

# OPINION

## ON THE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS NORMS TO THE INTERNAL WORKINGS OF THE EUROPEAN PATENT OFFICE

ADVOCATE PAUL BECKETT

QUINN LEGAL

[www.quinnlegal.im](http://www.quinnlegal.im)

9 JULY 2015

### INTRODUCTION

This is an opinion on the applicability of international human rights norms to the internal workings of the European Patent Office (the EPO, in both Munich and the Hague) (“EPO”), with particular reference to employment disputes.

Individual staff members can bring personal labour-related grievances to the Administrative Tribunal of the International Labour Organisation<sup>1</sup>, after having sought relief through internal means of conflict resolution. The Tribunal will apply, in addition to the internal law of the EPO, general principles of law. However, it does not consider binding any treaties or rulings to which the EPO is not party. Accordingly, human rights conventions and rulings of the human rights courts are not binding and seldom mentioned, if at all.

Corporate bodies like staff unions as such have no access to the Tribunal. Complaints by corporate bodies before the ATILO have failed, not on matters of substance (on which the ILO did not comment, having refused to rule on such cases) but on procedural grounds. Access to domestic Courts is fraught with difficulties in view of the functional immunity from jurisdiction and execution awarded to international organisations like the EPO.

The Staff Union of the EPO (SUEPO) has lobbied internally in the EPO, but the EPO has ignored all human rights arguments and has relied solely on its internal law. Those representatives of the Contracting States of the EPC who bothered to respond to SUEPO take the view that employment disputes are a matter internal to the EPO and do not seem to intend to interfere.

---

<sup>1</sup> Article 13(1) European Patent Convention

## SCOPE OF THIS OPINION

This Opinion argues that notwithstanding the external functional immunity of the EPO as an international organisation<sup>2</sup> and of its President<sup>3</sup> and staff,<sup>4</sup> international human rights norms do apply to its internal workings because they apply to the Contracting States which have created the EPO, and in accordance with the subsidiarity principle the human rights obligations of those Contracting States apply equally to the EPO itself.

This Opinion shows that the approach to date both of the EPO internally and of the Contracting States externally is misconceived and wrong in law.

The key question is not whether the immunity of the EPO can be waived in whole or in part so that its members of staff will have a right of audience in the Courts of Germany or of the Netherlands.<sup>5</sup>

The key questions are:

- whether the human rights obligations of the Contracting States filter down to the EPO and bind the EPO internally in exactly the same way as they bind the Contracting States which created the EPO; and
- whether the limitations of the ILO Administrative Tribunal in its dealings with the members of staff of the EPO can and should be remedied by the Contracting States in their capacity as Members of the ILO.

This Opinion does not examine individual allegations of abuse but instead establishes the principles which must be brought to bear when reviewing such allegations, and where the responsibility lies for ensuring that the EPO and the ILO as ultimate forum of appeal apply such principles.

## THE SUBSIDIARITY PRINCIPLE

States which have bound themselves to various international human rights norms – such as those of the United Nations, the Council of Europe and the European Union (specifically Covenants and Conventions having a direct effect within the jurisdictions of such States) -- are obliged to respect, protect and fulfil the human rights of individuals within their territories and/or jurisdictions.

The United Nations has made clear what the responsibility of States comprises:

“Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, *inter alia*, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the

---

<sup>2</sup> Protocol on Privileges and Immunities of the European Patent Organisation 5 October 1973 (“Protocol on Privileges and Immunities”)

<sup>3</sup> Protocol on Privileges and Immunities Article 13

<sup>4</sup> Protocol on Privileges and Immunities Article 14

<sup>5</sup> Therefore rendering irrelevant for the purposes of this Opinion the debate concerning sovereign immunity as a bar to suits in domestic civil courts as exemplified in *Al-Adsani v UK* 34 EHHR (2002) 280

legal guarantees required to ensure that **all persons under its jurisdiction, individually and in association with others,**<sup>6</sup> are able to enjoy all those rights and freedoms in practice.”<sup>7</sup>

The EPO is not a State and has not therefore itself been a signatory to any Covenant, Convention or other instrument on human rights. However, the EPO does not exist in a vacuum. It operates solely as a creature of the European Patent Convention under which the Contracting States to that Convention have delegated to the EPO some of their powers in the matter of the examination of applications for and the granting of patents.

