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DICHIARA

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INTRODUCTION

The codification of fundamental rights at the European Union level is a relatively recent phenomenon. The Charter of Fundamental Rights of the European Union, solemnly proclaimed in Nice on December 2000, and revised in Strasbourg on December 2007, has acquired binding legal force in 2009, after the entry into force of the Treaty of Lisbon. The Charter of Fundamental Rights of the European Union protects not only civil and political rights but also socio-economic rights, notably freedom of association and the right to take collective action, including strike action. What is the meaning and the content of these rights? What “*kind*” of right to strike do we have to expect it is protected at the European Union level? This study tries to provide an answer to these questions by looking at the codification of those rights in the supranational legal sources and at their interpretation.

The social rights protected by articles 12 and 28 of the Charter of Fundamental Rights of the European Union are not granted with a specific “*European Union*” meaning but they are deliberately construed around the meaning they have within supranational systems of human rights safeguard and their level of protection should not fall below the standards established by those systems. The study takes into consideration, first, the United Nation system (Chapter One) and, secondly, the Council of Europe system (Chapter Two). Both systems are aimed, respectively, to the international or regional protection of human rights. The characteristic is not precisely mirrored in the third system taken into consideration (the European Union in Chapter Three), that presents a combination of economic and social aspirations. Therefore, it seems appropriate to place the legal sources and the case-law examined in the specific legal, historical and political framework in which they were created in order to consider them from the appropriate perspective. For this reason, each Chapter devotes attention to the historical background that led to the creation of the different supranational structures and to the content of the preparatory documents, examined to the extent they are functional to answer the research questions referred above.

Chapter One presents the international legal sources protecting freedom of association and the right to strike together with the relevant case-law developed by the ILO supervisory bodies, the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights. It is argued that, even in the absence of an express recognition of the right to strike, historical reasons suggest that the concept of “*freedom of association*” should be understood

as encompassing the right to strike and to resort to collective actions for the furtherance of economic and social interests of individuals. The drafting history of ILO Convention n. 87 shows that there was a conscious decision of the ILO components to omit a reference to strike on the assumption that said reference was redundant. The right to strike was already included in the concept of “*freedom of association*” inserted in the ILO Constitution and there was a clear understanding about the appropriateness to develop the concept through the case-law of the ILO monitoring bodies, *in primis* the Committee on Freedom of Association. The fact that “*freedom of association*” encompasses the right to strike is confirmed also by the principles developed by the United Nations Human Rights Treaty Bodies. What emerges from the study is a system characterised by substantial coherence, that should increase legitimacy and reinforce the protection of workers’ rights globally in a time when social protection is of paramount importance to re-balance the negative effects of economic uncertainty and to contrast the temptation to seek parochial solutions in the social field, with the sole aim to strengthen national economies in the short run.

Chapter Two examines the Council of Europe framework, from its creation to the drafting of the European Convention on Human Rights and the European Social Charter. The first protects the right to “*freedom of peaceful assembly*” and to “*freedom of association*”, including the right to form and join trade unions for the protection of one’s interests. The second ensures, among others, the right to take collective action, including strike action, in cases of conflicts of interests. The documents complement each other and recent judicial trends confirm the possibility to embrace the protection of socio-economic claims under the catalogue of civil and political rights. The analysis of the case-law shows that the European Court of Human Rights has been paying increased attention to the safeguard of collective social rights, including the right to strike, by referring to the European Social Charter and the ILO labour standards. The attitude might contribute to the creation of a fundamental social rights platform for the maintenance of workers’ rights, even though certain features of the right to strike still need to find a coherent understanding in the framework of the Council of Europe. In particular there is discordance between the European Court on Human Rights and the European Committee of Social Rights in the way they handle certain forms of industrial actions, such as secondary actions and political strikes. Moreover, it is doubtful whether the European Court of Human Rights reconnects the exercise of the right to strike to the concept of freedom of association or to the concept of freedom of peaceful assembly, both protected

by article 11 ECHR. The different construction has implications in terms of what kind of right to strike the European Court of Human Rights is trying to construe and protect. This situation could have repercussions on the standard to be applied within the European Union, since the case-law of the Strasbourg Court is a source of reference to define the meaning of the rights contained in articles 12 and 28 of the Charter of Fundamental Rights of the European Union. Chapter Three is devoted to the analysis of the European Union framework. The construction of the European Union provides that domestic legal systems should remain the primary sources of social policy initiatives and crucial social rights, such as freedom of association and the right to strike, are in principle excluded from the Union competences enclosed in the “*Social Policy Title*” of the Treaty on the Functioning of the European Union. However, European market integration created asymmetry between social and market policies, in a way that turned to be detrimental for the enjoyment of social rights. The question regarding the relationship between economic freedoms and collective social rights, notably the right to take collective action including strike action, has been raised in the recent years by two cases decided before the European Court of Justice, Viking and Laval. The rulings confirmed the fundamental nature of the rights but construed them as a “*restriction*” to the exercise of Treaty freedoms, thereby requiring justifications for their exercise also in terms of suitability, necessity and proportionality. Lisbon might have changed this scenario. The European Union started to commit itself to the effective respect of fundamental rights by means of their codification. Freedom of association and the right to take collective action and strike are fundamental rights protected by the Charter of Fundamental Rights of the European Union. They should be justified as such and their meaning should be the same as they have within supranational systems of human rights protection. It is argued that their protection does not need to flow from “*federal*” legislative interventions, that would entail a common political will to modify the Treaties, but might be built upon the new legal instruments at the disposal of the judicial. This construction suggests, first, that it is necessary to look at European fundamental rights from a human rights perspective, that is the same perspective of the international systems of human rights protection who determine the meaning of European collective social rights. Secondly, in order to give collective social rights an unambiguous meaning within the European Union framework, the international machinery of fundamental rights protection should move in a coherent direction. And to reach the aim, there should be a

commitment of supranational courts and monitoring bodies to look at each other decisions, and to take into consideration the most protective standard internationally established.

Chapter One - The International Framework

International legal sources protect “freedom of association” as a fundamental right but only some of them explicitly refer to the right to strike. However, the concept of “freedom of association” encompasses the right to resort to collective actions for the furtherance of economic and social interests of individuals. States voluntarily undertook binding legal obligations to respect said principle. The ILO played the most significant part in framing the contours of “freedom of association” and established a substantial jurisprudence on the right to strike. The principles it developed influence the work of the United Nations Human Rights Treaty Bodies, namely the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. What emerges from the study is a system characterised by substantial coherence, that should increase legitimacy and reinforce the protection of workers’ rights globally, in a time when social protection is of paramount importance to re-balance the negative effects of economic uncertainty. Moreover, said system serves as a guidance for the enhancement of collective social rights in the framework of the Council of Europe and of the European Union.

SECTION I - Legal Sources

1.1. A new order for the post-war era: the Charter of the United Nations

«In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression - everywhere in the world.

The second is freedom of every person to worship God in his own way - everywhere in the world.

The third is freedom from want - which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants - everywhere in the world.

The fourth is freedom from fear - which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour - anywhere in the world.

That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very

antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb.

To that new order we oppose the greater conception - the moral order. A good society is able to face schemes of world domination and foreign revolutions alike without fear»¹.

The American President Franklin D. Roosevelt pronounced these words in January 1941 before the American Congress. He prompted the possibility for the country to enter into the European conflict - a resolution formally taken only after the Pearl Harbour attack of 7 December 1941, that solved the polarization between isolationism or international solidarity in favour of the latter² - and disclosed the future need to create a new international legal framework for the post-war era in order to prevent aggression between States, built upon the respect of political, economic and social entitlements of individuals in a society free from fear and tyranny. He was promoting a vision for a world system of states that endorsed respect for human dignity as a means to ensure security³.

Discussions on the patterns for a post-war organization started in August 1941 with the adoption of the so called “*Atlantic Charter*”, a joint declaration with merely political aims between the President of the United States and the UK Prime Minister Winston Churchill «*to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world*». The Charter, composed of eight points, demanded «*the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security*», whose precondition was to reach peace after the final destruction of the Nazi tyranny to give all the men in all lands the possibility to live out their lives «*in freedom from fear and want*». Notably, point eight of the Charter makes a reference to the pending establishment «*of a wider and permanent system of general security*», a cautious and early commitment to the creation of a post-war international organisation⁴.

¹ President Franklin D. Roosevelt, speech to the Congress, 6 January 1941, Congressional record 1941, vol. 1, I, in Q. Wright, Human rights and the world order, International Conciliation, 1942-1943, 21, 238 seq.

² B. Simma, D. Khan, G. Nolte, A. Paulus, N. Wessendorf, The Charter of the United Nations. A commentary, Oxford, Oxford University Press, 2012, 5.

³ M. R. Shulman, The four freedoms: good neighbors make good law and good policy in a time of insecurity, Fordham Law Review, 2008, 77, 555 seq.

⁴ The timid commitment was probably the only political option for the President of the United States. In August 1941 the State was still non-belligerent; see, B. Simma, D. Khan, G. Nolte, A. Paulus, N. Wessendorf, The Charter of the United Nations. A commentary, Oxford, Oxford University Press, 2012, 12.

It was only in summer 1944, at the Dumbarton Oaks Conference organised in Washington between the US and UK delegation, the Soviet Union and, at a later stage, China, that the most important stage in the creation of a new international order was taken.

The outcome of the Conference was a document published on 9 October 1944 titled “*Proposals for the establishment of a General International Organisation*”. The document served as a reference for the Founding Conference of the United Nations to be held at San Francisco in April 1945 and formally announced in the February of the same year by the leaders of US, UK and Soviet Union meeting in Yalta:

«We have agreed that a Conference of United Nations should be called to meet at San Francisco in the United States on the 25th April, 1945, to prepare the charter of such an organization, along the lines proposed in the formal conversations of Dumbarton Oaks».

During the San Francisco Funding Conference, concluded on 26 June 1945 with the signature by the fifty participating nations of the Charter of the United Nations, States made proposals for the insertion in the body of the document of provisions concerning human rights with an aim to give a solid basis to an international system for their protection⁵. Said proposals arrived in particular from Latin America countries. In February 1945 they participated to the Inter-American Conference on Problems of War and Peace held in Chapultepec, New Mexico, where they adopted resolutions concerning the protection of human rights and the creation of an international system for their defence, together with a Declaration of the International Rights and duties of Man⁶. A proposal from Panama⁷ to insert in the Charter of the United Nations a “*Declaration of the essential rights of man*” was not considered on the ground that the new organisation, and in particular the newly-established General Assembly, was better placed to consider the suggestion and to deal effectively with it through a special commission or by some other methods⁸.

Albeit the drafting of an International Bill of Rights was deferred to a later stage, the same Charter of the United Nations contains seven references to human rights.

⁵ K.J. Partsch, Art. 55, in B. Simma, *The Charter of the United Nations. A commentary*, Oxford, Oxford University Press, 1995, 778.

⁶ W.A. Schabas, *The Universal Declaration of Human Rights. The travaux preparatoires*, Cambridge, Cambridge University Press, 2013, Vol. 1, October 1946 to November 1947, lxxvi.

⁷ Additional amendments proposed by the Delegation of the Republic of Panama concerning the Proposals for the maintenance of peace and security agreed upon the Conference of Dumbarton Oaks, Doc. 2 G/7(g)(2), 265.

⁸ Report of Rapporteur of Committee I to Commission I, Doc. 944, I/1/34(I), 11.

The Preamble reaffirms the faith in fundamental human rights, article 1 establishes that the purpose of the United Nations is to promote and encourage the respect for human rights and for fundamental freedoms for all, article 13, addressed to the General Assembly, claims that the body shall initiate studies and make recommendations for the purpose of promoting international co-operation in the social and other fields and assist in the realization of human rights and fundamental freedoms for all, article 55 states that the United Nations shall promote conditions of economic and social progress and development and universal respect and observance of human rights, article 62 invites the Economic and Social Council to take actions for the promotion and respect of human rights and, to this extent, to set up specific commissions (article 68). Finally, it also contained provisions for the promotion of political, economic, social, and educational advancement of the inhabitants of the trust territories, encouraging the respect for human rights with an aim to ensure equal treatment in social, economic, and commercial matters (article 76).

Scholars have questioned whether the human rights provisions contained in the Charter may determine legal obligations.

According to certain positions, the Charter of the United Nations has the function to promote and encourage the respect for human rights through activities lacking of binding force and apt to have a limited effect on the domestic protection of human rights. According to this view, the provisions of the Charter referring to human rights could hardly be interpreted as constituting legal obligations of the members to treat their subjects in conformity with the principle of respect for fundamental human rights⁹. The Charter merely sets out a program of action for the organisation of the United Nations to pursue:

«in which the members are pledge to cooperate. It does not effect any result beyond fixing in general terms the aim of the program and conferring powers and exacting pledges for achieving them [...]. Moreover, none of its provisions has the self-executing character which is essential to the enforcement of a treaty provision as a part of the municipal law of the United States»¹⁰.

Under a different position, the human rights provisions contained in the Charter are «no mere embellishment of a historic document»¹¹ but legal obligations placed upon States

⁹ H. Kelsen, Principles of International law [1952], New Jersey, The Lawbook Exchange Ltd., 2003, 144.

¹⁰ M. O. Hudson, Integrity of International Instruments, The American Journal of International Law, 1948, 1, 107.

¹¹ H. Lauterpacht, International Law and Human Rights, London, Stevens & Sons Ltd., 1950, 147.

obliging them to act in accordance with the human rights provisions contained in the declaration of purposes of the United Nations. As it has been said:

«It is already the law, at least for Members of the United Nations, that respect for human dignity and fundamental human right is obligatory. The duty is imposed by the Charter, a treaty to which they are parties. The expansion of this duty, its translation into specific rules, requires further steps of a legislative character»¹².

Indeed, the fact that the provisions of the Charter might require further activities for their implementation does not deprive the Charter of its binding nature, a position often confused by the promoter of the programmatic nature of the Charter¹³.

The authority of the International Court of Justice backs the view that the Charter imposes on the Member of the United Nations legal obligations in the human rights field¹⁴. In the Advisory Opinion on the “*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*”¹⁵, the International Court of Justice held that the policy of apartheid applied by South Africa in Namibia, which constitute a denial of fundamental human rights, is a “*flagrant violation*” of the purposes and principles of the Charter.

The Human Rights Council, a subsidiary organ of the General Assembly, is responsible for promoting universal respect for the protection of all human rights and fundamental freedoms and it has the task to address situations of violations of human rights, including gross and systematic violations, make recommendations and promote the effective coordination and the mainstreaming of human rights within the United Nations system¹⁶.

On 6 October 2010, the Human Rights Council decided to appoint a Special Rapporteur on the rights to freedom of peaceful assembly and of association¹⁷ for an initial period of three

¹² P. G. Jessup, *A modern law of Nations*, New York, The Macmillan Company, 1948, 91.

¹³ O. De Schutter, *The Status of Human Rights in International law*, in C. Krause, M. Scheinin, *International Protection of Human Rights: a textbook*, Turku, Abo Akademi University, 2012, 40.

¹⁴ E. Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, *The American Journal of International Law*, 1972, 2, 337seq.

¹⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, 16.

