle").

[19] *See* Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629, paras. 17-24.

In order to give full effectiveness to Community law, the ECJ has developed three key principles to assure legal protection to individuals: the doctrines of direct effect, consistent interpretation, and state liability.[20]

A provision of EC law is said to have direct effect when individuals can rely on it before national courts. This means that individuals have rights pursuant to EC law that they can enforce in their own name in front of national authorities in order to set aside or replace a conflicting national standard.[21] This principle is based on the need for uniform interpretation and application of the EC law across the Member States.[22] In order for a provision to have direct effect, it must be clear, precise, and unconditional.[23] Direct effect is recognized for Treaty provisions in both vertical[24] and horizontal[25] relationships. The ECJ has also confirmed the direct effect of regulations, as they are "directly applicable in all Member States," as provided in Article 249 EC.[26] As regards directives, the ECJ accepts the principle of direct effect in vertical situations, but denies their direct enforcement when they impose an obligation for a private party in inverse vertical situations (Member State v. individual) and in horizontal situations.[27] Yet, these limitations for directives can be overcome by the possibilities offered by consistent interpretation and state liability.

The second way in which the ECJ ensures the effectiveness of Community law is through the doctrine of consistent interpretation. It consists of the obligation of national courts to interpret their national laws as far as possible in the light of EC law:

[20] For a summary of the rules governing these doctrines *see* JOLANDE M. PRINSSEN, DOORWERKING VAN RUROPEES RECHT – DE VERHOUDING TUSSEN DIRECTE WERKING, CONFORME INTERPRETAITE EN OVERHEIDSAANSPRAKELIJKHEID (2004) (summary in English, pp. 247-252).

[21] For discussions on the definition of direct effect *see* P. CRAIG & G. DE BÚRCA; EU LAW: TEXT, CASES AND MATERIALS, Chapter 5, pp. 178-182 (3rd edn, OUP, Oxford 2003).

[22] The origin of this principle was developed by the European Court of Justice in its famous ruling on the case *Van Gend and Loos* when it decided that Article 25 EC (ex art. 12 EC) could be invoked and enforced by the applicant before Dutch courts. *See* Case 26/6, Van Gend and Loos, [1963] CMLR 105.

[23] In *Van Gend and Loos*, the conditions for direct effect were expressed in strong terms as a provision needed to be *clear, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure. See* Van Gend and Loos, *supra*, n. 21. These conditions have been interpreted less strictly in the following case law. *See* Case 41/74, Van Duyn v. Home Office [1974] ECR 1337; Case 51/76, VNO ECR 1977; Case 8/81, Becker v. Finanzamt Münster-Innenstadt [1982] ECR 5; Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] ECR 723; Case 14/83, Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891.

[24] Vertical relationships include situations of individual v. Member State.

[25] Horizontal relationships include situations of individual v. individual.

[26] *See* Case 39/72, Commission v. Italy [1973] ECR 101. *Cf.* EC Treaty, *supra*, n. 13, art. 249.

[27] *See generally* S. PRECHAL., DIRECTIVES IN EUROPEAN COMMUNITY LAW: A STUDY ON EC DIRECTIVES AND THEIR ENFORCEMENT BY NATIONAL COURTS (OUP, Oxford, 1995); *id*., *Does Direct Effect Still Matter?*, 37 CMLREV 1047-1069 (2000).

> […] the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 [now Article 10] of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.[28]

As explained by the ECJ in Pfeiffer, the duty of consistent interpretation "is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it."[29]

The principle of state liability is a third way of giving effect to Community law. It allows individuals to bring proceedings against Member State for damages caused by their failure to implement a directive.[30] Such recognition of a right to reparation from a Member State was introduced by the ECJ in its ruling in Francovich, where it stated that "[…] it is a principle of Community law that the Member States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible."[31] The principle of State liability "is inherent in the system of the Treaty"[32] and it represents an important additional step to enhance the effectiveness of unimplemented directives. The liability is subjected to whatever organ of the State whose act or omission was responsible for the violation.[33]

It must be further noted that the principle of State liability only applies if the following conditions are fulfilled: (i) the rule of law infringed must be intended to confer rights on individuals, (ii) the breach must be sufficiently serious, and (iii) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[34] The ECJ has laid down a number of guidelines to be taken into account when

[28] *See* Case 14/83, Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891, para. 26.

[29] *See* Joined Cases 397 to 401/01, Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV [2004] ECR I-8835, para. 114.

[30] *See generally* T. Tridimas, *Liability for Breach of Community Law: Growing Up and Mellowing Down?,* 38 CML Rev. 301 (2001).

[31] *See* Cases C–6 & 9/90, Francovich and Bonifaci v. Italy [1991] ECR I–5357.

[32] *See id.*, at para. 35.

[33] This involves the public authorities, the legislature and the judiciary.

[34] *See* Francovich, *supra*, n. 30, at para. 38-43. It is noted that national courts have a certain margin of discretion in assessing the conditions for state liability. Still, the discretion must not infringe the principles of non-discrimination and effectiveness of EC law. For discussions on the legitimacy on the restrictive domestic rules on state liability *see* P. Craig & G. de Búrca, *supra*, n. 20, at Chapter 6, pp. 260-271.

determining the limits of these conditions.[35] An individual right is identified when it is possible to quantify with sufficient precision its content and to determine the identity of the holders of the right.[36] The test for finding that a breach of Community law is sufficiently serious is "whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion."[37] The ECJ has also given guidelines with respect to the margin of appreciation that the national courts have as regards the causal link condition.[38]

Together, these three principles create a powerful means for national courts to enforce European Community law in the national legal orders. The available remedies ensure the uniform application of EC law, and reflect the idea that the Community is based on the rule of law[39] consisting of "binding rules which apply uniformly and which protect individual rights."[40]

2. Substantive Provisions

Substantive legislation on social policy has increasingly been enacted at the EC level and it has been furthered by the ECJ in its jurisprudence.[41] The steps taken at the EC level in protecting workers' rights led to the adoption of the Community Charter of the Fundamental Social Rights of Workers in 1989, which highlights the need to build an effective legal framework for protecting workers within the European Union.[42] In point 26, it states: "All disabled persons, whatever the origin and nature of their disablement, must be entitled to

[35] *See generally* T. Tridimas, *supra*, n. 29, at 301-332.

[36] *See* Case C–178–9/94, 188–190/94, Dillenkofer and others v. Federal Republic of Germany [1996] ECR I–4845; Case C-222/02, Peter Paul and Others v. Federal Republic of Germany [2004].

[37] Cases C–46 &48/93, Brasserie du Pêcheur SA v. Germany [1996] ECR I–1029, para. 55

[38] *See* Case C–140/97, Rechberger v. Austria [1999] ECR I–3499 (the ECJ rejected the argument held by Austria that the breach of EC law was based also on the misconduct not of the plaintiff, but of a relevant third party).

[39] *See* Case 294/83, Parti Ecologiste Les Verts v. European Parliament [1986] ECR 1339, para. 23 ("It must first be emphasized in this regard that the European Economic Community is a community based on the rule of law[…]").

[40] Suggestion of the Court of Justice on the European Union, Bulletin of the European Communities, *EC Bulletin*, Supplement 9/75, p. 17.

[41] *See* Roger Blanpain, European Labour Law (Kluwer Law International, The Hague,10th rev. ed., 2006); Alan C. Neal, European Labour Law and Social Policy: Cases and Materials (Kluwer Law International, The Hague, 2nd ed., 2002); L. Waddington, From Rome to Nice in a Wheelchair; The Development of a European Disability Policy (Europa Law Publishing, Groningen, 2006).

[42] *See* Community Charter of the Fundamental Social Rights of Workers (1989), *available at* http://www.psi.org.uk/publications/archivepdfs/Trade%20unions/TUAPP1.pdf (last visited April 14, 2007). This Charter is not legally binding. It was adopted by 11 of the 12 Member States of the Union at that time.

additional concrete measures aimed at improving their social and professional integration. These measures must concern, in particular, according to the capacities of the beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing."[43] Moreover, at the Nice Summit in 2000, the Charter of the Fundamental Rights of the European Union was adopted,[44] reaffirming the fundamental values of the Union and containing a proclamation of specific rights for workers.[45] Although not legally binding, the ECJ has stated that these instruments serve as a basis to which the legislature can refer and as an aid to the interpretation of the provisions in the social policy field.[46] Similar provisions are also reaffirmed in the draft Treaty Establishing a Constitution for Europe.[47]

We also note that in its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community, the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people;[48] and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities, it affirmed the importance of giving specific attention *inter alia* to recruitment, retention, training and lifelong learning with regard to disabled persons.[49]

2.1. European Community Treaty Provisions

The Preamble to the EC Treaty formulates as an essential objective and increasing preoccupation within the European Union "the constant improvements of the living and working conditions of […] peoples."[50] To that end, Article 136 EC provides that the

[43] *Id*., at point 26.

[44] *See* Charter of the Fundamental Rights of the Union (2000), *available at* http://www.europarl.europa.eu/comparl/libe/elsj/charter/default_en.htm (last visited April 14, 2007). This Charter is not legally binding, as it is not yet contained in any EC Treaty. It was included in the Treaty Establishing a Constitution for Europe and it would have gained legal force if this treaty had been approved.

[45] The Charter contains workers' rights in each of its six chapters. *See especially* Charter of the Fundamental Rights of the Union, supra, n. 43, at Chapter III on *Equality* and IV on *Solidarity*.

[46] *See* Case C-151/02, Jaeger [2003] ECR I-0000, para. 47. *See also* Case C-173/99 BECTU [2001] ECR I-4881, para. 39.

[47] *See* draft Treaty Establishing a Constitution for Europe, *available at* http://europa.eu/constitution/index_en.htm (last visited April 14, 2007) (*see in particular*, arts. I-2 (the Union's values); II-75 (3) (freedom to choose an occupation and right to engage in work); II-81 (non-discrimination); II-86 (integration of persons with disabilities); II-87 (workers' right to information and consultation within the undertaking); II-91 (fair and just working conditions); II-92 (prohibition of child labor and protection of young people at work); II-95 (health care).

[48] Council Recommendation 86/379/EEC of 24 July 1986 [OJ 1986 L 225, p. 43].

[49] Council Resolution of 17 June 1999 on equal opportunities for people with disabilities, available at http://ec.europa.eu/employment_social/soc-prot/disable/ojc186/councilres_en.pdf (last visited April 14, 2007).

[50] *See* EC Treaty, *supra*, n. 13, Preamble. *Cf.* European Social Agenda, General Objectives, Nice, 2002, *available at* http://europa.eu.int/council/off/conclu/dec2000/dec2000_en.htm#a1 (last visited June 17, 2006).

Community and the Member States "shall have as their objectives […] improved […] working conditions, […], dialogue between management and labor, the development of human resources with a view to lasting high employment and the combating of exclusion."[51]

With a view to achieving these objectives, Article 137 EC directs the Community to support and complement the activities of the Member States, *inter alia*, in these fields: "improvement in particular of the working environment to protect workers' health and safety;" "working conditions;" "the information and consultation of workers;" and "condition of employment for third-country nationals legally residing in Community territory."[52] Article 136 and 137 EC do not contain directly effective provisions. Article 136 has a programmatic character, expressing the objectives set by the EC in the social policy area, whereas Article 137 represents the basis for Community actions as regards equal treatment in the labor market, giving to the Council the power to adopt directives in this area.

Article 13 EC Treaty prohibits discrimination on grounds of disability.[53] This Article was not believed to be directly effective, but rather to have the role of facilitating stronger law-making in this field by the EC.[54] However, in its judgment in Mangold, the ECJ stated that prohibition of discrimination on grounds of age contained in this Article was a general principle of Community law and as such had direct effect.[55] It can be argued that the same reasoning applies to prohibition of discrimination on grounds of disability.

See also European Commission, Employment and Social Affairs, Health and Safety at Work, available at http://ec.europa.eu/employment_social/health_safety/index_en.htm (last visited April 14, 2007); *id*., *Adapting to changes in work and society: a new Community strategy on health and safety at work 2002 - 2006*, March 11, 2002, *available at* http://europe.osha.eu.int/systems/strategies/future/com2002_en.pdf (last visited April 14, 2007).

[51] EC Treaty, *supra*, n. 13, art. 136.

[52] EC Treaty, *supra* n. 13, art. 137.

[53] *See id*., art. 13 ("1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonization of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the object²ives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.").

[54] *See generally* P. Craig & G. de Búrca, *supra*, n. 20, at Chapter 5, p. 390; D. Chalmers et al.,European Union Law 875 (CUP, Cambridge, 2006).

[55] *See* C-144/04, Arbeitsgericht München Werner Mangold v. Rüdiger Helm [2005], paras. 74-75.

2.2. Secondary Legislation

The relevant secondary legislation on health and safety at work is developed under the EC Social Policy. The main legal instruments that the EC uses to regulate this area are directives. In the following, we will set out provisions relevant for the issues investigated in this Report: worker protection and equal treatment.

2.2.1. Worker Protection

The most important pieces of legislation as regards the relevant issues of workers' protection are Directive 89/391 (safety and health at work),[56] Directive 92/85 (pregnant workers and working mothers)[57] and Directive 2003/88/EC (working time).[58] Of special interest is Directive 89/391/EEC, as it is a Framework Directive on the basis of which individual directives have been adopted in specific areas.[59] This Directive generally applies to all sectors of activity, both public and private; and employers are obliged to carry out the specific measures in order to ensure an adequate level of safety and health protection of workers in their work environment.[60] The objective of the Directive is to ensure a higher degree of protection of workers through the implementation of preventive measures to guard against accidents at work and occupational diseases, and through the information, consultation, balanced participation and training of workers and their representatives.

---

[56] *See* Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC) (amended by Regulation 2003/1882), [OJ 2003 L284/1].

[57] *See* Council Directive 92/85 of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers breastfeeding, 10th individual Directive with the meaning of Article 16(1) of Directive 89/391/EEC) [OJ 1992, L348/1].

[58] *See* Directive 2003/88/EC of the European Parliament and the Council of 4 November 2003 concerning certain aspects of the organisation of working time [OJ 2003, L2999/9]. Summaries of these Directives can be found on the website of the European Union under "Summaries of legislation," *available at* http://europa.eu/scadplus/leg/en/s02300.htm (last visited April 14, 2007).

[59] The Annex of the Directive lists the following areas: work places, work equipment, personnel protective equipment, work with visual display units, handling of heavy loads involving risk of back injury, temporary or mobile work sites, fisheries and agriculture, on which individual directives have been enacted.

[60] The Directive provides for the following measures to be taken:
- to ensure the safety and health of workers in every aspect related to the work, primarily on the basis of the specified general principles of prevention, without involving the workers in any financial cost;
- to evaluate the occupational risks, *inter alia* in the choice of work equipment and the fitting-out of workplaces, and to make provision for adequate protective and preventive services;
- to keep a list of, and draw up reports on, occupational accidents; - to take the necessary measures for first aid, fire-fighting, evacuation of workers and action required in the event of serious and imminent danger;
- to inform and consult workers and allow them to take part in discussions on all questions relating to safety and health at work;
- to ensure that each worker receives adequate safety and health training throughout the period of employment.

Since the entry into force of Directive 89/391/EEC, the European Commission has started numerous infringement proceedings under Article 226 EC,[61] subsequent to which the ECJ has found Member States in violation of their duty to implement and correctly apply the provisions of the Framework Directive and the related individual directives.[62] In the case Commission of the European Communities v. Kingdom of Spain, the ECJ declared that, by failing to transpose in their entirety into its national legislation Article 2(1) and (2) and Article 4 of the Framework Directive as regards non-civilian personnel in public authorities, the Kingdom of Spain had failed to fulfill its obligations.[63] In another case, Austria was held not to have acted in accordance with its obligations by not having adopted the laws, regulations and administrative provisions necessary to implement fully Directive 1999/92/EC of the European Parliament and of the Council of 16 December 1999 on minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres.[64]

Another decision related to the present Report is Pfeiffer.[65] In this case, the ECJ gave a preliminary ruling on the interpretation of Directive 93/104, now replaced by Directive 2003/88/EC concerning working time. The ECJ concluded that:

> Article 6(2) of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time ('Arbeitsbereitschaft') completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded.[66]

Also, in interpreting Directive 93/104, the ECJ recently reiterated that harmonization at the Community level is intended to guarantee better protection of the safety and health of

[61] *See* EC Treaty, *supra*, n. 13, art. 226. *See generally infra*, Part E, Section 3.1.1.

[62] *See* Case C-333/04, Commission of the European Communities v. Grand Duchy of Luxembourg, [2004]; Case C-16/04, Commission of the European Communities v. Federal Republic of Germany [2004]; Case C-357/03 Commission of the European Communities v. Republic of Austria [2004]; Case C-168/03 Commission of the European Communities v. Kingdom of Spain [2004].