If a State causes or permits a body or institution to exist, that State is responsible for the prevention of human rights abuses by that body, on the subsidiarity principle, which, simply put, means that when a State empowers a third party, then with that empowerment comes the responsibility on the part of the third party to exercise such power only in accordance with and subject to the legal limitations upon and obligations of the delegating State itself.

The third party is therefore bound inter alia by the international human rights obligations of the State which has empowered it.

By analogy, when a State authorises the existence of a business enterprise (through the establishment for example of laws promoting the formation and operation of corporations), the State cannot turn a blind eye to the manner in which those business enterprises conduct themselves:

“The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.”<sup>8</sup>

It is equally true that the Contracting States to the European Patent Convention remain responsible for the observance or non-observance by the EPO in its internal working<sup>9</sup> of all applicable international human rights norms.

---

<sup>6</sup> Emphasis added

<sup>7</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms A/RS/53/144 8 March 1999; Article 2

<sup>8</sup> Foundational Principle 1, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (“the Ruggie Principles”) A/HRC/17/31 / 21 March 2011.

<sup>9</sup> and in its external relations, which are beyond the required scope of this Opinion

Again, drawing upon the Ruggie Principles, States as members of multinational institutions (of which the EPO is a prime example) “...retain their international human rights law obligations when they participate in such institutions.”<sup>10</sup>

With specific reference to the European Convention on Human Rights it is “... clear that parties to the ECHR cannot absolve themselves from their obligations deriving from the ECHR by concluding international agreement. We can conclude from *X v Federal Republic of Germany* [1958 ECommHR app.235/56] and *Matthews v UK* [1999 ECHR app 24833/94 para 31] that parties to the ECHR remain bound by all its requirements even when they transfer powers to international organisations. When States delegate powers and at the same time grant immunity to international organisations they are required to secure adequate alternative means to ensure that the rights guaranteed by the [ECHR] are protected.”<sup>11</sup>

A useful working definition of what constitutes a State’s extraterritorial obligations is found in Article 8 of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights 2011<sup>12</sup>

#### **8. Definition of extraterritorial obligations**

For the purposes of these Principles, extraterritorial obligations encompass:

- a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory; and
- b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

The Maastricht Principles do not have the force of law, but are widely regarded as forming part of international common law and therefore applicable universally as *jus cogens*.

#### **HOW CAN EPO EMPLOYEE ENFORCE FUNDAMENTAL RIGHTS?**

On the one hand, the staff members may bring their grievances to the Administrative Tribunal of the ILO, but this does not consider human rights instruments as binding. Indeed, the ATILO on a

---

<sup>10</sup> Ruggie Principles, commentary on Article 10

<sup>11</sup> “The Non-compliance of the International Labour Organisation Administrative Tribunal with the Requirements of Article 5 ECHR” 3 August 2005, Amsterdam International Law Clinic p7

<sup>12</sup> [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) The Maastricht Principles do not purport to establish new elements of human rights law. Rather, the Maastricht Principles clarify extraterritorial obligations of States on the basis of standing international law.

number of occasions has ruled that “... neither a plea based on disregard for the principle of equity nor that based on the breach of principles enshrined in the European Convention on Human Rights, to which international organisations such as the EPO are not a party, can in any event be admitted.”<sup>13</sup>

On the other hand, there is no free access to domestic Courts because of the privileges and immunities of the EPO. Have EPO staff no effective recourse to justice when breaches of human rights are the issue?

The privileges and immunities of the EPO “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.”<sup>14</sup> It is strongly arguable that the EPO ought to be made to justify its behaviour towards its staff as being “necessary for its administrative and technical operation” (in other words, its “functional immunity”) if the EPO is to claim any form of immunity in relation to such conduct. If necessity cannot be proved – and it is strongly arguable that it cannot when oppressive conduct is concerned – then principles of immunity must be waived.<sup>15</sup>

Article 19(1) of the Protocol on Privileges and Immunities makes it clear that “the privileges and immunities provided for in this Protocol are not designed to give to employees of the European Patent Office [...] personal advantage. They are provided solely to ensure, in all circumstances, the unimpeded functioning of the organisation and the complete independence of the persons to whom they are accorded.” If the EPO breaches the human rights of its staff, then it cannot claim that its conduct is beyond challenge (save for the internal appeals procedure) on diplomatic grounds: such treatment cannot be demonstrated to be necessary or relevant to “the unimpeded functioning of the Organisation”.