¹⁶ Doc. A/RES/60/251, Resolution adopted by the General Assembly on 15 March 2006. The Human Rights Council is an inter-governmental body within the United Nations composed of forty-seven United Nations Member States elected by the General Assembly. It assumed the role and responsibilities of the former Commission on Human Rights. For an overview on the process, P.G. Lauren, «To Preserve and Build on its Achievements and to Redress its Shortcomings»: The Journey from the Commission on Human Rights to the Human Rights Council, *Human Rights Quarterly*, 2007, 2, 307.

¹⁷ Doc. A/HRC/RES/15/21.

years¹⁸. The Special Rapporteur has the duties to gather all relevant information relating to the promotion and protection of those rights, to make recommendations on the ways to promote and protect them, to prepare reports on their implementation at national level and to report on violations, wherever they may occur, in coordination with other Human Rights Treaty Bodies. The mandate of the Special Rapporteur does not include matters of specific competence of the International Labour Organization, with a view to avoid any duplication of work.

The decision of the Human Rights Council to appoint a Special Rapporteur lies in the unique importance placed on the rights to freedom of peaceful assembly and of association. They are identified as essential components of democracy, indispensable for the full enjoyment of civil and political rights, and economic, social and cultural rights, being capable to provide individuals with invaluable opportunities to, *inter alia*, form and join trade unions and elect leaders to represent their interests and hold them accountable.

1.2. Shaping the architecture of the international protection of freedom of association: the Universal Declaration of Human Rights

After the rejection at the San Francisco proceedings to have a declaration of human rights inserted in the Charter of the United Nations, Latin American countries remained active on the human rights front¹⁹ and in 1946 presented their proposals²⁰ to the newly established Commission on Human Rights, entrusted by the Economic and Social Council with the task to produce an International Bill of Rights²¹.

The resolution establishing the special Commission did not contain precise constraints on its content. However, some decisions were already made in advance and there was a common understanding at least on four points: human rights should be universal and should include the principle of non-discrimination, civil and political rights and also social and economic rights, a novelty for that time²².

¹⁸ On 11 October 2012 the Human Rights Council decided to continue its consideration of the issue of the rights to freedom of peaceful assembly and of association, Doc. A/HRC/RES/21/16.

¹⁹ M. A. Glendon, *The forgotten crucible: the Latin American influence on the Universal Human Rights idea*, Harvard Human Rights Journal, 16, 2003, 27 seq.

²⁰ Notably Panama and Cuba, Doc. E/HR/5; see, W.A. Schabas, *The Universal Declaration of Human Rights. The travaux préparatoires*, Cambridge, Cambridge University Press, 2013, Vol. 1, October 1946 to November 1947, lxxix.

²¹ Economic and Social Council resolution, February 1946, Doc. E/HR/6.

²² G. Alfredsson, A. Eide, *The Universal declaration of Human Rights. A common standard of achievement*, The Hague, Martinus Nijhoff, 1999, 11.

The Commission, composed of eighteen members and Chaired by Eleanor Roosevelt, met for the first time at Lake Success from 27 January to 10 February 1947. At this session it was decided to constitute a smaller drafting committee with the task to prepare a draft of International Bill of Rights following the instructions and the decisions of the Commission²³.

During this period some key events influenced the work of the United Nations and contributed to shape the present architecture of the international protection of labour rights.

The antagonism between western and eastern countries is at the basis of the different positions assumed by the protagonists of these events: the World Federation of Trade Unions and the American Federation of Labor²⁴.

The first organisation, bringing together European, Asian, Latina America and African trade union centres, was created in London in 1945 as the result of a conference held in October of the same year and convened by the Trade Union Congress. The Trade Union Congress had a double configuration, one Anglo-Russian and the other one Anglo-American. Indeed, before the Second World War, the Trade Union Congress tried to form a consultative committee to maintain contacts between trade union centres bringing together different representatives. However, due to the refusal by the American Federation of Labor to join the project, the Trade Union Congress resolved to form the two abovementioned committees²⁵.

The second organisation, the American Federation of Labor, was a national centre formerly chaired by Samuel Gompers, one of the founding fathers of the ILO.

The composition and traditions of the two trade unions had a great impact on the events that led to the decision to leave the subject of freedom of association to the competence of the ILO and can be explained only in the light of the «*political clouds which were gathering over the whole international scene at the time*»²⁶. While the World Federation of Trade Unions, supported by socialist countries, claimed for a direct action of the Economic and Social Council, the American Federation of Labor, in the tradition of Samuel Gosper (and supported by the western bloc), endorsed the cause of ILO's unique competence on the matter.

²³ Doc. E/CN.4/SR.12, 5.

²⁴ T. Novitz, *International and European protection of the right to strike*, Oxford, Oxford University Press, 2003, 114 seq.

²⁵ H. Dunning, *The origins of Convention n. 87 on freedom of association and the right to organise*, *International Labour Review*, 2, 1998, 160.

²⁶ H. Dunning, *The origins of Convention n. 87 on freedom of association and the right to organise*, *International Labour Review*, 2, 1998, 160.

As early as January 1947, the World Federation of Trade Unions wrote a letter to the Secretary-General of the United Nations asking to place on the Economic and Social Council agenda the item “*Guarantees for the exercise and development of Trade Union Rights*”²⁷.

The day before the first meeting of the Commission on Human Rights, the same World Federation of Trade Unions submitted to the Economic and Social Council a draft resolution containing some suggestions for the enhancement of trade union rights²⁸. The resolution plead for the recognition of trade union rights as «*inviolable prerogatives*» of «*salaried*» workers for the protection of their professional and social interests and for the recognition of the autonomy of trade unions as organisations in terms of absence of governmental interference in their duties. The respect of said principles should have been monitored by a newly established Committee for Trade Union Rights, entrusted with the duty to scrutinize possible violations and make necessary recommendations to the Economic and Social Council as to the measures to be adopted. A formula quite familiar to other international and regional human rights monitoring bodies²⁹.

At the fourth session of the Economic and Social Council on 24 March 1947³⁰ the document “*Guarantees for the exercise and development of Trade Union Rights*” was transmitted to the Commission of Human Rights and to the International Labour Organisation, the latter asked to provide a report with its considerations³¹.

In the same period, the American Federation of Labor, with a letter dated 12 March 1947, requested the Secretary General to submit to the Economic and Social Council a memorandum together with a draft resolution on the guarantees for the exercise and development of trade union rights³². The draft resolution contained an express request to the ILO to consider the problem of trade union rights with reference, among others, to the following question:

«*To what extent have workers the right to form, join or belong to labour or trade union organizations of their own choice without interference or coercion by the government?*»³³.

²⁷ Doc. E/CN.4/31, section B.

²⁸ Doc. E/C.2/28.

²⁹ For instance, the ILO monitoring committees and the European Committee of Social Rights.

³⁰ Resolution n. 52 IV.

³¹ Doc. E/CN.4/31, annex A.

³² Doc. E/CN.2/32.

³³ Doc. E/CN.4/31, 3.

The American Federation of Labor, together with some western countries such as the United Kingdom and the Netherlands, was of the opinion that trade union rights were a matter for the ILO and not for the Economic and Social Council. In addition it claimed that the proposed committee for the monitoring of trade union rights set up within the United Nations would have never been capable of acting as rapidly or of developing an adequate machinery for implementation with a short period of time. The same opinion was supported by the International Federation of Christian Trade Unions³⁴.

The ILO acted indeed very rapidly. In August 1947, at its fifth session, the Economic and Social Council had before it the ILO report entitled "*Decision concerning freedom of association adopted unanimously by the thirtieth session of the International Labour Conference on 11 July 1947*". The document served as a basis for drafting ILO Convention n. 87.

The feelings toward the role the ILO should have played in relation to trade union rights can be summarised under three different positions³⁵.

The delegations of France, the United Kingdom and the United States supported the view that freedom of association and trade union rights should have been dealt primarily at the ILO level and that any cooperation between the ILO and the Commission on Human Rights on trade union matters should have been limited to those aspects forming part of the Bill of Human Rights.

The delegations of the Dominican Republic and Argentina proposed to broaden the scope of the Economic and Social Council resolution «*so as to include the consideration of other safeguards such as minimum wages, compulsory social insurance, right to work, as might provide for the minimum well-being within the reach of all the workers of the world*»³⁶.

The delegations of the Union of Soviet Socialist Republics, Czechoslovakia and Yugoslavia, claimed that the ILO was not well place to develop mechanisms for the protection of trade union rights. In their view, its tripartite composition – due to which employers' organisations are on the same footing as the workers – affected the content of the resolution and left the respect of collective social rights in the hands of the employers. Moreover, it was said that the resolution was devoted to the principle of freedom of

³⁴ Doc. E/CN.4/31, section B, par. II, IV.

³⁵ Doc. E/CN.4/31, 7.

³⁶ Doc. E/CN.4/31, 7.

association and not specifically to trade union rights and that it failed to include the right of trade unions to have “*freedom of action*”.

Additionally, there were reservations about the creation of a special machinery for the enforcement of trade union rights outside the ILO, even if the supporters of the option claimed that:

«a machinery established under the auspices of a specialised agency on which important members of the United Nations are not represented might be lacking in the authority to safeguard trade union rights in all countries, particularly in those which are not member of the specialised agency»³⁷.

The Economic and Social Council Resolution n. 84 endorsed the position of the western block, also in relation to the establishment of an international machinery for safeguarding freedom of association. It referred the subject of freedom of association to the ILO and declared to await further ILO reports on the issue and the report from the Commission on Human Rights, the latter to be limited to *«those aspects of the subject which might appropriately form part of the bill or declaration on human rights»³⁸.*

But the resolution went further: it was decided to recognize the principles proclaimed by the International Labour Conference on freedom of association and there was a request to quickly adopt one or several international conventions on the matter.

The General Assembly adopted the text of the thirty articles of the Universal Declaration of Human Rights on 10 December 1948. The Declaration does not create binding legal obligations in international law but represents a common standard of achievement as declared in its Preamble³⁹. Nevertheless, as it has been affirmed, *«there can be little question that it sought to influence state behaviour»⁴⁰* and, together with the Charter, it is now considered to spell out the general human rights obligations of all UN member states⁴¹.

³⁷ Doc. E/CN.4/31, section E.

³⁸ Doc. E/CN.4/31, section B, Resolution adopted by the Economic and Social Council 84 (V), 8 August 1947.

³⁹ B. Creighton, Freedom of association, in R. Blanpain, Comparative labour law and industrial relations in industrialized market economies, The Hague, Kluwer Law International, 2010, 287.

⁴⁰ A. T. Guzman, Rethinking International Law as Law, Proceedings of the Annual Meeting, American Society of International Law, 25-28 March, 2009, 157.

⁴¹ T. Buergenthal, The Evolving International Human Rights System, The American Journal of International Law, 2006, 4, 787; M.S. McDougal, G. Bebr, Human Rights in the United Nations, The American Journal of International Law, 1964, 3, 603 seq. For an overview of the theories on the normative status of the Universal Declaration, see T. Buergenthal, D. Shelton, D. P. Stewart, International Human Rights in a Nutshell, 3rd ed., 2002; B. Simma, P. Alston, The sources of human rights law. Custom, jus cogens and general principles,

The first draft, consisting of a preamble and forty-eight articles, was prepared by John Humphrey and presented as an official document on 4 June 1947⁴².

Few articles of the draft referred to labour rights, both political, civil or social in character. Article 8 of the text contained a provision declaring that slavery and compulsory labour were inconsistent with the dignity of man and *«therefore prohibited by this Bill of Rights»*, article 37 and 38 provided that everyone has the right and the duty to perform socially useful work and to enjoy good working conditions and, finally, article 41 established a right to social security.

No specific reference was made to collective labour rights: draft article 19 simply recognised freedom of peaceful assembly and article 20 acknowledge freedom to form associations *«for purposes not inconsistent with this Bill of Rights»*.

A stronger commitment toward collective labour rights was contained in the second draft prepare by René Cassin and presented to the Committee a couple of weeks later⁴³.

The document re-arranged the provisions of the first draft and reduced the body to a preamble and forty-four articles. Notably, article 38 of the draft text provided as follows:

*«every worker has the right to protect his professional interests. In particular, he may, either in person or through his representatives or his trade union organisation, take part in the collective determination of conditions of work, the preparation of general plans of production or distribution, and in the supervision and management of the undertaking in which he works»*⁴⁴.

In the end, the events described above led to the adoption of a succinct article 20 recognising both freedom of assembly and association:

*«(1) Everyone has the right to freedom of peaceful assembly and association.
(2) No one may be compelled to belong to an association»*.

A previous draft dealing with assembly and association in two separate articles was modified⁴⁵, and the Declaration model was followed in the drafting of the European

Australian yearbook of International law, 1988-1989, 12, 82 seq.; L. B. Sohn, The new international law protection of the rights of individuals rather than States, The American University law review, 1982, 1 seq.

⁴² Doc. E/CN.4/AC.1/3.

⁴³ Doc. E/CN.4/AC.1/W.2/Rev.1.

⁴⁴ Doc. E/CN.4/AC.1/W.2/Rev.1.

⁴⁵ Doc. E/CN.4/AC.1, SR.8, 14. Panama proposed to have two different articles dealing separately with freedom of assembly and freedom of association; see, Doc. A/C.3/280; Doc. A/C.3/295.

Convention on Human Rights. However, the latter international treaty does not include the recognition of negative freedom of association, an amendment to the Declaration proposed by Uruguay⁴⁶ and finally accepted (even if considered problematic due to the existence of closed shop systems in some States⁴⁷).

Trade union rights find a more privileged position in article 23 dealing with the right to work (par. 1), the equal pay principle (par. 2), the just and favourable remuneration principle (par. 3) and the right of everyone «*to form and to join trade unions for the protection of his interests*» (par. 4).

It should be noted that there was a Swedish proposal, lately dismissed, to include in the Universal Declaration the following provision:

«'Everyone has the right to cease to work, when finding it impossible to work on the economic terms existing or offered'. Indeed, Swedish government was of the opinion that freedom of organisation is important as a citizenship freedom only if completed by the natural liberty to abstain from work, when the individual worker feels that he should not go on working on the economic terms existing or offered»⁴⁸.

If maintained, the Swedish proposal would have been important for the recognition of a right to abstain from the working performance, subject to the limitations contained in article 29 of the Declaration, reading as follows:

«In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society»⁴⁹.

However, the story went in a different way, a way in which the ILO, the most elaborated system in the field of labour laws and industrial relations, played an invaluable role⁵⁰.

⁴⁶ Doc. A/C.3/269. Uruguay also suggested to insert the word “*peaceful*” before the word “*assembly*”.

⁴⁷ Doc. GAOR III, part I, 438.

⁴⁸ Doc. A/C.3/252.

⁴⁹ Doc. A/C.3/252.

⁵⁰ M. Rood, *New developments within the ILO supervisory system*, R. Blanpain, *Labour law, human rights and social justice. Liber amicorum in honour of Ruth Ben-Israel*, The Hague, Kluwer Law International, 2001, 87 seq.

1.3. The concept of freedom of association within the International Labour Organisation

The International Labour Organisation (ILO) deserves special attention for its work being entirely devoted to the adoption of Conventions and Recommendations on labour matters⁵¹.