[63] *See* Case C-132/04, Commission of the European Communities v. Kingdom of Spain [2006].

[64] *See* Case C-377/04, Commission of the European Communities v. Republic of Austria [2005] (15th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).

[65] *See* Case C-297 to 403 /01, Bernhard Pfeiffer v. Deutsches Rotes Kreuz [2004] ECR I-8835.

[66] *Id.*, para. 120.

workers, *inter alia* by guaranteeing the right of workers of a minimum period of paid annual leave.[67]

2.2.2. Equal Treatment

Increasing interest has manifested itself at the European Community level as regards equal treatment, especially after the incorporation of Article 13 EC in the Treaty of Amsterdam.[68] Relevant provisions can be found in Directive 76/207 (equal treatment),[69] Directive 79/7 (social security, equal treatment),[70] Directive 96/34/EC (parental leave),[71] and Directive 2000/78 (general framework for equal treatment in employment and occupation).[72] The last of these Directives contains relevant provisions for the specific situation within EPO as regards discrimination on grounds of disability, as it imposes the following obligations on the employer:

[67] *See* Case C-124/05 Federatie Nederlandse Vakbeweging v. Netherlands [2006] (the ECJ holding that "Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000, must be interpreted as precluding a national provision which, during a contract of employment, permits days of annual leave, within the meaning of Article 7(1) of the directive, which are not taken in the course of a given year, to be replaced by an allowance in lieu in the course of a subsequent year.").

[68] *See generally* P. CRAIG & G. DE BÚRCA, *supra*, n. 20, at Chapter 20, pp. 842-935.

[69] *See* Council Directive of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (76/207/EEC) [OJ 1976 L39/40], amended by Directive 2002/73C. For examples of ECJ rulings on this Directive, *see* Case C-294/04, Carmen Sarkatzis Herrero v. Instituto Madrileño de la Salud (Imsalud) [2006]; Case C-196/02 Vasiliki Nikoloudi v. Organismos Tilepikinonion Ellados AE [2005].

[70] *See* Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/9/EEC) [OJ 1979, L6/24].

[71] *See* Council Directive 96/34/EC of 3 June 1996 on the framework on parental leave concluded by UNICE, CEEP and the ETUC [OJ 1996, L145/9] amended by Directive 97/75. For ECJ rulings on this Directive, *see* Case C-185/04, Ulf Öberg v. Försäkringskassan, länskontoret Stockholm, formerly Stockholms läns allmänna försäkringskassa [2005]; Case C-294/04 Carmen Sarkatzis Herrero v. Instituto Madrileño de la Salud (Imsalud) [2006].

[72] *See* Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [OJ 2000, L3003/16]. *See id*., art. 1 ("The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, *disability*, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment." [emphasis added]).

> In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.[73]

Same as for Framework Directive 89/391, there have been several infringement procedures started by the European Commission against Member States for failing to fully and correctly implement the Framework Directive 2000/78.[74]

In June 2006, the ECJ gave a preliminary ruling on the question whether "Directive 2000/78, in so far as Article 1 thereof lays down a general framework for combating discrimination on the grounds of disability, include within its protective scope an employee who has been dismissed by her employer solely because she is sick."[75] The reference was made in the course of proceedings between Ms Chacón Navas and Eurest Colectividades SA ('Eurest') regarding her dismissal whilst she was on leave of absence from her employment on grounds of sickness. According to the ECJ, "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."[76] While holding that sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination,[77] it stated that

[73] Council Directive 2000/78, art. 5.

[74] For ECJ jurisprudence on this Directive *see*, *e.g*., Case C-133/05 Commission of the European Communities v. Republic of Austria, [2006] (the ECJ declaring that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply, at federal level, with the provisions on discrimination based on disability, in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and, at Länder level, with the exception of the Länder of Vienna and Lower-Austria, to all the provision of that Directive, the Republic of Austria has failed to fulfill its obligations under that Directive).

[75] *See* Case C-13/05 Sonia Chacón Navas v. Eurest Colectividades SA [2006] (reference for a preliminary ruling from Juzgado de lo Social No 33 by order of that court of 7 January 2005).

[76] *Id*., at para. 43.

[77] *Id*, at para. 57.

> the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.[78]

3. Interim Conclusions

The legal framework of the European Community features mechanisms that ensure the full applicability and effectiveness of EC law within the Member States, in particular supremacy, and the doctrines of direct effect, consistent interpretation, and state liability. The substantive EC law provisions as regards worker protection and equal treatment display the importance that these issues have at EC level. To the extent to which EC law would be said to be applicable to the EPO and its staff members – a topic to be discussed in the subsequent Part – its normative content could be efficiently applied through these mechanisms.

[78] *Id*., at para. 52.

D. THE APPLICABILITY OF EUROPEAN COMMUNITY LAW TO THE EUROPEAN PATENT ORGANISATION

1. The Applicability of European Community Law Through National Law

It has been argued and held that national law does not apply to international organizations in general, and staff members of such organizations in particular. According to Brower, there exists "broad consensus for the proposition that the internal laws of international organizations govern their employment relations to the exclusion of municipal law."[79] This position is often favored and advocated by the organizations themselves.[80] One rationale for the non-applicability of national law with respect to the employee-organization relationship is the need for uniformity in the rights and duties of staff members throughout the particular organization, which may be based – as is the case for EPO – in several States. The application of national laws would lead to disparate protection of staff, depending on the location of employment.[81] A further argument in favor of the non-applicability of national law is the fact that international organizations have their own rules and regulations for their internal and external functioning.[82] Moreover, most international organizations make provision for separate administrative tribunals that settle disputes with their staff.[83] A final justification

[79] Charles H. Brower, II, *International Immunities: Some Dissent Views on the Role of Municipal Courts*, 41 Va. J. Int'l L. 1, 66 (2000) (referring, *inter alia*, to C.F. Amerasinghe, The Law of the International Civil Service 46 (1988); *id*., Principles of the Institutional Law of International Organizations 331 (1996); D.W. Bowett, The Law of International Institutions 317, 367 (4th ed. 1982); Felice Morgenstern, Legal Problems of International Organizations 37, fn. 105 (1986); Malcolm N. Shaw, International Law 918-919 (4th ed. 1997). *See also* Henry G. Schermers, *International Organizations, Legal Remedies against Acts of Organs*, *in* 2 Encyclopaedia of Public International Law 1318, 1319 (1995); Geisler (No. 2) and Wenzel (No. 3) v. EPO, [1988] ILOAT, Judgment No. 899, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0899.htm (last visited April 14, 2007).

[80] *See*, *e.g*., European Patent Office, *Working Conditions at the EPO: General*, *available at* http://www.european-patent-office.org/epo/jobs/work_conditions.htm (last visited March 18, 2007) ("employment regulations of the staff of the organisation fall outside of national law and under a special service regulation); Mr. R. A.-O. v United Nations Educational, Scientific and Cultural Organization (UNESCO), [2003] ILOAT, Judgment No. 2193, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2193.htm (last visited April 14, 2007) ("UNESCO replies that it was created by an international treaty and that it is therefore not subject to any European Community or national legislation"); Narcisi v. EPO, [1992] ILOAT, Judgment No. 1150, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1150.htm (last visited April 14, 2007); E.A. and R.H.W v. European Southern Observatory (ESO), [2002] ILOAT, Judgment No. 2133, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2133.htm (last visited April 14, 2007); Hébert v. EPO, [2000] ILOAT, Judgment No. 1994, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1994.htm (last visited April 14, 2007). *See also* Opinion of the Legal Counsel of the Food and Agriculture Organization of the United Nations (Sept. 4, 1970), 1970 U.N. Jurid. Y.B. 188, 190-91, U.N. Doc. ST/LEG/SER.C/8.

[81] *See* Kay Hailbronner, *Immunity of International Organizations from German National Jurisdiction*, 42 Archiv des Völkerrechts 329, 331 (2004).

[82] *Cf.* August Reinisch, International Organizations Before National Courts 377 (CUP, Cambridge 2000). For the EPO, *see* EPC, *supra*, n. 1, art. 33(2)(b). *See also infra*, at Section E. 3.

[83] For the EPO, *see* EPC, *supra*, n. 1, art. 13. *See also* Statute of the Administrative Tribunal of the International Labour Organization (ILOAT Statute), adopted by the International Labour Conference on 9 October 1946 and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992 and 16 June 1998, art. II, *available at*

relates to the immunity that such organizations enjoy in the national courts of their respective host state.[84]

The foregoing reasoning, and particularly the reference to immunity, fails to appreciate the important distinction between the *applicability* of the law of the host State and the possibility to *enforce* and *apply* it to the organization in question. August Reinisch debates this question in a forthcoming article in the Netherlands Yearbook of International Law. He argues that although national law may be precluded in its application to international organizations, that does not mean that it is inapplicable.[85] This view is supported by Schermers: "Most rules of national law are applicable to international organizations in the same way as to other subjects within the national jurisdiction. Adjudication of the laws is however limited by the immunity from jurisdiction granted to almost every international organization."[86] The basis of this view is a "territorial" approach, which implies that the local law applies unless there are explicit exclusions to its application.[87] This would appear to flow from the fact that a State is sovereign on its own territory. The international organization is a particular type of legal subject on national territory. Accordingly, the national law still applies on the entirety of the territory, including the international organization.

In light of this, the question that arises is whether EC law is applicable to the EPO as part and parcel of the national law of the three States members to the EC in whose territory in the EPO is based, viz. Germany, Austria and the Netherlands, considering that these States have international obligations vis-à-vis the EPC that may also form part of their national legislation. More specifically, it is necessary to determine the relationship between EC law and the international obligations of these States pursuant to the EPC, its Protocol on Privileges and Immunities, and the headquarters agreements.

---

http://www.ilo.org/public/english/tribunal/stateng.htm#Statute%20of%20the%20Administrative%20Tribunal (last visited April 14, 2007). *Cf.* Charles H. Brower, II, *supra*, n. 78, at 66-67.

[84] *Cf.* Staff Union of the European Patent Office, *Legal Protection of the Staff of the EPO*, CSC/54/03 - 0.74/2.20.2 (2003), *available at* https://www.suepo.org/rights/public/archive/suepo-legalprotstaffpaper.pdf (last visited April 14, 2007) (noting, but criticizing the assumption that "immunity of International organisations is absolute, that is to say, national law *does not apply*, or cannot be adjudicated or enforced, in any circumstance." [emphasis added]).

[85] August Reinisch, *Accountability of International Organizations According to National Law*, 36 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW (2005) [forthcoming].

[86] HENRY G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW para. 1610 (3rd edn., Martinus Nijhoff Publishers, 1999).

[87] A.S. MULLER, INTERNATIONAL ORGANISATIONS AND THEIR HOST STATES 131 (Martinus Nijhoff publishers, Leiden/Boston 1995).

The uniqueness of EC law is that, as aforementioned, it is the "supreme law of the land" in the Member States.[88] According to the EC Treaty, EC law, including secondary legislation, will prevail over inconsistent national law. As held by the European Court of Justice in the Costa v Enel case: "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply."[89]

The duties of the Member States in relation to EC law are also apparent from the ERTA decision[90] dealing with the obligation of the Member States to co-operate with the EC.[91] The ECJ stated: "under article 5 EC [now 10 EC], the Member States are required on the one hand to take all appropriate measures to ensure the fulfillment of the obligations arising out of the treaty or resulting from action taken by the institutions and, on the other hand, to abstain from any measure which might jeopardize the attainment of the objectives of the treaty."[92] In its jurisprudence, the ECJ has construed this obligation broadly.[93]

The obligation incumbent on EC Member States to give priority to EC law vis-à-vis international law is also supported by the ECJ in its judgment in the Mox Plant case: "The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC."[94]

On the basis of the foregoing, Germany, Austria, and the Netherlands are under an obligation to realign domestic law in accordance with EC (treaty) law in the event that they run contrary to each other. Moreover, in case of a conflict between EC (treaty) law on the one hand, and

[88] *See* Section C.1 of this Report.

[89] Case 6/64, Costa v. ENEL, [1964] ECR 585, at 593. *See also* Nikolaos Lavranos, *The Interface Between European and National Procedural Law: UN Sanctions and Judicial Review* (draft), *available at* http://www.jur.uva.nl/interface/object.cfm/objectid=BF9E65B3-5B8D-498C-AD80BE0FA6453295/download=true (last visited April 16, 2007) (according to the jurisprudence of the ECJ, the hierarchy of norms in the Community legal order is as follows (from highest to lowest): primary EC law (EC Treaty, including ECHR), international agreements/decisions of international organizations, secondary EC law (regulations/directives), national (constitutional) law). *See also* EC Treaty, supra, n. 13, art. 307. Further research is recommended on the exact consequences of the differentiation between the EC Treaty and secondary legislation vis-à-vis national law.

[90] Case 22/70, Commission v Council (ERTA) [1970] ECR 263.

[91] *See* EC Treaty, *supra*, n. 13, art. 10.

[92] Case 22/70, Commission v Council (ERTA) [1970] ECR 263, para 21 [footnote not in original].

[93] *See* P. Craig & G. de Búrca, *supra*, n. 20, Chapter 10, pp. 419-420.

[94] Case C-459/03, para. 123.

obligations pursuant to the EPC on the other, it could be argued that the former should prevail in the interests of co-operation with the EC. As national law may be said to apply to international organizations in particular circumstances, it may therefore be concluded that EC (treaty) law is applicable to the EPO even to the extent to which EC law is inconsistent with national law on the one hand; and arguably also the international obligations of the three Member States on the other.

2. Applicability of European Community Law as Part of International Law

In this Section it will be explored whether EC law could also be said to be applicable to the EPO on the bases, first, that the Organisation is a *de facto* European Union (EU) body; and second, that certain parts of EC law constitute (regional) customary international law.

2.1. The European Patent Organisation as a de facto *European Union Body*

With respect to the first argument, it is clear that the EPO is not a *de jure* EU body.[95] Still, in light of the strong dependency of the EU on the EPO, it might possibly be considered as a *de facto* EU body. As stated by the EPO in its 2004 Annual Report:

> […] the European Patent Office is aware that it has a major part to play in implementing the Lisbon Strategy. […] [T]here is no clearer proof than the doubling of annual filings between 1996 and 2004. European patents are a key factor in the European knowledge economy. The dynamic knowledge transfer process that has gripped both the global market and Europe's internal market would be inconceivable without them.[96]

[95] *See Gateway to the European Union*, *available at* http://europa.eu/index_en.htm (last visited Oct. 18, 2006) (listing EU institutions, excluding the EPO); European Parliament, Research and Innovation, *Software patents: the 'historic vote' in the European Parliament brings the battle to an end*, *available at* http://www.europarl.europa.eu/news/public/focus_page/057-1002-255-9-37-909-20050819FCS01001-12-09-2005-2005/default_en.htm (last visited July 9, 2006) ("In Europe today, a patent can be issued by the national offices and by the European Patent Office (which is not an EU body)."); European Parliament, Innovation Society, *European patent system is too costly and may be discouraging innovation*, *available at* http://www.europarl.europa.eu/news/expert/infopress_page/058-4844-031-01-05-909-20060130IPR04828-31-01-2006-2006-false/default_en.htm (last visited July 9, 2006). For more information about the relationship between the EPO and the EU, *see*, *e.g.*, Joseph Straus, *The Present State of the Patent System in the European Union As Compared with the Situation in the Unites States of America and Japan*, Section III(1)(1), para. 1, *available at* http://www.suepo.org/public/background/straus.pdf (last visited April 14, 2007).

[96] EPO Annual Report (2004), Foreword, *available at* http://annual-report.european-patent-office.org/2004/foreword/index.en.php (last visited July 9, 2006). *See also* European Commission, Patents, Innovation, *available at* http://ec.europa.eu/research/headlines/news/article_05_04_18_en.html (last visited July 9, 2006).

Reference to the synergy between the EPO and the EU is also found in the EPO Annual Report of 2005:

> [The European patent system] is extremely important in the context of the EU's wide-ranging initiatives to promote innovation in Europe, in particular the Seventh Framework Programme and the Competitiveness and Innovation Framework Programme and their objectives. By taking all the action needed to guarantee the system's efficiency, the Office will help to set the course for the Commission's innovation policy for the coming years.[97]

On its part, the EU has for several decades recognized the need for a uniform Community patent. As noted by the European Commission, "[i]n recognition of the important role patents play in economic growth and development, the Commission is working on a Community Patent in order to save entrepreneurs the cost, effort and potential confusion of being granted protection under different national patent regimes."[98] Whereas no agreement has so far been reached on the details, on January 16, 2006, the European Commission launched "a public consultation on how future action in patent policy to create an EU-wide system of protection can best take account of stakeholders' needs." The Community Patent is one of the issues on which the consultation focuses.[99]

Until a Community Patent is realized, the European Union is relying on the EPO for carrying out its tasks. For that reason, it might be argued that the EPO is a *de facto* EU body, and that EC law is therefore directly binding on the EPO.