In any event, faced with violations of human rights, the President is under a duty to waive immunity; and if the injustice stems from the President himself the Administrative Council has the discretion to waive the President’s immunity.<sup>16</sup>

This begs the question of what is to happen if the President’s subjective view is that immunity ought not to be waived, or if the Administrative Council itself exercises its discretion not to waive the President’s immunity. Any Contracting State has the right to “... submit to an international arbitration tribunal any dispute concerning the Organisation or an employee of the European Patent

---

<sup>13</sup> Miss E E H against the EPO [2003] ILOAT (judgment 2236) considerations para 11 (quoted in “The Non-compliance of the International Labour Organisation Administrative Tribunal with the Requirements of Article 5 ECHR” 3 August 2005, Amsterdam International Law Clinic p27

<sup>14</sup> Protocol and Privileges and Immunities Article 3(4).

<sup>15</sup> Reinisch and Weber concur; “Such language only makes sense if there are certain official acts that should enjoy immunity and other activities for which no immunity will be enjoyed. Otherwise it would indeed be redundant.” August Reinisch and Ulf Andreas Weber “In the Shadow of Waite and Kennedy” [International Organizations Law review 1: 59-110, 2004 at p 64]

<sup>16</sup> “The President of the European Patent Office has the duty to waive immunity where he considers that such immunity prevents the normal course of justice and that it is possible to dispense with such immunity without prejudicing the interests of the Organisation. The Administrative Council may waive immunity of the President for the same reasons.” Protocol on Privileges and Immunities Article 19(2)

Office [...] in so far as the organisation or the employees [...] have claimed a privilege or an immunity under this Protocol in circumstances where that immunity has not been waived.”<sup>17</sup>

One impediment is that this procedure “... shall not apply to disputes between the Organisation and the employees or experts in respect of the Service Regulations or conditions of employment or, with regard to the employees, the Pension Scheme regulations.”<sup>18</sup>

Nevertheless, it is not necessarily the case that this exclusion applies to *generic* human rights complaints – for example, a claim under Article 6 of the European Convention on Human Rights that due process has not been followed.

According to principles laid down by the **United Nations**:

“Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”<sup>19</sup>

Therefore as a general principle of international law the diplomatic status of SUEPO members is irrelevant as regards the rights of each individual member of staff to seek protection; and further to strive for improvements in the workings of the EPO:

“[There exists] the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.”<sup>20</sup>

And

“In the exercise of human rights and fundamental freedoms [...] everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of a violation of those rights.”<sup>21</sup>

The EPO does not exist isolated from general principles of international human rights law. The United Nations has made clear:

“To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has

---

<sup>17</sup> Protocol on Privileges and Immunities Article 23(1)

<sup>18</sup> Protocol on Privileges and Immunities Article 23(3)

<sup>19</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms A/RS/53/144 8 March 1999; Article 1

<sup>20</sup> Ibid. Article 8.2

<sup>21</sup> Ibid. Article 9.1

been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay."<sup>22</sup>

The pursuit of human rights ought not to result in those claiming their rights being penalised:

"The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration."<sup>23</sup>

Thus, if the ATILO is unable to enforce human rights enshrined in international conventions, then the Contracting States of the EPO must assume the responsibility, if necessary by collectively waiving the immunity of the EPO and its agents as needed.

## **THE INTERNATIONAL LABOUR ORGANISATION**

Similar considerations apply to the enforcement of rights enshrined in the Conventions of the International Labour Organisation.