The ILO, the first specialised agency of the United Nations since 1946⁵², was established in 1919 with the Peace Treaty of Versailles (Part XIII)⁵³ on the assumption that universal and lasting peace can be established only if it is based upon social justice and that said social justice can be achieved only through the improvement of working conditions, namely

«by the regulation of the hours of work including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures»⁵⁴.

Among the working conditions listed by the Treaty, the “*recognition of the principle of freedom of association*” merits particular consideration.

By means of an historical survey on the elements characterising “*freedom of association*” in the Anglo-American experience, Janice Bellace examines, among others, what the drafters of the preamble to Part XIII of the Treaty of Versailles meant by “*freedom of association*” in

⁵¹ Conventions create international obligations for the States that ratify them, while Recommendations aim at providing guidance for policy, legislation and practice. ILO Conventions are designed to be more effective than normal diplomatic treaties due to the tripartite structure of the body that adopts them. ILO Conventions and Recommendations are described as international labour standards; see, L. Swepton, *International Labour Law*, in R. Blanpain, *Comparative labour law and industrial relations in industrialized market economies*, The Hague, Kluwer Law International, 2010, 143.

⁵² Article 57 of the Charter of the United Nations provides that: «1. *The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.* 2. *Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies*». On 30 May 1946, the United Nations and the ILO signed in New York a specific agreement under which: «*The United Nations recognises the International Labour Organisation as a specialised agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein*»; see, *Agreement between the United Nations and the International Labour Organisation*, 30 May 1946, entered into force on 14 December 1946, *Official Bulletin of the ILO*, Vol. XXIX, 15 November 1946, n. 4.

⁵³ The Treaty of Peace between the Allied and Associate Powers and Germany, London, H.M. Stationary Office, 1919, part XIII, 387-411. See, also, J-M. Servais, *International Labour Law*, The Hague, Kluwer Law International, 2011, 21 seq.

⁵⁴ ILO Constitution 1919, Preamble.

1919⁵⁵. She shows that the term was understood to mean not solely the possibility to associate in trade unions but it encompassed also the right of workers to take actions to further their occupational interests. At that time, Europe was experiencing a wave of strikes, hitting Germany particularly hard. Therefore, it seems reasonable that *«those on the Labour Commission understood that workers engaged in collective bargaining routinely support their demands by threatening to engage in industrial action, and on occasion by resorting to the use of economic weapons, such as picketing and going on strike»*⁵⁶.

The request to repeal all laws against association and combination⁵⁷ was inserted in the “Labour Charter” adopted by the International Trade Union Conference held in Berne on 5-6 February 1919⁵⁸. The Charter, that sought to influence the Treaty of Peace, demanded the conversion of minimum labour requirements into a code of international law by the League of Nations on the conclusion of peace. Point 8 of the Charter provided as follows:

*«workers shall have the right of free combination and association in all countries. Laws and decrees (domestic service laws, prohibition of coalition, etc.) which place certain classes of workers in an exceptional position in relation to other workers, or which deprive them of the right of combination and association and of the representation of their economic interests, shall be repealed. Emigrant workers shall enjoy the same rights as the workers of the country into which they immigrate, as regards joining and taking part in the work of trade unions, including the right to strike»*⁵⁹.

However, this and other provisions discussed at the Berne Conference were not inserted in the Treaty of Versailles so that some felt that *«these provisions of the Treaty of Peace fell short of the targets the workers had set in the wartime conferences»*⁶⁰.

Conversely, as Dunning points out, in some years the Workers realised that their progress towards free association had in fact received a substantial boost⁶¹.

In 1921 the ILO promoted Convention n. 11 concerning the Rights of Association and Combination of Agricultural Workers. Article 1 of the Convention contains a provision

⁵⁵ J. R. Bellace, The ILO and the right to strike, *International Labour Review*, 2014, 1, forthcoming.

⁵⁶ J. R. Bellace, The ILO and the right to strike, *International Labour Review*, 2014, 1, forthcoming.

⁵⁷ For an historical survey on trade unionism in the 19th and 20th century, A. Jacobs, *Collective self-regulation*, in B. Hepple, *The making of labour law in Europe. A comparative study of nine countries up to 1945*, Oxford, Hart Publishing, 2010, 193.

⁵⁸ B. Hepple, *Labour Laws and Global Trade*, Oxford, Hart Publishing, 2005, exp. 25 seq.

⁵⁹ World Peace Foundation Pamphlet Series, *Labor in the Treaty of Peace, 1917-1919*, 271, 327.

⁶⁰ H. Dunning, The origins of Convention n. 87 on freedom of association and the right to organise, *International Labour Review*, 1998, 2, 156.

⁶¹ H. Dunning, The origins of Convention n. 87 on freedom of association and the right to organise, *International Labour Review*, 1998, 2, 156.

equalising the right of industrial and agricultural workers with regard to association and “combination”, a term used in the 19th century to refer to workers acting together⁶². In 1927 there was an attempt to deal again with freedom of association⁶³, meant in the sense explained above, inclusive of the freedom to combine. However, the attempt failed possibly because workers felt that a regulation on the right to strike would have turned to confine its exercise to the permitted option, and preferred to remain stick to the wording of article 427 of the Treaty of Peace, providing that the right of association was permitted *«for all lawful purposes by the employed as well as by the employers»*.

The fact that “*freedom of association*” is inserted in the ILO Constitution permits to apply the duty to recognise and respect said principle, that is inclusive of the right to strike, irrespective of the fact the State has ratified the relevant ILO Conventions⁶⁴.

The fundamental principles on which the Organisation is based had been reaffirmed in 1944 with the Declaration of Philadelphia that states, in particular, that:

«(a) labour is not a commodity; (b) freedom of expression and of association are essential to sustained progress; (c) poverty anywhere constitutes a danger to prosperity everywhere; (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare»⁶⁵.

The Declaration puts a strong emphasis on the vital importance of the right to associate since its respect is essential to the same effectiveness of the ILO. Indeed, in the absence of an effective right for workers and employers to associate and organise their activities, the whole ILO construction as a tripartite organisation might encounter the risk to collapse⁶⁶.

One of the special characteristics of the ILO is the tripartite membership of its organs, all of them composed of Workers’ representative, Employers’ representatives and Governments’

⁶² J. R. Bellace, The ILO and the right to strike, International Labour Review, 2014, 1, forthcoming.

⁶³ R. Ben-Israel, International Labour Standards: the case of freedom to strike, Deventer, Kluwer law and taxation publishing, 1988, 37-38.

⁶⁴ R. Ben-Israel, International Labour Standards: the case of freedom to strike, Deventer, Kluwer law and taxation publishing, 1988, 66 seq.

⁶⁵ Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), General Conference of the International Labour Organization, 26th session, 10 May 1944.

⁶⁶ B. Creighton, The ILO and protection of Freedom of Association in the United Kingdom, in K.D. Ewing, C.A. Gearty, B. Hepple, Human rights and labour law. Essays for Paul O’Higgins, London, Mansell Publishing Limited, 1994, 2. The Author notes that the ILO has adopted several Conventions to ensure the respect of freedom of association, the most important of which are Convention n. 87 and Convention n. 98.

representatives. The General Conference, the ILO supreme organ controlling the permanent secretariat of the International Labour Organization (the International Labour Office), is composed of representatives of the member States with two seats for the Government delegates, one for the Workers' delegates and one for the Employers' delegates, the latter two categories holding together half of the votes. The same voting mechanism applies also to the Governing Body consisting of fifty-six people, twenty-eight representing Governments, fourteen representing the Employers, and fourteen representing the Workers⁶⁷.

The strong commitment of the International Labour Organisation towards the respect of freedom of association and trade union rights can be appreciated in the 1957 Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members. The resolution called for the adoption of laws «*ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers*». In similar terms, the 1970 Resolution concerning Trade Union Rights and their Relation to Civil Liberties invited the Governing Body to instruct the Director-General to take action «*with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense*», with particular attention to be paid, *inter alia*, to the «*right to strike*»⁶⁸;

With the end of the Cold War, and the pressure of globalisation, the ILO had to move in a new environment that, from a political standpoint, was not anymore dominated by the contraposition between the eastern and the western bloc. It therefore encountered the need to redefine its role to face the new situation. In the report “*Defending values, promoting change*”, submitted to the International Labour Conference in 1994, on the occasion of the 75th ILO anniversary, the ILO Director-General focused on fundamental human rights recognised in the Universal Declaration of Human Rights, and contained in seven core ILO Conventions and launched a campaign for their ratification by all members of the organisation.

The process led to the adoption of the 1998 ILO Declaration of Fundamental Principles and Rights at Work⁶⁹.

⁶⁷ For an overview, J-M. Servais, *International Labour Law*, The Hague, Kluwer Law International, 2011.

⁶⁸ B. Gernigon, A. Otero de Dios, O. Guido, *ILO principles concerning the right to strike*, Geneva, International Labour Office, 2000, 7.

⁶⁹ For a detailed elaboration of the process leading to the adoption of the ILO Declaration of Fundamental Principles and Rights at Work see, J. R. Bellace, *The ILO Declaration of Fundamental Principles and Rights at Work*, *International Journal of Comparative Labour Law and Industrial Relations*, 2001, 3, 269 seq.

The Declaration states that all ILO Members, even if they have not ratified the Conventions developing the principles established by the Declaration of Philadelphia (such as Convention n. 87), «*have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize [...] the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining*».

At this stage there was already a conspicuous jurisprudence of the ILO monitoring body with regard to the content of “*freedom of association*” clearly including the right to strike, so there was no need to discuss on what freedom of association exactly meant⁷⁰.

1.3.1. ILO Convention n. 87 and the right to strike

A detailed elaboration of the freedom of association and the right to organise is contained in two fundamentals ILO Conventions: Convention n. 87, protecting freedom of association and the right to organise and Convention n. 98, complementary to the first and concerning the application of the principles of the right to organise and to bargain collectively.

Convention n. 87 promotes the right of workers and employers⁷¹ to establish and join organisations of their own choosing, to draw up their constitutions and rules, to elect their own representatives, to formulate their own programmes, to establish and join federations and confederations, national or international. On its part, each member of the ILO for which the Convention is in force has to ensure the free exercise of the right to organise.

⁷⁰ J. R. Bellace, The ILO and the right to strike, *International Labour Review*, 2014, 1, forthcoming. It should be noted that on 1994, during the 81st International Labour Conference, the Employers’ group specified that, in their view, the text of Conventions n. 87 did not include the right to strike and expressed their disagreement «*with the scope given to this right by the Committee of Experts*». They did not challenge «*the principle of the freedom to strike and lock-out, but they absolutely could not accept that the Committee of Experts deduced from the text of the Convention a right so universal, explicit and detailed, as it had done in this part of the survey*». With regard to the role of the Committee of Experts, they claimed that. «*the Committee of Experts’ function was to interpret existing provisions and not to substitute for legislators; it is not up to the Experts to create requirements with respect to questions upon which the technical committee could not agree. To base oneself on the part of Article 3 which states “Workers’ and Employers’ organizations shall have the right ... to organize their ... activities and to formulate their programs” is a very indirect and subjective method for concluding the existence of the right to strike in Convention No. 87*»; see, International Labour Conference, Record of Proceedings, 1994, 81st session, exp. par. 115-134 and speech of Mr. Wisskirchen, Employers’ Adviser Germany - Employer Vice-Chairman of the Committee on the Application of Standards, 28/9.

⁷¹ The Convention covers both the right of workers and employers even if there is no comparison between the two, since alleged violation of employers’ rights to associate occurs rarely; H. Dunning, The origins of Convention n. 87 on freedom of association and the right to organise, *International Labour Review*, 1998, 2, 149.

The American Federation of Labor strongly supported the drafting of a Convention on freedom of association before the United Nations Economic and Social Council⁷². However, in order to have a timely and adequate machinery for implementation, it requested the exercise being devolved to the ILO and not to the Economic and Social Council, the latter option being advocated by the World Federation of Trade Unions⁷³. The position was welcomed by western States such as the United Kingdom, the Netherlands, and the United States, feeling that any proposal for submitting the question to another organ besides the ILO would mean duplication of work, a loss of special competence available in the ILO, and that in the working out of practical measures to deal with this subject, the actual and practical groundwork should have been undertaken by an organisation in which the workers have the right of full participation and the right to vote⁷⁴. On the contrary, other States belonging to the eastern bloc⁷⁵ held that the ILO was not well placed to sustain the right of workers due to the participation in the drafting process of representatives of the employers. As said, it is likely that the western support to an international instrument adopted under the auspices of the ILO - contrary to the soviet preference for the same instrument adopted by the United Nations Economic and Social Council - was due essentially to political motivations⁷⁶. For obvious reason, the ILO, on its part, endorsed its unique role in the protection of freedom of association and in the establishment of specific monitoring machinery in consultation between the same organisation and the United Nations⁷⁷.

The Economic and Social Council decision to ask the ILO to include the subject of freedom of association on its agenda for the forthcoming Conference⁷⁸ and the subsequent resolution adopted by the ILO⁷⁹ prepared the ground for the adoption of Convention n. 87 in

⁷² R. Ben-Israel, *International Labour Standards: the case of freedom to strike*, Deventer, Kluwer law and taxation publishing, 1988, 38-39.

⁷³ Doc. E/CN.4/31, section B. See, Section I, par. 1.2, above. It is also reported that the American Federation of Labor considered the World Federation of Trade Unions to be Communist dominated; see, J. R. Bellace, *The ILO and the right to strike*, *International Labour Review*, 2014, 1, forthcoming.

⁷⁴ Doc. E/CN.4/31, section B, par. IV.

⁷⁵ Such as the Polish and Czechoslovak Governments, *International Labour Conference, Record of Proceedings*, 1947, 30th session, appendix X, 569.

⁷⁶ H. Dunning, *The origins of Convention n. 87 on freedom of association and the right to organise*, *International Labour Review*, 1998, 2, 160.

⁷⁷ Doc. E/CN.4/31, section D, par. VIII.

⁷⁸ Doc. E/CN.4/31, annex A.

⁷⁹ *International Labour Conference, Record of Proceedings*, 1947, 30th session.

1948⁸⁰, whose status was afterward recognised in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

In Convention n. 87 there is no direct mention of the right to strike. The only references to the right to strike in the ILO system are contained in Convention n. 105 concerning the Abolition of Forced Labour, prohibiting the use of any form of forced or compulsory labour as a punishment for having participated in strikes, and in Recommendation n. 92 concerning voluntary conciliation and arbitration, encouraging to abstain from strikes and lockouts during conciliation and arbitration procedures.

Yet, the literal argument is not conclusive.

Contrary to what someone argued⁸¹, the International Labour Conference was well aware of the right to strike⁸², but it was unable to expressly deal with the issue for a number of reasons.

A first reason can be identified in the obstacles to include the specific topic in its agenda due to strict time constraints⁸³.

On 24 March 1947, having received specific memoranda on trade union rights by the World Federation of Trade Unions and the American Federation of Labor, the Economic and Social Council transmitted these documents to the ILO and requested it to place them on its agenda for the forthcoming session to be held within three months, in June 1947. It also asked the organisation to provide a report for the next meeting of the Economic and Social Council.