Admittedly, not all the Contracting Parties of the EPC are Members of the European Community.[100] Consequently, the application to the EPO of EC law might seem to run counter

---

[97] EPO Annual Report (2005), Foreword, *available at* http://annual-report.european-patent-office.org/2005/foreword/index.en.php (last visited July 9, 2006).

[98] *See* European Commission, Patents, Innovation, *available at* http://ec.europa.eu/research/headlines/news/article_05_04_18_en.html (last visited July 9, 2006). *See also Community Patent*, *available at* http://en.wikipedia.org/wiki/Community_Patent (last visited July 9, 2006).

[99] European Commission, Internal Market, *Commission asks industry and other stakeholders for their views on future patent policy*, Brussels, Jan. 16, 2006, *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/38&format=HTML&aged=0&language=EN&guiLanguage=en (last visited July 9, 2006). *See also* Community Patent, Community Patent, *available at* http://en.wikipedia.org/wiki/Community_Patent (last visited July 9, 2006).

[100] A list of the EPC Contracting Parties is *available at* http://www.european-patent-office.org/epo/members.htm (last visited April 14, 2007). Bulgaria, Liechtenstein, Turkey, Iceland, Romania, Monaco, Switzerland are not EC Member States, whereas Liechtenstein is a Party to the European Economic Area. Furthermore there are States that have a right to accede to the EPO mechanism, such as Norway and so-called extension states such as

to the legal principle that that obligations on third parties can only be binding if freely consented to.[101] However, the applicability of EC law to the to the seven *Contracting Parties* not Members of the European Community – Bulgaria, Liechtenstein, Turkey, Iceland, Romania, Monaco, Switzerland – should be distinguished from the application of EC law to the *Organisation*. The latter would stem from the EPO's possible status as a *de facto* EU body, carrying out tasks on behalf of the European Union.

It remains questionable, however, whether the EPO can in fact be qualified as an EU body. The separate nature of the EPO and the EC is underscored by the discussions concerning the possible creation for the EPO of a two-tier court system modeled on the EC system.[102] Negotiations between the EU Member States, also parties to the EPC, and the EU are currently deadlocked; the latter claiming that it has exclusive jurisdiction, a position that is disputed by the former. While the original idea of the European Commission was to create one common pan-European patent system, the deadlock gives evidence that this aim will not be achieved for some time. Moreover, the attempt to create this court system within the EPO indicates that the EPO considers itself independent from the EU. Further, neither the EU nor the EPO has ever accepted the proposition that EPO staff members enjoy rights or obligations pursuant to the Staff Regulations of Officials of the European Communities.

Finally, EC staff members are not entitled to invoke EC law as such; rather, they benefit from "equivalent" protection. As stated in the Staff Regulations of Officials of the European Communities, "[o]fficials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties."[103] Accordingly, and assuming – *quad non* – that the EPO could be characterized as a *de facto* EU institution, its staff members would not benefit from any direct application of EC law.

Serbia and Montenegro. There are also States that have been invited to accede to the EPO such as Malta. Note that all the parties to the EPO are parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR). *See id*.; Status of Ratifications of the Principal International Human Rights Treaties, *available at* http://www.unhchr.ch/pdf/report.pdf (last visited April 14, 2007).

[101] *See* Vienna Convention on the Law of Treaties, art. 34, ILM 679 (1979), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited April 14, 2007) (*pacta tertiis nec nocent nec prosunt*). *See also* Decision of the Enlarged Board of Appeal dated 26 April 2004, G 2/02 and G 3/02, *available at* http://legal.european-patent-office.org/dg3/pdf/g020002ep1.pdf (last visited April 14, 2007).

[102] *See* N. Lavranos, *The New Specialized Courts Within the European Judicial System*, 30 EUROPEAN LAW REVIEW 261-272 (2005).

[103] *See* Staff Regulations of Officials of the European Communities, art. 1e (6), *available at* http://ec.europa.eu/dgs/personnel_administration/statut/tocen100.pdf (last visited April 14, 2007).

2.2. EC Law as Evidence of (Regional) Customary International Law

Secondly, EC law could arguably be applied indirectly through – as constituting evidence of – customary international law. Customary international law is made up by state practice and *opinio juris*, the latter being the belief that such practice is legally binding.[104] It is generally accepted that international organizations, being subjects of international law, are bound by rules of the international legal order.[105] In particular, international organizations are bound to respect human rights.[106] Whereas the EPO is not party to human rights treaties,[107] they are bound to the extent to which such rights constitute customary international law.[108]

---

[104] *See e.g.*, M. Byers, Custom, Power and the Power of Rules 129-146 (CUP, Cambridge 1999); North Sea Continental Shelf Cases (W. Ger./Den.; W. Ger./Neth.), 1969 ICJ Rep. 3 (Judgment of Feb. 20), *reprinted in* 8 ILM 340 (1969), *also available at* http://www.icj-cij.org/docket/index.php?p1=3 (last visited April 16, 2007); Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ Rep. 14 (Merits), *also available at* http://www.icj-cij.org/docket/index.php?p1=3 (last visited April 16, 2007).

[105] *See* Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, 1980 ICJ Rep. 73, pp. 89-90 (Advisory Opinion), *also available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4 (last visited April 16, 2007) (international organizations, as subjects of international law, "are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties"); Henry G. Schermers & NIELS M. Blokker International Institutional Law: Unity within Diversity 822 (3d edn Martinus Nijhoff Publishers, The Hague 1995) (because international organizations "have been established under international law, these rules of international law apply directly as part of the legal order of the organisation in question obviating the need for transformation"); H. Schermers, International Institutional Law para. 1574 (3rd edn., Martinus Nijhoff Publishers, 1999); International Law Association, Berlin Conference 2004, *Accountability of International Organisations*, 1 IOLR 221, 246 (2004), *available at* http://www.ila-hq.org/ (last visited April 14, 2007) (the internal rules of international organizations are subject to general rules of international law); Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organizations and Immunity From Jurisdiction: To Restrict or to Bypass*, 51 ICLQ 1 *(*2002).

[106] *See*, *e.g.*, Final Report of the International Law Association Committee on Accountability of International Organizations (2004), p. 22, *available at* http://www.ila-hq.org/html/layout_committee.htm (last visited April 14, 2007) ("[international organizations] should comply with basic human rights obligations."); A. Clapham, Human Rights Obligations of Non-State Actors 80 (Oxford University Press, 2006); A. Reinisch, *Securing the Accountability of International Organizations*, 7(2) Global Governance 131 (2001); J. Oloka-Onyango & D. Udagama, *Globalization and its Impact on the Full Enjoyment of Human Rights*, U.N. ESCOR, 55th Sess., Agenda item 4, at 1, U.N. Doc. E/CN.4/Sub.2/14 (2003).

[107] *Cf.* Mr. J.M.W. (No 14) v. EPO, ILOAT, Judgment No. 2292, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2292.htm (last visited April 14, 2007) ("The EPO notes that it is not a party to the European Convention on Human Rights, so that it is doubtful whether that Convention is directly applicable to it."); Mr. J.M.W. v. EPO, [2003] ILOAT, Judgment No. 2237, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2237.htm (last visited April 14, 2007) (in its reply, the EPO "rejects the complainant's arguments resting on the European Convention on Human Rights. The EPO is not bound by the Convention or any protocol thereto."); Miss E.E. H. (No 4) v. EPO, [2003] ILOAT, Judgment No. 2236, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2236.htm (last visited April 14, 2007).

[108] The applicability of human rights to the EPO is supported by the Organisation itself. In the case of Mr. J.M.W. v. EPO, "it points out that the Administrative Council adopted a declaration in 1994 whereby the Office undertakes to abide by general legal principles, including those concerning human rights." Mr. J.M.W. (No. 14) v. EPO, *supra*, n. 107.

Human rights are laid down in instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[109] the International Covenant on Civil and Political Rights (ICCPR),[110] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[111] The latter contains a specific provision on the right to health and safety at work:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: […] (b) Safe and healthy working conditions; […] (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.[112]

As regards discrimination on the basis of disability, the ICESCR provides that that the rights therein shall "be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*."[113] The ECHR contains similar language,[114] as does the ICCPR.[115] The ECHR[116] and the ICCPR[117] also prohibit "inhuman or degrading treatment." It is reasonable to argue discriminatory treatment because of a person's disability is inhuman, or at the very least degrading. In this respect, reference should also be had to the International Labour Organization Declaration on Fundamental Principles and Rights at Work, which declares that

> […] all (ILO) Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject

[109] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), *available at* http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=4/15/2007&CL=ENG (last visited April 14, 2007).
[110] *See* International Covenant on Civil and Political Rights (ICCPR), adopted and opened for signature by General Assembly resolution 2200 A (XXI) of 16 December 1966, *available at* http://www.ohchr.org/english/law/ccpr.htm (last visited April 14, 2007).
[111] *See* International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted and opened for signature by General Assembly resolution 2200A (XXI) of 16 December 1966, *available at* http://www.ohchr.org/english/law/cescr.htm (last visited April 14, 2007).
[112] *Id*., art. 7.
[113] *Id*., art. 2(2) [emphasis added].
[114] *See* ECHR, *supra*, n. 112, art. 14.
[115] *See* ICCPR, *supra*, n. 113, art. 26.
[116] ECHR, *supra*, n. 112, art. 3.
[117] ICCPR, *supra*, n. 113, art. 7.

> of those Conventions, namely: […] the elimination of discrimination in respect of employment and occupation.[118]

Importantly, both the ECHR and the ICCPR provide for the right to access to court/a fair trial [119] and an effective remedy.[120] Accordingly, staff members of the EPO have the right to vindicate their right to health and safety through judicial means in accordance with due process.

International human rights are designed to be implemented and elaborated on by States. With this in mind, the application of these rights to international organizations means little without any reference to a body of law that could give them practical application. As set out in Part E, Section 2 above, the EC has adopted extensive measures in the areas of health and safety and non-discrimination. These measures could be seen as a furtherance of that custom, rather than merely contractual obligations as between the Member States.[121] In this vein, one line of argument in favor of the (indirect) applicability of EC law to the EPO would be to consider the common values of the EC law aforementioned[122] as part of customary international law.[123] In view of the EPO being situated on EC territory, and because the majority of the EPC Member States are also Members of the EC, EC law would be a natural source to which the Organisation could refer to comply with its international human rights obligations.

A variation of this argument is to consider EC law in combination with the ECHR as evidence of special or regional customary international law,[124] in particular regarding the setting of European standards for the protection of fundamental rights. Indeed, the ECJ has repeatedly emphasized the constitutional importance of the ECHR in the Community legal order,[125] while

[118] *See* ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Session, Geneva, June 1998, *available at* http://www.itcilo.it/english/actrav/telearn/global/ilo/law/idec.htm (last visited April 14, 2007).
[119] *See* ECHR, *supra*, n. 112, art. 6; ICCPR, *supra*, n. 113, art. 14(1).
[120] *See* ECHR, *supra*, n. 112, art. 13; ICCPR, *supra*, n. 113, art. 2(3).
[121] *Cf.* Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, para. 52 at 23 (July 25) (ICJ holding that the subject fishing rights had "crystallized as customary law […] arising out of general consensus" evidenced at the Second U.N. Conference on the Law of the Sea."). *See also* Jennifer L. Johnson, *Public-Private-Public Convergence: How the Private Actor can Shape Public International Labor Standards*, 24 BROOK. J. INT'L L. 291 (1998).
[122] *See*, *supra*, Part C.
[123] *Cf.* Charter of the Fundamental Rights of the Union, *supra*, n. 43, at Preamble ("it is necessary to strengthen the protection of fundamental rights in the lights of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.").
[124] *See*, *e.g.*, E.T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 622 (2002) (defining regional customary international law as "custom forged between a small number of relatively homogenous states, binding among them only*"). See also* Right of Passage Over Indian Territory, (Portugal v. India) 1960 I.C.J. 39.
[125] See, *e.g.*, Case C-260/89 (ERT) [1991] ECR I-2925; Case C-112/00 (Schmidberger) [2003] ECR I-5659.

the ECJ has characterized the EC Treaty as the constitutional instrument for Europe.[126] In a similar vein, the European Court of Human Rights has described the ECHR as the basic European public law instrument.[127] The synergy between the EC Treaty and the ECHR Treaty is succinctly set out in the case of Bosphorus:

> […] the ECJ held as early as 1969 that fundamental rights were enshrined in the general principles of Community law protected by the ECJ. By the early 1970s the ECJ had confirmed that, in protecting such rights, it was inspired by the constitutional traditions of the Member States and by the guidelines supplied by international human rights treaties on which the Member States had collaborated or to which they were signatories. The Convention's provisions were first explicitly referred to in 1975 and by 1979 its special significance amongst international treaties on the protection of human rights had been recognised by the ECJ. Thereafter the ECJ began to refer extensively to Convention provisions (sometimes where the EC legislation under its consideration had referred to the Convention) and latterly to this Court's jurisprudence, the more recent ECJ judgments not prefacing such Convention references with an explanation of their relevance for EC law.[128]

In light of this synergy, it could be argued that the two Treaties represent customary international law as applied in Europe; that is, modifying it into special regional customary international law. The regional character of the custom illustrates that within Europe, certain fundamental rights standards are generally applicable although they might not necessarily be shared outside Europe. As noted by one scholar:

> [The ECJ] has developed a significant body of quasi-constitutional case law to give substance to the EC's aspirations to respect fundamental rights. In doing so, the court has used as its legal bases not only the scattered, express language of the treaties but also the case law of the European Court of Human Rights and the common

[126] *See* ECJ Opinion 1/91 (EEA) [1991] ECR I-6079 ("[i[n contrast, the EEC Treaty, albeit concluded in the form of an international agreement, *none the less constitutes the constitutional charter of a Community based on the rule of law*. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions") [emphasis added].

[127] The ECHR has stressed the "special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings" and declared the Convention "a constitutional instrument of European public order." *See* Loizidou v. Turkey (Preliminary Objections) 40/1993/435/514, at para. 93 (March 23, 1995).

[128] Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland (Preliminary Objections), June 30, 2005, at para. 73 [footnotes omitted].

> constitutional provisions of the member states, a sort of *regional customary international law*.[129]

3. The Complementary and Corrective Role of EC Norms

The applicability of EC law can be seen in light of the concept of a hierarchy of norms. When establishing the EPO, the States Parties to the EPC granted the Administrative Council the power to adopt or amend "the Service Regulations for permanent employees and the conditions of employment of other employees of the European Patent Office, the salary scales of the said permanent and other employees, and also the nature, and rules for the grant, of any supplementary benefits."[130] In view of the specific nature of these Regulations, it would follow that they are primarily applicable as the main body of law governing the internal functioning of the EPO vis-à-vis any other body of law, national or international.

Still, such primary application of the Service Regulations would only hold true to the extent to which the rights therein are normatively on the same or higher level of protection as the applicable national and international law binding on the EPO. As stated in a Report of the Study Group of the International Law Commission on Fragmentation of International Law:

> Most of general international law may be derogated from by *lex specialis*. But sometimes a deviation is either prohibited expressly or may be derived from the nature of the general law. […] [A]side from *jus cogens*, there may be other types of general law that may not permit derogation. In regard to conflicts between human rights norms, for instance, the one that is more favourable to the protected interest is usually held overriding. At least derogation to the detriment of the beneficiaries would seem precluded.[131]

In casu, the Service Regulations appear not to contain (adequate) provisions on health, safety or non-discrimination on the basis of disability. For that reason, EC law as part of the

---

[129] Alysa J. Ward, *The Opinion of the Court of Justice Regarding Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Redirecting the Development of Fundamental Rights Within the European Union*, 27 Ga. J. Int'l & Comp. L. 635, 644-645 (1999) [emphasis added].

[130] EPC, *supra*, n. 1, art. 33(2)(b).

[131] *Cf*. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the international Law Commission at its 58th Session (finalized by M. Koskenniemi), para. 108, A/CN.4/L.682, April 13, 2006, *available at* http://daccessdds.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement (last visited April 14, 2007) [footnote omitted].

applicable national law or as evidence of (regional) custom, would arguably be applicable in order to fill in these legal gaps, or *lacunae*. Further, to the extent to which the Service Regulations would contain any relevant provisions, EC provisions pertaining to the (human) rights of individuals to adequate protection at work could be seen to prevail to the extent to which they give a higher level of protection than the Service Regulations. [132]

4. Interim Conclusions

On the basis of the foregoing, it can be argued that EC law is applicable to the EPO and its staff members first, as part and parcel of national law. Second, EC law may be referred to as evidence of (regional) customary international law in the area of health, safety and non-discrimination. Third, it seems difficult to argue that EC law would apply to the EPO and its staff members on the basis that the EPO constitutes a *de facto* EU body.

