IDENTIFYING THE ACTORS RESPONSIBLE FOR HUMAN RIGHTS VIOLATIONS COMMITTED AGAINST STAFF MEMBERS OF INTERNATIONAL ORGANIZATIONS: AN IMPOSSIBLE QUEST JUSTICE?

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Abstract: The purpose of this article is to identify actors responsible for lack of protection for staff members of the European Patent Organisation (EPO) in particular; and thereby, of other international organizations in general. Currently, the protection provided to staff members of the EPO is insufficient for example with respect to health and safety at work. As a consequence, the employees are often left without legal redress for injuries or disabilities caused by undesirable working conditions. Establishing who can be legally responsible for this situation is of particular importance since acts or omissions of international organizations are generally not subject to review by national courts. The article will establish that the EPO, as a subject of international law endowed with legal personality, is bound to respect the health and safety of their staff members on the basis of (regional) customary international law; general principles of law; and, possibly, national law, including European Community Law. It will be also shown that member States of international organizations, as they are bound by international human rights treaties and EC law, have the obligation to ensure equivalent protection of fundamental rights within international organizations. The role of States hosting international organizations is of special importance, as the doctrine of functional immunity allows their courts to scrutinize the level of protection within those organizations, ensuring access to justice for staff members.

Key words: European Patent Organisation; fair trial; health and safety at work; immunity; international organizations; States members of international organizations; responsibility; the right to adequate means of redress.

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I. INTRODUCTION

International organizations[1] have a significant impact on the international community and on the lives of individuals. They positively influence relations between States, creating effective and friendly standards of conduct in international relations.[2] Traditionally, international organizations have been viewed as guarantors of human rights rather than potential perpetrators of human right abuses. For that reason, to raise the issue of accountability of international organizations may seem odd at first. However, due to an expansion of the activities of international organizations and a corollary rise in their number, the ancient query of *Sed quis custodiet ipsos custodies?* demands renewed attention.[3]

Because of the increasing role of international organizations and their expanding activities, the international civil servant has become an important and active figure on the international scene. As international organizations generally function outside of the legal sphere of any State, it is paramount that the organizations protect the rights of their staff members. But what happens if employment relationships lack sufficient regulation and the control exercised by internal review mechanism and administrative tribunals fails to meet internationally required standards?[4] Eventually, the question must be asked: who can be held accountable for such denial of justice?

As the nature and constituent documents of international organizations differ, we will use as an example the situation of staff members of one international organization, the European Patent Organisation (EPO).[5] The EPO is an international organization set up pursuant to the European Patent Convention (EPC).[6] It has its head office in Munich and sub-offices in Berlin, in The Hague, and in Vienna. The EPO employs more than 6,000 staff

[1] In this article, the term "international organizations" or "organizations" is used to refer to "international governmental organizations".

[2] C.F. Amerasinghe, Principles of the Institutional Law of International Organizations 7-8 (Cambridge University Press, 2005).

[3] August Reinisch, Securing the Accountability of International Organizations, vol.7, issue 2, Global Governance 1075 (2001). *Sed quis custodiet ipsos custodies?* means "But who is to guard the guards?" *Cf.* Plato, The Republic, ca. 360 B.C.

[4] *Cf.* Staff Union of the International Labour Organization, ILOAT Reform: London Resolution, 28 September 2002, available at http://www.ilo.org/public/english/staffun/info/iloat/londonres.htm (last visited 15 January 2007): "Considering that the Statute, Rules and Practices of the ILOAT do not guarantee all fundamental human rights […]".

[5] In doing so, the article draws upon previous research conducted by the Amsterdam International Law Clinic, in particular: Simona Constantin, Nikolai Napier Jørgensen, Application of European Community Law to (Staff Members of) the European Patent Organisation; Vincent A. Böhre, Sophia E. von Dewall, Ingeborg J. Middel, Cassandra E. Steer, The Non-application of International Law by the ILO Administrative Tribunal: Possible Legal Avenues for Establishing Responsibility; Nicole Kuijer, Susan L. Park, Judicial Independence of International Labor Organization Administrative Tribunal: The Potential for Reform; Keith J. Webb, Arthur van Neck, The Non-compliance of the International Labor Organization Administrative Tribunal with the Requirements of Article 6 ECHR.

[6] EPC, available at http://www.european-patent-office.org/legal/epc/ (last visited 15 January 2007).

members.[7] Their general conditions of employment are set out in the Service Regulations.[8] These Regulations are intended to cover all aspects of the employee-employer relationship. However, the protection provided to the staff members of the EPO is insufficient in a number of areas. This article focuses on problems with respect to standards of protection of health and safety at work. This lack of protection is compounded by the fact that the immunity of the premises of the EPO prevents national safety authorities from inspecting whether the work conditions meet standards provided by national law. As a consequence, the employees are often left without legal redress for injuries or disabilities caused by undesirable working conditions at the work place. This picture stands in sharp contrast to the organization'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 organization."[9]

The purpose of the article is to identify actors responsible for such lack of protection for staff members of the EPO in particular; and thereby, of other international organizations in general. The legal accountability of international organizations is of special importance since their acts or omissions are generally not subject to review by national courts. Although the EPO is not a party to human rights treaties and ILO conventions, it will be established that certain health and safety norms may be said to enjoy (regional) customary international law status; and as such, are binding on international organizations. Reference will also be made to the applicability of general principles, national and EC law. As the EPO thereby has an obligation to provide health and safety at work, the staff members have a corollary right to receive such protection. In that vein, the article will also consider the human right to receive adequate redress, including the right to a fair trial in accordance with due process (Part II).

Despite the emergence of new players at the international level, international law is still predominantly made and implemented by States. International organizations are to a large extent dependent upon States and their willingness to support them.[10] For that reason, we will also explore the existence of responsibility of States members of international organizations for acts or omissions of the latter (Part III).

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[7] EPO Annual Report (2005), Staff & Resources, available at http://annual-report.european-patent-office.org/2005/staff/index.en.php (last visited 15 January 2007).

[8] Service Regulations for Permanent Employees of the European Patent Office based on Article 33 of the EPC and adopted by the Administrative Council of the European Patent Organization in 1977.

[9] EPO, Annual Report (2005), Mission Statement, available at http://annual-report.european-patent-office.org/2005/mission_statement/index.en.php (last visited 15 January 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, available at http://annual-report.european-patent-office.org/2005/staff/index.en.php (last visited 15 January 2007).

[10] M. Akehurst and P. Malanczuk, Modern Introduction to International Law 2 (Routledge, UK, 1997).

As an effect of interference between the functional legal personality and the functional immunity of international organizations; in practice, the immunity of international organizations has tended to become absolute. As the territorial scope of human rights treaties is limited, it will be argued that host States should play a special role in scrutinizing the actions of organizations seated on their territory, defining on a case-to-case basis the extent of their functional immunity (Part IV).

It will be ultimately concluded that the EPO, as a subject of international law endowed with legal personality, is bound to respect human rights obligations that are directly binding on it, via (regional) customary law; general principles of law; and, possibly, national law, including European Community (EC) law. As a result, the EPO, as an international organization, may be held responsible for its omission to provide adequate standards of health and safety to its staff members. Pursuant to the European Convention on Human Rights, all States Members to the EPO have an obligation to ensure equivalent protection of fundamental rights within international organization. There are, however, difficulties in establishing and enforcing the secondary or concurrent liability of States Members to international organizations. In light of this, the scrutiny of the actions of international organizations by the domestic courts of the host State, i.e. Germany, the Netherlands and Austria, is of particular importance in the staff members' quest for justice (Part V).

II. THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS FOR HUMAN RIGHTS VIOLATIONS

1. The International Legal Personality of International Organizations

International organizations are generally considered subjects of international law and, in accordance with the standard definition of subjects; they are capable of independently bearing rights and obligations under international law.[11] The International Court of Justice (ICJ) observed in the *Reparations for Injuries* case that an organization's participation in international political and legal processes means "that it is a subject of international law and

[11] M.N. Shaw, International Law 191 (Cambridge University Press, 1997); A. Reinisch, International organizations Before National Courts 53 (Cambridge University Press, 2000); A. Clapham, Human Rights Obligations of Non-State Actors 59 (Oxford University Press, 2006); Article 2 of the Draft Articles on Responsibility of International Organizations, ILC, Fifty-fifth session (2003) available at http://untreaty.un.org/ilc/reports/2003/2003report.htm (last visited 15 January 2007):"the term 'international organization' refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality".

capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims."[12]

In determining the international legal personality of international organizations, reference may be made to explicit provisions to that effect in their founding instrument.[13] In the absence of any provisions, personality on the international plane may be derived from the purposes and functions of the organization, as well as its practice.[14]

The international legal personality of the EPO is explicitly set out in the EPC, Article 5: the "Organization shall have legal personality".[15] It further addresses the issue of the EPO's legal status in the Member States, noting that "the Organization shall enjoy the most extensive legal capacity accorded to legal persons under the national law of that State" and that it "may be a party to legal proceedings".[16] It can be concluded that the EPO has international legal personality. Consequently, the EPO is a subject of international law and is capable of bearing international rights and obligations.

2. International Organizations are Bound to Respect The Human Rights of Health and Safety at Work and the Right to Access to Court

In order to hold international organizations, such as the EPO, responsible for violations of human rights obligations, it first has to be established whether these obligations are legally binding on them. In general, international organizations, including the EPO, are not parties to human rights treaties such as the European Convention for the Protection of Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Consequently, those and other treaties are not binding on international organizations, thereby excluding responsibility of international organizations on the basis of treaties. However, treaties are not the only source of law in which human rights standards are protected. A certain number of human rights obligations have achieved the status of customary

[12] ICJ 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, para. 174.
[13] *See* e.g. Treaty on European Union (adopted 7 February 1992, entered into force 1 November 1993, 31 ILM 253 art 281: "The Community shall have legal personality".
[14] ICJ 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, para.185 (supporting the existence of presumptive personality).
[15] Article 5 of the Convention on the Grant of European Patents, available at www.european-patent office.org/legal/epc/e/ar4.html#A4 (last visited 8 January 2007).
[16] Article 5 of the Convention on the Grant of European Patents, available at www.european-patent office.org/legal/epc/e/ar4.html#A4 (last visited 8 January 2007).

international law (Section 2.1); may be said to constitute general principles of law (Section 2.2); and are incorporated into national law, including EC law (Section 2.3).

2.1. Customary International Law

Customary law as a source of international law is important in terms of ensuring responsibility of non-state actors, including international organizations.[17] As a direct result of their international legal personality, international organizations are now recognised to be bound by general international law including any human rights norms that have risen to the level of custom.[18] As stated by the ICJ in its Advisory Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law."[19] Although international organizations are reluctant to acknowledge in explicit terms a legal obligation to comply with human rights, declaratory statements of EPO organs seem to accept the applicability of human rights law.[20] By the virtue of an analogy with the law on state responsibility, it is commonly accepted that individual organs of an international organization enjoy legal personality derived from the legal personality of the international organization. Consequently, international law binding on the organization is *ipso facto* binding on all its organs.[21]

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[17] A. Clapham, Human Rights Obligations of Non-State Actors 80 (Oxford University Press, 2006).

[18] A. Reinisch, Securing the Accountability of International Organizations, vol.7, issue 2, Global Governance 131 (2001). See also 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 25 January 2007): "[International organizations] should comply with basic human rights obligations."

[19] ICJ 20 December 1980, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, para. 90. *Cf.* International Law Commission, Commentary on the Jus Cogens Provision of Article 53 Vienna Convention on the Law of Treaties Between States and International organizations, vol.2, issue 2, Yearbook of International Law Commission 56 (1982): "International organizations are created by treaties concluded between States […] despite a personality which is in some aspects different from that of States parties to such treaties, they are nonetheless the creation of those States. And it can not be maintained that States can avoid compliance with peremptory norms by creating organizations." in A. Clapham, Human Rights Obligations of Non-State Actors 87 (Oxford University Press, 2006). Cf. Mahnoush H. Arsanjani, Claims Against International Organizations: *Quis Custodiet Ipsos Custodies*, 7 Yale Journal of World Public Order 131, 133–34 (1981): It would be "fantastic" to assume that international organizations "are authorized to violate the principles they were established to serve" and it would "be perverse, even destructive, to postulate a community expectation that [international organizations] need not conform to the principles of public order."

[20] See Declaration adopted at the 55th meeting of the Administrative Council of December 13 to 15 1994, EPO-document CA/PV 55, CA/104/94, point 66, and Communiqué No. 257 ("The Administrative Council and the President of the Office note that when reviewing the law applied to EPO staff the ILO Tribunal considers not only the legal provisions in force at the European Patent Organization but also general legal principles, including human rights. The Administrative Council also noted with approval the President's declaration that the Office adheres to the said legal provisions and principles."). See also K. Wellens, Remedies Against International organizations 15 (Cambridge University Press, 2002).