The ILO components did not have time to negotiate an instrument specifically mentioning the right to strike and made the choice to rely on the established understanding of “*freedom of association*”, confirming the assumption according to which the right to strike was included in the more general guarantee on freedom of association. Therefore, there was no need to further express the concept. Indeed, as it has been affirmed, this right «*arises directly from the freedom of association – i.e., it is a qualified species of that freedom – rather than from the right to bargain collectively*»⁸⁴. The position finds a support on the basis of the historical

⁸⁰ L. Swepston, Human rights law and freedom of association: development through ILO supervision, *International Labour Law Review*, 1998, 2, 171.

⁸¹ A. Wisskirchen, The standard-setting and monitoring activity of the ILO: legal questions and practical experience, *International labour review*, 3, 2005, 253 seq.

⁸² R. Ben-Israel, *International Labour Standards: the case of freedom to strike*, Deventer, Kluwer law and taxation publishing, 1988, 35 seq.

⁸³ J. R. Bellace, The ILO and the right to strike, *International Labour Review*, 2014, 1, forthcoming. See, also, R. Ben-Israel, *International Labour Standards: the case of freedom to strike*, Deventer, Kluwer law and taxation publishing, 1988, 38.

⁸⁴ J-M. Servais, ILO law and the right to strike, *Canadian Labour Law and employment Journal*, 2009, 15, 150.

considerations underlined above. The Labour Commission that drafted Part XIII of the Treaty of Versailles assumed that “*freedom of association*” meant the right of workers to join trade unions for the purpose of collective bargaining. And this conception affected the subsequent developments of the principle.

A second reason for the lack of a specific standard on the right to strike can be attributed to the workers’ members. They were reluctant to have a right to strike inserted in an international document due to the limitations that, likely, the employers and governments representatives would have introduced, thereby diluting its strength⁸⁵. Moreover, for the reason explained above, they probably felt that a specific reference to the right to strike was redundant in the light of the accepted understanding of the term “*freedom of association*”.

Finally, a further reason for the absence of ILO standards on industrial disputes is offered by the former Director of the ILO, Jean-Michel Servais:

«it has proved difficult to reconcile the Anglo-American legal vision of work stoppages with the continental European vision, let alone with the Communist total prohibition of such stoppages, and to work out the consequences of those different approaches in terms of the legitimate objective of industrial action and the appropriate degree of protection for strikers»⁸⁶.

The position claiming for an inclusion of the right to strike in ILO Convention n. 87 as inherent in the concept of freedom of association finds a further support in article 8 par. 3 of the International Covenant on Economic, Social and Cultural Rights, having the function to prevent conflicts between the International Covenant and the 1948 ILO Convention. As it has been observed:

«why would it be appropriate to tell states that it is not permissible to fall below the ILO standards on the right to strike, if the right to strike is not protected by those ILO standards in the first place?»⁸⁷.

⁸⁵ R. Ben-Israel, *International Labour Standards: the case of freedom to strike*, Deventer, Kluwer law and taxation publishing, 1988, 45. In the same vein, T. Novitz, *International and European Protection of the Right to Strike*, Oxford, Oxford University Press, 2003, 117-118. The author identifies two reasons for the exclusion of a right to strike: first, the beginning of a Cold War division between western and eastern block and, second, the workers’ reluctance to have a right to strike inserted in an international document for the reasons already expressed by Ben-Israel.

⁸⁶ J-M. Servais, *ILO law and the right to strike*, *Canadian Labour Law and employment Journal*, 2009, 15, 149.

⁸⁷ K. D. Ewing, *Myth and reality of the right to strike as a ‘Fundamental labour right’*, *International Journal of comparative labour law and industrial relations*, 2013, 2, 146.

It was the Committee on Freedom of Association and, subsequently, the other monitoring bodies, that had to face with the need to define the boundaries of freedom of association in order to determine when it was violated. Therefore, they had to expressly speak about the “*right to strike*”.

1.4. The 1966 United Nation Covenants

The principles enunciated in articles 20 and 23 of the Universal Declaration are implemented in two covenants created in the framework of the United Nations system of human rights protection: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

With Resolution n. 217 (III) of 10 December 1948 the General Assembly adopted the Universal Declaration on Human Rights⁸⁸ and requested the Economic and Social Council to ask the Commission on Human Rights to continue to give priority in its work to the preparation of a draft covenant on human rights and draft measures on its implementation⁸⁹. As a consequence, on 9 February 1949 the Economic and Social Council transmitted the resolution to the Commission on Human Rights for the actions contemplated therein⁹⁰.

In spring 1950, the Commission on Human Rights presented a first draft convention to the Economic and Social Council for its considerations. Among other things, the Commission devoted its attention to discussing the question of including additional articles on economic and social rights, due to the fact that, according to certain views, they were a prerequisite for the enjoyment of the other rights already included in the draft covenant⁹¹.

The first intention of the General Assembly was to incorporate in the draft covenant on human rights also economic, social and cultural rights. The enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent, and a man would have not represented the human person whom the Universal Declaration regards as the ideal of free man if deprived of economic, social and cultural rights.

⁸⁸ General Assembly, Resolution n. 217 (III) A.

⁸⁹ General Assembly, Resolution n. 217 (III) E.

⁹⁰ Economic and Social Council, Resolution n. 191 (VIII), 9 February 1949, doc. E/1162.

⁹¹ Commission on Human Rights, Report to the Economic and Social Council on the work of the 6th session of the Commission, Lake Success, New York, 27 March -19 May 1950, doc. E/1681.

The Economic and Social Council was requested to instruct the Committee in the sense of including a clear expression of economic, social and cultural rights in a manner which related them to the civic and political freedoms proclaimed by the draft covenant⁹².

However, with the adoption of Resolution n. 543 of 5 February 1952, the General Assembly reconsidered its position. It received an express invitation of the Economic and Social Council in this sense, as the latter was facing with the problem of having «*two different kind of rights and obligations*» in one covenant⁹³. Therefore, there was a request to write two separate covenants, one to contain civil and political rights and the other one to contain economic, social and cultural rights, to be approved and opened for signature simultaneously⁹⁴.

The decision to distinguish civil and political from economic, social and cultural rights lies, on the one hand, in the different nature of the rights from which, traditionally, derives a diversity in their definition, application and control.

It is often assumed that civil and political rights, identified also as “*first generation rights*”, are universal, individual and justiciable rights, entailing a negative obligation of the State from interfering in the life of individuals. Since they do not require positive States’ actions, their realisation is supposed to be costless⁹⁵. On the contrary, economic, social and cultural rights, identified also as “*second generation rights*”, are seen as programmatic rights in character, requiring a positive action on the part of the State for their realisation, an activity that implies the use of financial resources. The set of obligations placed upon the States as stemming from said categorization could have had the effect of deter some States from undertaking obligations deriving from an international covenant containing both civil and political and economic, social and cultural rights.

Moreover, the decision to split the protection of human rights in two separate instruments should be weighed against the ideological conflict between East, that associated the cause of economic, social and cultural right with the aims of the socialist society, and West, that

⁹² General Assembly, Resolution n. 421 (V), E.

⁹³ Economic and Social Council, Resolution n. 384 (III), C.

⁹⁴ General Assembly, Resolution n. 543 (VI).

⁹⁵ M. Bossuyt, *La distinction juridique entre les droits civil et politiques et le droits economiques, sociaux et cultureles*, *Revue de droit de l’homme*, 1975, 8, 789.

professed the priority of first generation rights as being the foundation of liberty and democracy in the free world⁹⁶.

The Commission on Human Rights completed its work in line with the new indications of the General Assembly and drafted two covenants, both adopted on December 1966: the International Covenant on Civil and Political Rights, entered into force on 23 March 1976, and the International Covenant on Economic Social and Cultural Rights, entered into force on 3 January 1976.

Despite the fact that «*all human rights are universal, indivisible, interdependent and interrelated*» and must be treated «*in a fair and equal manner, on the same footing, and with the same emphasis*»⁹⁷, it has been noted that the two covenants had been for a long time falls twins⁹⁸ due to the dissimilar monitoring and complaints mechanisms⁹⁹.

Article 28 of the International Covenant on Civil and Political Rights provided for the establishment of an ad-hoc committee - the Human Rights Committee (HRC) - composed of eighteen members with high moral character and recognized competence in the field of human rights. The HRC has the task to examine the reports periodically submitted by State Parties on the measures implemented to fulfil the obligations under the International Covenant on Civil and Political Rights. The Human Rights Committee is enabled to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant by means of the Optional Protocol to the International Covenant on Civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976. The possibility to address individual petitions to the Committee once exhausted all available domestic remedies permitted the creation of a specific case-law capable to shed light on treaty provisions and also allowed the world community to devote more attention and effort in the realization of civil and political rights than economic, social, and cultural rights¹⁰⁰.

⁹⁶ M. C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights*, Oxford, Clarendon Press, 1995, 9.

⁹⁷ Vienna Declaration and Programme of Action, adopted on 25 June 1993, U.N. GAOR, 48th session, 22nd plenary meeting, 5, U.N. Doc. A CONF.157/23, 1993, reprinted in 32 I.L.M. 1661, 1993.

⁹⁸ C. de Albuquerque, *Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights-The Missing Piece of the International Bill of Human Rights*, *Human Rights Quarterly*, 2010, 32, 147.

⁹⁹ For an overview, J.A. Mertus, *The United Nations and Human Rights. A guide for a new era*, 2nd ed., London, Routledge, 2009.

¹⁰⁰ J.A. Mertus, *The United Nations and Human Rights. A guide for a new era*, 2nd ed., London, Routledge, 2009, 148.

Instead, the States Parties to the International Covenant on Economic Social and Cultural Rights undertook to submit reports on their observance of the rights recognized in the treaty to the Economic and Social Council (article 16), a political body established by the Charter of the United Nations with general duties to make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms (chapter X of the Charter of the United Nations).

The monitoring turned to be ineffective and with the Economic and Social Council Resolution 1985/17¹⁰¹ it was decided to create a “*Committee on Economic, Social and Cultural Rights*” (CESCR) composed of eighteen members with specific expertise in the field of human rights and with the function of examine States’ Parties report and adopt general comments. In sum, the same supervisory model adopted for the International Covenant on Civil and Political Rights.

However, the International Covenant on Economic Social and Cultural Rights still lacked of a specific mechanism for individual petitions that mirrored the one already in force for the international protection of civil and political rights.

Since 1992 there was a movement toward the creation of a specific system for the examination of individual cases under the International Covenant on Economic, Social and Cultural Rights, which would have offered:

«the only real hope that the international community will be able to move towards the development of a significant body of jurisprudence in this field. As the experience of the Human Rights Committee demonstrates such a development is essential if economic, social and cultural rights are to be treated as seriously as they deserve to be»¹⁰².

It took more than fifteen years to have a final draft of an optional Protocol to the International Covenant on Economic, Social and Cultural Rights¹⁰³, under which the Committee on Economic, Social and Cultural Rights is enabled to receive communications submitted by or on behalf of individuals or groups of individuals claiming to be victims of a

¹⁰¹ Economic and Social Council, Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Economic and Social Council Resolution 1985/17, 28 May 1985.

¹⁰² Preparatory Committee of the Vienna World Human Rights Conference, doc. A/CONF.157/PC/62/add.5, 93-94.

¹⁰³ A. Vandenbogaerde, W. Vandenhole, The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: an Ex Ante Assessment of its Effectiveness in Light of the Drafting Process, Human Rights Law Review, 2010, 2, 207 seq.

violation of any of the economic, social and cultural rights set forth in the treaty. The Optional Protocol was adopted on 10 December 2008¹⁰⁴ and so far has been signed by forty-five states and ratified by only eleven, over the one hundred-sixty parties to the International Covenant on Economic, Social and Cultural Rights.

1.4.1. The absence of a positive recognition of the right to strike in the International Covenant on Civil and Political Rights

In contrast to the provisions of article 20 of the Universal Declaration of Human Rights, freedom of peaceful assembly and freedom of association are dealt with in two different articles of the International Covenant on Civil and Political Rights.

Article 21 of the International Covenant on Civil and Political Rights reads as follows:

«The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others».

Article 22 provides that:

*«1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention».*

On this point, it should be noted that the proposal coming from the Soviet Union to have a common article for both assembly and association¹⁰⁵ was defeated because, it was said, there

¹⁰⁴ General Assembly Resolution, doc. A/RES/63/117.

¹⁰⁵ Doc. E/CN.3/222 (SU); doc. E/CN.4/L.126.

were substantial differences in the two articles to justify a separate treatment¹⁰⁶. Moreover, if separated, it was possible to insert specific limitations to the freedom of association, slightly different than the ones provided for the freedom of peaceful assembly¹⁰⁷. Nevertheless, an examination of the Covenant's preparatory works shows that similar considerations were done and comparable problems arose during the drafting process of the two articles, in relation, first, to their formulation.

Notwithstanding a general agreement on the desirability to include in the Covenant an article on the right to freedom of assembly and association, there was no concordance on the elements constituting said rights.

As far as freedom of assembly is concerned, a proposal from the Soviet Union claiming that the right should include freedom to hold assemblies, meetings, street processions and demonstrations «*in the interests of democracy*»¹⁰⁸ was contrasted by the majority of the drafting Commission, convinced that a general formulation, not referring to the democratic interests, was preferable. The Soviet formulation – if accepted - would have excluded assemblies not directly related to the “*interests of democracy*”, a vague concept that might encounter the risk to be equated with the interests of the political regime, thereby rendering impermissible assemblies not aimed to support the established order¹⁰⁹.

The formulation of the right to freedom of association met some troubles too, notably on whether the right to form and join trade unions should have been specifically mentioned in article 22.

Some held that including trade union rights both in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights might have led to the paradoxical result to have trade union rights subjected to two sets of limitations: specific limitations stemming from article 22 par. 2 of the International Covenant on Civil and Political Rights and general limitations stemming from article 4 of the International Covenant on Economic, Social and Cultural Rights¹¹⁰. The prevailing opinion

¹⁰⁶ Doc. E/CN.4/SR.325, 5 (GB), 6 (F), 8 (RCH), 11 (RL), 12 (PAK).

¹⁰⁷ M. Novak, UN Covenant on Civil and Political Rights, CCPR Commentary, Kehl am Rhein, Engel Publisher, 2005, 483. For a reconstruction of the preparatory works, M.J. Bossuyt, Guide to the “travaux préparatoires” of the International Covenant on Civil and Political Rights, Dordrecht, Martinus Nijhoff Publisher, 1987, 414.

¹⁰⁸ Doc. E/CN.4/SR.120, 11 (SU). Poland argued that, should the right of peaceful assembly be exercised by anti-democratic groups, all the rights recognised in the Covenant might be jeopardised; see, doc. E/CN.4/SR.325 (PL).

¹⁰⁹ M. Novak, UN Covenant on Civil and Political Rights, CCPR Commentary, Kehl am Rhein, Engel Publisher, 2005, 482.

¹¹⁰ Doc. E/CN.4/SR.121, 8 (Chairman), 11 (DK); doc. E/CN.4/SR.325, 8, 14 (RCH).

was, however, that a possible decision to mention trade union rights only in the International Covenant on Economic, Social and Cultural Rights could have led to the erroneous interpretation that these rights were not civil rights but only economic or social¹¹¹, in contrast with the assumption that all human rights are indivisible and interdependent.