Due to the arguably superior and special nature of EC law, the EPO would be advised to pay heed to this body of law, and should conduct its relations with staff accordingly. In view of legal certainty, the better option may be for the EPO to include specific provisions to this effect in the Service Regulations, cf. the legislative powers of the Administrative Council as set out in the EPC.[133] This would be in line with the statement by the International Law Association that it is a basic principle of international human rights law that the right to a remedy applies in the dealings of an [international organization] with states and non-state parties.[134] According to the ILA, these remedies should be "adequate, effective and, in the case of legal remedies, enforceable."[135] To that end, states the ILA, international organizations "should establish a framework to respect and to guarantee the right to a remedy for States and non-state parties who are affected in their interests or rights by actions or omission of an organ of an [international organization] or one of its agents."[136]

---

[132] *But see, e.g.*, Mr. R.A.O. v. UNESCO, *supra*, n. 79 (Article 5(2) of the Headquarters Agreement provided that UNESCO shall have "the right to make internal regulations applicable throughout Headquarters in order to enable it to carry out its work." Relying on this latter provision, UNESCO argued – and the Tribunal agreed - that Article 5(3) could not be interpreted as obliging the Organization to apply all statutory and regulatory provisions of the host country.).

[133] EPC, *supra*, n. 1, art. 33(2)(b). *Cf.* Lindsey v. International Telecommunication Union (ITU) [1962] ILOAT, Judgment No. 61, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0061.htm (last visited April 14, 2007) (holding that rules appertaining to the structure and functioning of the international civil service can be amended at any time subject to the legality of the acts and general principles of law).

[134] International Law Association, Berlin Conference 2004, *supra*, n. 105, at 265.

[135] *Id.*

[136] *Id.*

The Staff Union of the European Patent Office has sought to bring about such changes to the Staff Regulations. Negotiations broke down around the issue of which specific law applied and who was to ensure a correct interpretation of the various provisions.[137] However, a draft proposal has been submitted to the EPO Administrative Council, but it is unclear at this stage whether this will be adopted.[138] In addition, there are at present genuine concerns about the internal functioning of the EPO and its interpretation of the Service Regulations.[139] It is therefore necessary to consider other venues of ensuring the (correct) application of EC law to the EPO, ultimately by the leading authority: the European Court of Justice. In the following Part (E), it will be discussed whether this can be accomplished through the International Labour Organization Arbitral Tribunal (Section 1) and/or through national courts (Section 2).

[137] Jacinta paper.***
[138] *See id.*
[139] *See id*. *See also* Vincent A. Böhre et al. Sophie E. von Dewall (LLM), Ingeborg J. Middel and Cassandra E. Steer. Supervised by Joost van Wielink (LLM) and Dr. habil. Erika de Wet, *The (Non-)Application of International Law by the ILO Administrative Tribunal: Possible Legal Avenues for Establishing Responsibility* (Amsterdam International Law Clinic, Amsterdam, July 2004), *available at* http://www.iowatch.org/legal/amsterdam.pdf (last visited April 17, 2007). *Cf.* Staff Union of the European Patent Office, *Legal Protection of the Staff of the EPO*, *supra*, n. 83.

E. APPLICATION OF EUROPEAN COMMUNITY LAW

1. Administrative Tribunal of the International Labour Organization (ILOAT)

The International Labour Conference adopted the ILOAT Statute in 1946 and undertook amendments in 1949, 1986, 1992 and 1998.[140] The Tribunal hears complaints alleging non-observance of the terms of appointment of officials and of provisions of the Service Regulations from serving and former officials of the International Labour Organization or one of the other international organizations that recognize its jurisdiction, including the EPO.[141] For a complaint to be receivable all means of internal appeal must have been exhausted.[142]

First, with respect to standing, it should be noted that the ILOAT will not accept cases from persons whose application to work for the organization was rejected. This means that applicants rejected on a discriminatory basis, for instance a disability, will not have access to the ILOAT for redress for such treatment.[143]

Second, and in regard to the applicable law, the ILOAT applies the relevant terms of the contract and provisions of the internal service regulations of the respondent organization.[144] Neither the Statute nor the Rules of the Administrative Tribunal of the International Labour Organization contain any further provision on the applicable law.[145] The following sub-sections explore whether this lack of reference to specific systems of law prevents the Tribunal from applying EC law either directly or indirectly.

---

[140] ILOAT Statute, *supra*, n. 82.

[141] *Id*., at art. II. *See also* EPC, *supra*, n. 1, art. 13.

[142] *See* ILOAT Statute, *supra*, n. 82, art. VII(1).

[143] *See*, *e.g*., Liaci v. EPO, [2000] ILOAT, Judgment No. 1994, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1964.htm (last visited April 14, 2007) ("EPO's agreement to appoint the complainant was subject to the fulfilment of a condition which cannot be said to be a mere formality, namely, recognition that he was physically fit enough to discharge his functions. The complainant was not appointed as an employee of the EPO, and under Article 8 d) he could not have been appointed as a permanent employee unless he met 'the physical requirements of the post'. Consequently, the complainant, who has never been an employee of the EPO, is raising a matter which is not within the scope of the Tribunal's competence.").

[144] ILOAT Statute, *supra*, n. 82, art. II; Zihber v. CERN, [1980] ILOAT, Judgment No. 435, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0435.htm (last visited April 14, 2007).

[145] *See* Statute and Rules of the Administrative Tribunal of the International Labour Organization, *available at* http://www.ilo.org/public/english/tribunal/stateng.htm (last visited April 14, 2007).

1.1. The Direct Application of European Community Law

First, it should be explored whether the ILOAT could apply EC law directly through the national law of the EPO's respective seats. This possibility is weakened by the ILOAT's own interpretation of its mandate to apply national law. In the case of Guerra Ardiles v. ESO, it held that

> As a rule the conditions of employment of staff are subject exclusively to the ESO's own Staff Regulations and to the general principles of the international civil service: see Judgments 322 (in re Breuckmann (No. 2)) under 2; 473 (in re Haas) under 2 and 3; and 493 (in re Volz) under 5. National laws, and in particular those of the host country, apply only where there is express reference thereto."[146]

This ruling is confirmed in numerous other cases, including Mr P.J.M. G. v. UNESCO: "The Tribunal considers that, according to its case law and contrary to the views of the complainant, it cannot refer to national law in order to settle a dispute, unless express reference is made to that law in an organisation's regulations or the signed contract […]."[147]

The case of Mr. R.A.O. v UNESCO also exemplifies the position of the ILOAT, even in cases in which the headquarters agreement contains specific reference to the applicability of national law. The Complainant argued that the Respondent Organization should interpret the notion of a dependent spouse, as set out in the Service Regulations, to include same-sex partners. In support of his argument, he referred to Article 5(3) of the Headquarters Agreement between the French Government and UNESCO, which provided that, subject to the provisions of Article 5(2), "the laws and regulations of the French Republic shall apply at Headquarters." Article 5(2) provided that the Organization shall have "the right to make internal regulations applicable throughout Headquarters in order to enable it to carry out its

[146] Guerra Ardiles v. European Southern Observatory (ESO), [1994] ILOAT, Judgment No. 1311, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1311.htm (last visited April 14, 2007).
[147] Mr P.J.M. G. v. UNESCO, [2005] ILOAT, Judgment No. 2415, para. 3, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2415.htm (last visited April 14, 2007). *See also* Mr H. M. B., Mrs E. J. N.-P., and Ms K. S. v. International Service for National Agricultural Research (ISNAR), [2002] ILOAT, Judgment No. 2147, para. 8, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2147.htm (last visited April 14, 2007) ("Most of the arguments advanced by the complainants are based on provisions of Dutch national law, which is not applicable"); Saunoi v. International Criminal Police Organization (Interpol), [1990] ILOAT, Judgment No. 1020, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1020.htm (last visited April 14, 2007) ("Interpol is an international organisation and not subject to any national law and, as to the issues on which he submits that French law has a bearing, he does not cite any text of Interpol's that warrants taking account of such law"); Waghorn v. International Labour Organization (ILO), [1957] ILOAT, Judgment No. 28, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0028.htm (last visited April 14, 2007).

work." Relying on this latter provision, UNESCO argued – and the Tribunal agreed - that Article 5(3) could not be interpreted as obliging the Organization to apply all statutory and regulatory provisions of the host country.[148]

Whereas the Tribunal in Mr. R.A.O. did not consider national law applicable as such, it demonstrated a willingness to consider national law to elucidate the meaning of specific provisions of the Service Regulations. Since the latter contained no definition of the word "spouse," the ILOAT went on to consider the legal significance according to French law of the Civil Solidarity Contract (*Pacte civil de solidarité*) entered into between the Complainant and his partner. Concluding that "[i]t cannot be said on the basis of the French texts submitted in the present case that the PACS is a form of marriage," the ILOAT held that UNESCO could not be accused of taking a discriminatory decision against the Complainant.[149] This example of reference to national law does not carry persuasive authority with respect to health, safety and non-discrimination, however, as it concerned a particular contract entered into under the French legal system. That is, the Tribunal did not consider that French law could play an interpretative role in general.

It is worth noting that the ILOAT's attitude toward national law arguably finds support in the Annex to the ILOAT Statute, which sets out as a condition for an organization to recognize the jurisdiction of the Tribunal, that it "must either be intergovernmental in character" or, in addition to enjoying immunity from legal process "it shall not be required to apply any national law in its relations with its officials […]".[150] Whereas the latter requirement only applies to organizations that are not intergovernmental in character, thus excluding the EPO, it is reasonable to conclude that the drafters of the ILOAT Statute considered the non-application of national law to constitute an element of the intergovernmental character of the respective organizations, including the EPO.

In light of this, one may conclude that it is unlikely that the ILOAT will apply EC law through national law in a claim by an EPO staff member that the Organisation failed to

[148] Mr. R.A.O. v. UNESCO, *supra*, n. 79. *See also* Waghorn v. ILO, supra, n. 149; M. AKEHURST, THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS 263 (CUP, Cambridge 1967).
[149] Mr. R.A.O. v. UNESCO, *supra*, n. 79.
[150] Annex to the Statute of the Administrative Tribunal of the International Labour Organization, *available at* http://www.ilo.org/public/english/tribunal/stateng.htm#ANNEX (last visited April 14, 2007).

protect his/her right to health and safety at work, or that s/he was discriminated against for example on the basis of disability.

A second possibility that remains to be examined is the direct application by the ILOAT of EC law. In the Décarnière judgment, the ILOAT held that "[t]he Tribunal must enforce the law within the full ambit of the competence its statute vests in it. For that purpose it will apply any material rule of law, be it international or administrative or labour law or any other body of law."[151] This broad reference to other systems of law, including international law, may support the direct application of EC law. However, in no case has the ILOAT directly applied EC law. Rather, it has expressly held that it is not bound by the judgments of the European Court of Justice, although it has stated that in some cases, its decisions can carry persuasive authority.[152] It follows that unless the ILOAT would change its approach in this respect, any direct application of EC law will be incidental and incremental rather than by a sense of obligation.

1.2. The Indirect Application of European Community Law

Whereas we have seen that the ILOAT does not apply national law directly, national law may still have relevance. For example in Kock N'Diaye Silberreiss v. EPO, the Tribunal held that it did not rule out municipal law *a priori* and that it could apply where it was possible to educe general principles of law.[153] The ILOAT's mandate to apply such general principles is also set out in Mr. R.A.O. v. UNESCO:

> […] in examining the cases submitted to it, the Tribunal verifies, in particular, whether from both a substantive and a formal point of view the employing organisation has failed to observe the terms of the staff member's contract of

[151] Décarnière (No. 2) and Verlinden (Nos. 1 and 2) v. Eurocontrol, [1994] ILOAT, Judgment No. 1369, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1369.htm (last visited April 14, 2007) (adding that "[t]he only sort it will not apply is national law, save where there is express renvoi thereto in Staff Regulations or contract of employment").

[152] *In re* Cook v. EPO, [1993] ILOAT, Judgment No. 1296, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1296.htm (last visited April 14, 2007); Theuns v. EPO, [1993] ILOAT, Judgment No. 1297, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1297.htm (last visited April 14, 2007).

[153] *In re* Kock, N'Diaye and Silberreiss v. EPO, [1995] ILOAT, Judgment No. 1450, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1450.htm (last visited April 14, 2007).

> employment or the provisions of the Staff Rules. It also verifies whether there has been any breach of the general principles of law.[154]

This part of its jurisprudence consequently mitigates the ILOAT's reluctance to apply municipal law to international organizations.[155] Considering that EC law is part and parcel of the national law of as many as twenty-five States, it is reasonable to conclude that the ILOAT could also refer to EC law as evidence of general principles of law. This possibility is supported by the fact that the ILOAT considers itself competent to apply the law *proprio motu*, that is, by its own motion.[156] This principle of judicial competence has also been put forward by Cheng in his treatise of general principles of law.[157]

The ILOAT has developed certain requirements for the application of general principles of law. Importantly, the law of international civil service, including general principles,[158] is only applicable where the internal law is silent.[159] This is also confirmed by the general preference given to the internal law of the respondent organization.[160] Also, whereas the ILOAT has held that general principles are applicable to the internal bodies of the EPO in the exercise of their discretionary powers, it has noted that it only limits the administration in cases of gross abuse of those general principles.[161]

The difficulty presented by the application of general principles is one of content.[162] Nonetheless, general principles have been held to be applicable in many cases despite the lack of a clear definition of the rights that apply.[163] Furthermore, recourse to general principles is

[154] Mr. R.A.O. v. UNESCO, *supra*, n. 79, at para. 6.

[155] *Cf*. Décarnière (No. 2) and Verlinden (Nos. 1 and 2), *supra*, n. 153.

[156] *See* Zihber v. CERN, *supra*, n. 145.

[157] Bin Cheng, General Principles of Law as applied by International Courts and Tribunals, Article 10, p. 398 (Stevens & Sons Limited, 1953 London).

[158] *Cf*. Waghorn v. ILO, *supra*, n. 149 (the ILOAT is "bound by general principles of law").

[159] Berthet v. European Center for Nuclear Research (CERN), [1982] ILOAT, Judgment No. 491, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0491.htm (last visited April 14, 2007).

[160] Hamouda v. Universal Postal Union (UPU), [1995] ILOAT, Judgment No. 1451, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1451.htm (last visited April 14, 2007).

[161] Mrs. U.M.K and Mr. A.G. K. v. EPO, [2003] ILOAT, Judgment No. 2244, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2244.htm (last visited April 14, 2007).

[162] C.F. Amerasinghe, *The Law of International Organisations: a Subject which Needs Exploration and Analysis*, 99 International Organizations Law Review 9, 18 (2004) ("there are situations in which the application of general principles may be elusive").

[163] *See*, *e.g*., Franks (No.2) and Vollering (No. 2) v. EPO, [1994] ILOAT, Judgment No. 1333, *available at* http://www.ilo.org/public/english/tribunal/fulltext/1333.htm (last visited April 14, 2007); Breuckmann v. Eurocontrol, [1977] ILOAT, Judgment No. 322, available at http://www.ilo.org/public/english/tribunal/fulltext/0322.htm (last visited April 14, 2007); Wakley v. World

valuable because in cases where they are fundamental, they are not "only inviolable, but also invariable."[164]

In the context of health, safety and disability, EC law could be applied – albeit indirectly – through the following general principles of international civil law already recognized by the ILOAT: the duty of care, and the right not to suffer unjustified discrimination.[165] With respect to the duty of care, the ILOAT has affirmed that an international organization, "bound as it is, like its own employees, to show good faith, must avoid causing them undue injury".[166] This would seem to support the view that adequate health and safety protection is a fundamental principle that is binding on the EPO. The application of EC law to ensure that health and safety laws are applied for the benefit of EPO staff would be consistent with this principle. As held in Grashoff v. WHO:

> It is a fundamental principle of every contract of employment that the employer will not require the employee to work in a place which he knows or ought to know to be unsafe. […] If there is doubt about the safety of a place of work, it is the duty of the employer to make the necessary inquiries and to arrive at a reasonable and careful judgment, and the employee is entitled to rely upon his judgment. […] [I]f he accepts the order, as prima facie he is bound to do, and the employer has failed to exercise due skill and care in arriving at his judgment, the employee is, subject to any contrary provision in the contract, entitled to be indemnified in full against the consequences of the misjudgment.[167]

However, the interpretation taken by the ILOAT suggests that this duty applies only in so far as the danger is greater than the normal performance of the employee's duties.[168]

Health Organization (WHO), [1961] ILOAT, Judgment No. 53, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0053.htm (last visited April 14, 2007); Sharma v. ILO, [1957] ILOAT, Judgment No. 30, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0030.htm (last visited April 14, 2007).