An evolution of norms contained in human rights treaties into customary law is possible when a treaty attracts nearly universal ratification.[22] It can safely be asserted that human rights instruments, such as the Universal Declaration of Human Rights, the ICCPR, and the ICESCR have generated norms of customary international law.[23] Nonetheless, it cannot be assumed that all human rights norms have acquired a customary status.[24] Still, certain human rights norms that may not have achieved customary status in the world at large, may nevertheless be binding as regional customary international law amongst a smaller number of homogenous States. [25] As such, these norms would arguably apply to international organizations active in that particular region. In the following, we will discuss the customary international law status of the right to health and safety at work, and the right to access to court in accordance with due process.

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[21] J. Klabbers, An Introduction to International Institutional Law 55 (Cambridge University Press, 2002). See also Final Report of the International Law Association Committee on Accountability of International Organizations (2004), p. 28, available at http://www.ila-hq.org/html/layout_committee.htm (last visited 25 January 2007).

[22]T. Buergenthal, The World Bank and Human Rights, in: E. Brown Weiss, A. Rigo Suerda and L. Boisson de Chazournes (eds.), The World Bank, International Financial Institutions and the Development of International Law 96 (American Society of International Law, 1999). See also A. Clapham, Human Rights Obligations of Non-State Actors 100 (Oxford University Press, 2006): "the two Covenants and the Universal Declaration - which over time can be said to have acquired normative status either as a customary international law or as an authoritative interpretation of the Charter - constitute what has become as the International Bill of Rights." 19 September 2006: The Maldives becomes the 154th State party to ICESCR, information available at http://www.ohchr.org/english/bodies/cescr/ (last visited 8 January 2007). See also C. Tomuschat, Human Rights: Between Idealism and Realism 4 (Oxford University Press, 2003); "the wide scale acceptance of the Declaration and the Covenants constitutes "a framework which might even be said to have become binding on non-signatory States, in any event as far as substantive content is concerned." See also M. Cogen, Human Rights, Prohibition of Political Activities and the Lending Policies of World Bank and International Monetary Fund, in: Chowdhury, Denters and de Waart (eds.), The Right to Development in International Law 387 (1988): "The Universal Declaration and the Covenants represent minimal standards of conduct for all people and all nations. Intergovernmental organizations are inter-state institutions and they too are bound by the generally accepted standards of the world community." See also M. Cogen, Human Rights, Prohibition of Political Activities and the Lending Policies of World Bank and International Monetary Fund, in: Chowdhury, Denters and de Waart (eds.), The Right to Development in International Law 387 (1988): "The Universal Declaration and the Covenants represent minimal standards of conduct for all people and all nations. Intergovernmental organizations are inter-state institutions and they too are bound by the generally accepted standards of the world community."

[23] T. Meron, Human Rights and Humanitarian Norms as Customary Law 34 (Clarendon Press Oxford, 1989); International Law Commission, Report on State Responsibility, Third Report, UN Doc. A/CN.4/507, para 96, available at http://untreaty.un.org/ilc/guide/9_6.htm (last visited 15 January 2007):"one can infer that the core cases of obligations *erga omnes* are those non-derogable obligations of a general character which arise directly under general international law or under generally accepted multilateral treaties (e.g. in the field of human rights)".

[24] A. Clapham, Human Rights Obligations of Non-State Actors 86 (Oxford University Press, 2006). See also O. Schachter, International Law in Theory and Practice 340 (Hague Academy International Law, 1982): "Only some rights recognised in the Declaration and other human rights texts have a strong claim to the status of customary law".

[25]*See, e.g.*, E.T. Swaine, Regional 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 further, infra, at Section 2.4.

2.1.1. Health and Safety at Work

The right to health and safety at work is encompassed in the ICESCR.[26] First, the right to work is laid down in Article 6 in general sense, and explicitly developed towards individual dimension through the recognition in Article 7 of the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe and favourable working conditions, including the working mothers of newborns.[27] Vulnerable groups have the right to special protection.[28] Second, the ICESCR protects the right to the highest attainable standard of health in Article 12. Specifically, Article 12.2 (b) provides for the right to healthy natural and workplace environments, comprising, *inter alia*, preventive measures in respect of occupational accidents and diseases as well as adequate housing and safe and hygienic working conditions. As regards the addressees of the obligation to ensure these rights, General Comment No. 14 states refers to the general responsibility of other members of society, including international organizations:

> "While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, i*ntergovernmental* and non-governmental *organizations*, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities".[29]

Whereas the customary law status of the ICESCR is debated,[30] the Millennium Declaration and the accompanying Millennium Development Goals adopted by the United Nations (UN) General Assembly in 2000 supports the argument that at least some of the rights

[26] International Covenant on Economic, Social and Cultural Rights, available at http://www.unhchr.ch/html/menu3/b/a_cescr.htm (last visited 8 January 2007).
[27] Article 6, 7 and 10 of the ICESCR, available at http://www.unhchr.ch/html/menu3/b/a_cescr.htm (last visited 8 January 2007).
[28] See general comment No. 16 (2005) on article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights, paragraphs 23-25; general comment No. 6 (1995) on the economic, social and cultural rights of older persons, paragraph 22 and paragraph 24 on retirement; general comment No. 5 (1994) on persons with disabilities, including other references in paragraphs 20-24, available at http://www.unhchr.ch/html/menu3/b/a_cescr.htm (last visited 15 January 2007).
[29] ICESCR General Comment 14, Twenty-second session, 2000: Article 12: The Right to the Highest Attainable Standard of Health, E/2001/22 (2000), GC 14 para. 42 (Obligations of Actors Other than State Parties), available at http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument [emphasis added], (last visited 15 January 2007).
[30] See discussion in B. Simma and P. Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, in: 12 Australian Year Book of International Law 82 (1988-1999).

contained in the ICESCR have achieved the status of customary law.[31] As the Goals are agreed to by most heads of State and represent the Goals for the entire UN, Alston argues that the first six Goals (which include the right to work and health) reflect the norms of customary international law,[32] thereby binding on the EPO. In this respect, reference should also be made to the General Assembly Declaration on Social Progress and Development (1969), giving flesh to the binding international law on economic, social and cultural rights.[33] Although General Assembly declarations cannot be considered as "black letter law" creating binding obligations, it seems pertinent to accept their increasing influence in indicating the universal acceptance of certain human rights instruments, including the ICESCR.

2.1.2. The Right to Adequate Means of Redress

Due process and an effective judicial means to resolve disputes are essential elements of the rule of law.[34] The right to adequate means of redress in case of a violation of law is widely considered a norm of customary international law.[35] It includes both the procedural right of effective access to a fair hearing and the substantive right to a remedy,[36] as both elements serve as safeguards for providing adequate legal protection.

The right to a fair trial is established in several human rights instruments, such as in Article 14 ICCPR,[37] Article 6 of the ECHR, Article 8 of the American Convention on Human Rights, and Articles 7 and 27 of the African Charter on Human and Peoples Rights. It encompasses a number of guarantees for disputes of a civil nature, such as the right to a fair and public hearing; the right to a trial by a competent, independent and impartial tribunal; and the right to equality of arms.[38] Moreover, under the ECHR and the ICCPR, all Parties are

[31] Center for Human Rights and Global Justice, Human Rights Perspectives on the Millennium Development Goals: Conference Report (New York: NYU School of Law, 2003), available at http://www.nyuhr.org/images/NYUCHRGJMDGREPORT2003.pdf (last visited 8 January 2007).

[32] P. Alston, A Human Rights Perspective on the Millennium Development Goals: Paper Prepared as a Contribution to the Work of the Millennium Project Task Force on Poverty and Economic Development, para. 35 (2004), available at http://www.ohchr.org/english/issues/development/taskforce.htm (last visited 8 January 2007).

[33] General Assembly Declaration on Social Progress and Development (1969) GA Res. 2542 (XXIV), Article 6: "Social development requires the assurance to everyone of the right to work and the free choice of employment." Available at http://www.unhchr.ch/html/menu3/b/m_progre.htm (last visited 8 January 2007).

[34] Article 14 ICCPR, and Article 6.1 / 13 European Convention for the Protection of Human Rights.

[35] D. Shelton, Remedies in International Human Rights Law 182 (1999).

[36] D. Shelton, Remedies in International Human Rights Law 14-15 (1999).

[37] Article 14 of the ICCPR provides for a fair and public hearing by a competent, independent and impartial tribunal established by law, in the determination of any criminal charge against rights and obligations of an individual in a suit at law.

[38]International Convenant of Civil and Political Rights, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited 15 January 2007). Convention for the Protection of

under a legal obligation to implement the right to a fair trial in their domestic legal orders and practice.[39] The fact that the right to a fair trial is enunciated in many legal instruments and is widely recognised in domestic legal systems, has led to the conclusion that the right to a fair trial is now customary international law.[40] This implies that international organizations, including the EPO, are under a legal obligation to secure and respect the right to a fair trial in the exercise of their functions.

For the purpose of examining the normative content of the right to a fair trial, it is useful to focus on the interpretations of one of the most elaborate human rights instruments, the ECHR. Article 6(1) of the ECHR provides, *inter alia*, that: "In the determination of his civil rights and obligations […] everyone is entitled to a *fair* […] and public hearing […] by an independent and impartial tribunal […]." As such, Article 6(1) provides a general right to a 'fair hearing' in proceedings which constitute a determination of a person's civil rights and obligations, including rights established under national law. In light of our conclusion that international organizations have an obligation to provide health and safety at work, staff members of these organizations consequently have the right to a fair hearing with respect to any alleged violations of their corollary rights.[41]

Article 6(1) of ECHR contains the following specific express rights:

- the right to a hearing within a reasonable time;
- the right to an independent and impartial tribunal established by law;

Human Rights, available at http://www.hri.org/docs/ECHR50.html (last visited 15 January 2007).

[39] International Convenant of Civil and Political Rights, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited 8 January 2007). Convention for the Protection of Human Rights, available at http://www.hri.org/docs/ECHR50.html (last visited 8 January 2007).

[40] H. Hannum, The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law, 287 Georgia Journal of International and Comparative Law 345 (1995-96).

[41] The judgment by the European Court of Human Right in *Pellegrin v France* should not be construed to encompass claims against international organizations by staff members alleging lack of health and safety at work. ECtHR 8 December 1999, *Pellegrin v France*, para. 66. See e.g. Matthews v. Ministry of Defence, [2002] EWCA Civ. 773, paras. 18-33, England, Court of Appeal, 29 May 2002, available at http://www.hmcourts-service.gov.uk/judgmentsfiles/j1208/Matthews_v_Defence.htm (last visited Jan. 25, 2007): The decision in *Pellegrin* does not exclude claims in tort of public servants against the State, *in casu* an ex-service man seeking damages against the Ministry of Defence in respect of injuries caused at work by exposure to asbestos. See also European Commission for Democracy Through Law (Venice Commission), Opinion on a Possible Solution to the Issue of Decertification of Police Officers in Bosnia and Herzegovina, Opinion no. 326/2004, 24 October 2005, CDL-AD(2005)024, available at <http://www.venice.coe.int/docs/2005/CDL-AD(2005)024-e.pdf> (last visited 25 January 2007). For criticism of the *Pellegrin* judgment, see Loukis G. Loucaides, Questions of Fair Trial under the European Convention on Human Rights, 3(1) Human Rights Law Review 27, 29 (2003): "I find [the *Pellegrin*] criterion unsatisfactory and unjustified and I agree with the joint dissenting opinion in that case in saying that the concept of civil rights and obligations should cover 'all disputes that are decisive for a person's legal position, even if he or she is a civil servant'" (reference omitted).

- the right to a public hearing[42] unless it is necessary to exclude the press and public from all or part of the trial in the interest of morals, public order, national security, to protect juveniles or private life or where publicity would prejudice the interests of justice;
- the right to the public pronouncement of judgment.

The right to a public hearing consists of both the right of the parties to be present at the hearing and the right of the public to have access to hearing.[43] As noted by Doswald-Beck: "The aim is to ensure that justice is done and is seen to be done, and this cannot be verified if hearings are held in secret." [44] Moreover, in order to constitute a fair trial in compliance with the ECHR, courts must guarantee an equality of arms in adversarial proceedings, including full access to documents relating to the case, as well as public hearings regarding all factual matters.[45]

Complementing the right to a fair trial, Article 13 of the ECHR establishes the right to an effective remedy before national authorities for violation of rights under the ECHR.[46] As a consequence, an inability to obtain an effective remedy for a violation of the rights provided for by the ECHR constitutes an independent and separate infringement of the ECHR. As noted above, the right to adequate means of redress is considered customary international law. Accordingly, international organizations, such as the EPO, are also bound by the broader duty to provide a remedy.[47]

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[42] R. Clayton and H. Tomlinson, Fair Trial Rights 88 (Oxford University Press, 2001). Depending on the proceeding, the absence of public hearing at later instances generally has been held to be in accordance with Article 6 (1) so long as a public hearing was guaranteed at the first instance.