The same discussions underpinned the debate on the acceptance of an Ukrainian amendment - modelled on article 8 of the International Covenant on Social, Economic and Cultural Rights - asking to extend the provisions of article 22 also to the right to form national and international trade unions and the right of these organisations to discharge their functions without interference¹¹². Those who opposed the amendment observed that the proposed modification, if accepted, would have changed the nature of the article by placing primary stress on the rights of trade unions to the neglect of other associations such as, for example, political parties¹¹³.

There were also various opinions on whether both rights should have been formulated as in article 20 of the Universal Declaration on Human Rights, so that «*everyone shall have the right to freedom of peaceful assembly*»¹¹⁴ and «*everyone shall have the right to freedom of association*»¹¹⁵, or whether they should have been only “*recognised*” as a fundamental human right rather than granted under the International Covenants¹¹⁶. Finally, the Commission on Human Rights opted for the latter formulation with regard to the right to freedom of peaceful assembly¹¹⁷, on the assumption that it was understood in the sense of natural law¹¹⁸, while it preferred to maintain the other formulation for the right to freedom of association.

A second source of debate was connected to the permissible restrictions.

Broadly speaking, the general limitations on the right to freedom of assembly are the comparable to those on the right to freedom of association. Both provisions recognise limitations necessary in a democratic society, in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection

¹¹¹ Doc. E/CN.4/SR.325, 4 (GB), 6 (F), 15 (S).

¹¹² Doc. A/C.3/L.935.

¹¹³ Doc. A/C.3/SR.1085, par. 35-37; doc. A/C.3/SR.1086, par. 17, 35-37, 39; doc. A/C.3/SR.1087, par. 13, 24, 30, 34, 48, 60, 69; doc. A/C.3/SR.1088 par.11, 17; doc. A/C.3/SR.1089, par. 2, 11, 19, 37, 50.

¹¹⁴ Doc. E/CN.4/SR.169, par. 25, 87 (RL), 40 (AUS), 88 (GB).

¹¹⁵ Doc. E/CN.4/SR.171, par. 44 (RL); doc. E/CN.4/SR.172, par. 15 (RL).

¹¹⁶ Doc. E/CN.4/SR.171, par. 51 (PI), par. 60 (F); doc. E/CN.4/SR.169, par. 46 (F).

¹¹⁷ Doc. A/2929, VI, par. 140. The choice, however, does not seem to weaken the protection accorded to the right in question; see, M. Novak, UN Covenant on Civil and Political Rights, CCPR Commentary, Kehl am Rhein, Engel Publisher, 2005, 484.

¹¹⁸ M. Novak, UN Covenant on Civil and Political Rights, CCPR Commentary, Kehl am Rhein, Engel Publisher, 2005, 483.

of the rights and freedoms of others. The main discrepancy relates to the inclusion of the words «*imposed in conformity with the law*» in article 21 and «*prescribed by law*» in article 22. The divergence is due to a proposed amendment aimed to allow legitimate administrative actions to restrict the exercise of the right to freedom of peaceful assembly¹¹⁹.

There were also some discussions on the opportunity to protect said rights only against «*governmental interference*»¹²⁰ but, finally, the drafters acknowledged the general understanding that individuals should be protected against any kind of interference in the exercise of said rights¹²¹.

Article 21 and 22 of the International Covenant on Civil and Political Rights do not overtly cover collective actions. However, it can be said that, notwithstanding any specific reference to the right to strike in article 22, there was an idea that freedom of association encompasses also the right to strike.

It is reported that, notwithstanding some adverse proposals, there was an express choice to formulate the reference to the “*protection of his interests*” in article 22 in general terms because, it was observed, trade union organisations must often struggle for the protection of the civil rights as well as the economic and social interests of their members¹²². It was also said that the formula was better than the one used in article 8 of the International Covenant on Economic, Social and Cultural Rights, that refers only to interests of an economic and social nature¹²³. It would be difficult to imagine what other kind of “*struggle*” the drafters had in mind when writing the Covenant if it was not the right to strike. It can be argued that the intention of the drafters was not only to guarantee an individual right to organise in trade unions but also a collective right to take actions aimed to protect the interests of their members, irrespective of their economic or social character.

Finally, it should be noted that articles 21 and 22 of the Covenant substantially differ in two points.

First, article 22 introduces specific restrictions on the right to freedom of association, and provides that lawful restrictions might be imposed on members of the armed forces and of the police. The same restrictions are not present in article 21. The explanation lies on the fact that

¹¹⁹ Doc. E/CN.4/SR.169, par. 37 (GB), 79 (B).

¹²⁰ Doc. E/CN.4/365 (USA).

¹²¹ Doc. A/2929, VI, par. 148; doc. E/CN.4/SR.121, 3.

¹²² Doc. A/CR.3/SR.1086, par. 3 (B). The proposal to omit the words «*for the protection of his interests*» was in the end withdrawn; see doc. A/C.3/SR.1087, par. 5 (B).

¹²³ Doc. A/2929, VI, par. 147.

the separation of freedom of assembly and association in two distinct articles was determined by the decision to leave open the possibility to provide for specific limitations to the freedom of association. The provision was widely regarded as necessary¹²⁴, even if, according to some delegations, the restriction was already contained in the concept of public service and that it should have been deleted¹²⁵.

By contrast, article 22 does not contain any specific reference to restrictions placed on the members of the administration of the State, that would have introduced interpretative doubts on the beneficiaries of said provision¹²⁶. The restriction is present in article 8 par. 2 of the International Covenant on Economic, Social and Cultural Rights and in other human rights treaties such as article 11 par. 2 of the European Convention on Human Rights.

Secondly, article 22 par. 3 prevents conflicts between the International Covenant on Civil and Political Rights and the ILO Convention n. 87 concerning freedom of association and the protection of the right to organise. State parties would not be authorised to apply article 22 of the Covenant in such a manner as to prejudice the guarantees provided for in the ILO Convention.

According to one opinion, it was not appropriate to adopt such a formulation because well-established principles of international law would already prevent possible conflicts¹²⁷ and, in any case, cross-references to special conventions were not appropriate in a general legal instrument¹²⁸. On the contrary, the supporters emphasised that the ILO Convention was far more comprehensive in the matter of trade union rights than article 22¹²⁹ and the absence of cross-references could have been interpreted as the United Nations overlooked or underestimated the progress achieved in safeguarding trade union rights in international law¹³⁰.

¹²⁴ Doc. A/C.3/SR.1086, par. 21 (IND), 27 (TN); doc. A/C.3/SR.1087, par. 9 (CDN), 70 (IND); doc. A/C.3/SR.1088, par. 16 (NIC); doc. A/C.3/SR.1089, par. 56 (MAL).

¹²⁵ Doc. A/C.3/SR.1087, par. 53 (U), 61 (NZ), 66 (YU); doc. A/C.3/SR.1088, par. 10 (I); doc. A/C.3/SR.1089, par. 3 (USA), 30 (ETH), 58 (GR).

¹²⁶ Doc. A/C.3/SR.1089, par. 23 (SA), 34 (PAK), 42 (IQ), 54 (GB); doc. A/C.3/SR.1090, par. 3 (CL), 7 (WAN), 13 (TR).

¹²⁷ Doc. E/CN.4/SR.171, par. 84 (CHI), 85 (F), 87 (U).

¹²⁸ Doc. E/CN.4/SR.121, 11 (PI), 12 (SU); doc. E/CN.4/SR.171, par. 16, 50 (YU), 18, 73 (U), 22 (RCH), 29-30, 55, 69 (AUS), 33, 57-59 (GR); doc. E/CN.4/SR.172, 5-8 (YU).

¹²⁹ Doc. A/CN.3/SR.1086, par. 20 (IND), 24 (GCO).

¹³⁰ Doc. E/CN.4/SR.121, 9 (USA), 8-9 (F); doc. E/CN.4/SR.172, par. 13, 42-43, 63, 85 (F), 49 (RL), 34 (PI), 87 (U).

1.4.2. The duty of the States' Party to ensure the right to strike under the International Covenant on Economic, Social and Cultural Rights

Article 8 International Covenant on Economic, Social and Cultural Rights covers different aspects of trade unions activities. It provides that States Parties shall ensure: (a) the right of everyone to form and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests; (b) the right of trade unions to establish federations and organisations at a national and international level; (c) the right of trade unions to function freely; (d) *«the right to strike, provided that it is exercised in conformity with the laws of the particular country»*.

As it happens with the International Covenant on Civil and Political Rights, these rights are not construed as absolute ones.

In particular, the rights contained in par. 1 (a) and (c) are subjected to possible statutory restrictions *«necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others»* and States are free to impose lawful restrictions on the exercise of these rights on certain categories of personnel such as members of the armed forces, of the police or of the administration of the State.

Whether trade union rights should have been treated in the Covenant on Economic, Social and Cultural Rights or in the Covenant on Civil and Political Rights was a matter of some discussion¹³¹.

The detractors underlined that trade union association was an aspect of the general freedom of association already covered in article 22 of the draft Covenant on Civil and Political Rights and in article 20 of the Universal Declaration of Human Rights. Therefore the inclusion of trade union rights in the draft Covenant was an unnecessary repetition¹³².

The supporters claimed that unions were necessary instruments for the implementation of economic, social and cultural rights¹³³ and their specific protection was essential for the guarantee of said rights¹³⁴. However, the proposition encountered a systematic obstacle.

If trade union rights were to be protected under the Covenant on Economic, Social and Cultural Rights in the sense that the State shall not interfere with their enjoyment, at the same time they could not be made subject to the principle of *“progressive”* protection enunciated in

¹³¹ Doc. A/2929, 307-308.

¹³² Doc. E/CN.4/SR.224, 24 (AUS).

¹³³ Doc. E/CN.4/SR.298, 8, (LE).

¹³⁴ Doc. E/CN.4/SR.298, 9, (YU).

article 2¹³⁵, because its application implies an intervention from the State¹³⁶. The issue was not insurmountable: as some States pointed out, the obligation was not merely negative and a certain degree of governmental intervention was required in order to promote trade unionisms¹³⁷, in particular in countries where said organisations were obstructed¹³⁸.

According to the 1955 “*Annotations on the text of the draft International Covenants on Human Rights*”, a number of provisions were proposed elaborating the ways in which trade-union rights could have been protected¹³⁹. Said proposals encountered a number of criticisms on the grounds, among others, that they fell within the competence of the ILO and overlapped with its work and that some related to the rights of unions rather than to those of the individual¹⁴⁰.

Included among the proposals were provisions relating to the right to strike¹⁴¹.

Some States opposed the insertion of a clause guaranteeing the right to strike in the draft Covenant for reasons connected to the “*nature*” of the right to strike.

In particular, it was held not appropriate to insert in the draft Covenant a reference to that right because it was not truly universal right and many restrictions were placed on its exercise¹⁴²; it was a collective right, while the draft Covenant was designed to protect individual rights¹⁴³; it was not a proper right but a right to implement trade union rights¹⁴⁴; it was a right of last resort to be used only when the usual conciliation procedures had failed to secure a solution and when other rights were endangered¹⁴⁵. Moreover, nor the

¹³⁵ Article 2 par. 1 provides that State parties have a duty to “*take steps*” to the maximum of their available resources, «*with a view to achieving progressively the full realisation of the rights recognised in the International Covenant on Economic, Social and Cultural Rights*». It has been argued that under the Covenant it is difficult to determine whether a State has exercised sufficient endeavour to protect a right so that it is also difficult to hold it accountable for having breached said generic obligations; S. Joseph, UN Covenants and Labour Rights, in C. Fenwick, T. Novitz, Human Rights at work, Oxford, Hart Publishing, 2010, 333.

¹³⁶ Doc. A/C.3/SR.720, par. 20 (UK).

¹³⁷ Doc. A/C.3/SR.720, par. 3 (Chile).

¹³⁸ Doc. A/C.3/SR.720, par. 6 (Chile).

¹³⁹ Doc. A/2929, 308.

¹⁴⁰ For an overview of the debate, M.C.R. Craven, The International Covenant on Economic, Social and Cultural Rights, Oxford, Clarendon Press, 1995, 248 seq.

¹⁴¹ R. Ben-Israel, International Labour Standards: the case of freedom to strike, Deventer, Kluwer Law and Taxation Publisher, 1988, 72 seq.

¹⁴² Doc. E/CN.4/SR.225, 25 (IN).

¹⁴³ Doc. A/C.3/SR.723, 213 (AUS).

¹⁴⁴ Doc. E/CN.4/SR.300.

¹⁴⁵ Doc. A/2929, 307.

Universal Declaration on Human Rights neither the ILO Conventions did contain any specific provision regulating the right to strike¹⁴⁶.

These arguments did not prevent the insertion of a specific protection of the right to strike in article 8 par. 1(d) of the International Covenant on Economic, Social and Cultural Rights. It was observed that the right to strike was recognised in the domestic legal system of many countries¹⁴⁷, it was vital for the protection of the economic and social rights of workers and it was the only one method among many whereby trade unions could effectively pursue their interests¹⁴⁸. In addition, it was not ignored that at the ILO level “*freedom of association*” was generally understood as encompassing the right to strike.

Swepston compares the provisions of article 8 with ILO standards and concludes that, while there are some differences, the ILO and United Nations texts are almost completely consistent one with the other¹⁴⁹. He reports the following comments by Valticos and Von Potobsky¹⁵⁰:

«This provision is not as detailed as Convention No. 87. Moreover, the restrictions which it authorizes might reduce considerably the extent of the protection which it affords. This applies to the limitations which, contrary to Convention No. 87, are permitted as regards the members of the administration of the State. This is also the case as regards the limitations “which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others”, for which there is no equivalent in Convention No. 87. However, the obligations arising from that Convention are expressly reserved by the saving clause contained in Article 8, para. 3, of the Covenant. On the other hand, this Article recognizes the right to strike, but it leaves the conditions of its exercise to the discretion of national legislations».

To make the provision generally acceptable, the limitation of the “*laws of the particular country*” was adopted in article 8 par. 1(d), combined with the specific limitations placed on

¹⁴⁶ Doc. E/CN.4/SR.300, 4 (F). The insertion of a clause protecting the right to “*cease to work*” was nevertheless proposed and then dismissed by the Swedish delegation.

¹⁴⁷ Doc. A/C.3/SR.721, 202 (Perù).

¹⁴⁸ Doc. A/2929, 307. Article 8 was not intended to govern the rights of employers. It was stated that independent professional workers should be entitled to form professional organizations and that the rights of co-operative associations would not be prejudiced by their not being mentioned in the covenant; see, doc. A/2929, 308. On this point, R. Ben-Israel, *International Labour Standards: the case of freedom to strike*, Deventer, Kluwer law and taxation publisher, 1988, 81.

¹⁴⁹ L. Swepston, *Human rights law and freedom of association: Development through ILO supervision*, *International Labour Review*, 1998, 2, 173.

¹⁵⁰ N. Valticos, G. von Potobsky, *International labour law*, 2nd ed., Deventer, Kluwer, 1995, 105 in L. Swepston, *Human rights law and freedom of association: Development through ILO supervision*, *International Labour Review*, 1998, 2, 173.

certain category of personnel. The formula “*laws of the particular country*” is a compromise to render it acceptable to the majority of the States, even if some pointed out that making the right subject to the law of the particular country could render it virtually inoperable¹⁵¹. A proposition contradicted by the subsequent case-law of the supervisory body.