[164] C.F. Amerasinghe, *supra*, n. 164, at 21 ("there are situations in which the application of general principles may be elusive").

[165] *See* Mr. R. A.-O. v. UNESCO, *supra*, n. 79; Meyler v. UNESCO, [1989] ILOAT, Judgment No. 978, para. 13, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0978.htm (last visited April 14, 2007); Marsault v. Food and Agriculture Organization of the United Nations (FAO), [1988] ILOAT, Judgment No. 917, para. 6, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0917.htm (last visited April 14, 2007).

[166] Awoyemi v. UNESCO, [1998] ILOAT, Judgment No. 1756, para 10 (a), *available at* http://www.ilo.org/public/english/tribunal/fulltext/1756.htm (last visited April 14, 2007).

[167] Grasshoff (Nos. 1 and 2) v. World Health Organization (WHO), [1980] ILOAT, Judgment No. 402, para. 1, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0402.htm (last visited April 14, 2007).

[168] *See id*., at para. 2 ("The question in each case is whether the risk is abnormal having regard to the nature of the employment."); Zihber v. CERN, *supra*, n. 145.

Concerning the right not to be unjustly discriminated against, the Tribunal has stated that the principles that govern the international civil service forbid discrimination and require that all members of the staff be treated considerately and with respect for their dignity.[169] According to Mr. Justice Hugessen, "[t]his statement highlights a crucial point: at the heart of the rule against discrimination in the international civil service are the protection of, and respect for, basic human dignity."[170] Arguably, discrimination on the basis of a person's disability would conflict with his/her human dignity.

Of relevance to the issues at hand are also the right to due process,[171] legal certainty,[172] principles of equity, and proper administration in good faith. As held by the ILOAT in the case of Guerra Ardiles v. ESO, international organizations must "comply with the principles of equity, good faith and the duty of care.[173]

Another source of law the ILOAT has held applicable alongside "general principles" is human rights.[174] Whereas the Tribunal has held that the European Convention on the Protection of Human Rights and Fundamental Freedoms does not apply as such, some of its principles were considered applicable to the EPO.[175] As noted above, however, it is not entirely clear what is the content of those human rights, or how far they are applicable in every case.[176]

---

[169] Marsault v. FAO, *supra*, n. 147, at para. 6.
[170] Mr. R. A.-O. v UNESCO, *supra*, n. 79, Dissenting Opinion by Mr. Justice Hugessen, at para. 22.
[171] *See*, *e.g.*, T.B. v. Universal Postal Union (UPU), [2005] ILOAT, Judgment No. 2398, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2398.htm (last visited April 14, 2007); Fraquelli v. United Nations Industrial Development Organization (UNIDO), [2001] ILOAT, Judgment No. 2014, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2014.htm (last visited April 14, 2007).
[172] *See* Cervantes (No. 8), De Lucia (No. 3), Kagermeier (No. 7), Luckett (No. 5) and Munnix (No. 4) v. EPO, [2001] ILOAT, Judgment No. 2037, *available at* http://www.ilo.org/public/english/tribunal/fulltext/2037.htm (last visited April 14, 2007).
[173] Guerra Ardiles v. European Southern Observatory (ESO), *supra*, n. 148.
[174] Franks (No.2) and Vollering (No. 2) v. EPO, *supra*, n. 145; Breuckmann v. Eurocontrol, *supra*, n. 145; Wakley v. WHO, *supra*, n. 145; Sharma v. ILO, *supra*, n. 145.
[175] Mr. J.M.W. v. EPO, *supra*, n. 107. *See also* Pilowsky v. World Intellectual Property Organization (WIPO), [1987] ILOAT, Judgment No. 848 ("The Organization is bound to recognise that 'everyone has the right to a nationality' and that 'no one shall be arbitrarily deprived of his nationality', as stated in the Universal Declaration of Human Rights approved on 10 December 1948. It should also be guided by the definition of stateless persons set out in Article I of the Convention relating to the Status of Stateless Persons of 28 September 1954 as 'a person who is not considered as a national by any State under the operation of its law'. It follows that the Organization was under an obligation to examine the available evidence with great care before concluding that the complainant had not proved the nationality he claimed.")
[176] *See infra*, Part D, Section 2.2.

In sum, the abovementioned principles and rights can be applied in a case brought by staff members of the EPO because they may incorporate standards that do not exist in the Service Regulations. It is suggested that in order to give them meaning and the possibility of practical application, the ILOAT could rely on EC law. It should be noted, though, that the Tribunal's references to EC law are limited; and such references have never been used to grant concrete rights to applicants, but only as a means of interpreting service regulations that have similarity with equivalent EC Service Regulations.

1.3. The Request of a Preliminary Ruling from the European Court of Justice

A final possibility that is considered is the ILOAT requesting a preliminary ruling from the European Court of Justice. Article 234 EC of the EC Treaty empowers the European Court of Justice to give preliminary rulings on the interpretation of Community law.[177] The question arises whether this procedure is available for the ILOAT. Upon the request of a claimant to refer a question to the ECJ, the ILOAT answered in the negative: "the complainant requests that the matter of the recognition of his degree should be referred to the Court of Justice of the European Communities for a preliminary ruling. The Tribunal has no authority to order such reference".[178]

Assuming that the ILOAT would revisit its decision in this respect, it is highly questionable whether the ECJ would accept a request. Article 234 of the EC Treaty stipulates that bodies competent to request a preliminary ruling are: "any court or tribunal of a Member State."[179] Whereas this reference goes beyond that of national courts proper, it is unlikely that it would encompass the ILOAT. In the case Busseni, the ECJ held that Article 234 EC was established in order "to ensure the utmost uniformity in the application of the Community law and to establish for that purpose effective cooperation between the Court of Justice and *national courts*."[180] Considering the international nature of the ILOAT, and its location in a State not

[177] EC Treaty, art. 234 (1) (a) ("The Court of Justice shall have jurisdiction to give preliminary rulings concerning (a) the interpretation of this Treaty […]"). *Cf. infra*, Part E, Section 2.3.
[178] Van der Peet v. EPO (No. 6), [1986] ILOAT, Judgment No.768, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0768.htm (last visited April 14, 2007); Van der Peet (No. 7) v. EPO, [1986] ILOAT, Judgment No. 777, *available at* http://www.ilo.org/public/english/tribunal/fulltext/0777.htm (last visited April 14, 2007).
[179] EC Treaty, *supra*, n. 13, art. 234.
[180] Case C-221/88, Busseni [1990] E.C.R. at I-523, para. 13 [emphasis added].

member to the European Community,[181] it follows that the ECJ would most likely dismiss a request by the ILOAT for a preliminary ruling.

1.4. Interim Conclusions

Through its mandate, the ILOAT could hold that EC law constitutes part of the general principles of law and apply such principles where the internal law of the international organization is silent on a matter. Nevertheless, the practice of the ILOAT demonstrates a reluctance towards EC law both as to its content and to its application and interpretation by the ECJ.

A further substantive problem is the normative content of "general principles" and "human rights." Whereas it can be hoped that the ILOAT's jurisprudence will further evolve in the direction toward incorporation of EC standards, an examination of the present case law indicates that such a development is unlikely to take place in the foreseeable future. If the ILOAT were to apply EC law, a further difficulty is that the possibility for referral to the ECJ would be excluded with the consequence that standardization of interpretation would not be guaranteed.

Finally, it has been recognized that there are concerns about the ILOAT's compliance with fair trial criteria such as those defined in Article 6 of the ECHR. A number of scholars found after reviewing ILOAT at the request of the Staff Union of the International Labour Organisation ("ILO") that the Tribunal does not meet the basic requirements of an independent tribunal.[182] One of these scholars, Dr. Ian Seiderman, notes that the ILOAT "appears to lack certain core attributes of independence" including "[t]he manner in which judges are selected, the conditions of their tenure, the apparent lack of procedures for their discipline or removal and the lack of right of appeal […]."[183] In addition, the *UN Special*, the

[181] It is situated in Geneva. *See* Administrative Tribunal of the ILO, *available at* http://www.ilo.org/public/english/tribunal/ (last visited April 14, 2007).
[182] *See* Louise Doswald-Beck, *ILO: The Right to a Fair Hearing Interpretation of International Law* (2002), *available at* http://www.ilo.org/public/english/staffun/info/iloat/doswald.htm (last visited April 14, 2007); Geoffrey Robertson Q.C., *Opinion for the Information Meeting on the ILO Administrative Tribunal Reform and related matters*, *available at* http://www.ilo.org/public/english/staffun/info/iloat/robertson.htm (last visited April 14, 2007); Ian Seiderman, *Does the ILO Administrative Tribunal meet the standards of an independent and impartial judiciary?*, (2002), *available at* http://www.ilo.org/public/english/staffun/info/iloat/seiderman.htm (last visited April 14, 2007).
[183] Ian Seiderman, *Does the ILO Administrative Tribunal meet the standards of an independent and impartial judiciary?* (2002), *supra*, n. 184. *Cf*. Keith J. Webb & Arthur van Neck, Supervised by Joost van Wielink

magazine of the international staff in Geneva, has dedicated several articles to the functioning of the ILOAT, highlighting several possible independence issues of this Tribunal.[184] Commenting on administrative tribunals in general, Singer notes that "[u]nfortunately, only a few international organizations offer procedures meeting these basic standards necessary to assure adequate protection of human rights."[185] He concludes that "[t]he chief issues of concern [with regard to international administrative tribunals] are the independence of the tribunals, the adequacy of their procedures and the timely publication of signed decisions."[186]

If the ILOAT is both ineffective as a judicial body and does not apply EC law, EPO staff members are left with no recourse to protect their rights. In sum, the ILOAT's reluctance to apply EC law and its lack of detail when applying human rights and general principles impose a severe limitation on the effectiveness of the legal protection provided by the ILOAT. In this situation, alternatives must be considered to ensure the application of EC law to the EPO.

2. National Courts

One possibility is for staff members of the EPO to seek redress in the national courts of the States in which the Organisation is situated – Germany, Austria, and the Netherlands[187] – all Members of the European Community. This is particularly so in light of the fact that national courts are responsible for upholding European Community law on the territory of the Member States.[188]

(LLM), *The Non-compliance of the International Labour Organisation Administrative Tribunal with the Requirements of Article 6 ECHR* 20-21 (Amsterdam International Law Clinic, Amsterdam, August 2005); Vincent A. Böhre et al., *supra*, n. 140.

[184] *See* Edward Patrick, *The Best of the Bunch Flunks*, 614 UN Special (2003), *available at* http://www.unspecial.org/uns614/UNS_614_T18.html (last visited April 14, 2007) (topping the list of defects were the manner in which the ILOAT members (so- called contract judges) are appointed and renewed (their short appointment terms and multiple renewals, the current Tribunal President having been renewed three times after his initial 3 year appointment, give rise to at least the perception that their judgments might be influenced by the need to keep the defendant Administrations happy in order to win another term).

[185] Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Va. J. Int'l L. 53, 163 (1995), *quoted in* Charles H. Brower, II, *supra*, n. 78, at 83.

[186] *Id*., at 155. *Cf*. United Nations Secretary General, *Report of the Redesign Panel on the United Nations*, United Nations General Assembly, 61st session, A/61/758, *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N07/248/77/PDF/N0724877.pdf?OpenElement (last visited April 17, 2007) (sharing the view that there are significant problems with the existing system of internal justice, and agreeing that an entirely new system is needed). *But see* Brower, *supra*, n. 78, at 91 ("international administrative tribunals offer procedures that are sufficiently transparent, independent, and fair to ensure that international organizations will conduct their employment activities with a high degree of accountability").

[187] *See supra*, n. 2.

[188] Case C-224/01, Gerhard Köbler v. Republik Österreich [2003] ECR I- 10239.

One obstacle to enforcing EC law against international organizations is the long tradition of national judicial bodies of upholding the immunity of international organizations.[189] Admittedly, the immunity of international organizations serves a legitimate purpose – the fulfillment of an organization's mission without interference by the host State.[190] Moreover, their immunity has been considered to be wider than the immunities of States, since international organizations have little power to react against violations of their immunities (no reciprocity) and there is less scope for abuse due to their limited competences.[191]

However, as will be demonstrated, the immunity of international organizations – including the EPO – is not absolute. Further, international law in general and EC law in particular have important implications for the position of international organizations within the territory of EC Member States.

2.1. The Limits of the Immunity of the European Patent Organisation

Article 8 of the European Patent Convention provides: "The Protocol on Privileges and Immunities annexed to this Convention shall define the conditions under which the Organisation […] shall enjoy, in the territory of each Contracting State, the privileges and immunities necessary for the performance of their duties." [192]

The Protocol on Privileges and Immunities (PPI) provides in Article 3 (1) that "[w]ithin the scope of its official activities the Organisation shall have immunity from jurisdiction and execution, except (a) to the extent that the Organisation shall have expressly waived such immunity in a particular case […]."[193] The PPI further states that "[t]he official activities of

[189] *See generally* REINISCH, *supra*, n. 81.
[190] *See* Siedler v. Western European Union (WEU), Brussels Labour Court of Appeal (4th chamber), Sept. 17, 2003, Journal des Tribunaux 2004, 617; *reprinted in* Arb.H. Brussel (4° kamer), 17 september 2003, J. WOUTERS, M. VIDAL, CASES VAN INTERNATIONAAL RECHT, ANTWERPEN, INTERSENTIA 572 (2005). For a commentary in English, see ILDC 53 BE (2003) (the Western European Union has instituted proceedings before the Court of Cassation against the decision of the Labor Court of Appeals. The case has been inscribed on the docket of the Court (nr. S.2004.0129.F), but no date has as yet been indicated for delivery of the Court's judgment); Waite and Kennedy v. Germany and Beer and Reagan v. Germany (App. No. 26083/94) [1999] ECHR 6.
[191] *See* Siedler v. WEU, *supra*, n. 192. *But see* Case C-364/92, SAT Fluggesellschaft mbH v. Eurocontrol [1994] ECR I-00043 (Advocate General Tesauro), para. 6 (stating that it would be manifestly wrong to grant international organizations immunity greater than that of States).
[192] *See* EPC, *supra*, n. 1, art. 8, *available at* http://www.european-patent-office.org/legal/epc/e/ma1.html#CVN (last visited July 12, 2006).
[193] Protocol on Privileges and Immunities of the European Patent Organization, *supra*, n. 6. The other exceptions contained in Article 1 (b) and (c) are inapplicable to the case at hand, as they concern civil actions brought by third parties, and enforcement of arbitration awards. *See id*.

the Organisation shall, for the purposes of this Protocol, be such as are strictly necessary for its administrative and technical operation, as set out in the Convention." [194]

Immunity is further maintained through the headquarters agreements concluded with the Dutch,[195] Austrian[196] and German[197] Governments.

2.1.1. Functional Immunity

International organizations generally enjoy immunity from jurisdiction in national courts. However, "no immunity is absolute, in any legal order."[198] It has been stated that the application of national law to international organizations is limited in so far as the independence of the international organization is necessary.[199] In this vein, Reinisch observes that "[t]he paramount rationale for granting jurisdictional immunity is to secure the independence, and guarantee the functioning, of the respondent [international organization]." [200]

Whereas it remains unclear how far this "functional immunity" of international organizations extends,[201] it can be argued that national courts should construe the immunity of the EPO in a functional manner so that it would be inapplicable to the case at hand. Then they could proceed to apply national law, and through it EC law, to the Organisation and its staff

[194] *Id*., at para. 4.

[195] Agreement between the European Patent Organisation and the Kingdom of the Netherlands concerning the branch of the European Patent Office at the Hague, Aug. 10, 2006, NL/TRACTATENBLAD No. 155, 2006, ISSN 0920 – 2218 (Sdu Uitgevers, 's-Gravenhage 2006), *available at* http://wetten.overheid.nl/ (last visited April 14, 2007).

[196] Agreement between the European Patent Organisation and the Republic of Austria concerning the headquarters of the Vienna sub-office of the European Patent Office, AT/BGBL. No. 263 of 6 November 1990, p. 4071 *et seq*.

[197] Agreement between the European Patent Organisation and the Government of the Federal Republic of Germany, DE/BGBI. II No.17 of 4 April 1978, page 337 et seq.

[198] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), [2002] ICJ REP 121, Separate Opinion, of Judge S.O Rezek p. 91, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3 (last visited April 16, 2007).