[43] L. Doswald-Beck, ILO: The Right to a Fair Hearing Interpretation of International Law, para 5, available at http://www.ilo.org/public/english/staffun/info/iloat/doswald.htm (last visited 15 January 2007).

[44] L. Doswald-Beck, ILO: The Right to a Fair Hearing Interpretation of International Law, para 5, available at http://www.ilo.org/public/english/staffun/info/iloat/doswald.htm (last visited 15 January 2007). *Cf*. ECtHR 29 October 1991, *Helmers v. Sweden*, para. 44.

[45] ECtHR 22 February 1996, *Bulut v Austria*, para. 10: "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent." L. Doswald-Beck, ILO: The Right to a Fair Hearing Interpretation of International law, para 3, available at http://www.ilo.org/public/english/staffun/info/iloat/doswald.htm (last visited 15 January 2007).

[46] Article 13 of ECHR.

[47] Cf. Effects of Awards of Compensation Made by the UN Administrative Tribunal, Advisory Opinion of 13 July 1954, I.C.J. Reports, 1954, p. 47, at p. 57: not to afford judicial or arbitral remedy would "hardly be consistent with the expressed aim of the Charter to promote freedom for individuals and with the constant preoccupation of the UN to promote this". See also Annuaire de l'Institut de Droit International, 1957, Vol. 47, II, p. 478, III, 1: Expressing the wish "that, for every particular decision of an international organ or organization which involves private rights or interests, there be provided appropriate procedures for settling by judicial or arbitral methods juridical differences which might arise from such a decision".

2.1.3.1. The European Patent Organisation Internal Procedure

The law applicable to the staff of the EPO is defined in the Service Regulations and associated terms and conditions of employment.[48] It is commonly argued in cases before the Administrative Tribunal of the International Labour Organization (ILOAT) that no other law applies, unless this is explicitly referred to in the service regulations.[49] It remains unclear how legal protection related to matters not covered in the service regulations can be provided. Moreover, since there is no defined "internal" human rights law, there is no certainty on how the obligations of the Member States to protect fundamental rights are met within the EPO.

The legal remedies lie at two levels: the internal appeal process and the Administrative Tribunal of the International Labour organization (ILOAT).[50] In order to be the subject of an internal appeal, a decision must be legally binding and adversely affecting the individual appellant.[51] This means that a decision must affect the employee personally, and it must emanate from the President or from the Administration where it has explicit or implied delegation from the President. In addition, employees have the right to ask the President to issue a decision on a particular issue that affects them.[52] A negative answer is considered an appealable decision.[53] Once employees lodge an appeal, the Internal Appeals Committee (IAC) will evaluate the case. The IAC consists of five members: two members and a chairman appointed by the President and two members appointed by the Staff Committee.[54] The IAC has possibility to request information and to carry out additional investigation. Moreover, an appellant has a right to be heard before the IAC upon request, as well as to be informed of any document or new factor produced during the investigation.[55] After evaluation, the IAC delivers the opinion together with a recommendation "as to the decision which the appointing authority is required to take".[56] While the opinion of the IAC is authoritative and

[48] Service Regulations for Permanent Employees of the European Patent Office based on Article 33 of the EPC and adopted by the Administrative Council of the European Patent Organization in 1977.

[49] A. Reinisch and U. A. Weber, In the Shadow of Waite and Kennedy, 63 International Organizations Law Review 31-38 (Leiden, Koninklijke Brill, 2004).

[50] Article 13 of the European Patent Convention.

[51] Service Regulations for Permanent Employees of the European Patent Office, Article 107: Possibility of internal appeal (1) Any person to whom Article 106 applies may lodge an internal appeal either against an act adversely affecting him, or against an implied decision of rejection as defined in Article 106. The lodging of the internal appeal shall not suspend the decision against which the appeal has been lodged.

[52] Service Regulations for Permanent Employees of the European Patent Office, Article 106 (2), A permanent employee, a former permanent employee, or rightful claimant on his behalf may submit to the appointing authority a request that it take a decision relating to him.

[53] Service Regulations for Permanent Employees of the European Patent Office, Article 108, (2), If the President of the Office has taken no decision within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected.

[54] Service Regulations for Permanent Employees of the European Patent Office, Article 110.

[55] Service Regulations for Permanent Employees of the European Patent Office, Article 113.

[56] Service Regulations for Permanent Employees of the European Patent Office, Article 112.

comprehensive, the President is not obliged to follow the advice received, regardless of whether the IAC issues a unanimous and strong opinion or a divided and ambiguous opinion.[57]

The IAC cannot be qualified as a proper judicial body as it only delivers advisory opinions, and no specific legal training is provided for the members in their role as "judges" in staff disputes. In addition, its independence may be questioned on the basis that the appointment of three of its five members is made by the President.[58] Moreover, the appeal process within the EPO is slow: in general, the overall process takes between 2-5 years.[59] This could not be considered consistent with the right to receive due process within a reasonable time.

2.1.3.2 The International Labour Organization Administrative Tribunal

The EPO provides for the jurisdiction of the International Labour Organization Administrative Tribunal after the internal appeals process has been exhausted.[60] The ILOAT was established in 1946 for the purpose of reviewing employment disputes between ILO staff and the ILO administration. The Statute of the ILOAT was later amended to permit other international organizations, such as the EPO, access to the Tribunal.[61] In view of the finality of the awards, it serves as the final arbiter of employment disputes for some 35,000 international civil servants.[62] The ILOAT is composed of seven judges who must be of

[57] Service Regulations for Permanent Employees of the European Patent Office, Article 112 does not render finality of decision to IAC opinion.

[58] Legal Protection of the Staff of the EPO, 2003 SUEPO Central Executive Committee Report, available at https://www.suepo.org/rights/public/Projects/projects.html (last visited 15 January 2007). *Cf.* L. Doswald-Beck, ILO: The Right to a Fair Hearing Interpretation of International Law, para 2.1, available at http://www.ilo.org/public/english/staffun/info/iloat/doswald.htm (last visited 15 January 2007): "A body is a "tribunal" if it is independent from the administration, can decide cases without interference from the administration, its members are themselves independent and impartial, and due legal process is guaranteed."

[59] Legal Protection of the Staff of the EPO, 2003 SUEPO Central Executive Committee Report, available at https://www.suepo.org/rights/public/Projects/projects.html (last visited 8 January 2007).

[60] Article 13 of the European Patent Convention; Service Regulations for Permanent Employees of the European Patent Office, Article 108 (3) (Statutory preconditions for this complaint include exhausting the internal means of redress, i.e., if an employee has diligently pursued an internal appeal and has received a decision of the President) and Articles 107-109. A complaint at ILOAT may also be lodged if the President refuses to forward the complaint to the IAC or if the internal appeal is not treated within a reasonable time.

[61] Annex to the Statute of the Administrative Tribunal of the International Labour Organization [hereinafter ILOAT Statute], adopted by the International Labour Conference on October 9, 1946, amended by the Conference on June 29, 1949; June 17, 1986; June 19, 1992, and June 16, 1998, available at http://www.ilo.org/public/english/tribunal/stateng.htm (last visited 15 January 2007). For a list of the organizations that have accepted the jurisdiction of the ILOAT, see http://www.ilo.org/public/english/tribunal/orgs.htm.

[62] Opinion prepared by Geoffrey Robertson Q.C., Doughty Street Chambers, London 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 15 January 2007).

different nationalities and who serve renewable terms of three years.[63] The Conference of the International Labour Organization appoints the judges, while the ILOAT elects its own President and Vice-President.[64] The ILOAT's jurisdictional power is limited to disputes concerning the alleged non-observance of the terms of appointment of staff members, and of applicable provisions of the service regulations.[65] The procedure before the ILOAT is a written one consisting of a complaint by the employee; a reply by the administration; another submission by the employee if so desired, with the administration having the final submission. If the ILOAT finds for the complainant, it can order that the disputed decision be rescinded or that the obligation relied upon be performed. If it is not possible or advisable to rescind a decision or to perform an obligation, the ILOAT can award compensation to the complainant for his/her injury. The judgments of the ILOAT are final.[66] By July 2006, the ILOAT has rendered 2568 judgements.[67]

According to the ILOAT Statute, "the Tribunal shall decide in each case whether the oral proceedings before it or any part of them shall be in public or *in camera*."[68] In case the application for an oral hearing is granted, the complainant must obtain leave from the ILOAT to present witnesses.[69] It must be emphasized that the denial of oral hearings is the rule rather than the exception; the last oral hearing took place in 1989.[70] A denial of oral and public hearings and the right to present witnesses may be said to not only infringe upon the right to a fair trial; it also reduces transparency and judicial accountability.[71] This is particularly so

[63] Article 3 of the ILOAT Statute. According to a Letter by the Registrar to the ILOAT to the University of Amsterdam, 12 December 2006, the ILO Director-General, after consultation with the Officers of the International Labour Organization Governing Body, examines potential candidatures for the position of Judge of the Administrative Tribunal on the basis of the following criteria: candidates must have experience as judges of a high national jurisdiction or equivalent status at the international level and must be representative of different systems of law.
[64] Article 4 of the ILOAT Statute.
[65] Article 2 of the ILOAT Statute.
[66] Article 4 of the ILOAT Statute.
[67] See http://www.ilo.org/public/english/tribunal/lastsesn.htm (last visited 15 January 2007).
[68] Article V of the ILOAT Statute; Article 12 of Rules of the Administrative Tribunal of the International Labour Organization [hereinafter ILOAT Rules], adopted Nov. 24, 1993, available at http://www.ilo.org/public/english/tribunal/stateng.htm#Rules (last visited 15 January 2007).
[69] Article 12 of Rules of the Administrative Tribunal of the International Labour Organization, para. 3: "Hearings shall include oral submissions by the parties and may, with leave from the Tribunal, include oral testimony by any witness."
[70] See Graph of hearing statistics 1947-2006, available at https://www.suepo.org/rights/public/Projects/projects.html (last visited 15 January 2007). Letter by the ILOAT Registrar to the University of Amsterdam, 12 December 2006: "We have no statistics concerning oral proceedings which are held once in a blue moon. The last oral hearing took place in 1989 (Judgment 986)".
[71] Opinion prepared by Geoffrey Robertson Q.C., Doughty Street Chambers, London for the Information Meeting on the ILO Administrative Tribunal Reform and related matters, para. 5, available at http://www.ilo.org/public/english/staffun/info/iloat/robertson.htm (last visited 8 January 2007): "the practice of the ILOAT to consistently deny applications for oral hearings "renders otiose Article V of the [ILOAT] Statute and Article 12 of its Rules. It is not, in my view, a practice that is permitted by the Statute: it is *ultra vires* and unlawful."

where the ILOAT system provides no opportunity for review by an independent appellate court. As noted by Robertson, a finding that the ILOAT lacks the necessary qualities of transparency,

> "does not mean that its decisions have necessarily been biased in favour of employers. What can be said is that the deficiencies in compliance with human rights standards have produced a perception of injustice, and have denied to unsuccessful complainants a proper opportunity to press their case to a more satisfactory conclusion."[72]

2.2. General Principles of Law

Human rights have an ambiguous status within international organizations. For example, it is argued by the EPO and the ILOAT that human rights are considered a part of general principles of law. As declared by the EPO Administrative Council:

> "The Administrative Council and the President of the Office note that when reviewing the law applied to EPO staff the ILO Tribunal considers not only the legal provisions in force at the European Patent Organisation but also general legal principles, including human rights. The Administrative Council also noted with approval the President's declaration that the Office adheres to the said legal provisions and principles."[73]

However, this statement does not define the rights themselves and does not refer to a body of law that could be used to interpret such rights. It should also be noted that the Declaration does not state that such rights apply, it is rather an observation of the Administrative Council, that the ILOAT applies such rights; and that the President has stated these are applied within the EPO. Nevertheless, by affirming through unilateral declaration that human rights (norms) and general principles of law are also applicable to their staff, the EPO could be considered in

[72] Opinion prepared by Geoffrey Robertson Q.C., Doughty Street Chambers, London for the Information Meeting on the ILO Administrative Tribunal Reform and related matters, para. 5, available at http://www.ilo.org/public/english/staffun/info/iloat/robertson.htm (last visited 15 January 2007). *Cf.* Ian Seiderman, Does the ILO Administrative Tribunal meet the standards of an independent and impartial judiciary?, available at http://www.ilo.org/public/english/staffun/info/iloat/seiderman.htm (last visited 14 January 2007): "The fact that a complainant does not have a right to appeal not only impairs his or her direct interests, but also may have adverse implications for the independence of the judiciary."