The EPO cannot be a signatory to the ILO Constitution.<sup>24</sup> Nevertheless, its Contracting States are themselves signatories<sup>25</sup>, and on the subsidiarity principle the internal workings of the EPO are

---

<sup>22</sup> Ibid. Article 9.2

<sup>23</sup> Ibid. Article 12.2

<sup>24</sup> "Article 1.2. The Members of the International Labour Organization shall be the States which were Members of the Organization on 1 November 1945 and such other States as may become Members in pursuance of the provisions of paragraphs 3 and 4 of this article.

Article 1.3. Any original member of the United Nations and any State admitted to membership of the United Nations by a decision of the General Assembly in accordance with the provisions of the Charter may become a Member of the International Labour Organization by communicating to the Director-General of the International Labour Office its formal acceptance of the obligations of the Constitution of the International Labour Organization.

Article 1.4. The General Conference of the International Labour Organization may also admit Members to the Organization by a vote concurred in by two-thirds of the delegates attending the session, including two-thirds of the Government delegates present and voting. Such admission shall take effect on the communication to the Director-General of the International Labour Office by the government of the new Member of its formal acceptance of the obligations of the Constitution of the Organization."

<sup>25</sup> An alphabetical List of ILO Members can be found at <http://www.ilo.org/public/english/standards/relm/country.htm>

subject in the same way as are its Contracting States to obligations and responsibilities under the ILO Constitution and the various ILO Conventions made under it.

In particular, the provisions of Article 2 of the ILO Declaration on Fundamental Principles and Rights at Work 1998 (revised 2010)<sup>26</sup> apply:

“2. Declares that all 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 of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

[...]

(d) the elimination of discrimination in respect of employment and occupation.”

Here, too, if the ATILO is unable to enforce fundamental rights enshrined in international conventions, then the Contracting States of the EPO must assume the responsibility, if necessary by collectively waiving the immunity of the EPO and its agents as needed.

## CONCLUSIONS

The staff members of the EPO should therefore encourage – and expect – the Contracting States to intercede directly with the ILO on their behalf, notwithstanding the role of the ILO Administrative Tribunal in the internal appeals procedure of the EPO<sup>27</sup>.

Such direct intervention by the Contracting States would avoid the problem which the ILO has created by the rulings of its Administrative Tribunal on a number of occasions that “... neither a plea based on disregard for the principle of equity nor that based on the breach of principles enshrined in the European Convention on Human Rights, to which international organisations such as the EPO are not a party, can in any event be admitted.”<sup>28</sup>

The subsidiarity principle makes the ILO’s rejection of generic human rights claims by the staff members of the EPO - either on the ground that the EPO is not itself a Member of the ILO or on the ground that the EPO is not a signatory to the European Convention on Human Rights – unsound.

---

<sup>26</sup> <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>

<sup>27</sup> Article 13(1) European Patent Convention

<sup>28</sup> Miss E E H against the EPO [2003] ILOAT (judgment 2236) considerations para 11 (quoted in “The Non-compliance of the International Labour Organisation Administrative Tribunal with the Requirements of Article 5 ECHR” 3 August 2005, Amsterdam International Law Clinic p27



## SUMMARY

- The EPO itself has immunity of jurisdiction and execution as regards its relations with any organisation or individual outside its walls.
- The President of the EPO has status equivalent to that of an Ambassador.
- EPO staff have a more limited level of immunity.
- Diplomatic immunity does not prevent the pursuit of human rights.
- The EPO does not exist in a legal and diplomatic vacuum: it has been created by its Contracting States, its existence recognised under the European Patent Convention.
- Each of those Contracting States has delegated part of its authority to the EPO for the examination of applications for and the granting of patents.
- Each of those Contracting States is bound to a greater or lesser extent by international human rights norms.
- On the subsidiarity principle, the responsibility of each Contracting State under those norms which are relevant to the day to day operation of the EPO is equally a responsibility the EPO.
- Therefore, within the EPO the same range of international human rights norms which applies to each Contracting State also applies to the EPO itself.
- If the EPO internally fails to comply with international human rights norms, the Contracting States bear the responsibility before the staff of the EPO.
- The Contracting States in their capacity as signatories to the European Convention on Human Rights and to other international human rights instruments, including ILO conventions they have signed, are obliged to supervise the internal working of the EPO and intervene to correct abuses.