[199] Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organizations and Immunity From Jurisdiction: To Restrict or to Bypass*, 51 ICLQ 1, 4 (2002).

[200] REINISCH, *supra*, n. 81, at 233-234; August Reinisch & Ulf Andreas Weber, *In the Shadow of Waite and Kennedy: the jurisdictional immunity of international organizations, the individual's right of access to the courts and administrative tribunals as alternative means of dispute settlement*, 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW 59 (2004); M. AKEHURST, THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS 5-6 (CUP, Cambridge 1967); C.F. AMERASINGHE, PRINCIPLES OF INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS, *supra*, n. 28, at 315-316.

[201] Vincent A. Böhre, *et al*., *supra*, n. 140.

members. This possibility finds implicit support in both the EPC and the PPI. As stated above, Article 8 of the EPC refers to immunities "necessary for the performance of the duties" of the Organisation.[202] This language supports the view that the EPO enjoys functional, rather than full, immunity.[203] Whereas Article 3 of the PPI appears quite absolute in its formulation of immunity from national courts and only provides for the exception of waiver by the EPO itself,[204] such immunity only concerns "the official activities of the Organisation."[205] Such "official activities" are defined as those that are "strictly necessary for its administrative and technical operation, as set out in the Convention." [206]

One could argue that the lack of protection of staff cannot be construed as being a privilege of the EPO or strictly necessary for its operation. Whereas national courts have occasionally circumvented the immunity from jurisdiction of international organizations,[207] in the case of T v. European Patent Organization, the German Court upheld EPO's immunity by ruling that the notion of "official activities" covered the legal relationship between the EPO and its employees.[208] The argument could be made, however, that a distinction should be made between the content of the work conducted by the employees (a matter that could fall within the EPO's immunity) from their working conditions (which arguably is outside the scope of its immunity).

2.1.2. The Doctrine of Delegated Powers and the Duty to Cooperate

Another possibility of circumventing the EPO's immunity from suit in national courts concerns the doctrine of delegated powers.[209] This argument would base itself on the fact that the EPO was set up for a specific purpose, i.e., to grant patents. For that purpose it was

[202] EPC, *supra*, n. 1, art. 8.

[203] REINISCH , *supra*, n. 81, at 140.

[204] Protocol on Privileges and Immunities of the European Patent Organization, *supra*, n. 1, art. 3 (1) (a). The other exceptions do not deal with cases brought by staff members of the Organisation. *See id*.

[205] *Id*.

[206] *Id*., at para. 4.

[207] REINISCH , supra, n. 81, at177-229. *See also* Siedler v. WEU, *supra*, n. 192.

[208] T v. European Patent Organization, *referred to in* REINISCH, *supra*, n. 81, at 209. *See also E GmbH v European Patent Organization* [11th June 1992] Austrian Supreme Court. *Cf*. REINISCH , *supra*, n. 81, at 164; Agence de Cooperation Culturelle Technique v. Housson [18 November1982 Court of Appeals; 24 October 1985 Cour de Cassation]; Gilbert Bertrand v. Europese Octrooi Organisatie (EPO), *supra*, n. 10 (the decision, upholding the immunity of the EPO, has been appealed).

[209] *See generally*, Dan Sarooshi, *The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government*, 25 MICH. J. INT'L L. 1107 (2004).

accorded the "most extensive legal capacity accorded to legal persons under the national law of that State."[210] Without such delegation of powers to the EPO, the Member States would have needed to employ persons to carry out the same task. These employees would necessarily be protected by national law, and in the case of Germany, Austria and the Netherlands, EC law.

It could be argued that implicit in the delegation of powers to the EPO was the understanding that the Organisation would also sufficiently protect its staff. This argument can be supported by a reference to Article 20 of the PPI, in which the EPC Member States agree that

> The Organisation shall co-operate at all times with the competent authorities of the Contracting States in order to facilitate the proper administration of justice, to ensure the observance of police regulations and regulations concerning public health, labour inspection and other similar national legislation, and to prevent any abuse of the privileges, immunities and facilities provided for in this Protocol.[211]

When the Organisation fails to protect its staff with respect to matters such as health, safety and non-discrimination, the EPO is arguably acting in a manner that is inconsistent with its delegated mandate. Accordingly, the EPO has no right to immunity, and it should be set aside by the national court. This would also be consistent with the ICJ's judgment concerning the UN, in which it made clear that immunity of organizations is necessary to protect staff to enable them to exercise their missions with independence.[212] As for the EPO, if immunity is upheld, it is in effect being used against the staff rather than for their protection.

Additional support in this respect may be found in Article 19 of the PPI, according to which the President of the Organisation has a duty to waive the immunity where s/he "considers that such immunity prevents the normal course of justice […]."[213] The apparent lack of protection by staff as set out in this Report is not in accordance with justice. Firstly, there appear to be gaps in the internal law of the international organization in relation to issues such as health safety and the rights of disabled persons.[214] Second, as concluded by in a previous report by

[210] EPC, *supra*, n. 1, art. 5 (b).
[211] Protocol on Privileges and Immunities of the European Patent Organisation, *supra*, n. 6, art. 20.
[212] Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights [1999] ICJ Rep 62, pp. 96-97.
[213] Protocol on Privileges and Immunities of the European Patent Organisation, *supra*, n. 6, art. 19.
[214] Jacinta paper ***

the Amsterdam International Law Clinic, the "judicial bodies" internal to the EPO do not constitute tribunals as laid down by the European Court of Human Rights jurisprudence.[215] Third, and apart from the fact that the ILOAT cannot be considered to sufficiently remedy *lacunae* in the EPO Service Regulations,[216] serious concerns have been raised about the compatibility of the ILOAT with requirements of an independent tribunal.[217]

Thus, when the President fails to set aside immunity in order to remedy the situation, as is the consistent practice, it would arguably fall on national courts to hear the case. An argument in favor of taking on the case would be that the President is the representative of the EPO and as such cannot be considered independent.

2.2. The Duty of National Courts to Set Aside Immunity

2.2.1. The Impact of European Community Law

The immunity of the EPO must also be considered in light of the legal relationship between Member States and the European Community. Permitting Member States to "hide behind" the EPC and not meet their obligations with regard to EC law would appear in contradiction to basic tenets of this legal order. It has been stated that "[a]ll legal systems confer responsibilities upon public bodies to ensure that the law is generally applied, policed, accessible and that there are sufficient remedies for breach of the law."[218] The EC imposes on the Member States not only the obligation of not breaching EC law, but also an obligation to secure the full effectiveness of the EU legal system.[219]

A duty of national courts to set aside the EPO's immunity could be construed on the basis of Article 10 EC, according to which

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action

[215] Keith J. Webb & Arthur van Neck, *supra*, n. 185. *Cf.* Siedler v. WEU, *supra*, n. 192, at para. 617 (the Belgian court determined that the internal Appeals Commission of the WEU did not provide adequate alternative legal protection in terms of Article 6(1) ECHR).
[216] *See supra*, Part E, Section 1.4.
[217] *See id.*
[218] D. CHALMERS, ET AL, *supra*, n. 73, at 193.
[219] *See id*., at 193-196.

> taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.[220]

The general application of Article 10 EC has been extensively invoked by the ECJ in cases where actions conducted by Member States were contrary to their obligations under the EC Treaty.[221] In the case Commission v. France,[222] concerning public disorder, the ECJ found that France has breached EC law by not taking actions to stop the protests or prosecute the offences committed. It stated that

> Article 30 [now Article 28 EC] therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 [now Article 10 EC] of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory.[223]

There is extensive legislation at the EC level in regard to workers' protection, as identified in Part C of this Report, and which is generally applicable within the jurisdiction of the Member States. The principle of loyal cooperation enshrined in Article 10 EC requires national institutions of the EC Member States – including national courts – to secure the full and correct application of EC law. Accordingly, the EC Member States on which territory the EPO has its offices have a positive obligation to guarantee the full scope and effect of Community law, including its provisions on health, safety, and non-discrimination. This obligation would arguably include a duty by national courts of EC Member States to set aside the immunity of EPO when (standards equivalent to) EC norms are disregarded by the Organisation.

Moreover, worker protection has a clear human rights dimension. In this context, reference can be made to the Schmidberger case,[224] which shows the weight that human rights protection enjoys within the Community. In this case the ECJ ruled that

[220] EC Treaty, *supra*, n. 13, art. 10.

[221] For discussions on the ECJ's case law on Article 10 EC, *see*, *e.g.*, Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, *31* NYJILP 307-348 (1999), *available at* http://www.law.nyu.edu/journals/jilp/issues/31/pdf/31j.pdf (last visited July 14, 2006).

[222] Case C-265/95, Commission v. France [1997] ECR I-6959.

[223] *Id*., at para. 32.

[224] Case C-112/00, Schmidberger [2003] ECR I-5659.

> […] since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.[225]

The Court set aside the economic interests of the Community by restricting the free movement of goods in order to give effect to the need to protect fundamental rights. The reasoning put forward in this case can also be applied to the interaction existing between the EC, its Member States, and the EPO. Specifically, it could be argued that the immunity granted by Member States to international organizations on their territories should be set aside in order to give effect to fundamental civil rights such as health and safety at work and the prohibition of discrimination set forth in EC law.

In fact, recent jurisprudence indicates that the ECJ is prepared to narrowly construe the immunity of international organizations and their officials, including those of the EC. In a case brought against the EC, Anne Hogan v Court of Justice of the European Communities, immunity from jurisdiction granted to employees of the EC was held to be limited to "have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the Communities."[226]

Further, in the Advocates General's opinion in the SAT Fluggesellschaft mbH v Eurocontrol case, arguments were presented against Eurocontrol's contention that it had immunity from the exercise of jurisdiction of the ECJ. Advocate General Tesauro posited that such an approach was fallacious and that it would be manifestly wrong to grant international organizations immunity greater than that of States. He also emphasized the importance "of the need not to deprive individuals of the protection afforded to subjective rights that might be impaired by the activities of international organizations."[227] The ECJ did not refer to this part of Tesauro's opinion, but they did adopt his general position.[228]

---

[225] *Id*., para. 74

[226] Case T-497/93, Anne Hogan v. Court of Justice of the European Communities [1995] ECR-SC I-A-77, para 48.

[227] SAT Fluggesellschaft mbH v. Eurocontrol, *supra*, n. 193, at para. 6.

[228] *Id*., para 15; SAT Fluggesellschaft mbH v. Eurocontrol, [1994] ECR I-00043 (Judgment), para 31.

There are also examples of national courts setting aside the immunity of international organizations in order to secure the application of EC law. In a case instigated by Greenpeace, a Dutch criminal court allowed criminal proceedings against Euratom (European Atomic Energy Community) to continue.[229] In so doing, the Court held that the failure to abide by EC law could not be seen to fall under the functions of Euratom, and that the enforcement of EC law against it could not be seen as an encroachment on the carrying out of its functions.[230]

2.2.2. The Impact of International Law

This Section examines whether national courts have a duty set aside the immunity of the EPO on the basis that it constitutes a violation of the right to an effective remedy and/or an abuse of rights.

To the extent to which national courts would hold a case against the EPO inadmissible because of the latter's immunity, and where no adequate alternative forum is available, the Organisation is left in legal void that appears to be fundamentally opposed to concepts intrinsic to the rule of law. One such concept is *ubi jus, ibi remedium* - there is no right without a remedy.[231] If the national court upholds the immunity of the international organization, there would be a failure to provide justice, as EPO staff members would be left without proper legal redress in relation to their right to health, safety and non-discrimination at work.

The right to access to court in accordance with due process and the right to an effective remedy right are embodied in the European Convention on Human Rights and Fundamental

[229] *See* Greenpeace v. Euratom, AU9264, Court of Amsterdam, R2004/337/12Sv, Dec. 12, 2005, *available at* http://www.rechtspraak.nl/default.htm (last visited April 14, 2007).
[230] *See id.*
[231] *See* Karel Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap*, 25 MICH. J. INT'L L. 1159, 1162 (2004) ("The right to a remedy as a general principle of law and a norm of customary international law applies in all dealings between an [international organization] and other parties." [footnote omitted]). *Cf.* Ashby v. White, 92 ENG. REP. 126 (K.B. 1703) ("If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for […] want of right and want of remedy are reciprocal […]. Where a man has but one remedy to come at his right, if he loses that he loses his right.); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163-66 (1803) ("it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded […]. [F]or it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.").

Freedoms[232] to which the EPO is not a party, however, all its Member States are.[233] Jurisprudence demonstrates the difficulty (applicant) staff members have had in bringing the international organizations for which they work before national and international courts, relying on these provisions of the ECHR.

In the case of Spaans v the Netherlands,[234] a former employee of the Iran-United States Claims Tribunal brought a claim against the host State for granting immunity from suit to the Tribunal. His grievance against the Tribunal concerned his dismissal as employee, without having receiving salary until his labor contract would have been terminated in accordance with the rules of Dutch law. The European Commission of Human Rights dismissed the case as inadmissible, as it did "not consider that such a restriction of national sovereignty in order to facilitate the working of an international body gives rise to an issue under the convention."[235]

In another case, the European Commission on Human Rights declared inadmissible an application from an employee of the EPO, in which he argued a violation of Article 6 ECHR by the Netherlands and Germany.[236] He alleged, *inter alia*, that he did not have a fair hearing by an independent and impartial tribunal concerning his complaints about certain decisions by the EPO relating to his employment with that Organisation. He also complained about a violation of Article 6 ECHR in conjunction with Article 14 ECHR with regard to the proceedings before the Administrative Tribunal of the ILO, claiming that the Tribunal discriminated against him on the basis of his national origin.[237] According to the Commission, his application was inadmissible *ratione materiae* on the grounds that litigation concerning the modalities of employment as a civil servant, on either the national or international level, fell outside the scope of the European Convention on Human Rights.[238] It is noted that the employee subsequently brought a communication to the Human Rights Committee, which declared the communication inadmissible:

---

[232] *See* ECHR, *supra*, n. 112, arts. 6, 13.
[233] *See* Council of Europe, Convention on Human Rights and Fundamental Freedoms: Status as of April 14, 2007, *available at* http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG (last visited April 15, 2007).
[234] Spaans v. Netherlands (App no 12516/86), European Commission of Human Rights (1988) 107 ILR 1.
[235] *Id*., at 5.
[236] P. v. Netherlands (App no 11056/84), European Commission of Human Rights, May 15, 1986.
[237] *See id.*
[238] *See id.*

> [The Committee] can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant. The author's grievances, however, concern the recruitment policies of an international organization, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto. Accordingly, the author has no claim under the Optional Protocol.[239]

Alleged violations of procedural basic rights guaranteed by the German Constitution in the proceeding before the EPO Board of Appeal were held to be inadmissible before the German Supreme Constitutional Court.[240] The Court held that decisions of the EPO regarding a foreign claimant did not amount to powers exercised by the sovereign, in this case the German Government (*Hoheitsgewalt*). Since standing is only granted to individuals alleging that the exercise of the *Hoheitsgewalt* infringes upon their basic rights, the case was dismissed. The European Commission of Human Rights rejected the claim on the basis that access to the German courts could be refused by Germany, so long as the standard of protection of the procedural rights within the international organization was comparable with that guaranteed under the Convention.[241] The procedure adopted by the EPO Board of Appeal was not reviewed at any point.

In another case, an appeal to decisions of the Internal Appeals Committee before the German Supreme Constitutional Court was rejected on the basis that the German Constitution does not require the protection of basic human rights in every single case.[242] According to the Court, the openness of the German Constitution to international cooperation has as a result that the protection at international level should only be comparable to that of the Constitution. The internal procedure was held to meet that standard. These judgments reflect the general approach taken by the German Supreme Constitutional Court when reviewing alleged human rights infringements by international organizations. In *Eurocontrol II*,[243] for instance, where the independence of the judges of the ILOAT was at issue, the Court generally based its

[239] H. v. d. P. v. Netherlands, Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, 29th session, Communication No. 217/1986, April 8, 1987, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0c1b9a9abf86410c1256ad10028cac6?Opendocument (last visited April 14, 2007).
[240] BverfG, 3. Kammer des Zweiten Senats, decision of 8 September 1997, NJW 1997, 1500.
[241] Ecomm'n HR 9 September 1998, *Lenzing AG v Germany*, Application No. 39025/97, para. 9.
[242] BverfG, 4. Kammer des Zweiten Senats, DVBl. 2001, 1130.
[243] BverfG, 2. Kammer, 59, 63, *available in* NJW (1982), 512, DVBl (1982), 189, DÖV (1982), 404.

analysis on the ILOAT Statute without reviewing the use made of the available procedures in practice.[244]

Since then, the European Court of Human Rights have delivered important judgments that illustrate a departure from the previous approach, and it is no longer automatically presumed that international organizations protect the human rights of their staff members.[245] In M & Co v. Federal Republic of Germany, the Commission of Human Rights held that "the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive equivalent protection. […]."[246] Similarly, in the case Matthews v. The United Kingdom, the European Court of Human Rights observed that acts of the EC as such cannot be challenged before that Court because the EC is not a Contracting Party. Yet it went on to say: "The Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer."[247] Following the same line of argument, one may conclude that whereas the EPO is not a contracting party to the ECHR, Member States party to the EPO, including, notably, Germany, Austria, and the Netherlands, must ensure that standards equivalent to the ECHR is upheld within the EPO and that the staff members' rights are ensured.