[73] Declaration adopted at the 55th meeting of the Administrative Council of December 13 to 15 1994; See EPO-document CA/PV 55, CA/104/94, point 66, and Communiqué No. 257. *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 14 January 2007).

breach of good faith if it would then deny to its own staff the right to the protections required by international human rights law.[74] Such denial might also give rise to the argument of estoppel.[75]

The ILOAT applies (some) general principles of law to staff disputes where the internal law of the respondent organization is silent.[76] In *Franks and Vollering v. EPO*, it held that "the law that the tribunal applies in entertaining claims that are put to it includes not just the written rules of the defendant organization, but general principles of law and basic human rights."[77] However, while the ILOAT has referred to the human rights instruments such as the ECHR,[78] and it has supported the "reference to municipal law for the sake of comparison and so as to educe certain general principles of law that apply to the international civil service,"[79] it has not referred to international human rights law or national law to remedy *lacunae*.

One area where this is of particular concern is that of health and safety standards. The lack of internal provisions regarding health and safety is not remedied by the application by the ILOAT of the general principle of duty of care. The Tribunal has affirmed that an

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[74] ICJ 20 December 1988, *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), Judgment, ICJ Reports (1988) p. 69, at p. 105: "The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' (*Nuclear Tests, I.C.J. Reports 1974*, p. 268, para. 46; p. 473, para. 49)…" See also Final Report of the International Law Association Committee on Accountability of International Organizations (2004), p. 12 available at http://www.ila-hq.org/html/layout_committee.htm (last visited 25 January 2007): "[International organizations], their organs, and their agents are under a general legal obligation to act in all their dealings in accordance with the principle of good faith."

[75] The concept of 'estoppel' is considered to be a general principle of international law founded in the broad doctrine of good faith (R. Bernhardt, Encyclopedia of International Law 118 (Kluwer Law International The Hague 2000)). If one party had reason to believe in good faith, based on the actions or words of another party, the other party may not change the situation in different manner. See also ICJ 13 September 1990, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* Judgment, ICJ Reports 92, 118-119 (1990) (defining estoppel as "statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it"). See also *Moorgate Mercantile v. Twitchings* [1976] 1 QB 225, CA at 241 (per Lord Denning MR) (defining estoppel as "a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so"); 28 Am Jur 2d, Estoppel and Waiver, § 1 ("[s]peaking generally, estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by the acts of judicial or legislative officers, or by his own deed, acts, or representations, either express or implied").

[76] ILO Administrative Tribunal, 1982, *Berthet v. European Center for Nuclear Research (CERN)*, Judgment No. 491, available at http://www.ilo.org/public/english/tribunal/fulltext/0491.htm (last visited 15 January 2007), para 19.

[77] ILO Administrative Tribunal 31 January 1994, *Franks and Vollering v. EPO*, Judgment No. 1333, available at http://www.ilo.org/public/english/tribunal/fulltext/1333.htm (last visited 15 January 2007), para. 5: "the general principles enshrined in the Convention, particularly the principles of non-discrimination and the protection of property rights ... are part of human rights, which... in compliance with the Tribunal's case law, apply to relations with staff."

[78] ILO Administrative Tribunal 4 February 2004, *J.M.W. v. EPO*, Judgment No. 2292, available at http://www.ilo.org/public/english/tribunal/fulltext/2292.htm (last visited 15 January 2007), para. 11.

[79] ILO Administrative Tribunal 6 July 1995, *Kock, N'Diaye and Silberreiss v. EPO*, Judgment No. 1450, available at http://www.ilo.org/public/english/tribunal/fulltext/1450.htm (last visited 15 January 2007), para. 19.

international organization, "bound as it is, like its own employees, to show good faith, must avoid causing them undue injury".[80] This would seem to support the view that adequate health and safety protection at work is a fundamental principle that is binding on the EPO. 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."[81]

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.[82] More fundamentally, in no case has the ILOAT reproached the EPO or any other international organization for the lack of specific provisions in their service regulations pertaining to health and safety at work, nor their practice to rely on immunity and deny national safety authorities from enforcing such provisions.

2.3. National Law, Including European Community Law

In general, national law is applicable to international organizations unless excluded expressly or implicitly in order not to affect their proper functioning.[83] However, the application of different parts of national law to international organizations varies greatly. As

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[80] ILO Administrative Tribunal 1998, *Ayowemi v. Unesco*, Judgment No. 1756, available at http://www.ilo.org/public/english/tribunal/fulltext/1756.htm (last visited 15 January 2007) para. 10.

[81] ILO Administrative Tribunal 1980, *Grasshoff (nos. 1 and 2) v. WHO*, Judgment No. 402, available at http://www.ilo.org/public/english/tribunal/fulltext/0402.htm (last visited 8 January 2007) para. 1.

[82] ILO Administrative Tribunal 1980, *Grasshoff (nos. 1 and 2) v. WHO*, Judgment No. 402, available at http://www.ilo.org/public/english/tribunal/fulltext/0402.htm (last visited 8 January 2007) para. 2: "The question in each case is whether the risk is abnormal having regard to the nature of the employment." ILO Administrative Tribunal 1980, *Zihler v. CERN*, Judgment No. 435, available at http://www.ilo.org/public/english/tribunal/fulltext/0435.htm (last visited 15 January 2007).

[83] A.S. Muller, International Organizations and their Host States: Aspects of their Legal Relationship 131 (Kluwer Law International, 1995): "as a main rule that the laws of the host state – civil, criminal and administrative – apply within the seat of an international organization unless specifies otherwise in the host arrangement."

for employment law, it is widely considered that employment relations between international organizations and their staff members are governed by a separate body of law of the organization's internal law, sometimes referred to as the "law of the international civil service"[84] and not national law.[85] The rationale for the exclusion of national law to the employment relations of international organizations partly derives from a concern that the application of national employment law of the host State may lead to arbitrary and fortuitous choices.[86] It is also asserted that only the application of a "neutral" international body of law would sufficiently safeguard employment relations from national pressures and guarantee the independence of the international civil service.[87] The jurisprudence of the ILOAT confirms this position. For instance, in *Geisler and Wenzel v. EPO*, it held that it "will not review criteria laid down in any national law. The only rules it will apply are those that govern the international civil service and in this case they are the EPO Service Regulations".[88] In another case the ILOAT expressly shared the view of UNESCO that "having been created by an international treaty it is not bound by any European or national legislation".[89]

Some scholars argue that although national law may be precluded in its application to international organizations, in practice that does not mean that it is inapplicable. 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."[90] Since the international organization is a legal

[84] C. Amerasinghe, The Law of the International Civil Service (As Applied by International Administrative Tribunals) 25, vol, 2 (1994).

[85] C. W. Jenks, The Proper Law of International Organisations 43 (Stevens and Sons Ltd., 1962). See also Final Report of the International Law Association Committee on Accountability of International Organizations (2004), p. 20, available at http://www.ila-hq.org/html/layout_committee.htm (last visited 25 January 2007): "The relations between an [international organization] and its staff members are governed by the provisions of particular employment contracts, relevant rules of the Organization, any agreement binding upon the Organization, and rules of general international law."

[86] C. Amerasinghe, Principles of the Institutional Law International Organizations 277 (2005).

[87] C. W. Jenks, The Proper Law of International Organisations 45 (Stevens and Sons Ltd., 1962).

[88] ILO Administrative Tribunal 30 June 1988, *Geisler and Wenzel v. EPO*, Judgment No. 899, available at http://www.ilo.org/public/english/tribunal/fulltext/0899.htm (last visited 15 January 2007), para. 14.

[89] ILO Administrative Tribunal 3 February 2003, *M.R.A.-O. v UNESCO*, Judgment No. 2193, available at http://www.ilo.org/public/english/tribunal/fulltext/2193.htm (last visited 15 January 2007), para. 8. The application of national law may be possible in case of an express or implied incorporation of such rules into a specific employment relationship, either in the internal law of an organization or in the employment contract. See, e.g., ILO Administrative Tribunal 6 July 1995, *Kock, N'Diaye and Silberreiss v. EPO*, Judgment No. 1450, available at http://www.ilo.org/public/english/tribunal/fulltext/1450.htm (last visited 8 January 2007), para. 19: "although it is ordinarily and essentially competent in a context of international law, it may well have to heed some provisions of municipal law where, as indeed in this case, there is *renvoi* to such law in a contract of service or in an organization's rules."; Court of Appeal of Paris (Twenty-first Chamber) of 7 February 1984, *International Institute of Refrigeration v. Elkaim*, Cour de Cassation of 8 November 1988, 1. ch civ; AFDI (1989), 875; 77 ILR (1988), 498-506 – 499.

[90] H.G.Schemers, International Institutional Law 1610 (Martinus Nijhoff Publishers, 1999).

subject on national territory, the national law would still apply on the entirety of the territory including the international organization.

In addition, it could be argued that national law should apply in situations where the internal law of an organization does not (adequately) provide for recognised employment rights for staff members. Presumably, international organizations have the obligation to grant a sufficient level of protection to their employees whenever they claim an exemption from national jurisdiction or national legislation. In the context of the ECHR, it is only when an equivalent level of protection is safeguarded within the organization that a Member State may deny jurisdiction on the basis of the organization's immunity. This was clearly stated by the European Court of Human Rights in the *Waite and Kennedy* case: "a material factor in determining whether granting ESA immunity from German jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."[91] This may become a crucial argument for the application of national law to the relationship between staff members and international organizations.

Further support with respect to the area of health and safety in particular may be derived from Article 20 of the EPO Protocol on Privileges and Immunities, according to which:

> "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."[92]

It is noted that EC law forms part and parcel of the national law of the three States hosting the EPO, by virtue of their membership to the EC.[93] As the Service Regulations of the EPO do not contain any provisions on health and safety, and for the reasons just stated, EC law would arguably be applicable as part of national law in order to fill in this *lacuna*.

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[91] ECtHR, 18 February 1999, *Waite and Kennedy v Germany*, Application No. 26083/94, available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=26083/94&sessionid=9536527&skin=hudoc-en (last visited 15 January 2007), para. 68.

[92] Article 20, Protocol on Privileges and Immunities of the European Patent Organization, 5 October 1973, 1065 UNTS (1999). Available at www.european-patent-office.org/legal/epc/e/ma5.html (last visited 15 January 2007) (emphasis added).

[93] ECJ 15 July 1964, *Costa v. ENEL*, Case 6/64 [1964] ECR 585, at 593: "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."

2.4. Regional Customary International Law

Whereas the right to access to court in accordance with due process enjoys customary international law status,[94] the same is not necessarily the case with regard to health and safety at work.[95] Alongside the fact that all Members of the EPC are Parties to the ICESCR,[96] several regional instruments recognise the right to work and health.

The European Social Charter of 1961 and the Revised European Social Charter of 1996 stresses elimination of occupational hazards so as to ensure that health and safety at work are provided for by law and guaranteed in practice; as well as fair working conditions as regards pay and working hours, protection from sexual and psychological harassment, promotion of joint consultation, collective bargaining, conciliation and voluntary arbitration, protection in case of dismissal, the right to strike, and access to work for persons with disabilities.[97] In light of the fact that the Charter has been signed by 38 States, including all States Members to the EPC,[98] it could be argued that the Charter gives evidence of the existence of regional customary law binding on the EPO and its Member States.[99]

Further, the European Community has enacted numerous provisions relating to labour protection. The area of health and safety and work has been stated to be one of the EC's most important social policy areas.[100] Article 137 of the EC Treaty gives the EC authority to legislate in this field.[101] In particular, Directive 89/391/EEC, or the Framework Directive, addresses specific issues such as chemical agents, noise, and pregnant workers.[102] There is also a special EU agency, the European Agency for Safety and Health at Work set up to make Europe's workplaces safer, healthier and more productive; and in particular to promote an effective prevention culture.[103] Whereas it could be argued that the regional practice of the EC

[94] *See supra*, at p 10.
[95] *See supra*, at p 9.
[96] Status of Ratifications of the Principal International Human Rights Treaties, available at http://www.unhchr.ch/pdf/report.pdf (last visited 8 January 2007).
[97] See at http://www.coe.int/T/E/Human_Rights/Esc/ (last visited 8 January 2007). The European Committee of Social Rights (ECSR) is the body responsible for monitoring compliance in the states party to the Charter.
[98] Liechtenstein, Monaco and Switzerland signed but did not ratify the European Social Charter. See at http://www.humanrights.coe.int/cseweb/gb/GB1/GB1.htm (last visited 15 January 2007).
[99] The number of signatory States is 46 and 38 of them have ratified the Charter, including all EPC Member States. See at http://www.coe.int/T/E/Human_Rights/Esc (last visited 15 January 2007).
[100] See at http://osha.europa.eu/about/ (last visited 15 January 2007).
[101] Article 137 of EC Treaty.
[102] See European Agency for Safety and Health at Work, available at http://osha.europa.eu/help (last visited 2 January 2007); International Labour Organization, International Labour Law, available at http://www.itcilo.it/english/actrav/telearn/global/ilo/law/lablaw.htm (last visited 15 January 2007).
[103] See at http://osha.europa.eu/about/ (last visited 15 January 2007).

is evidence of regional customary international law, not all States Parties to the EPC are Members of the EC.[104] Thus, while health and safety at work might be considered regional customary international law binding on States parties to the EC, the principle that obligations on third parties can only be binding if freely consented to may prevent this area from being binding on the EPO.[105]

3. Human Rights Violations by International Organizations Entail International Responsibility

In the *Chorzow Factory* case, the Permanent Court of International Justice held that it is a principle of international law that "the breach of an engagement involves an obligation to make reparation in an adequate form".[106] Whereas the principle was held to apply to States, it is reasonable to extend it to international organizations.[107] The imposing of obligations on organizations without the corollary sanction of responsibility in case of breach leaves the notion of obligations hollow and meaningless. Such responsibility is explicitly endorsed by the International Law Association Committee on Accountability of International Organizations: "No situation should arise where an [international organization] would not be accountable to some authority for an act that might be deemed illegal. The principle that [international organizations] may be held internationally responsible for their acts is nowadays part of customary international law."[108] Importantly, the Committee states that the international responsibility of an international organization remains regardless of whether the act or omission in question is considered lawful by the organization's internal legal order.[109]

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[104] A list of the EPC Contracting Parties is available at http://www.european-patent-office.org/epo/members.htm (last visited 14 January 2007).