In any case, setting limitations to the right was a way to accommodate the need of those States, such as the United Kingdom and the Netherlands, who claimed that any provision relating to striking should permit restrictions in the case of public or essential services, notably on members of the police, the armed forces and - contrary to the International Covenant on Civil and Political Rights - the administration of the State¹⁵². The insertion clashed with the ILO practice that did not allow restriction on trade union rights placed on all personnel belonging to the administration of the State. However the provision was maintained because, as it has been observed:

«it would seem that States’ acceptance of this provision was conditioned to some extent by their assumption that the ILO would play a significant part in the supervision of the Covenant. It could be inferred from the discussion that restrictions imposed would be considered legitimate only in so far as they comply with ILO standards in the area»¹⁵³.

In compliance with the model adopted for article 22 of the International Covenant on Civil and Political Rights, article 8 par. 3 provides that:

«Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention».

Article 8 par. 3 makes express reference to the ILO Convention n. 87 concerning freedom of association and the protection of the right to organise, and therefore it points to the standard of protection developed by the ILO. A choice that enhances coherence within the United Nations system of human right protection, of which the ILO is an element, albeit a key one.

¹⁵¹ Doc. A/C.3/SR.722, 209 (UK); doc. A/C.3/SR.723, 214 (AUS); doc. A/C.3/SR.725, 221 (NOR).

¹⁵² Doc. A/C.3/L.550; doc. A/C.3/L.555.

¹⁵³ M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights*, Oxford, Clarendon Press, 1995, 260.

As it happened with article 22 of the International Covenant on Civil and Political Rights, also in this case the debate concentrated on the opportunity to adopt such a clause. According to some States, it was unclear and unnecessary¹⁵⁴, cross-references to special conventions were not appropriate in a general legal instrument and no similar reference had been made in articles 6 and 7¹⁵⁵. The uncertainties on its adoption did not prevent the approval of the clause, even with a small majority¹⁵⁶.

SECTION II - The Case-Law

After a survey on the international legal sources protecting the exercise of the right to strike, it is now time to turn to the case-law developed by the various supervisory body. The ILO played the most significant part in framing the contours of “*freedom of association*” and established a substantial jurisprudence on the right to strike. The principles it developed affect the work of the other United Nations Human Rights Treaty Bodies, namely the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. Therefore, it is appropriate to start the analysis taking into consideration, first, the ILO case-law and, secondly, the case-law of the Human Rights Treaty Bodies. What emerges from the survey is a system of international protection characterised by substantial coherence which should increase legitimacy and reinforce the protection of workers’ rights globally in a time when social protection is of paramount importance to re-balance the negative effects of economic uncertainty.

2.1. ILO supervisory bodies

In order to implement the monitoring of ILO standards, the organisation employs two types of mechanisms¹⁵⁷: a regular system of supervision, based on the examination of periodic reports submitted by Member States on the measures they have taken to implement the provisions of the ratified Conventions, and special systems of supervision, the most relevant for our purposes is the procedure for freedom of association.

¹⁵⁴ Doc. A/C.3/SR.719 (U).

¹⁵⁵ Doc. E/CN.3/SR.720, 196 (PI).

¹⁵⁶ 19 votes to 14 with 35 abstentions; doc. A/3525, 6.

¹⁵⁷ International Labour Office, Handbook of procedures relating to international labour Conventions and Recommendations, Geneva, International Labour Standards Department, 2012.

One of the most well-known works on the ILO supervisory system describes the function of the aforementioned bodies as “*quasi-judicial*”:

«The application of freedom of association Conventions is regularly examined by the international supervisory bodies and these, in their decisions on hundreds of cases, have built up a substantial body of case law, in the broadest sense of the term. This case law has been the work essentially of two ILO bodies: one is the Committee of Experts on the Application of Conventions and Recommendations, whose individual comments and general surveys, though not to be construed as a definitive interpretation of Conventions, which only the International Court of Justice is empowered to give, have acquired wide authority; the other is the Committee on Freedom of Association, whose decisions have been published systematically in a widely used digest. This latter case law is not limited to determining the meaning of freedom of association Conventions. Since it is not bound by the terms of these Conventions but is more generally inspired by the principles of freedom of association, this Committee has, owing to the variety of cases referred to it, been led to formulate principles and standards which, on various points, have complemented and extended the express provisions of the Conventions»¹⁵⁸.

In brief, under the regular system of supervision, a special committee, the Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts), has the duty to examine the reports submitted periodically by the Governments on the steps taken to give effectiveness to both ratified and non-ratified ILO Conventions¹⁵⁹. Employers’ and Workers’ organizations may comment on the Governments’ reports.

The Committee of Experts was set up initially on a trial basis in 1926 by the eight session of the International Labour Conference¹⁶⁰. As it is explained in the readers’ notes of the reports of the Committee of Experts, the reason for the establishment of the experts’ body can be found in the considerable increase in the number of ratifications of Conventions and the proportional increase in the number of annual reports originally submitted to the plenary. The result was that the ILO General Conference was not able to examine the reports and perform,

¹⁵⁸ N. Valticos, *Les methodes de la protection internationale de la liberte syndicale*, Recueil des cours, 1975, 1, 89-90.

¹⁵⁹ The aim of the reporting obligation in relation to ratified and non-ratified Conventions is different. If the Convention has been ratified by the State, the system serves the purpose of supervision irrespective the compliance of the State with its obligations. If the Convention has not been ratified by the State, the information request is aimed to provide the ILO with the Country’s position on the matters covered by the Convention and the reasons preventing its ratification. See, M. Rood, *New developments within the ILO supervisory system*, R. Blanpain, *Labour law, human rights and social justice. Liber amicorum in honour of Ruth Ben-Israel*, The Hague, Kluwer Law International, 2001, 87 seq.

¹⁶⁰ International Labour Conference, *Record of Proceedings, 1926, 8th session, Vol. 1. Appendix VII.*

at the same time, its other institutional activities. In this framework, the ILO Governing Body decided to appoint the Committee of Experts as an independent, objective and impartial committee meeting annually during the months of November-December.

The task of the Committee of Experts is to examine the States' periodical reports and indicate whether State's legislation and practice are in conformity with ratified Conventions and the extent to which member States have fulfilled their obligations under the ILO Constitution in relation to standards¹⁶¹. The Committee of Experts does not have the task to deal with individual cases. Moreover, the Committee of Experts is also asked to examine, on the base of the reports submitted by the States, the status of the legislation and practice concerning a specific area chosen by the Governing Body and covered by a given number of Conventions and Recommendations, and to reflect its analysis on General Surveys. The Committee of Experts' observations are reproduced in an annual report composed of two volumes - the first containing the general report and observations and the second containing the General Survey - to be submitted to the Committee on the Application of Standards in June.

The annual report, comprehensive of the General Survey, is discussed by the other pillar of the ILO standard supervisory system, the Committee on the Application of Standards, a conference committee set up in 1926 in accordance with article 7 of the Standing Orders of the General Conference¹⁶² and composed of Government, Employers and Workers members. The Committee on the Application of Standards has the duty to examine not only cases of serious failure by the States to fulfil reporting and other standards-related obligations, but also a number of individual cases concerning serious misapplications of ratified Conventions which have been the subject of observations by the Committee of Experts. Its report is submitted to the plenary sitting of the ILO Conference for adoption.

Unlike the regular system of supervision, a special supervisory mechanism is devoted to complaints regarding violations of the right to freedom of association.

¹⁶¹ Terms of reference of the Committee of Experts, Minutes of the Governing Body, 1947, 103rd session, Appendix XII, par. 37.

¹⁶² Article 7 of the Standing Orders of the International Labour Conference reads as follows: «1. *The Conference shall, as soon as possible, appoint a Committee to consider: (a) the measures taken by Members to give effect to the provisions of Conventions to which they are parties and the information furnished by Members concerning the results of inspections; (b) the information and reports concerning Conventions and Recommendations communicated by Members in accordance with article 19 of the Constitution, except for information requested under paragraph 5 (e) of that article where the Governing Body has decided upon a different procedure for its consideration; (c) the measures taken by Members in accordance with article 35 of the Constitution.* 2. *The Committee shall submit a report to the Conference.*».

As said, the ILO attaches great importance to the respect of freedom of association but it missed the opportunity to clearly define its content in Convention n. 87, partly for the rapid modalities in which the Convention was drafted and, partly, for a specific choice in this sense due to the number of factors underlined in the paragraphs above.

However, in 1951 it was evident that the ILO had to act in some ways to «*determine whether freedom of association had been infringed in specific cases*»¹⁶³ and it chose to do so by establishing a committee with the ability to shape the concept of “*freedom of association*” on a case-by-case basis.

In winter 1951 the Governing Body set up a specific Committee on Freedom of Association, chaired by an independent person and composed of three representatives each of governments, employers, and workers¹⁶⁴.

The Committee on Freedom of Association is entitled to receive complaints by governments or organisations of workers and employers irrespective of the fact the government concerned has ratified the above-mentioned Conventions. Indeed, in the eyes of the Committee on Freedom of Association, the acceptance of the freedom of association principle derives from the mere membership to the ILO¹⁶⁵.

The ILO, first through the Committee on Freedom of Association and, subsequently, through the other supervisory bodies, has not ignored the right to strike.

Two studies of the International Labour Office dated 1987¹⁶⁶ and 2000¹⁶⁷ respectively back this proposition by referring to the following facts:

- (i) strikes are common and important activities of workers’ organisations for furthering and defending their interests falling within the scope of articles 3 and 10 of Convention n. 87;
- (ii) the ILO supervisory bodies have reaffirmed the principle of the right to strike when considering the domestic application of article 3, 8 and 10 of Convention n. 87;

¹⁶³ J. R. Bellace, The ILO and the right to strike, *International Labour Review*, 2014, 1, forthcoming.

¹⁶⁴ E. Gravel, I. Duplessis, B. Gernigon: The Committee on Freedom of Association. Its impact over 50 years Geneva, International Labour Organisation, 2001.

¹⁶⁵ Digest of decisions and principles of the Freedom of Association Committee of the Governing Body, 4th ed., Geneva, International Labour Organisation, 1995, par. 10.

¹⁶⁶ J. Hodges-Aeberhard, A. Odero de Dios, Principles of the Committee on Freedom of Association concerning strikes, *International Labour Review*, 1987, 5, 543 seq.

¹⁶⁷ B. Gernigon, A. Odero de Dios, O. Guido, ILO principles concerning the right to strike, Geneva, International Labour Office, 2000.

- (iii) the ILO supervisory bodies have clarified that the participation in a lawful strike can be considered as the participation in a trade union activity, thereby guaranteed by a number of ILO provisions protecting workers against acts of anti-union discrimination;
- (iv) the Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation, adopted in 1957, called for the adoption of laws «ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers». In similar terms, the 1970 Resolution concerning Trade Union Rights and their Relation to Civil Liberties invited the Governing Body to instruct the Director-General to take action «with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense», with particular attention to be paid, *inter alia*, to the «right to strike»¹⁶⁸;
- (v) there is a broad consensus among the members of the Committee on the Application of Standards regarding the principle of the right to strike, although there is no coincidence in the views of Workers, Employers and Governments. In particular, in the absence of explicit ILO provisions on the matter, Employers acknowledged the right to strike and to lock out as an integral part of international common law, but they do not accept a global, precise and detailed, absolute and unlimited right to strike as allegedly deduced by the Committee of Experts from the text of ILO Conventions¹⁶⁹.

A recent General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization highlights the broad convergence of views between the Committee on Freedom of Association and the Committee of Experts on specific problems relating to freedom of association, such as the exercise of the right to strike, to be explained by a need for coherence between the supervisory bodies in relation to the fundamental principles set forth, among others, in Conventions n. 87¹⁷⁰. Therefore, it seems appropriate to rely especially on the conclusions of these bodies to frame the understanding of the right to strike in the ILO system.

¹⁶⁸ B. Gernigon, A. Odero de Dios, O. Guido, ILO principles concerning the right to strike, Geneva, International Labour Office, 2000, 7.

¹⁶⁹ The view of the Employers have changed in recent times; see, Section III, below.

¹⁷⁰ International Labour Conference, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, 101st session, 2012, par. 52.

2.1.1. Some descriptive features of the right to strike

The basic principles developed in the ILO framework with regard the right to strike do not entail a definition on what constitute a legitimate strike but they amount to a general description of a far-reaching standard of understanding and protection¹⁷¹. The Committee on Freedom of Association played a capital role in the definition of “*freedom of association*” and to accomplish this task it clarified, since its early days, two main characteristics of the right to strike in the ILO system: the right to strike as an “*essential mean*” and as a “*legitimate weapon*” to further the interests of workers.

In 1952, one year after its establishment, the Committee on Freedom of Association examined a complaint presented by the World Federation of Trade Unions against the Government of the United Kingdom (Jamaica). In the period February 1950 - January 1951, the Government of Jamaica used the police, reinforced by troops, to break strikes and prohibited public meetings for a period of one month. In this occasion, the Committee on Freedom of Association got the chance to establish the principle that the right to strike is one of the essential elements of trade union rights, stating as follows:

«The right to strike and that of organising union meetings are essential elements of trade union rights, and measures taken by the authorities to ensure the observance of the law should not, therefore, result in preventing unions from organising meetings during labour disputes»¹⁷².

The concept was confirmed in case n. 11, when the Committee on Freedom of Association stated that strikes are «*essential means*» of defending occupational interests of workers¹⁷³.

Subsequently, in case n. 5, a complaint presented by the Hind Mazdoor Sabha and the World Federation of Trade Unions against the Government of India, the Committee on Freedom of Association further developed the concept claiming that in most countries strikes are recognised not only as «*essential means*» but also as «*a legitimate weapon*» of trade unions in furtherance of their members’ interests so long as they are exercised peacefully and

¹⁷¹ J. Hodges-Aeberhard, A. Odero de Dios, Principles of the Committee on Freedom of Association concerning strikes, *International Labour Review*, 1987, 5, 548.

¹⁷² Case n. 28, Complaint presented by the World Federation of Trade Unions against the Government of the United Kingdom (Jamaica), 6th Report of the International Labour Organisation to the United Nations, 1952, Appendix V, 210, par. 68, [http://www.ilo.org/public/libdoc/ilo/P/09618/09618\(1952-6\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09618/09618(1952-6).pdf).

¹⁷³ Case n. 11, Complaints presented by the World Federation of Trade Unions against the Government of Brazil, 7th Report of the International Labour Organisation to the United Nations, 1953, Appendix V, 251, [http://www.ilo.org/public/libdoc/ilo/P/09618/09618\(1953-7\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09618/09618(1953-7).pdf).

with due regard to temporary restrictions placed thereon (for example, cessation of strikes during conciliation and arbitration procedures, refraining from strikes in breach of collective agreements)¹⁷⁴.

It was only some years later, in 1959, that the Committee of Experts made reference to the right to strike in relation to Convention n. 87. It stated that a ban on strike placed on workers other than public officers acting in the name of the State *«may sometimes constitute a considerable restriction of the potential activities of trade unions ... There is a possibility that this prohibition may run counter to Article 8, paragraph 2 of Convention No. 87»*¹⁷⁵.

Some years later it stressed that:

*«general prohibition of strikes constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interest of their members (Article 10 of Convention No. 87) and of the right of trade unions to organize their activities»*¹⁷⁶.