In the Waite and Kennedy decision, the European Court of Human Rights was prepared to review on the merits the argument by staff members to the European Space Agency that Germany had violated their right to access to court in accordance with Article 6, by upholding the Agency's immunity from suit.[248] A material factor in determining whether the granting of immunity was permissible was whether the staff members had available to them reasonable alternative means to effectively protect their rights under the ECHR. In the opinion of the Court of Human Rights, the European Space Agency Appeals Board, which was "independent of the Agency," was a sufficient alternative. The Court also noted that the temporary workers also had the possibility to seek redress from the firms that had employed them and hired them

[244] Please note that such scrutiny fails to apply in cases where potential employees want to appeal their rejection, since they do not have standing before the internal tribunals or the ILOAT, if it only extends to the procedural provisions created for the international organization in its statute.

[245] *Cf.* E. de Wet, *The Emerge of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN JOURNAL OF INTERNATIONAL LAW 624 (2006).

[246] M. & Co. v. Federal Republic of Germany (App no 13258/87), (1990), 64 DR 138.

[247] Matthews v. United Kingdom (App no 24833/94) [1999] ECHR 12, para. 32.

[248] Waite and Kennedy v. Germany and Beer and Reagan v. Germany, *supra*, n. 192. *See also* August Reinisch & Ulf Andreas Weber, *supra*, n. 202, at 110.

out. It is noted that the Court did not thoroughly analyze the internal procedure and it did not take into account the fact that the mechanism would probably not be available to the applicants.[249]

The ECtHR rephrased its Waite and Kennedy approach in Bosphorus.[250] It established that a State action taken to comply with its obligations resulting from their membership in an international organization could be considered in compliance with the ECHR as long as the substantive and procedural protection of fundamental rights within the international organization was equivalent to that provided for by the ECHR.[251] Manifestly deficient legal protection by an international organization would not meet the requirements of the ECHR.[252]

Subsequent to these judgments, the Belgian Court of Appeal waived the immunity of the international organization in the case S. v. Western European Union (WEU).[253] Following a detailed analysis of the internal procedure, the Court held that the proceedings before the Appeals Commission of the WEU did not satisfy the requirements of Article 6(1) ECHR.[254] In its view, the limitation on the access to national courts by virtue of the WEU's immunity would be incompatible with Article 6 ECHR.[255]

With respect to the EPO, the Organisation does not appear to sufficiently protect the human rights of its staff. Moreover, concerns have been raised about the ILOAT's compliance with fair trial criteria such as those defined in Article 6 ECHR.[256] To the extent to which this is the case, it could be argued that the courts of Germany, Austria and the Netherlands have a duty

[249] Waite and Kennedy v. Germany and Beer and Reagan v. Germany, *supra*, n. 192, at paras. 67-68; *id*., Report of the Commission, Ecomm'n HR, Dec. 2, 1997, Dissenting Opinion of Mr. G. Ress. Please note that this issue was raised in the Dissenting Opinion, but not considered by the European Court of Human Rights. *See further* August Reinisch & Ulf Andreas Weber, *supra*, n. 202, at 79.
[250] Bosphorus, *supra*, n. 128.
[251] *Id*., at para 155.
[252] *Id*., at para 156.
[253] *See* Siedler v. WEU, *supra*, n. 192.
[254] *See id*., para. 617. *Cf*. Banque Africaine de Developpement v. M.A. Degboe, French Court of Cassation 25 January 2005, Case No. 04-41012 (the impossibility of a party to a civil dispute to bring the case before a court of law that renders binding decisions, constituted a denial of justice that violated the international public order). *See generally*, Erika de Wet, *VICI Project on The emerging international constitutional order - The implications of hierarchy in international law for the coherence and legitimacy of international decision-making* (2007-2012), at 5, *available at* http://www.uva.nl/object.cfm/objectid=46AD23AE-E51C-473D-97E9E57C6E8330A1/download=true (last visited April 14, 2007).
[255] *See id*. It is noted that in applying Belgian labor law to the case at hand, the Court relied on the fact that neither the 1948 Treaty of Brussels nor the 1955 WEU Status Agreement had vested the power to adopt a personnel statute in the Council of the WEU. Hence, the WEU Staff Rules did not amount to a personnel statute in the sense of the Belgian Act on Labor Contracts, which was therefore fully applicable.
[256] *See supra*, Part E, Section 1.4.

to set aside the immunity of the EPO in a suit brought by its staff members. This argument has even greater force with respect to disabled persons not being hired by the EPO on the basis of his or her disability. S/he is left in a legal void, as there is no protection either by the international rules of the EPO nor the ILOAT, as the latter only hear complaints of staff members.

The duty of States to set aside immunity receives support from the International Law Association (ILA): "States cannot evade their obligations under customary international law and general principles of law by creating an [international organisation] that would not be bound by the legal limits imposed by its Member States."[257] Currently, the internal mechanisms of the EPO appear to exhibit a number of flaws with respect to aspects of labor protection such as health, safety and non-discrimination. Not only are these aspects not reflected in the Service Regulations, they are heeded neither by the Organisation,[258] nor the ILOAT. In such a situation, one cannot but concur with the ILA that the denial of human rights on the basis of the functional immunity of the international organization would be an absurdity.[259]

Of relevance is also the maxim *ubi jus, ibi officium*: where there is a right, there is also a duty. This right is linked to a basic general principle of law that is succinctly put forward by Cheng: the theory of abuse of rights.[260] This theory further provides for the prevention of malicious injury as basic to any legal order.[261] The principle was applied in the French Court of Cassation in the case of Avenol v Avenol.[262] The Court held that diplomatic immunity was not absolute to the extent where it was a "flagrant contradiction to the sacred and profound sentiment of justice."[263] From this, the French Court of Cassation appears to be inferring that a State has a duty to uphold justice where the rule of immunity goes against fundamental principles of justice.

[257] International Law Association, Berlin Conference 2004, *Accountability of International Organisations*, *supra*, n. 135, at 243.
[258] Jacinta paper ***
[259] *Id*., at 266.
[260] *See* Bin Cheng General Principles of Law as applied by International Courts and Tribunals 121 (Stevens & Sons Limited, 1953 London).
[261] *See id*.
[262] Avenol v. Avenol (1935-36) Annual Digest of Public International Law Cases 395.
[263] *Id*., at 396.

2.3. A Request of a Preliminary Ruling from the European Court of Justice

If we assume that the immunity barrier could be overcome, then a complaint introduced by a(n) (applicant) staff member against the EPO invoking the application of EC law would be receivable by the national court. In this scenario, the court would face the question of whether European Community law should apply to EPO as regards the circumstances described in this Report. Since "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals,"[264] the EC Treaty establishes a bridge of co-operation between the national courts and the European Court of Justice. This is the preliminary ruling procedure,[265] which will be described in this Section of the Report.

Article 234 EC of the EC Treaty empowers the European Court of Justice to give preliminary rulings on the interpretation of Community law[266] in order "to ensure the utmost uniformity in the application of the Community law and to establish for that purpose effective cooperation between the Court of Justice and national courts."[267] This procedure is "essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community."[268]

A request for a preliminary ruling takes the form of a question put to the ECJ by the national court. With respect to the application of EC law to (staff members) of the EPO, the question could be phrased in the following terms "whether (standards equivalent to) Community law applies to an international organization established on the territory of an EC Member State given the legal personality and (functional) immunity which it enjoys." And, furthermore, "if an international organization fails to apply (standards equivalent to) Community law, does this result in liability on the part of the Member State, on which territory the organization has

[264] Case 106/77, Administrazione delle Finanze dello Stato v. Simmenthal [1978] ECR 629, para.21.
[265] *Cf. infra*, Section E. 1.3.
[266] EC Treaty, *supra*, n. 13, art. 234 (1) (a) EC ("The Court of Justice shall have jurisdiction to give preliminary rulings concerning the interpretation of this Treaty; the validity and interpretation of acts of the institutions of the Community and of the ECB; the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.").
[267] Case C-221/88, Busseni [1990] ECR I-523, para. 13.
[268] Case 166/73, Rheinmuhlen v. Einfuhr-und Vorratsstelle Getreide [1974] ECR 33, para. 2.

its offices, for not ensuring that Community law is fully applied within its jurisdiction?" It would then be up to the ECJ to give its interpretation through a preliminary ruling.[269]

The procedure of referring a question to the ECJ for a preliminary ruling on the interpretation of Community law is subject to a number of rules,[270] and allows a considerable degree of discretion for national courts in putting forward the questions. In the first place, the question has to emanate from a court or tribunal of a Member State, either on its own motion or acting on the request made by one of the parties to the proceedings. But, parties to the proceedings cannot compel the national court to make a reference,[271] as the court "alone is competent under the system established by article 177 [now Article 234] to assess the relevance of questions concerning the interpretation of Community law in order to resolve the dispute before it."[272]

A second element of discretion flows from the wording of Article 234 EC Treaty. When the question is "raised before any court or tribunal of a Member State, that court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon."[273] "Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court of Justice."[274] There is a difference between the second and third paragraph of Article 234 with respect to the duty to request a preliminary ruling. For the second paragraph of Article 234, the reference for a preliminary ruling is seen as an option for the national court, while the third paragraph imposes the reference for a preliminary ruling as a duty for the highest courts in the national hierarchy. Still, the ECJ has found that also courts other than those of last resort have the same duty when they take decisions against which there is no judicial remedy.[275]

[269] *Cf*. EC Treaty, art. 220 EC ("[t]he Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.").
[270] For detailed explanations on the procedure, *see* KOEN LAENARTS & DIRK ARTS, PROCEDURAL LAW OF THE EUROPEAN UNION, Chapter 2, pp. 17-56 (Sweet and Maxwell, London, 1999).
[271] Case 93/78, Matheus v. Doego [1978] ECR 2203 at 2210, para. 4-6.
[272] Case 247/86, Alsatel v. Novasam [1988] ECR 5987 at 6007, para. 8.
[273] EC Treaty, supra, n. 13, at art. 234(2) [emphasis added].
[274] EC Treaty, *supra*, n. 13, art. 234 EC(3) [emphasis added].
[275] Case 6/64, Costa v. ENEL [1964] ECR 585, para. 3 ("By the terms of this article (article 177, now 234), however, national courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice so that a preliminary ruling may be given upon the interpretation of the Treaty whenever a question of interpretation is raised before them.").

Third, an element of discretion is allowed at the level of the courts through the application of the third paragraph of Article 234 EC that relates to the assessment of the relevance of a request for a preliminary ruling from the ECJ. The limits of this discretion were dealt with in the judgment that ECJ gave in the CILFIT Case:

> It follows from the relationship between the second and third paragraphs of article 177 [now Article 234 EC] that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant , that is to say , if the answer to that question , regardless of what it may be, can in no way affect the outcome of the case. If, however, those courts or tribunals consider that recourse to community law is necessary to enable them to decide a case, article 177 [now Article 234 EC] imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise.[276]

Therefore, the discretion of the court rests in deciding whether the question to be answered by ECJ would be necessary in deciding the case pending before it. If this question is answered in the affirmative, then "Art. 234 ECT is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice[…]."[277]

Yet, in the case of CILFIT, the ECJ also noted some exceptions to this duty. The first exception comprises the situation when an identical question has already been answered by the ECJ on a preliminary ruling.[278] This is known as the *acte éclairé* doctrine. It means that is no longer a duty for courts to ask for a preliminary ruling if the answer to the question is to be found in a previous ECJ decision. Since the question that ECJ would have to answer concerns

[276] Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health [1982] ECR 341, [1983] 1 CMLR 472, paras. 10-11.
[277] *Id*., para. 21.
[278] *Id*, para. 14 ("The same effect, as regards the limits set to the obligation laid down by the third paragraph of article 177, may be produced where previous decisions of the court have already dealt with the point of law in question , irrespective of the nature of the proceedings which led to those decisions , even though the questions at issue are not strictly identical.").

the application of EC law to EPO, and this question has not been previously addressed by the Court, either with regard to the EPO or other international organization, we are not in the situation of an *acte éclairé*.

The second exception refers to situations when "the correct application of Community law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved."[279] Before this conclusion may be drawn, however, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the ECJ. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the ECJ and take upon itself the responsibility for resolving it.[280] This exception is referred to as the *acte clair* doctrine.[281] Although this would appear to grant a wide margin of discretion, the ECJ set out conditions that the highest national courts have to take into consideration before releasing themselves from the obligation to seek a preliminary ruling. These conditions are related to the characteristics of Community law and to the difficulties with regard to its interpretation.[282] Lenaerts and Arts state that if these factors would be scrupulously taken into account, then the cases in which "the correct application of Community law is as obvious as to leave no scope for any reasonable doubt"[283] would be reduced to an absolute minimum.[284]

Despite the specificity of the conditions for the *acte clair* doctrine, there have been cases in which national courts wrongly used the CILFIT judgment in order to avoid requesting for preliminary rulings from the ECJ.[285] With the Köbler case,[286] the ECJ set new limits to the discretion that national courts enjoy in assessing the relevance of referring questions for a

[279] *Id.*, para. 16.
[280] *Id.*, para. 16.
[281] *See* P. Craig & G. de Búrca, *supra*, n. 20, Chapter 11, pp. 14-18.
[282] These conditions are as follows: 1) the interpretation of a provision of Community law involves a comparison of the different language versions, as they are all authentic (CILFIT, para. 18); 2) given the peculiarity of the Community law terminology, legal concepts do not always have the same meaning as they do in different national legal systems (CILFIT, para. 19); 3) every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied (CILFIT, para. 20).
[283] *See* Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health [1982] ECR 341, [1983] 1 CMLR 472, para. 21.
[284] Koen Laenarts & Dirk Arts, supra, n. 271, at Chapter 2, p. 51.
[285] *See* A. Arnull, *The Use and Abuse of Art. 177 [now Art. 234] EEC*, 52 M.L.R., 622-639 (1989) (the author examines the practice of English courts).
[286] Case C-224/01, Gerhard Köbler v. Republik Österreich [2003] ECR I-10239.

preliminary ruling. It held that Member States are liable for damages caused to individuals by "manifest infringements" of EC law by their highest courts,[287] and stated that the national court "was not entitled to take the view that resolution of the point of law at issue was clear from the settled case-law of the Court or left no room for any reasonable doubt. It was therefore obliged under the third paragraph of Article 177 [now Article 234] of the Treaty to maintain its request for a preliminary ruling."[288]

According to the Köbler judgment, Member States can be held liable if the highest national courts fail to request preliminary rulings in cases before them when it was obvious that neither the doctrine of *acte clair* or that of *acte éclairé* applied. There are three conditions that must be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible: (i) the rule of law infringed must be intended to confer rights on individuals, (ii) the breach must be sufficiently serious and (iii) there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.[289] Regarding the second condition, the Court has stated that "regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty" and "state liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law."[290] It is for the national courts to assess the fulfillment of this condition when hearing an individual claim for reparation, and it must take into account the characteristics of the situation put before it.[291]

It is believed that the decision in Köbler will give rise to more referrals to the ECJ for a preliminary ruling.[292] In this context it must be noted that the German national courts are the

[287] *Id.*, para. 36 ("Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance").

[288] *Id.*, para. 118.

[289] *Id*., para. 51.

[290] *Id.*, para. 53.

[291] The factors upon which the national court can assess whether there was a sufficiently serious breach are as follows: "the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC." (Köbler, para. 55).