[105] Article 34 of the Vienna Convention on the Law of Treaties, ILM 679 (1979), available at http://web.archive.org/web/20050208040137/http://www.un.org/law/ilc/texts/treatfra.htm (last visited 8 January 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 8 January 2007).

[106] PCIJ 21 November 1927, *Case Concerning the Factory at Chorzow*, Series A, Judgment No. 8, para 21.

[107] J. Klabbers, An Introduction to International Institutional Law 307 (Cambridge University Press, 2002). Cf. Eisuke Suzuki and Suresh Nanwani, Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks, 27 Michigan Journal of International Law 177, 179 (2005): "It is now clear that the legal personality of international organizations entails a responsibility for their conduct."

[108] Final Report of the International Law Association Committee on Accountability of International Organizations (2004), p. 26, available at http://www.ila-hq.org/html/layout_committee.htm (last visited 25 January 2007) (reference ommitted). See also id., at 27: "Every internationally wrongful act of an [international organization] entails the international responsibility of that [international organization]."

[109] Final Report of the International Law Association Committee on Accountability of International Organizations (2004), p. 26, available at http://www.ila-hq.org/html/layout_committee.htm (last visited 25 January 2007) (reference ommitted). See also id., at 27: "The characterization of an act of an [international organization] as internationally wrongful is governed by international law. Such characterization is not affected

Thus, the EPO may not invoke the lack of any health and safety provisions in the EPO Staff Regulations as a defense. The need for sanctions also appears to constitute the starting point of the International Law Commission in its work on providing a framework for the responsibility of international organizations.[110] Thus, whereas the more detailed scope of the responsibility of international organizations for violations of international law is yet to be delineated,[111] its existence in international law is accepted.

4. Interim Conclusions

The EPO possesses international legal personality and is consequently a subject of international law, i.e. a bearer of international rights and obligations. The EPO is bound to respect those human rights obligations that are directly binding on it, via (regional) customary law; general principles of law; and, possibly, national law, including EC Law. As a result, the EPO may be held responsible for the breaches of its international obligations.

The right to health and safety at work and the right to access to court may be said to have achieved the status of (regional) customary international law. The EPO is bound by these human rights obligations. Consequently, in case of a breach, the EPO could be held responsible before domestic courts when immunity from domestic jurisdiction would be lifted due to the absence of reasonable alternative means within the Organisation. Whether this possibility exists in presence will be discussed more fully below.

III. THE RESPONSIBILITY OF STATES MEMBERS OF AN INTERNATIONAL ORGANIZATIONS FOR HUMAN RIGHTS VIOLATIONS COMMITTED BY THE ORGANIZATION

The relationship between international organizations and their member States has always been perceived as complex. There would not be international organizations without member States and States would not play the role of member States without the organizations.

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by the characterization of the same act as lawful by the [international organization's] internal legal order."

[110] Article 1(1) Draft Articles on Responsibility of International Organizations, ILC, Fifty-fifth session 2003, available at http://untreaty.un.org/ilc/reports/2003/2003report.htm (last visited 15 January 2007): "The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law."

[111] *Cf.* Report of the Working Group on Responsibility of International Organizations, UN GAOR, 54th Session, para. 9, UN Doc.A/CN.4/L.622 (2002), available at http://www.un.org/law/ilc/sessions/53/54sess.htm (last visited 15 January 2007): international organizations "vary so much that with regard to responsibility it may be unreasonable to look for general rules applying for all international organizations".

Membership in an international organization gives a State an additional role, as part of the organs of international organization, where it must act in a good faith pursuing the goals of the organization and fulfil any additionally formulated obligations.[112] Legal opinions on the relationship between an international organization and its member States fluctuate from the approach that views the organization as a mere vehicle for the activities of member States that are responsible for controlling the actions of the organization; to the opposite position that acknowledges the organization as a distinct entity, excluding responsibility of member States. Frequently, there is a shifting of blame from an organization to member States and vice versa, leaving victims of abuse without redress.

In examining the responsibility of States Members of the EPO for human rights violations committed by the Organisation, this Section is divided in two parts. The first examines whether it is possible to establish secondary responsibility of member States in cases when an international organization cannot meet its obligations under international law. The second part discusses the possible existence of responsibility on the part of members States on the basis that States are bound to protect human rights in the area of health and safety at work and the right to access to court by international treaties and EC law.

1. Concurrent and Secondary Liability of Member States for Obligations of International Organizations

As a general rule, subjects of international law are responsible for their own acts and omissions. The attribution by States of legal personality to an international organization is often seen as evidence of the intention of States to create a separate entity, also for purposes of liability.[113] There may, however, be situations where, for example, an organization violates fundamental rights of international law or abuses its legal personality in different ways. In those cases, it has been argued that the "corporate veil" of the organization should be pierced so as to recognise also liability of Member States.[114]

It is generally agreed that the concurrent liability of Member States exists only if constituent document of organization provides for it.[115] However, most international organizations, including the EPO, do not refer to the issue of Member States liability in their

[112] N. Blokker, International Organizations and Their Members, 1 International Organizations Law Review 147 (2004).
[113] J. Klabbers, An Introduction to International Institutional Law 316 (Cambridge University Press, 2002).
[114] J. Klabbers, An Introduction to International Institutional Law 317 (Cambridge University Press, 2002).
[115] C. Brölmann, A Flat Earth? International Organizations in the System of International Law, 70 Nordic Journal of International Law 332 (2001).

constituent documents. The main exceptions in this respect are financial institutions whose activity entails financial risk. Those organizations explicitly limit liability of their Member States for the obligations of the institutions.[116]

What seems to be more problematic, however, is whether Member States incur secondary liability when the organization is not able to meet its obligations under international law.[117] Some scholars maintain that in the absence of specific provisions on limited responsibility in international law, members are liable for the obligations of their organizations. Others argue that unlimited liability of Member States cannot be concluded merely as a consequence of non-existence of international rule regulating the issue.[118] Disagreement between scholars as to the existence or exclusion of secondary liability of States is a corollary of the absence of rules of international law that confer such liability for States for obligations of international organizations merely due their membership. It has been argued that the lack of general and comprehensive rules regarding the liability of Member States to third parties for the obligations of international organizations is of great significance as regards the credibility and independence of international organizations.[119]

Concrete attempts have been made to establish secondary liability of States for acts or omissions of organizations to which they are members. The first such endeavour was the *International Tin Council* (the ITC) litigation.[120] In 1985, when the ITC became insolvent, its creditors commenced a series of actions in the UK courts in which they sought to invoke the responsibility of the Member States for debts of the ITC.[121] The creditors argued that as a legal entity the ITC had no separate existence from that of its Member States and contracts concluded in its name were therefore contracts by the Member States. They maintained that

[116] See examples in J. Klabbers, An Introduction to International Institutional Law 315-316 (Cambridge University Press, 2002).

[117] C. Brölmann, A Flat Earth? International Organizations in the System of International Law, 70 Nordic Journal of International Law 332 (2001).

[118] See the opinions on liability of Member States of international organizations in C.F. Amerasinghe, Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent, 85(2) American Journal of International Law 265-269 (1991). See also C. Brölmann, A Flat Earth? International Organizations in the System of International Law, 70 Nordic Journal of International Law 332-333 (2001); M. Hirsch, The Responsibility of the Members of International Organizations: Analysis of Alternative Regimes, 6(2) Griffins View (2005), available at http://www.rechten.vu.nl/dbfilestream.asp?id=1770 (last visited 15 January 2007).

[119] R. Higgins, Report on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties, Session of Lisbonne, Institute of International Law (1995), Article 8.

[120] The issue of secondary and concurrent liability was raised two cases: Court of Appeal, *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1988] 3 All E.R. 257 and the House of Lords, *J. H. Rayner Ltd v Department of Trade and Industry* [1989] 3 W.L.R. 969. See C.F. Amerasinghe, Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent, 85(2) American Journal of International Law 263 (1991).

[121] Article 6 of the 1972 International Tin Council Order provided for immunity of the organization from "suit and legal process".

the Member States were secondarily responsible under English domestic law for the debts of the organization. Alternatively, the creditors sought such responsibility of the ITC Members under international law as sovereign States having established international organization by treaty and without disclaiming any such liability in that treaty. Finally, since under the Sixth International Tin Agreement the ITC was authorized to contract only as an agent for the Member States, they argued that the Members were responsible as principals.[122] The English Court of Appeal dismissed this part of the claim.[123] With reference to domestic law, the Court of Appeal held:

> "the ITC has full juridical personality in the sense that it exists as a separate legal entity distinct from its members; though it is sufficient to dispose of this case to say that it has the characteristic attribute of a body corporate which excludes the liability of the members, that is to say the ability to incur liabilities on its own account which are not the liabilities of the members".[124]

As regards the responsibility of the International Tin Council Members under international law, the House of Lords reaffirmed that there was no evidence of a rule of international law conferring secondary or concurrent liability on Member States.[125]

By way of contrast, in the litigation against Member States of the Arab Organization for Industrialization (AOI) in the *Westland Helicopters* case,[126] the Court set up by the International Chamber of Commerce found the Member States responsible in the absence of exclusion, expressly or impliedly, of their responsibility in the constituting document. For reasons not related to responsibility, the award was subsequently annulled by the Court of Justice of Geneva,[127] and the annulment was upheld by the Federal Supreme Court.[128] Without referring explicitly to the secondary responsibility of Member States, however, the Federal Supreme Court highlighted the "total legal independence" of the AOI.[129]

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[122] *Macline Watson & Co Ltd v. International Tin Council* (No 2) [1988] 3 All ER at 294.
[123] C.F. Amerasinghe, Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent, 85(2) American Journal of International Law, 259-280 (1991).
[124] Court of Appeal, *Maclaine Watson & Co Ltd v Department of Trade and Industry* [1988] 3 All E.R. 44.
[125] House of Lords, *J. H. Rayner Ltd v Department of Trade and Industry* [1989] 3 W.L.R. at 983 (per Lord Templeman), and 1014-15 (per Lord Oliver). *Cf.* C.F. Amerasinghe, Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent, 85(2) American Journal of International Law 265 (1991).
[126] *Westland Helicopters Ltd and Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*, Award of 5 March 1984, in 80 ILR 600, p. 613.
[127] Court of Justice of Geneva 23 October 1987, *Arab Organization for Industrialization and others v. Westland Helicopters Ltd*., in 80 ILR 622.
[128] Swiss Federal Supreme Court 19 July 1988, *Arab Organization for Industrialization and others v. Westland Helicopters Ltd*., in 80 ILR 652.
[129] Swiss Federal Supreme Court 19 July 1988, *Arab Organization for Industrialization and others v. Westland Helicopters Ltd*., in 80 ILR 658.

In light of the foregoing, it can be concluded that it will prove difficult to establish either any concurrent or secondary liability on the part of EPO Member States for the acts or omissions by the Organisation.[130]

2. Responsibility of Member States on the Basis of International Human Right Treaties and European Community law

2.1. International Human Rights Treaties

Unlike international organizations, Member States are bound by international treaties to protect human rights in the area of health and safety at work and the right to access to court. In the case of the EPO, all parties to the EPC have signed and ratified the ECHR,[131] the ICCPR,[132] and the ICESCR.[133] Although wide discretion is given to States as regards the application of those treaties, all Member States of the EPO are legally bound to ensure compliance with fundamental rights and freedoms. However, most human rights treaties, apart from the ICESCR, limit the obligations of the Contracting Parties to "their territory or within their jurisdiction."[134] Whereas it has been acknowledged that in exceptional circumstances a State can be held responsible for breaches of the provisions of a treaty to which it is a party in relation to acts done outside its territory,[135] it remains unclear whether all

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130 Cf. Final Report of the International Law Association Committee on Accountability of International Organizations (2004), p. 33, available at http://www.ila-hq.org/html/layout_committee.htm (last visited 25 January 2007): noting "the probable absence of a general rule of international law on co-responsibility of Member States for the non-fulfillment by the [international organization] of its commitments and obligations towards third parties."