The interests of workers to be pursued through a strike action might be, obviously, diverse: however, the supervisory bodies limited the purposes of legitimate strike actions to the ones aimed at promoting and protecting the “*economic and social interests of workers*”, thereby fixing the third main characteristics of the right to strike in the ILO system¹⁷⁷.

In the 1983 General Survey the Committee of Experts expressed the following view:

*«the right to strike is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers»*¹⁷⁸.

¹⁷⁴ Case n. 5, Complaints presented by the Hind Mazdoor Sabha and the World Federation of Trade Unions against the Government of India, 7th Report of the International Labour Organisation to the United Nations, 1953, Appendix V, 181, [http://www.ilo.org/public/libdoc/ilo/P/09618/09618\(1953-7\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09618/09618(1953-7).pdf).

¹⁷⁵ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 1959, par. 68.

¹⁷⁶ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 1973, par. 107.

¹⁷⁷ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 109, par. 521.

¹⁷⁸ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 1983, par. 200; Case n. 1081, Complaints presented by the International Confederation of Free Trade Unions, the Federation of Peruvian Light and Power Workers and various other trade union organisations against the Government of Peru, 214th Report of the Committee on Freedom of Association, 1982, 55 seq., par. 261.

To reach said conclusion the Committee of Experts referred to articles 3, 8 and 10 of Convention n. 87, on the assumption, derived from the work of the Committee on Freedom of Association, that the right to strike is an intrinsic corollary to the right to organize protected by Convention n. 87¹⁷⁹. In any case, countries are not allowed to limit the exercise of the right to strike only to those actions aiming at the conclusions of a collective agreement. As the Committee on Freedom of Association noted:

«workers and their organisations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests»¹⁸⁰.

In addition, when the right to strike is utilised as a means of defending the economic and social interests of workers, the Committee on Freedom of Association has always regarded it as constituting a “*fundamental right*” of workers and of their organizations¹⁸¹. In case n. 1067, a complaint presented by the International Confederation of Free Trade Unions and the World Confederation of Labour against the Government of Argentina, the Committee on Freedom of Association expressed the following principle:

«The Committee has always considered that the right to strike is a legitimate and, indeed, an essential means whereby workers may promote and defend their occupational interests. However, the right to strike constitutes a fundamental right of workers and their organisations only in so far as it is utilised as a means of defending those interests»¹⁸².

Therefore, the fourth quality of the right to strike, namely the one of being a “*fundamental right*” of workers and their organisations, flows from the scope for which the strike action is performed: only in the event the action entails the protection of economic and social interests of workers, even in the broad sense describe above, then the right to strike gains the status of a fundamental right within the ILO system of protection.

¹⁷⁹ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 109, par. 523.

¹⁸⁰ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 111, par. 531.

¹⁸¹ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 109, par. 520.

¹⁸² Case n. 1067, Complaint presented by the International Confederation of Free Trade Unions and the World Confederation of Labour against the Government of Argentina, 214th Report of the Committee on Freedom of Association, 1982, par. 208, [http://www.ilo.org/public/libdoc/ilo/P/09604/09604\(1982-65-series-B\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09604/09604(1982-65-series-B).pdf).

2.1.2. Individual or collective right?

From an analysis of the early case-law of the Committee on Freedom of Association, that stated that the right to strike is one of the essential elements of trade union rights, it might seem that the exercise of said right is a prerogative of trade unions' associations, so that any kind of collective action not endorsed by a trade union should be regarded as falling outside the ILO protection. However, this is not the case.

On several occasions the supervisory bodies claimed that the right to strike is an integral part of the right «*of workers and their organisations*» to defend their collective economic and social interests: the accurate use of the word “*workers and their organisations*” instead of “*trade unions*” repels the idea that wildcat strikes, namely strikes performed by non-unionised workers, or not endorsed by a trade union, are not covered by ILO protective standards. More specifically, the Committee on Freedom of Association considered that

*«it is not called upon to give an opinion on the question as to how far the right to strike in general [...] should be regarded as constituting a trade union right. In several earlier cases and, in particular, in that relating to Turkey 1, the Committee has observed that the right to strike is generally accorded to workers and their organisations as an integral part of their right to defend their collective interests»*¹⁸³.

Therefore national legislation should not prevent workers and workers' organisations from exercising the right in question, irrespective of the fact the domestic legal system recognise the right to strike as a trade union right or as a right of individual workers¹⁸⁴. Moreover, in order to prevent a possible elusion of the principle - based on the argument that a certain organisation cannot be considered a workers' organisation under national law - the Committee on Freedom of Association, since its first 1952 meeting, laid down the following principle based on the conclusions adopted in 1937 by the Governing Body in the Labour Party of the Island of Mauritius Case:

¹⁸³ Case n. 60, Complaints presented by the World Federation of Trade Unions and by the General Council of Trade Unions of Japan against the Government of Japan, 8th Report of the International Labour Organisation to the United Nations, 1954, 212, par. 55, [http://www.ilo.org/public/libdoc/ilo/P/09618/09618\(1954-8\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09618/09618(1954-8).pdf).

¹⁸⁴ J. Hodges-Aeberhard, A. Odero de Dios, Principles of the Committee on Freedom of Association concerning strikes, *International Labour Review*, 1987, 5, 547.

«the Governing Body laid down the principle that it would exercise its discretion in deciding whether or not a body is to be regarded as an industrial association for the purpose of the Constitution of the Organisation and will not consider itself bound by any national definition of the term ‘industrial association’. The Committee proposes to follow the same principles when considering the receivability of complaints which come before it»¹⁸⁵.

Therefore, the prohibition on the calling of strikes by federations and confederations based on the fact that these are not workers’ organisations under the domestic legal system has been considered not compatible with Convention n. 87¹⁸⁶.

A practical application of the principle can be appreciated in the 2008 observations of the Committee of Experts against Colombia¹⁸⁷.

Section 417(i) of the Colombian Labour Code prohibits workers’ federations and confederations to call strikes. The alleged rationale for the introduction of the principle in the Labour Code lies in the fact that, for the Government, federations and confederations cannot be assimilated to first-level organizations. Those who hold a legal interest in collective bargaining are the workers who are members of enterprise, industry or branch trade unions and the employers to whom lists of claims have been submitted. The State is of the opinion that, if federations and confederations do not have a legal interest in collective bargaining, then they clearly have much less interest in strikes.

The Committee of Experts, avoiding the use of the word “*trade unions*” and autonomously establishing what are the organisations falling within the scope of ILO standards of protection, recalled to Colombia that the guarantees provided to first-level organizations by Article 6 of Convention n. 87 also apply to higher level organizations. Indeed, in order to defend the interests of their members more effectively, workers’ and employers’ organizations need to have the right to establish federations and confederations of their own choosing, which should themselves enjoy the various rights accorded to first-level organizations, in particular as regards their freedom of operation, activities and programmes.

The principle according to which the right to strike should be recognised by national legislation as a right of both workers and trade unions was mitigated in the course of the monitoring bodies activity.

¹⁸⁵ 6th Report of the International Labour Organisation to the United Nations, 1952, Appendix V, 210, par. 28, [http://www.ilo.org/public/libdoc/ilo/P/09618/09618\(1952-6\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09618/09618(1952-6).pdf).

¹⁸⁶ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 110, par. 525.

¹⁸⁷ International Labour Conference, Observations of the Committee of Experts, Colombia, 98th session, 2009.

It seems that the Committee on Freedom of Association took a more flexible and functional approach to the issue and stated that, if national legislation accords to the sole unions the prerogative of calling a strike, this does not violate, per se, Convention n. 87. However, said prerogative should be counterbalanced by a specific protection of individual workers not only against any act of discrimination caused by their participation in a strike but also by accessible procedures for the formation of trade unions and by specific protection against acts of anti-union discrimination. It stated as follows:

«It does not appear that making the right to call a strike the sole preserve of trade union organizations is incompatible with the standards of Convention No. 87. Workers, and especially their leaders in undertakings, should however be protected against any discrimination which might be exercised because of a strike and they should be able to form trade unions without being exposed to anti-union discrimination»¹⁸⁸.

The same functional approach is mirrored in the decision of other monitoring bodies of regional systems of fundamental rights protection¹⁸⁹.

For instance, the European Committee of Social Rights moved from a strict interpretation of the right to strike as an individual right to the acceptance of domestic provisions requiring a certain degree of collectiveness for the legitimate exercise of strike action. It stated that the national system is compliant with the provisions the European Social Charter also in case only trade unions have the right to call a strike, provided that workers are protected against liability and other acts of discrimination due to the participation in the strike and the domestic legislation does not provide for formal conditions to establish a trade union.

2.1.3. Different forms of “strikes”

The Committee of Experts observed that *«a question that frequently arises is whether the action undertaken by workers constitutes a strike under the law»¹⁹⁰.*

¹⁸⁸ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 110, par. 524; see, also, Case n. 834 (Greece), Committee on Freedom of Association, Definitive Report n. 160, March 1977, par. 199-200. For a further analysis, J-M. Servais, *International Labour Law*, The Hague, Kluwer Law International, 2011, 122, par. 280.

¹⁸⁹ Notably, the European Committee of Social Rights, see, Chapter Two, Section II, par. 2.2.1; R. Blanpain, M. Colucci, F. Hendrickx, *Legal analysis of certain aspects of collective labour law: strike*, European Social Fund, 2011, 40, par. 109. They observe a contraposition between the individual doctrine, according to which the right to strike is a right of individual workers, prevalent in the Council of Europe system and the organic doctrine, according to which the right to call a strike is a prerogative of trade unions, conditionally accepted by the ILO Committee on Freedom of Association.

Albeit this choice can be operated on a case-by-case basis, it is possible to trace some guiding trends.

The supervisory bodies of the ILO considered expression of the right to freedom of association not only collective actions entailing a suspension of the working performance but also other forms of strikes, often just as paralyzing as a total stoppage, such as tools-down¹⁹¹, go-slow¹⁹², working to rule¹⁹³, sit-down strikes, picketing operations¹⁹⁴, boycotts¹⁹⁵ and so on.

All these forms of industrial action are acceptable in the ILO framework because national laws and practices vary so considerably that it would be impossible for the supervisory bodies to provide a comprehensive list of all forms of permitted action.

Strike picketing, namely that action aimed at ensuring the success of the strike by persuading as many persons as possible to stay away from work, might be cited as an example of the great variety of understanding of the same protest activity. As underlined by the Committee of Experts:

«in some countries strike pickets are merely a means of information, ruling out any possibility of preventing non-strikers from entering the workplace; in other countries they may be regarded as a form of the right to strike, and the occupation of the workplace as its natural extension, aspects which are rarely questioned in practice, except in extreme cases of violence against persons or damage to property»¹⁹⁶.

¹⁹⁰ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 76, par. 173.

¹⁹¹ International Labour Conference, Observation of the Committee on the Application of Standards, Pakistan, 1998, 86th session.

¹⁹² International Labour Conference, Direct Request of the Committee of Experts, Switzerland, 1991, 78th session; International Labour Conference, Observation of the Committee of Experts, Bangladesh, 2011, 101st session.

¹⁹³ Case n. 2815, Complaints presented by the Trade Federation for Metals, Electronics, Electrical and other Allied Industries – Federation of Free Workers (TF4FFW) against the Government of Philippines, Interim report of the Committee of Experts n. 362, 2011, par. 1370.

¹⁹⁴ International Labour Conference, Observation of the Committee of Experts, Turkey, 2010, 99th session.

¹⁹⁵ International Labour Conference, Observation of the Committee of Experts, United Kingdom, 1991, 78th session; for secondary boycotts, for instance, International Labour Conference, Observation of the Committee on the Application of Standards to Australia, 2006, 95th session.

¹⁹⁶ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 76, par. 174.

Despite the great variety of national law and practices, the monitoring bodies made clear that, in order to respect ILO standards, any types of protests should share at least the characteristic of being exercised in a peaceful manner¹⁹⁷.

In February 1998 a group of former workers and persons leaded by the Trade Union of Banana Plantation Workers of Izabal (SITRABI) invaded some bananas' plantations in the north-east of Guatemala. The former workers were persuaded by SITRABI to commit criminal acts causing major damage to private property. In 1999, the case was brought to the attention of the Committee on Freedom of Association by the Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations (CACIF) and the International Organization of Employers (IOE) because the Government of Guatemala violated ILO Convention n. 87 by permitting the occupation not exercised in a peaceful manner. The lack of this fundamental characteristic led the Committee on Freedom of Association to declare that the occupation of plantations by workers accompanied by acts of violence is contrary to article 8 of Convention n. 87¹⁹⁸.

The same principles apply in case of lock-outs. The ILO monitoring bodies dealt with the question of lock-outs only incidentally claiming that also employers should enjoy their right to strike. Recently, for instance, the Committee of Experts found the Ministerial Order of the Government of Rwanda n. 4 dated 13 July 2010 contrary to Convention n. 87 because, in establishing the "*indispensable services*" and the conditions of exercising the right to strike in these activities, its section 11, paragraph 2, determined that: «*For public interest and the health of the population, the Authorities may stop [...] the employers from exercising the [...] lock-out*»¹⁹⁹.

In addition to ordinary strikes performed in the framework of a dispute between the employees and their direct employer, the ILO monitoring bodies had to consider also the situation of strikes held in support of other striking workers, therefore not issued against the direct employer of the strikers.

Sympathy or solidarity strikes, which are recognized as lawful in some countries, are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centres.

¹⁹⁷ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 113, par. 545.

¹⁹⁸ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 113, par. 546.

¹⁹⁹ International Labour Conference, Direct Request of the Committee of Experts, Rwanda, 2013, 102nd session.

The Committee on Freedom of Association and the Committee of Experts generally regarded with favour this form of action considering that its general prohibition might lead to abuses. As the Committee of Experts recently put:

«With regard to so-called “sympathy” strikes, the Committee considers that a general prohibition of this form of strike action could lead to abuse, particularly in the context of globalization characterized by increasing interdependence and the internationalization of production, and that workers should be able to take such action, provided that the initial strike they are supporting is itself lawful»²⁰⁰.

In this sense, Croatian legislation was overviewed in a positive way for the recognition of the right to call sympathy strikes in the national legislation. However, the monitoring bodies underlined the difficulties inherent in a tentative definition of the concept of sympathy strikes and in discerning the relationship justifying recourse to these types of actions.

A specific aspect of sympathy action has been recently examined by the Committee on Freedom of Association.

Article 19 of the Employment Relations Law of Jersey establishes that a strike is immune from tort only if it takes place in the framework of an “*employment dispute*”. Code 2 provides that there is no immunity from tort for picketing or calling upon employees to picket a place of work other than that of the employees, because in such an event they will interfere in the rights of neighbouring properties and trespass on private property. The Committee of Experts held that picketing in support of secondary action should be possible and that restrictions on strike pickets should be limited to cases where the action ceases to be peaceful and therefore requested the Government to indicate the measures taken or contemplated to ensure that pickets in support of secondary action is possible and that limitations on strike pickets apply only where the action ceases to be peaceful²⁰¹.

In any case, it should be remembered that sympathy strikes can be considered, in a broad sense, expression of a general principle of solidarity among workers that the Committee on Freedom of Association regarded as protected by article 5 of Convention n. 87. The solidarity

²⁰⁰ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, 101st session, 2012, 51, par. 125.