[292] *See* Peter J. Wattel, *Köbler, CILFITt and Welthgrove: We Can't Go On Meeting Like This*, CML REV, No. 41, 177–190 (2004); Claus Dieter Clasen, *Case C-224/01, Gerhard Köbler v. Republik Österreich, Judgment of 30*

most active ones as regards the request for preliminary rulings under Article 234 EC, which is of particular interest since the EPO has its main office in Germany.[293]

From the foregoing discussion, we may conclude that a national court could request a preliminary ruling in a case concerning the application of Community law to the EPO. It would then be in the ECJ's competence to deliver its opinion on the subject. In the preliminary ruling, ECJ formally does not decide on the specific case, but delivers an answer concerning the interpretation of EC law. National courts give a final decision on the case and they cannot *de facto* deviate from the ECJ's decision.[294]

2.4. Interim Conclusions

It has been argued that national courts could allow a case against the European Patent Organisation to go forward based on a narrow and functional construction of the EPO's immunity, coupled with a reliance on the doctrine of delegated powers and the duty of the EPO to cooperate with the host States. The setting aside by German, Austrian, and Dutch courts of the EPO's immunity would also be consistent with the duty of these States as Members of the European Community to ensure the full and correct application of EC law on their territory, as well as the obligations incumbent on them pursuant to international law, including the European Convention on Human Rights and Fundamental Freedoms. If immunity is set aside, the national courts could apply for a preliminary ruling from the ECJ. It would then be up to the ECJ to decide on the applicability of EC law to the situation discussed in this Report.

3. The Invoking of State Responsibility for Upholding Immunity

If immunity from jurisdiction for the EPO is upheld by national courts, the possibility of further (legal) action at the EC and international level may still be open. In the following, it will be examined what consequences may follow from a national court upholding the

*September 2003, Full Cour*t, 41 CML Rev. 813–824 (2004).

[293] In 2005, there were 221 questions raised to the ECJ by the Member States, out of which 51 came from the German jurisdiction. *See* European Commission, Secretariat-General, XXIIIrd Report on monitoring the application of Community Law, COM(2006) 416, Annex VI: *Application of community law by national courts: a survey*, *available at* http://ec.europa.eu/community_law/eulaw/pdf/XXIII_rapport_annuel/annexe6_fr.pdf (last visited April 14, 2007) (in French).

[294] *See* D. Chalmers, et al., *supra*, n. 73, at 295-297.

immunity of the EPO; first at the European Community level, and then at the level of international law.

3.1. The European Community Level

The primary responsibility for correctly implementing and applying Community law lies with national administrations and the courts of the Member States.[295] If the national authorities fail to properly implement or apply Community law, they may be subject to sanctions from Community authorities. In addition to the specific provisions, this follows from the general principle of the rule of law, which is an important feature of the Union.

It is the duty of the European Commission, as "Guardian of the Treaties" to make sure that there is a correct application of Community law within the Member States "if it is to make the Union a reality for businesses and citizens."[296] In this Section, we will present the infringement procedure that the European Commission can start pursuant to Article 226 EC and discuss the margin of discretion that this institution has in monitoring the application of Community law.

3.1.1. The European Commission Infringement Procedure

According to Article 226 EC Treaty, the European Commission can start infringement procedures against a Member State for any measure (law, regulation or administrative action) or practice attributable to that State which it considers incompatible with a provision or principle of Community law.[297]

The infringement procedure may be initiated by the Commission on its own motion, but it may also be requested by a Member State or an individual.[298] In its annual reports, the

[295] This aspect was emphasized in the *European Governance – A white Paper*, COM (2001) 428, Brussels, 25 July 2001, *available at* http://europa.eu/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf (last visited April 14, 2007).

[296] *Id*, at p. 25.

[297] EC Treaty, *supra*, n. 13, art. 226 ("If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.").

[298] An electronic standard form for complaints can be accessed on the European Commission web site, at http://ec.europa.eu/community_law/complaints/form/index_en.htm (last visited April 14, 2007). Complaints can also be submitted by ordinary mail and at any Commission's representative offices in the Member States, see http://ec.europa.eu/comm/represent_en.htm (last visited April 14, 2007).

Commission has stressed the importance individual complaints play in establishing breaches of Community law.[299] In lodging the complaint, individuals do not have to demonstrate that they are directly concerned about the matter, and they are not party to the proceedings. "The enforcement procedure is not intended primarily to provide individuals with a means of redress, but rather an 'objective' mechanism for ensuring state compliance with EC law."[300]

The main aim of the infringement action is to compel Member States to remedy their breaches of Community law. The procedure contains several stages; it initiates by starting a dialogue with the offending Member State and it can end with referring the case to the European Court of Justice.[301]

With respect to the EPO, the complaint would be made against the Member States on which territories the Organization has its offices. The possible arguments on which the European Commission could base its infringement procedure are detailed Section 2.2.1 above.

The usefulness of the infringement procedure is limited by the fact that the Commission has a wide power of discretion in deciding whether or not to initiate proceedings.[302] The wording of Article 226 EC makes clear that the Commission "shall deliver a reasoned opinion" only if it "considers" that a Member State failed in fulfilling its obligations under the Treaty. Craig and de Búrca put forward three main arguments for this discretion: firstly, "the Commission has neither the time nor the resources to detect and pursue every instance of national infringement of Community law;" secondly, there are "pragmatic and political reasons;" and thirdly,

---

[299] *See* European Commission, *10th Annual Report* (1992) [1993] OJ C233/7; *id*., *11th Annual Report* (1993) [1994] OJ C154/6.

[300] P. CRAIG & G. DE BÚRCA, *supra*, n. 20, at Chapter 10, p. 398, 178-182.

[301] The infringement procedure contains the following steps:
1) *Pre-contentious stage*. At this stage, negotiations take place between the Member State at issue and the Commission, and the Member State is given the chance to explain and clarify the situation and the opportunity, if possible, of reaching a solution with the Commission.
2) *Formal notification*. If the matter is not clarified, the Member State will be formally notified of the alleged infringement by a letter of the Commission. The State is given a two months period to reply.
3) *Reasoned opinion.* If the matter is not resolved, Commission may proceed to the stage of issuing a reasoned opinion setting out clearly the grounds for the alleged infringement. From this moment on, the time limit set by Commission for the Member State to comply with the opinion starts running.
4) *Referral of the matter to the European Court of Justice*. This final stage of the procedure is regulated by the provisions of Article 228 EC Treaty. This Article provides that the European Court of Justice has jurisdiction to impose pecuniary penalties on a Member State that has failed to fulfill its obligations under the EC Treaty. *See* EC Treaty, *supra*, n. 13, art. 228. For a detailed description of the procedure *see* A. Dashwood & R. White, *Enforcement Actions Under Articles 169 and 170 EEC*, 14 ELREV. 388-413 (1989).

[302] For criticism, *see* A. Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 4 ELREV. 442, 445 (1979).

"enforcement actions successfully brought before the ECJ do not necessarily lead to compliance, even with the cumbersome procedure introduced into Article 228 EC."[303]

The Commission's discretion to start infringement procedures has been recognized and sustained in the judgments of the ECJ. Thus, it was held that the procedure under Article 226 EC "involves a power on part of the Commission to consider the most appropriate means and time limits for the purposes of putting an end to any contravention of the Treaty."[304] In the case Star Fruit v. Commission, the ECJ stated that "it is clear from the scheme of Article 169 [now Article 226] of the Treaty that the Commission is not bound to commence the proceedings provided for in that provision, but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position."[305] The same position has been adopted in other cases, in which the ECJ dismissed actions introduced by individuals against the decision of the Commission not to start proceedings against a Member State.[306]

Another aspect of the Commission's discretion to act rests in the areas in which it usually intervenes. Although it has an active role[307] in monitoring the application of Community law, the most numerous infringement procedures initiated by the Commission are in the field of the environment, the internal market, consumer protection, taxation, and the customs union.[308] It has been argued that the Commission is reluctant in taking action regarding claims against national judiciaries for failing to comply with Community law, since it could be seen as "putting in issue the constitutional arrangements of Member States."[309] Advocate General Warner maintained that "[i]n the judicial sphere, Article 169 [now article 226 EC] could only

[303] P. CRAIG & G. DE BÚRCA, *supra*, n. 20, at Chapter 10, p. 401.

[304] Case 7/71, Commission v. France [1971] ECR 1016. *See also* Case 7/68, Commission v. Italy [1968] ECR 428.

[305] Case 247/87, Star Fruit v. Commission [1989] ECR 291, para.11.

[306] Case C–87/89, Sonito v. Commission 1990 ECR I–1981; Case T–201/96, Smanor and Others v. Commission [1997] ECR II–1081; Case T–182/97, Smanor v. Commission [1998] ECR II–271.

[307] As regards the infringement procedure, in 2005, the Commission gave 1623 formal notifications, 737 reasoned opinions and 166 referrals to the ECJ. *See* European Commission, Secretariat-General, XXIIIrd Report on monitoring the application of Community Law, COM(2006) 416, Statistical Annex II: Infringements procedures - break down per stage reached, legal basis, Member State and sector, Table 2.1, *available at* http://ec.europa.eu/community_law/eulaw/pdf/XXIII_rapport_annuel/23_rapport_annuel_en.htm (last visited May 22, 2006) (in French).

[308] *See id*., at Table 2.4.

[309] *See* A. Dashwood & R. White, *supra*, n. 302, at 400. *See also* A. Evans, *supra*, n. 303; P. CRAIG & G. DE BÚRCA, *supra*, n. 20, at Chapter 10, p. 424.

come into play in the event of a court of a Member State deliberately ignoring or disregarding Community law."[310]

Although there is no case in which the Commission started infringement procedures on the basis of such a claim, the ECJ has held in a more recent case that a "Member State's failure to fulfil obligations may, in principle, be established under Article 226 EC whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution."[311] Therefore, it would be in the Commission's discretion to take actions under Article 226 based on the claim that national courts within the territory of the Member States where EPO has offices failed to apply Community law by deciding to uphold the immunity of the Organisation. This argument could be strengthened by the decision rendered by the ECJ in Köbler as regards the responsibility incurred by States due to decisions of the highest national courts.[312]

3.1.2. The European Ombudsman

Another alternative is to obtain a non-judicial remedy through complaints to the European Ombudsman. Article 21 EC provides that every citizen of the Union may apply to the Ombudsman established in accordance with Article 195 EC.[313] Since the procedure is open to any citizen of the Union or any natural or legal person residing or having its registered office in a Member State, EPO Staff Union members and employees would have standing to lodge complaints. The complaints can be submitted by mail, fax or e-mail. A complaint form is

[310] Case 30/77, Regina. v. Pierre Bouchereau [1977], ECR 1999, 2220.

[311] *See* Case 77/69, Commission v. Belgium [1970] ECR 237, para. 15. *See also* Case C-129/00 Commission v. Italy [2003] ECR I-14637, para. 29.

[312] *See* discussions on the *Köbler* case, *supra*, Part E, Section 2.3.

[313] Article 195(1) EC provides: "The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution concerned. The person lodging the complaint shall be informed of the outcome of such inquiries."

available from the Ombudsman's office and can be downloaded from the Ombudsman's website.[314]

The European Ombudsman investigates only cases of poor or failed administration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.[315] It cannot investigate complaints against national, regional, or local authorities in the Member States; nor against companies or private individuals, even when the complaints are about European Union matters.[316]

Therefore, the only possible avenue for EPO Staff Union and employees would be to submit a complaint against the European Commission on the basis of a failure to act under the infringement procedure described in Section 3.1.1. above. This implies that a prior complaint would have had to be lodged to the Commission in order to start infringement procedures against a Member State on which territories the EPO has its office, and the Commission must have failed to act.

One difficulty with this argument is that, as noted above, the European Commission has much discretion in initiating such procedure. However, it could be argued that such discretion is not unfettered. If it is established that there is a systematic and *male fide* failure on the part of the European Commission to decline to exercise its powers under Article 226 EC Treaty, the Ombudsman may be inclined to take action. Assuming that this is the case, the Ombudsman would first inform the European Commission about the complaint in order for it to resolve the problem. If the case would not be resolved satisfactorily during the course of the inquiries, the Ombudsman would try to find a friendly solution that puts right the case of maladministration and satisfies the complainant. If the attempt at conciliation fails, the Ombudsman can make recommendations to solve the case. If the Commission does not accept his/her recommendations, s/he can make a special report to the European Parliament. Due to the

[314] *See* European Ombudsman, *available at* http://www.euro-ombudsman.eu.int/home/en/default.htm (last visited April 14, 2007).
[315] *See* the Statute of the European Ombudsman, art. 2.2, available at http://www.ombudsman.europa.eu/lbasis/en/statute.htm (last visited April 14, 2007).
[316] *See The European Ombudsman At a glance*, available at http://www.ombudsman.europa.eu/glance/pdf/en/glance_en.pdf (last visited April 14, 2007).

specific issues with which the Ombudsman usually deals,[317] however, it is not very likely that this would be a successful remedy as regards the legal issues investigated in this Report.

3.2. The International Level

A State's failure to set aside the immunity of the EPO may also have repercussions on the international scene. The International Law Commission, in its authoritative Articles on the Responsibility of States for Internationally Wrongful Acts, provides that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission […] is attributable to the State under international law; and […] constitutes a breach of an international obligation of the State."[318] It further establishes that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[319] It is generally accepted that decisions of national courts, as State organs, are attributable to the State.[320] In the following, it will briefly be discussed whether a case can be brought against the States hosting the EPO before the European Court of Human Rights.

3.2.1. The European Court of Human Rights

The upholding of the immunity of the EPO by the national courts of Germany, Austria, or the Netherlands could be said to be in conflict with obligations incumbent on these States as Parties to the ECHR, in particular Article 14 prohibiting discrimination;[321] Article 3 prohibiting inhuman or degrading treatment;[322] Article 6 on the right to access to court in accordance with due process,[323] and Article 13 on the right to an effective remedy.[324]

---

[317] Many of the complaints lodged with the Ombudsman concern administrative delay, lack of transparency or refusal of access to information. Some concern work relations between the European institutions and their agents, recruitment of staff and the running of competitions. Others are related to contractual relations between the European institutions and private firms.

[318] ILC Articles on the Responsibility of States for Internationally Wrongful Acts, art. 2, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last visited April 14, 2007).

[319] *Id*., art.1.

[320] *Id*., art. 4. *See also* Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), Judgment, 2004 I.C.J. (Mar. 31), para. 28, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3 (last visited April 16, 2007).

[321] *See* ECHR, *supra*, n. 112, art. 14.

[322] *See id*., art. 3.

[323] *See id*., art. 6.

[324] *See id*., art. 13.

3.2.1.1. Inter-State Cases

According to Article 33 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, "[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party."[325]

Thus, it would be possible for a State Party to the ECHR to start a proceeding against Germany, Austria and the Netherlands, alleging that their upholding of immunity constitutes a violation of the ECHR. It should be borne in mind, however, that inter-state cases are quite rare. This may be explained on the basis that States are generally reluctant to bring to court another State with which it has diplomatic ties; and the fact that individuals have no legal possibility to influence such a decision.

3.2.1.2. Individual Applications

A case concerning the allegedly wrongful upholding by national courts of the EPO's immunity would more likely stem from an EPO staff member, acting in his or her own behalf. In so doing s/he would be relying on Article 34 of the ECHR: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto […]."[326]

Such a case would only be admissible before the Court to the extent to which all domestic remedies have been exhausted, and within a period of six months from the date on which the final decision was taken.[327]

3.3. Interim Conclusions

To the extent to which it can be established that staff members of the EPO do not receive sufficient protection, a decision by a German, Austrian or Dutch court to uphold the immunity of the EPO may be said to constitute a violation of both EC and international law. At the EC

[325] *Id*., art. 33.
[326] *Id*., art. 34.
[327] *See id*., art. 35.

level, the responsibility for the Member States on which territories EPO has offices could be triggered through the operation of European Commission infringement procedure as set out in Article 226 EC. Complaints to the Commission could be brought by EPO (applicant) staff members or the Commission could act on its own motion. Further, (applicant) staff members of the EPO could obtain a non-judicial remedy through complaints to the European Ombudsman. Both the Commission and the Ombudsman enjoy discretion in whether to start the infringement procedure and investigate complaints, respectively.

At the international level, EPO (applicant) staff members could – assuming that lack of sufficient protection can be established and after domestic remedies have been exhausted – bring a case against Germany, Austria, or the Netherlands before the European Court of Human Rights for a failure by these States to abide by the European Convention on Human Rights and Fundamental Freedoms.

F. GENERAL CONCLUSIONS

It could be argued that European Community law, which contains specific provisions on health, safety and non-discrimination at work, applies directly (via national law) or indirectly (through (regional) customary international law or general principles of law) to the EPO and their staff members.

Although the EPO would therefore be bound to respect these fundamental rights of staff (or their equivalence), there appear to be serious gaps in the EPO Service Regulations. These gaps do not seem to be remedied neither by the EPO's internal appeals procedure, nor by the Administrative Tribunal of the International Labour Organisation.

In view of these *lacunae*, the States that host the EPO – Germany, Austria, and the Netherlands – arguably have a duty to set aside the immunity of the EPO in order to fully guarantee the application of European Community law on their territory, or *at the very least* to ask the European Court of Justice for a preliminary ruling on this issue. This duty is reinforced by the jurisprudence of the European Court of Human Rights concerning the right to access to court.