131 Status of Ratifications of the Principal International Human Rights Treaties, available at http://www.unhchr.ch/pdf/report.pdf (last visited 11 January 2007).

132 Status of Ratifications of the Principal International Human Rights Treaties, available at http://www.unhchr.ch/pdf/report.pdf (last visited 11 January 2007).

133 Status of Ratifications of the Principal International Human Rights Treaties, available at http://www.unhchr.ch/pdf/report.pdf (last visited 11 January 2007)

134 Article 2(1) of the International Covenant on Civil and Political Rights, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; Article 1 of the European Convention of Human Rights, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf (last visited 15 January 2007).

135 In HRC General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004 the Commission held that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party". This statement found confirmation in *Burgos/Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 at 88 (1984) and in ICJ 9 July 2004, *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 43 International Legal Materials 1009 (2004). The Court found "that the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory." However, in contrast to the Human Rights Committee's broad reference to conduct by authorities "that affect[s]

acts of a State done in exercising its membership in international organization fall within a scope of such responsibility.

In case fundamental rights within international organizations are at stake, Member States can, however, be held accountable for not providing sufficient protection. In the *Heinz* case, the European Commission of Human Rights stated that a transfer of powers to an international organization does not exclude the responsibility of a State under the ECHR with regard to the exercise of those powers.[136] This principle has later been reaffirmed by the European Court of Human Rights (ECtHR) in *Waite and Kennedy*,[137] *Beer and Regan*,[138] and *Matthews*.[139] As recognised by the ECtHR, the establishing of an international organization may have implication as to the protection of fundamental rights of its staff members. For that reason, it is important that States remain responsible under the ECHR as to the activities covered by the attribution of powers to the organization.[140] In *Senator Lines*, the ECtHR stated that: "A transfer of powers to an international organization cannot remove acts of the organization from the ambit of control mechanisms established by particular treaties nor can it exclude the responsibility of the States who transferred powers to an international organization."[141] The International Commission of Jurists in its submission to this case took the view that "the Court should accept the possibility of Member States' responsibility for the conduct of organs of international organizations of which they are members."[142] It considered that "it would be unacceptable for violations of basic rights to go unredressed merely because the perpetrator is an international body established by the State, rather than the State itself. States should not be allowed to escape their obligations by transferring powers to international organizations."[143] This statement is supported by the International Law Association:

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the enjoyment of rights," the Court accepted more limited notion of "acts done (. . .) in the exercise of its jurisdiction." See also ECtHR 10 May 2001, *Cyprus v. Turkey,* Application No. 25781/94 (the Court has found that the ECHR is applicable outside of territory of the State).

[136] Ecomm'n HR 10 January 1994, *Heinz v. Contracting Parties who are also Parties to the European Patent Convention*, Application No. 12090/92.

[137] ECtHR 18 February 1999, *Waite and Kennedy v Germany*, Application No. 26083/94, para. 73.

[138] ECtHR 18 February 1999, *Beer and Regan v Germany*, Application No. 28934/95, para. 57.

[139] ECtHR 18 February 1999, *Denise Matthews v. United Kingdom*, Application No. 24833/94, para. 32.

[140] ECtHR 18 February 1999, *Waite and Kennedy v Germany*, Application No. 26083/94, para. 67. See also ECtHR 18 February 1999, *Beer and Regan v Germany*, Application No. 28934/95, para. 57.

[141] ECtHR 30 March 2004, *Senator Lines GmbH v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Application No. 56672/00, para. 46.

[142] ECtHR 30 March 2004, *Senator Lines GmbH v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Application No. 56672/00, para. 46.

[143] ECtHR 30 March 2004, *Senator Lines GmbH v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Application No. 56672/00, para. 46.

> " [M]embership of an [international organization] does not suspend or terminate the responsibility of any State for continuing compliance with rules of international law applicable to that State, while there is a conventional and/or customary legal obligation for Member States to ensure through adequate supervision that [international organizations] act within the constraints of applicable international law and in such a way as not to cause unnecessary damage to third parties."[144]

In light of the broad language of these opinions, and specifically the lack of reference to the territory of States, it might be concluded that despite the relocation of powers by States to an international organization, the responsibility for protecting fundamental rights within the organization remains with all the States Members of the treaty in question. Otherwise the creation of an international organization would allow States to circumvent those standards they have agreed upon under international human right treaties like the ECHR.

Nevertheless, the question remains how those obligations may be enforced. The territorial scope of human rights treaties seems to limit the possibility of legal recourse to the Member States hosting international organizations on their territory. As a consequence, the role of fulfilling international obligations is attributed to the national courts of the Host States. Regrettably, these courts often fail to meet their responsibility, leaving staff members without a remedy and the organs of the international organization with an unlimited discretion when it comes to meeting their obligations under international law.[145]

2.2. European Community Law

International organizations form an integral part of the Community legal order and EC law applies to an international organization established on the territory of an EC Member State.[146] The question can be asked what happens when an international organization, in this case the EPO, does not apply EC law. Are the Member States of the EPO responsible for violating EC law? Membership in 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

[144] International Law Association, New Delhi Conference (2002), Committee on Accountability of International Organisations, p. 13, available at http://www.ila-hq.org/pdf/Accountability/Accountability%20Of%20International%20organisations%202002.pdf (last visited 15 January 2007). See further: Final Report of the International Law Association Committee on Accountability of International Organizations (2004), p. 18 available at http://www.ila-hq.org/html/layout_committee.htm (last visited 25 January 2007).
[145] C. Walter, Grundrechte gegen Hoheitsakte internationaler Organisationen , 129 Archiv des oeffentlichen Rechts Band 60 (2004).
[146] N. Lavranos, Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Members States 53 (Europa Law Publishing, 2004).

the EU legal system.[147] The duties of the Member States in relation to EC law are apparent from the *ERTA* decision[148] concerning the obligation of the Member States to co-operate with the EC.[149] Member States should therefore not be allowed to "hide behind" the EPO to contravene the application of EC law.

The right of an individual to reparation from a Member State was recognised by the European Court of Justice (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."[150] The principle of State liability applies if the conditions specified by the ECJ are fulfilled.[151]

Additionally, at the EC level, the responsibility for the Member States on which territories the 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 staff members or the Commission could act on its own motion. Further, staff members of the EPO could obtain a non-judicial remedy through complaints to the European Ombudsman.[152]

However, since not all the Contracting Parties of the EPC are Members of the EC,[153] the application to the EPO of EC law might run counter to the legal principle that obligations on third parties can only be binding if freely consented to.[154] Moreover, since national courts are responsible for upholding EC law on the territory of the Member States,[155] it can be argued

[147] N. Lavranos, Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States 193-196 (Europa Law Publishing, 2004).

[148] ECJ 31 March 1971, Case 22/70, *Commission v Council (ERTA)* [1970] ECR 263. In para. 21 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 fulfilment 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."

[149] EC Treaty, art. 10.

[150] ECJ 19 November 1991, Cases C–6 & 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I–5357, para. 37.

[151] (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. See ECJ 19 November 1991, Cases C–6 & 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I–5357, para. 38-43.

[152] However, both the Commission and the Ombudsman enjoy discretion in whether to start the infringement procedure and investigate complaints, respectively.

[153] A list of the EPC Contracting Parties is available at http://www.european-patent-office.org/epo/members.htm (last visited 15 January 2007).

[154] Vienna Convention on the Law of Treaties, art. 34, ILM 679 (1979), available at http://web.archive.org/web/20050208040137/http://www.un.org/law/ilc/texts/treatfra.htm (last visited 8 January 2007) (*pacta tertiis nec nocent nec prosunt*). *See also* Decision of the Enlarged Board of Appeal 26 April 2004, G 2/02 and G 3/02, available at http://legal.european-patent-office.org/dg3/pdf/g020002ep1.pdf (last visited 15 January 2007).

[155] ECJ 30 September 2003, Case C-224/01, *Gerhard Köbler v. Republik Österreich* [2003] ECR I- 10239.

that only Germany, Austria and the Netherlands are responsible for ensuring that fundamental rights of employees at the EPO are complied with. National courts may request a preliminary ruling from the European Court of Justice to obtain clarity with respect to the obligations of EC Member States vis-à-vis international organizations (seated on their territory).[156]

3. Interim Conclusions

There exist difficulties in determining the concurrent or secondary liability of member States for acts or omissions of international organizations. For that reason it is necessary to look for another possible legal avenue that could lead to redress for staff members of international organizations.

International organizations can only exercise their regulatory powers to the extent that they have been granted these by their member States.[157] The competences of the member States have previously been limited by their commitments under the human rights treaties and a member State should not be allowed to escape its obligations by transferring competences to international organizations. Accordingly, States Members to the EPO remain responsible for ensuring equivalent protection of fundamental rights within the EPO. Jurisprudence and scholarship seems to support a general obligation for all members to human rights treaties to ensure equivalent protection within international organizations to which they are members, even though in usual circumstances the application of human right treaties is limited to the territory or jurisdiction of the State.

It has to be emphasized, however, that despite the fact that all Member States of the EPO may therefore be held responsible, enforcement of such responsibility towards all of them is difficult, if not impossible. The only viable alternative appears to be the national courts of the States hosting the EPO on their territory, as these States are responsible for avoiding situations where a legal order lacking proper human rights protection is created.[158]

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[156] EC Treaty, art. 234.

[157] K. Hailbronner, Immunity of International Organizations from German National Jurisdiction, Volume 42, Archiv des Völkerrechts 336, 3rd Edition (Tübingen, Mohr Siebeck, 2004).

[158] C. Walter, Grundrechte gegen Hoheitsakte internationaler Organisationen , 129 Archiv des oeffentlichen Rechts Band 60 (Tuebingen, Mohr Siebeck, 2004).

IV. THE RESPONSIBILITY OF STATES HOSTING INTERNATIONAL ORGANIZATIONS FOR HUMAN RIGHTS VIOLATIONS COMMITTED BY THE ORGANIZATION

In this Section, we will examine the special role of the States hosting the EPO as a means of redressing human rights violations of its staff members. Germany, the Netherlands and Austria are bound to comply with its obligations under treaty law and customary international law, including the European Convention of Human Rights. At the same time, they have agreed to not interfere with the functioning of the EPO, granting it judicial immunity. These different obligations of the host States can be in conflict where the EPO commits human rights violations on their territory. The implications of and solutions for such a conflict will be outlined below.

1. The Obligation of Host States to Ensure the Right of Access to Court

The right to adequate means of redress in the face of violations of law is guaranteed under several international conventions, and has achieved the status of international customary law.[159] Consequently, all States are under a legal obligation to ensure this right on their territory.

The responsibility of host States pursuant to international law plays an important role vis-à-vis other States parties to human right treaties and the international community in general, since international human rights treaties generally have a territorial scope and because States have an affirmative duty to prevent human rights law violations from being committed by non-State actors on their territory. The latter was established in the *Case Concerning United States Diplomatic and Consular Staff in Teheran*.[160] The question to be considered next therefore is whether a State Party to the ECHR hosting an international organization has the power, or even the obligation to ensure that the internal procedure of an international organization meets the standards it has obliged itself to guarantee.

2. The Immunity of International Organizations Before National Courts as an Obstacle to the Right to Access to Court

[159] See supra, at p.10.

[160] ICJ 9 October 1998, *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v Iran)*, ICJ Rep 3, para. 35.

International organizations generally enjoy immunity from jurisdiction in the national courts of the host State.[161] Such immunity has been considered necessary since an international organization can only fulfil its purpose efficiently if it can act independent of its host State.[162] The immunity in general is granted to the international organization from its constituent documents. Host States further define the scope of the immunity of an international organization on their territory through national law and headquarter agreements, since this area of the law lacks a universally accepted and legally binding treaty.[163] The scope of the immunity of an international organization therefore will vary between the different host States depending on the provisions in the headquarter agreement. The EPO, for example, has two different Headquarter Agreements for its three Host States Austria, Germany and the Netherlands.[164] On the one hand, flexibility in defining the immunity of international organizations has allowed host States as well as international organizations to give weight to their individual requirements and their variety of objectives. The discretion of the host States and the international organizations in defining the scope of immunity, on the other hand, has led to an inconsistency in defining the concept.

2.1. Functional Immunity

Traditionally, the scope of the immunity from jurisdiction of an international organization was considered absolute to prevent States from abusing their power of interpreting the legality of actions of an international organization.[165] Such extensive protection was also believed necessary to prevent contradictory rulings at the national level. In the employment context, involvement by the courts of the member States or the host States would presumably also have resulted in varying rights and obligations for the employees working for the same organization but stationed in different countries. National courts consequently have been very reluctant to decide on matters involving international

[161] M. Dixon, Textbook on International Law 165 (London: Blackstone Press, 2000).
[162] I. Pingel-Lenuzza, International organizations and Immunity from Jurisdiction: To Restrict or Bypass, 51(1) International and Comparative Law Quarterly 4 (2002).
[163] J. Klabbers, An Introduction to International Institutional Law 155 (Cambridge, 2002).
[164] Agreement between the European Patent organization 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.; Agreement between the European Patent organization and the Government of the Federal Republic of Germany, DE/BGBI. II No.17 of 4 April 1978, p.337 et seq.; Agreement between the European Patent Organization and the Kingdom of the Netherlands concerning the branch of the European Patent Office at the Hague, NL/Tractatenblad No.16 of 31 January 1978, p.1 et seq..
[165] A.S. Muller, International organizations and Their Host States; Aspects of their Legal Relationship 151 (The Hague, Kluwer, 1995).

organizations. Their initial refusal to consider claims against international organizations has been said to have been influenced by their general unfamiliarity with the varying structures and the administrative particularities of international organizations.[166]

The vast increase in the number of international organizations and their general acceptance as important players in the international legal order has indicated that an absolute immunity no longer seemed appropriate.[167] The necessity for a more restrictive approach was underlined by the growing importance of the rights of individuals at international level. These developments have led to the introduction of the doctrine of functional necessity.[168] This doctrine extends the immunity of an international organization only to those functions necessary for the fulfilment of the purposes established in the treaty setting up the organization.[169] By setting limits beyond which there is no need to grant immunities the possibility for national court to scrutinize actions taken by the international organization is created. A national court, where the parties have standing, could therefore hear employment disputes, in theory. Extending the immunity beyond what is strictly necessary for it to fulfil its function efficiently no longer seems justified.[170] The duty to apply the doctrine for a court on the other hand introduces the possibility to define the purposes and objectives of an international organization. By framing the actions that are to be considered necessary for the international organization to function, the court indirectly is restricting the power of the organization to act in the first place.

The doctrine of functional necessity has arguably reached the status of customary law. Between 1963 and 1992, the International Law Commission published several reports on inter-State and consular intercourse, also covering the issue of immunities and privileges of international organizations. The Fourth Report[171] expressly refers to the matter of immunities and privileges and states that "[international organizations] are entitled to certain immunities in their capacity as legal persons and can require them of states". The statement is best

[166] K. Hailbronner, Immunity of International Organizations from German National Jurisdiction, Volume 42, Archiv des Völkerrechts 331, 3rd Edition (Tübingen, Mohr Siebeck, 2004).
[167] I. Pingel-Lenuzza, International organizations and Immunity from Jurisdiction: To Restrict or Bypass, 51 (1) International and Comparative Law Quarterly 2 (2002).
[168] J. Klabbers, An Introduction to International Institutional Law 148 (Cambridge, 2002); P. Sands and P. Klein, Law of International Institutions 148 (London, Sweet& Maxwell, 2001).
[169] J. Klabbers, An Introduction to International Institutional Law 148 (Cambridge, 2002); P. Sands and P. Klein, Law of International Institutions 487 (London, Sweet& Maxwell, 2001).
[170] P.H. Bekker, The Legal Position of Intergovernmental organizations; A Functional Necessity Analysis of Their Legal Status and Immunities 165 (The Hague, Martin Nijhoff, 1994).
[171] International Law Commission, UN Doc A/CN.4/SR 2176-2180 (1990) reprinted in: 1 Yearbook International Law Comments 200-233 (1990).

understood in the light of the Preliminary Report[172] of that series, which had taken into account evidence of immunities granted on the basis of the doctrine of functional necessity.

2.2. Immunity in Practice

The restrictive concept of immunity has been adopted for many international organizations in their constituent conventions.[173] No provision has, however, been made in any of those documents defining the exact meaning of that concept. While multilateral agreements on privileges and immunities provide for absolute immunity,[174] the scope given to immunity in the individual host States varies. Most national courts consider all acts of international organizations to fall within the scope of immunity. Before examining the case-law, it is necessary to outline the difficulties with the concept.

Unlike States, international organizations are not automatically granted substantive rights and obligations. The approach taken to limit their immunity is also a reflection of the fact that the legal personality of an international organization and its power to act is restricted to its functions. The problem with the doctrine of functional necessity is that "the notion itself requires theoretical elaboration, lacking any concept establishing which acts are necessary for an international organization to function effectively.[175] Reinisch concludes: "The fundamental problem is clearly that functional immunity means different, and indeed contradictory, things to different people or rather different judges and States".[176] A broad interpretation of the concept of functional necessity would allow for all actions, which can be taken to fulfil one of the purposes of the organization, to be within the scope of immunity, while a narrow understanding would only extend the immunity to certain functions considered necessary for the international organization.[177]

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[172] International Law Commission, *Preliminary Report on Relations between States and International Organizations* (second part), UN Doc A/CN.4/304 (1997), reprinted in: 2(139) Yearbook International Law Comments 151-152 (1997), paras 59-62.

[173] E.g.: United Nations (UN), see Article 105 of the United Nations Charter; The Organization of American States (OAS), see Article 133 of the OAS; World Health Organization (WHO), see Article 67(a) of the WHO Constitution; World Trade Organization (WTO), see Article VIII, para. 2 of the Agreement Establishing the WTO; The Council of Europe, see Statute of the Council of Europe, 5 May 1949, ETS No.1.

[174] E.g.: Article 8 of the Headquarters Agreement between the Government of the United Kingdom and the International Tin Council, London, 9 February 1972, 834 UNTS 287; Article 3 of the General Agreement on Privileges and Immunities of the Council of Europe, 2 September 1949, ETS no.2, 250 U.N.T.S. 14; Article 2of the Agreement on Privileges and Immunities of the OAS, 15 May 1949, OAS Treaty Ser.22.

[175] J. Klabbers, An Introduction to International Institutional Law 39 (Cambridge, 2002).

[176] A. Reinisch , International Organizations before National Courts 206 (Cambridge, 2000).

[177] In the case the defendant (UN Official) had engaged in espionage. In the decision of the UN District Court it was held that such behaviour was not part of the functions of the United Nations.

Another issue arising in relation to the concept is that the legal personality of an international organization is limited to the functions they need to perform to fulfil their purpose efficiently. Acts outside of that scope are considered *ultra vires*.[178] As expressed by Seidl-Hohenveldern: ”Any activity of an international organization is either official or ultra vires”.[179] Academics believe this to interfere with the theory of functional necessity, basing their argument on the fact that all acts falling outside of the scope of the immunity automatically are beyond the powers given to the international organization, and consequently *ultra vires*.[180] This is a misconception of the theory. Acts held to be outside of the scope of immunity, do not automatically have to amount to conduct pursued for other purposes than those of the international organization. The concept only distinguishes them on the basis that evaluating them will not interfere with the independence of the organization. Klabbers further points out that the doctrine is biased in favour of international organizations, generally assuming their conduct is always a good thing, which deserves to prevail over any other rights, so long as exercised in the course of their functions. The introduction of a moral evaluation of the purposes of international organizations seems inappropriate and underestimates the importance of international cooperation. It consequently has to be rejected.

The concept of functional necessity lacks definition and a consistent application since it does not clearly elaborate which acts of an international organization it exempts from immunity. Ways in which these difficulties have been dealt with in practice and problems with the application of the doctrine will be outlined below, using the example of the EPO. In practice the application of the concept varies depending on the State and the organization in question. Early case-law relying on the concept of functional immunity can be derived from Italy and the United States, where the courts have been active in further developing the scope of the immunity of international organizations, using the restrictions of state immunity as a guideline to define the scope of the functional immunity of international organizations.[181]

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[178] A. Reinisch, In the Shadow of Waite and Kennedy, International Organizations Law Review 63, (Leiden, Koninklijke Brill, 2004).

[179] I. Seidl-Hohenveldern in an unpublished report to the ILA Committee on State Immunity, quoted in: ILA Buenos Aires Conference, The Final Report on State Immunity 475 (1994).

[180] A. Reinisch, In the Shadow of Waite and Kennedy, International Organizations Law Review 63 (Leiden, Koninklijke Brill, 2004).

[181] The restrictive approach is being favoured in the U.S. *Cf.*: D.D.C. 1990, *Morgan v. IBRD*, 752 F. Supp 492, para. 494; D.C.Cir. 1981, *Tuck v. Pan American Health Organization*, 668 F.2d 547; S. D. N.Y. 1994, *De Luca v. United Nations Organizations, Perez de Cuellar, Gomez, Duque, Annan*, et.al, 841 F. Supp. 531, 533 fn. 1. In Italy older cases relied on the distinction of *iure imperii/iure gestionis* applied in cases of state immunity. *Cf.*: Court of Cassation, *Branno v. Ministry of War*, (1955), 352, 22 ILR 756; Rome Court of First Instance (Labour Section) 25 June 1969, *Porru v. FAO*, UNJYB 238; Court of Cassation 5 June 1976, *Allied Headquarters of Southern Europe (HAFSE) v. Capocci Belmonte*, No. 2054, 12 RDIPP (1976), 860, [1977], ItYBIL 328. But absolute immunity form suit has in some cases been granted at later instances. *Cf.* Supreme Court of Cassation 18 October 1982, *FAO v. INPDAI* [1982] UNJYB 234, was abandoned in Court of Cassation 18 May 1992, *FAO*

The question whether a Member State of an international organization has the obligation to guarantee that the human rights of the employees of that organization are protected has been discussed. As established in *Waite and Kennedy*, host States incur responsibility if they grant immunity to international organizations without examining the internal procedure made available by the international organization. Only where the standard of legal protection afforded by the international organization is comparable with that of the ECHR will such a rejection of jurisdiction be in compliance with the obligations under the Convention. The ECtHR rephrased its *Waite and Kennedy* approach in *Bosphorus.*[182] 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.[183] Manifestly deficient legal protection by an international organization would not meet the requirements of the ECHR.[184] The approach previously taken presuming compliance has been departed from.[185]

The jurisprudence of the ECtHR, applying the doctrine of functional immunity, has had implications at national level. Domestic courts have relied on its judgments in order to apply the doctrine, and have done so without any of the major difficulties outlined above. In *S. v. Western European Union (WEU)*[186] the Belgian Court of Appeal waived the immunity of the international organization. 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. Courts from other jurisdictions, like France[187] and Switzerland[188] have followed this example, and have allowed proceedings before their domestic courts to comply with their obligations under the ECHR.

The case-law from national courts of States hosting the EPO draws a different picture of the matter. Article 8 of the European Patent Convention provides: "The Protocol on

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v. Colagrossi, No. 5942, 75 RivDI (1992), para.407.

[182] ECtHR 30 June 2005, *Bosphorus Haa Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, available at http://cmiskp.echr.coe.int (last visited 3 January 2007).

[183] ECtHR 30 June 2005, *Bosphorus Haa Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, available at http://cmiskp.echr.coe.int (last visited 3 January 2007), para 155.

[184]ECtHR 30 June 2005, *Bosphorus Haa Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, available at available at http://cmiskp.echr.coe.int (last visited 3 January 2007), para 156.

[185] 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).

[186] Court of Appeal (Brussels) 17 September 2003, *S. v. Western European Union*, JT 2004, para. 617.

[187] Court of Cassation 25 January 2005, *Banque Africaine de Developpment v. M.A. Degboe*, Case No. 04-41012. Please note that the court of first instance in the case specifically referred to *Waite and Kennedy*.

[188] Swiss Supreme Court 3 September 2001, *Rukundo*, available at www.isdc.ch (last visited 15 January 2007).

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*."[189] The Protocol on Privileges and Immunities limits the immunity of the Organisation to those "official activities of the Organisation [that] are *strictly necessary for its administrative and technical operation*, as set out in the Convention." [190] This restrictive formulation of the principle of functional necessity indicates the intention of the Member States to the Organisation to not exempt the international organization from national jurisdiction.[191] Nonetheless, 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.[192] 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.[193] 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.[194] 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*,[195] for instance, where

[189] Article 8 of the European Patent Convention, available at http://www.european-patent-office.org/legal/epc/e/ma1.html#CVN (last visited 14 December 2007) (emphasis added).

[190] Article 3 of the Protocol on Privileges and Immunities of the European Patent Organization, 5 October 1973, 1065 UNTS (1999). Available at www.european-patent-office.org/legal/epc/e/ma5.html (last visited 15 January 2007) (emphasis added). The other exceptions contained in Article 3 (1) (b) and (c) are inapplicable to the case at hand, as they concern traffic accidents, and enforcement of arbitration awards.

[191] Cf. Article 3(1)(a) of the EPO Protocol on Privileges and Immunities of the European Patent Organization, 5 October 1973, 1065 UNTS (1999): The Organisation may expressly waive its immunity in a particular case. See also ibid., Article 19: 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 […]."

[192] BverfG, 3. Kammer des Zweiten Senats, decision of 8 September 1997, NJW 1997, 1500.

[193] Ecomm'nHR 9 September 1998, *Lenzing AG v Germany*, Application No. 39025/97, para. 9.

[194] BverfG, 4. Kammer des Zweiten Senats, DVBl. 2001, 1130.

[195] BverfG, 2. Kammer, 59, 63; available in NJW (1982), 512, DVBl (1982), 189, DÖV (1982), 404.

the independence of the judges of the ILOAT was at issue, the Court generally based its analysis on the ILOAT Statute without reviewing the use made of the available procedures in practice.[196]

The persuasive analytical framework developed hence simply is not applied in a stringent manner, as was seen in *Waite and Kennedy*,[197] where the ECtHR held that the dispute settlement mechanism of the ESA satisfied the requirement of reasonable alternative means, without thoroughly analysing the internal procedure and without taking into account the fact that the mechanism would probably not be available to the applicants.[198] Another example is that of oral proceedings before the ILOAT. As stated above, all applications for oral hearings have been refused since 1989. The review of the proceedings by the domestic courts will only fulfil its purpose if it goes beyond the mere acknowledging of the rights provided for in theory and additionally takes into account the actual practice in the proceedings. Applying the test defined in *Bosphorus*,[199] the protection of human rights in cases before the ILOAT would appear to be manifestly deficient in so far as no clear body of human rights law is defined setting out which rights are protected. In these circumstances, no effective comparison can be made as to whether the rights protected within international organizations are equivalent to the Convention rights. The hurdle staff members of international organizations face when starting proceedings against the organizations therefore does not appear to consist of the difficulties so feared by the academics, but instead stems from the seeming reluctance of international and consequently also national courts to review in detail the internal procedures in the context of the doctrine of functional immunity in the relevant case. Unsatisfactory health and safety standards therefore escape the scrutiny. Such a failure undermines the progress achieved by the introduction of the doctrine of functional necessity.[200] Again, national jurisdictions therefore create a space without human rights.[201]

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[196] 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.

[197] ECtHR 8 February 1999, *Waite and Kennedy v Germany*, Application No.26083/94, paras. 67, 68.

[198] ECtHR 8 February 1999, *Waite and Kennedy v Germany*, Application No.26083/94, paras. 67, 68. Ecomm'nHR 2 December 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 A. Reinisch, In the Shadow of Waite and Kennedy, International Organizations Law Review 79 (Leiden, Koninklijke Brill, 2004).

[199] ECtHR 30 June 2005, *Bosphorus Haa Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, available at http://cmiskp.echr.coe.int (last visited 15 January 2007).

[200] Cf. Mahnoush H. Arsanjani, Claims Against International Organizations: *Quis Custodiet Ipsos Custodies*, 7 Yale Journal of World Public Order 131, 175, n. 172 (1981): "It would be quite ironic to negate the rights of individuals on the assumption that they might be incompatible with the functions of International Organisations".

[201] C. Walter, Grundrechte gegen Hoheitsakte internationaler Organisationen , 129 Archiv des oeffentlichen Rechts Band 60 (Tuebingen, Mohr Siebeck, 2004). See also Final Report of the International Law Association Committee on Accountability of International Organizations (2004), p. 19, available at http://www.ila-

2.3. Priority of Human Rights over the Immunity of International Organizations

As discussed above, in accordance with the doctrine of functional necessity, the immunities and privileges of an international organization only extend to those acts necessary to guarantee the efficient functioning of the organization. Any extension of immunity beyond that scope is no longer is justified.

The absolute immunity of an international organization could also be rejected on the basis that human rights enjoy prevalence over any immunity.[202] As held by the ICJ in the *Case Concerning United States Diplomatic and Consular Staff in Teheran,* States have an affirmative duty to prevent human rights law violations from being committed by non-State actors on their territory.[203] The issue therefore is whether this affirmative duty of a State in combination with its obligations under Article 6 ECHR enjoys priority over the international law obligation of a State to grant immunity to an international organization. De Wet argues that a hierarchy has developed between different international normative systems. Obligations under the ECHR have attained normative superiority since the jurisprudence of the ECtHR is binding on all States Parties.[204] As mentioned above, express rights under the ECHR are absolute, and consequently any infringement of them will result in a breach. A State that has reasonable grounds to foresee a violation and that fails to take action in such circumstances will incur responsibility.[205] Article 6 (1) ECHR has been considered to be of such importance in a democratic society that even terrorism and organized crime do not sacrifice its violation. [206]

Internal procedures and administrative tribunals at the international level are supposed to protect the rights of employees of international organizations and consequently are considered to justify the reluctance of national courts to commence proceedings against

hq.org/html/layout_committee.htm (last visited 25 January 2007) (reference omitted): "States should 'make provision that a potential jurisdictional gap concerning the control of the exercise of such transferred powers does not arise'."

[202] M. Singer, Jurisdictional Immunity of International organizations: Human Rights and Functional Necessity Concerns, 36(53) Va. Journal of International Law 89 (1995).

[203] ICJ 9 October 1998, *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v Iran)*, ICJ Rep. 3, para. 35.

[204] E. de Wet, The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order, 19 Leiden Journal of International Law 633-34 (2006).

[205] ECtHR 7 July 1989, *Soering v. The United Kingdom*, available at http://cmiskp.echr.coe.int (last visited 8 January 2007).

[206] ECtHR 6 December 1988, *Barbera, Messegué & Jabardo v. Spai*n; ECtHR 20 November 1989, *Kostovski v. The Netherlands*, ECtHR 23 October 1990; *Moreira de Azevedo* v *Portugal*, para. 66: "the right to a fair trial holds so prominent a place in a democratic society that there can be no justicification for interpreting the [relevant guarantees] restrictively. ECtHR judgments are available at http://cmiskp.echr.coe.int (last visited 15 January 2007). *Cf.* J. Dugard and C. van den Wyngaert, Reconciling Extradition with Human Rights, 92 American Journal of International Law 210 (1998).

international organizations. The prevalence of the immunity over the human rights of the employee in this context seems justified, as these are protected via the provided mechanisms of the international organization. The immunity therefore works both ways, creating a situation of catch 22 for the employees: The provided procedures justify immunity and the immunity prevents the review of the offered procedures.[207] The employees of international organizations like the EPO are left with no possibilities to challenge the procedure provided by the international organization, and no other legal means are provided to ensure the procedures offered meet the standards incumbent on the organization.[208] "One cannot justify [...] immunity by reference to the existence of an alternative means of dispute and, at the same time, allow immunity to interfere with the proper functioning of the mechanisms that are supposed to counterbalance [immunity]".[209]

2.4. The Hierarchical Superiority of the European Convention on Human Rights

The prevalence of the ECHR over international commitments is demonstrated not only in *Waite and Kennedy*[210] and *Bosphorus*,[211] but also in another decision of the ECtHR in which it was established that an agreement between States affecting the rights of individuals under the ECHR, would only meet the requirements of the ECHR if Member States provide for a mechanism that takes into account the specific circumstances of the individuals affected.[212] The ECHR therefore requires an evaluation of the specific circumstances in each case; and the rights it guarantees can trump over other international obligations of a State, like the immunity of an international organization, in cases of manifestly deficient protection.[213]

The *de facto* hierarchical superiority of obligations arising under the ECHR is further indicated by the fact that later international commitments by the States have not prevailed

[207] E.g. Ecomm'nHR, *Spaans v The Netherlands*, Application No. 12516/86 (1988).
[208] I. Pingel-Lenuzza, International organizations and Immunity from Jurisdiction: To Restrict or Bypass, 51(1) Journal of Comparative Law Quarterly 11 (2002).
[209] I. Pingel-Lenuzza, International organizations and Immunity from Jurisdiction: To Restrict or Bypass, 51(1) Journal of Comparative Law Quarterly 4 (2002).
[210] ECtHR 8 February 1999, *Waite and Kennedy v Germany*, Application No.26083/94, paras. 67, 68.
[211] ECtHR 30 June 2005, *Bosphorus Haa Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, available at http://cmiskp.echr.coe.int (last visited 3 January 2007), para. 156.
[212] ECtHR 5 July 2003, *Slivenko v. Latvia*, available at http://cmiskp.echr.coe.int (last visited 15 January 2007).
[213] Loukis G. Loucaides, Questions of Fair Trial under the European Convention on Human Rights, 3(1) Human Rights Law Review 27, 43 (2003): "when dealing with the application of the provisions of the European Convention on Human Rights the *lex specialis* is the Convention and because of that one should be reluctant to accept substantial restrictions on Convention rights derived from principles of international or national laws, such as those establishing immunities."

over the earlier-entered into ECHR, as would be the case where two international treaties are in conflict following the *lex posterior* rule. The obligations of the State under the ECHR have not changed and have also prevailed over conflicting obligations under other international treaties.[214]

The approach of the ECtHR consequently offers guidance as to how the conduct of international organizations can be scrutinized without interfering with the functioning of the international organization. National courts therefore have no reason not to limit the immunity of international organizations.

3. Interim Conclusions

The doctrine of functional immunity introduces a test by which national courts can objectively decide whether the act or omission of an international organization falls within the scope of behaviour that needs to be protected from interference by other parties in order to guarantee the functioning of the organization. Fundamental rights of individuals such as the right to access to a court therefore no longer have to be set aside for the sake of efficient transnational cooperation offered by international organizations.

The scrutiny of the actions of international organizations by the domestic courts of host States is of particular importance since these States are currently the only members of the organizations where the responsibility of the member States can be enforced. The denial of access to national courts would result in the creation of a space without human rights protection. The example of the EPO illustrates that protection within an international organization is not always guaranteed and can be insufficient.

The case-law at the national and international level in which the internal dispute settlement mechanisms and the ILOAT have been reviewed has failed to improve the situation, since they often lacked a close scrutiny of the practices of the international organization.

The unsatisfactory application of the doctrine of functional immunity starkly contrasts with the growing importance given to the ECHR. A hierarchical prevalence of the Treaty will not improve the situation of staff members of international organizations if the level of scrutiny by the courts does not increase.

[214] ECtHR 7 July 1989, *Soering v. The United Kingdom*, available at http://cmiskp.echr.coe.int (last visited 3 January 2007).

V. GENERAL CONCLUSIONS

From the above analysis we can conclude that three different potential actors can be identified as being responsible for the human right violations affecting the staff of international organizations, though their roles in the quest for justice vary.

The analysis of the first actor, the international organization, confirms its obligation to respect those human right norms directly binding on it, given that its identity as an independent, international player confers obligations in addition to rights on the actor.[215] The lack of a consistent definition of the boundaries of responsibility of an international organization is unsatisfactory and considering the growing importance of the actor at the international level no longer justified. The deficiencies of the adequacy and effectiveness of the internal mechanisms and the International Labour Organization Administrative Tribunal expose the dangers flowing from the creation of an international identity without a matching international responsibility.[216]

The second actor that can be identified as responsible for human rights violations is the State member of an international organization. The responsibility of the State would stem from the violation of obligations incumbent on it under international law, such as human rights treaties. The review of the case-law of the European Court of Human Rights leaves no doubt as to the continuing responsibility of the Member States to ensure that equivalent protection of fundamental rights is guaranteed within the international organization. The creating by States of an international organization does not discharge the member State of its obligations under international human rights law.

The territorial scope of international human rights treaties bestows a special role on some of the member States of the international organization, exposing a third actor, the host State. Its responsibility for not providing sufficient fundamental rights protection within the international organization can be enforced before national courts. In order to comply with obligations under international human rights treaties, the host State has to review whether protection of fundamental rights within international organization provides an adequate and effective alternative. The doctrine of functional immunity represents a milestone in the

[215] C. Brölmann, International Organizations in the System of International Law, 70 Nordic Journal of International Law, cited in J. Klabbers, International Law 186 (Dartmouth, Ashgate, 2005).

[216] Cf. Final Report of the International Law Association Committee on Accountability of International Organizations (2004), p. 32, available at http://www.ila-hq.org/html/layout_committee.htm (last visited 25 January 2007): "The establishment and refinement of an accountability regime for [international organizations] may require the development of innovative procedures to allow states and non-state entities actually or potentially affected by the actions or omissions of an IO to bring complaints directly against the [international organization] concerned."

process of review. Its increased role in international and national jurisdiction seems to partly satisfy the quest for justice, although a closer evaluation of the case-law reveals that the scrutiny is not always sufficiently stringent to ensure the protection of the fundamental rights of staff members of international organizations.

In sum, practice unfortunately often shows that while three actors can be identified to have responsibility under the international human rights treaties, effective remedies do not always seem to be available to those whose fundamental rights have been violated.

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