²⁰¹ International Labour Conference, Observation of the Committee of Experts, Jersey, 2011, 100th session.

cannot be limited to one specific undertaking or to a particular industry, or even to the national economy, but should be extended to the whole international economy²⁰².

Another kind of strike to be considered is the “*political strike*”.

As a general principle, strike actions should be aimed to protect the economic and social interests of workers: consequently, purely political strikes do not fall within the scope of the principles of freedom of association because their goal is different than the protection of said interests²⁰³. Case n. 86 against Italy can be cited as an example of purely political strikes. Here, the strike performed by government workers was directed solely against the electoral law, and the Committee on Freedom of Association considered that the complaint was «*so wholly political in character that it would not be appropriate to pursue the matter and that consequently no action is called for on its part*»²⁰⁴.

However, political strikes should be considered in a narrow sense. The Committee of Experts does not regard as purely political strikes those

*«relating to the Government’s economic and social policies, including general strikes, strike action or protest action to support workers’ position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on the workforce»*²⁰⁵.

Therefore, a general strike seeking an increase in the minimum wage, respect of collective agreements in force and a change in economic policy (to decrease prices and unemployment) is legitimate and within the normal field of activity of trade union organizations²⁰⁶.

In addition, in countries where employers’ and workers’ organisations do not enjoy the fundamental liberties necessary to fulfil their mission they would be justified to call strikes for the recognition of such fundamental rights²⁰⁷. In this sense, a general protest strike

²⁰² Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 149, par. 734.

²⁰³ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 111, par. 529.

²⁰⁴ Case n. 86 (Italy), 8th Report of the International Labour Organisation to the United Nations, 1954, 179, par. 21, [http://www.ilo.org/public/libdoc/ilo/P/09618/09618\(1954-8\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09618/09618(1954-8).pdf).

²⁰⁵ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, 101st session, 2012, 50-51, par. 124.

²⁰⁶ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 113, par. 543.

²⁰⁷ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, 101st session, 2012, 50-51, par. 124.

demanding that an end be brought to the hundreds of murders of trade union leaders and unionists is a legitimate trade union activity and its prohibition therefore constitutes a serious violation of freedom of association²⁰⁸.

2.1.4. Permissible restrictions

The ILO supervisory bodies have never considered the right to strike to be an absolute and unlimited right, but they sought to establish limits to its exercise in order to be able to determine any cases of abuse and the sanctions that may be imposed²⁰⁹. Limitations to the right to strike can derive from various sources that might be classified according to (i) the nature of the collective dispute; (ii) the category of personnel involved in the collective action; (iii) the nature of the services provided; (iv) the possible intervention of the State in the industrial dispute through specific statutory provisions or regulations; (v) the acts of the judicial authority. There are also other causes of limitations to be considered: for instance, specific procedural requirements to be fulfilled before going on strike might turn in an unlawful restriction of the same.

2.1.4.1. *Restrictions connected to the nature of the dispute: dispute “over interests” and dispute “over rights”*

In many industrial relations systems, collective disputes can be classified into two main categories: “*disputes over interests*” or “*disputes over rights*”.

In the 2013 General Survey concerning labour relations and collective bargaining in the public service the ILO defines these two groups as follows:

«A dispute can arise in the course of determining terms and conditions of employment if the parties claim new rights or seek to establish new obligations (dispute over interests) or in the interpretation and application of the terms and conditions of employment contained in existing agreements, violation of which may be alleged, or in current laws and regulations (dispute over rights)»²¹⁰.

²⁰⁸ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 113, par. 544.

²⁰⁹ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, 101st session, 2012, 49, par. 119.

²¹⁰ General Survey concerning labour relations and collective bargaining in the public service, Report of the Committee of Experts on the Application of Conventions and Recommendations, 102nd session, 2013, 168, par. 410 seq.

The distinction between disputes over right or interests is sometimes blurring and difficult to determine in practice and, occasionally, a dispute over rights can turn into a dispute over interests. Nevertheless, said distinction is important because, while some countries give to the two situations an identical legal treatment, the majority reconnect different rules to the two conditions, establishing, for instance, the prohibition to strike or to impose lock-outs in case of conflict of rights. In addition, some industrial relations systems reconnect to collective bargaining agreements the function of social peace treaties of fixed duration during which strikes and lock-out are prohibited.

In principle, the ILO monitoring bodies do not oppose the introduction of a statutory distinction between disputes entailing a conflict of rights and a conflict of interests, nor the attribution to collective agreements of the function of social peace treaties, this choice being left to the law and practice of each State²¹¹.

However, the possibility to restrict the exercise of the right to strike should be mitigated according to the following principles:

- (i) *«workers' organizations should not be prevented from striking against the social and economic policy of the Government, in particular where the protest is not only against that policy but also against its effects on some provisions of collective agreements (for instance the impact of a wage control policy imposed by the Government on monetary clauses in the agreement)»²¹²;*
- (ii) *«this major restriction on a basic right of workers' organizations must be compensated by the right to have recourse to impartial and rapid arbitration machinery for individual or collective grievances concerning the interpretation or application of collective agreements. Such a procedure not only allows the inevitable difficulties of application and interpretation to be settled during the term of an agreement, but has the advantage of clearing the ground for subsequent bargaining rounds by identifying the problems which have arisen during the term of the agreement»²¹³;*

²¹¹ General Survey concerning labour relations and collective bargaining in the public service, Report of the Committee of Experts on the Application of Conventions and Recommendations, 102nd session, 2013, 170, par. 418 seq.; Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 73, par. 166-167.

²¹² Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 73, par. 166.

²¹³ So called, compensatory guarantees; see, Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 73, par. 167.

- (iii) *«the settlement of conflicts of interpretation [of collective agreements] by independent judicial authorities is likely to meet these requirements, although other mechanisms might also be admissible if they provide the above guarantees»²¹⁴.*

In application of these principles, the Committee on the Application of Standards requested the Romanian Government to provide detailed information concerning the distinction made between disputes of rights and disputes of interest and the registering of disputes for conciliation²¹⁵. Indeed, Act n. 168/1999, regulating conflicts between the social partners with respect to employment relations, made a clear distinction between conflicts of rights and conflicts of interests. However, as pointed out by the Workers' during the discussion before the Committee on the Application of Standards, the strict regulation endangered the right to strike and created situations in which a strike could be considered unlawful by employers, the public authorities and the courts. The legal texts obliged the social partners to resolve conflicts of interest through prior conciliation procedures, in practice impossible to initiate, and a strike became unlawful if it fall within the legal definition of conflict of rights or if the conciliation procedure had not been respected.

2.1.4.2. Restrictions connected to the category of personnel involved

ILO supervisory bodies derived the protection of the right to strike from Convention n. 87, the latter being a positive implementation of the right to freedom of association inherent in the same ILO Constitution. The Convention recognises the right to organize for workers in both the private and public sectors, including public servants, the only exceptions provided relates to the armed forces and the police²¹⁶. Indeed, as acknowledged by the Committee of Experts, during the preparatory work on Convention n. 87 it was emphasized that:

²¹⁴ General Survey concerning labour relations and collective bargaining in the public service, Report of the Committee of Experts on the Application of Conventions and Recommendations, 102nd session, 2013, 169, par. 413.

²¹⁵ International Labour Conference, Observation of the Committee on the Application of Standards, Romania, 2007, 96th session.

²¹⁶ However, it might be difficult in practice to determine whether workers belong to the military or to the police or are simply civilians working in military installations or in the service of the army and who should, as such, have the right to form trade unions. In the view of the Committee of Experts, *«since Article 9 of the Convention provides only for exceptions to the general principle, workers should be considered as civilians in case of doubt»*; see, Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 27, par. 55.

«freedom of association was to be guaranteed not only to employers and workers in private industry, but also to public employees. Accordingly, the law and practice report prepared by the Office provided that public servants and officials should be covered by that instrument: ‘The guarantee of the right of association should apply to all employers and workers, public or private, and, therefore, to public servants and officials and to workers in nationalized industries. It has been considered that it would be inequitable to draw any distinction, as regards freedom of association, between wage-earners in private industry and officials in the public services, since persons in either category should be permitted to defend their interests by becoming organized’»²¹⁷.

Strikes are considered important and legitimate means of workers’ and employers organisations for furthering and defending their interests falling within the scope of articles 3 and 10 of Convention n. 87. Therefore, there is an expectation that also public sector workers should enjoy the right to strike.

On the contrary, the ILO monitoring bodies made clear that the recognition of public servants’ trade union freedom does not exclude the possibility to restrict their exercise of the right to strike²¹⁸.

As the Committee of Experts put:

«the right to strike is an intrinsic corollary of the right of association protected by Convention No. 87. This right is not, however, absolute and may be restricted in exceptional circumstances or even prohibited for certain categories of workers, in particular certain public servants»²¹⁹.

Since the right to strike can be restricted for “*certain public servants*” it is important to define the term “*public servants*”, since a too broad definition of the category is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers²²⁰.

To do so, it is possible to rely on the literal definition of public servants in each domestic system or try to draw a list of public servants admitted to enjoy the right to strike.

²¹⁷ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 25, par. 48; International Labour Conference, Freedom of association and industrial relations, 30th session, 1947, Report VII, 108. In the same vein, Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 46-47, par. 218.

²¹⁸ J-M. Servais, ILO and the right to strike, Canadian Labour Law and Employment Journal, 2009, 15, 153.

²¹⁹ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 77, par. 179; Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 118, par. 572.

²²⁰ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 119, par. 575.

However, both solution had been refuted by the ILO supervisory bodies.

With regard to the first option (rely on the literal definition of public servants), the Committee of Experts observed that the concept of public servants varies considerably from one country to another. For example, the terms “*civil servant*”, “*fonctionnaire*” and “*funcionario*” are far from having the same coverage, an identical term used in the same language does not always mean the same thing in different countries and some systems give a specific classification of public servants that does not exist or does not have the same consequences in other systems²²¹.

On the second option (to draw a list of public servants admitted to enjoy the right to strike) it assumed it would be futile «*to try to draw up an exhaustive and universally applicable list of categories of public servants who should enjoy the right to strike or be denied such a right*»²²².

Therefore, the supervisory bodies concentrated on the nature of the public servants functions, holding that, for the ILO purposes, public servants are only those employees exercising authority in the name of the State²²³.

For instance, officials working in the administration of justice and the judiciary do exercise authority in the name of the State and their right to strike could thus be subject to restrictions, such as its suspension or even prohibition²²⁴. On the contrary, public servants in state-owned commercial or industrial enterprises should enjoy the right to strike, provided that the interruption of services does not endanger the life, personal safety or health of the whole or part of the population²²⁵.

Public servants not enjoying the right to strike should in any case be compensated by other forms of guarantees such as impartial conciliation and arbitration procedures. The arbitration

²²¹ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 69, par. 158.

²²² Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 69, par. 158.

²²³ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 118, par. 574; more recently, International Labour Conference, Observation of the Committee of Experts, Russian Federation, 2013, 102nd session.

²²⁴ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 119, par. 578.

²²⁵ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 118, par. 577.

awards should be binding on both parties and, once issued, should be implemented rapidly and completely²²⁶.

2.1.4.3. Restrictions connected to the nature of the services provided

A third source of restrictions to the exercise of the right to strike stems from the qualification of the services provided as “*essential services*”. The essentiality of a service entails a high degree of discretion since it depends, to a large extent, on the particular circumstances prevailing in a country²²⁷.

The Committee of Experts clarified the concept making the following example:

«A strike in the port or maritime transport services, for example, might more rapidly cause serious disruptions for an island which is heavily dependent on such services to provide basic supplies to its population than it would for a country on a continent»²²⁸.

The possible restrictions placed on the right to strike in case of essential services are highly controversial and mainly solved on a case by case basis, due to the great divergence of views between Employers and Workers on the point²²⁹. For instance, the Employers’ group recently criticised the Committee of Experts on the assumption that, when it expresses its views in detail on strike policies, especially on essential services, it applies a “*one-size-fits-all*” approach that fails to recognize differences in economic or industrial development and current economic circumstances²³⁰. On the contrary, the Workers’ group endorsed the role of the Committee of Experts in defining the possible restriction on the right to strike in essential services, describing the manner in which the supervisory bodies developed its view as “*very*

²²⁶ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, 101st session, 2012, 147.

²²⁷ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 119, par. 582.

²²⁸ General survey on Freedom of association and collective bargaining, International Labour Conference, 81st Session, 1994, 70, par. 160.

²²⁹ J-M. Servais, ILO and the right to strike, Canadian Labour Law and Employment Journal, 2009, 15, 153.

²³⁰ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, 101st session, 2012, 47.

cautious, gradual and balanced”²³¹. In any case, it should be considered that the exercise of the right to strike in essential services should be carefully considered since, more than in other fields, it affects third parties who sometimes feel that they are the victims in disputes in which they have no part²³².

Broadly speaking, it can be confirmed the general acceptance of the principle that services whose interruption would endanger the life, personal safety or health of the whole or part of the population should be considered as essential services²³³. The concept is not absolute: as said, non-essential services may turn to be essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population²³⁴.

The following services had been considered “*essential services*” by the Committee on Freedom of Association: hospital sector, electricity services, water supply services, telephone service, police and armed forces, fire-fighting services, public or private prison services, provision of food to pupils of school age and the cleaning of schools, air traffic control²³⁵.

The same Committee considered the following services “*non-essential*”: radio and television, petroleum sector, ports, banking, computer services for the collection of excise duties and taxes, department stores and pleasure parks, metal and mining sectors, transport generally, airline pilots, production, transport and distribution of fuel, railway services, metropolitan transport, postal services, refuse collection services, refrigeration enterprises, hotel services, construction, automobile manufacturing, agricultural activities, the supply and distribution of foodstuffs, the Mint, the government printing service and the state alcohol, salt and tobacco monopolies, the education sector, mineral water bottling company²³⁶.

²³¹ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, 101st session, 2012, 48.

²³² Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 61, par. 136.

²³³ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 119, par. 583.

²³⁴ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 119, par. 582.

²³⁵ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 120, par. 585.

²³⁶ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 120-121, par. 587.

Rather than imposing an outright ban on strikes, which should be limited to essential services in the strict sense of the term²³⁷, the ILO supervisory bodies indicated that a good practice might be to establish a system of minimum of services to be provided also in case of strike in services that, albeit not essential, can be considered of public utility²³⁸. By doing so, the State could possibly fulfil both the duty to protect the exercise of the right to strike and the rights and interests of third parties, namely the users or consumers who suffer the economic effects of collective disputes²³⁹.

The “*minimum service*” to be mandatory provided should have the following characteristics:

- (i) it should be limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear²⁴⁰;
- (ii) workers’ organisations, along with employers and the public authorities, should be able to participate in the definition of the service since the system restricts one of the essential means of pressure available to workers to defend their economic and social interests²⁴¹;
- (iii) the provisions regarding the minimum service to be maintained in the event of a strike in an essential service should be established clearly, applied strictly and made known to those concerned in due time²⁴².

In any case, it should be remembered the general principle according to which, if the right to strike is restricted or prohibited in certain services considered essential, workers should receive compensatory guarantees:

²³⁷ Some States gave effectiveness to the necessity to ensure that any restriction on the right to strike is limited to essential services in the strict sense of the term. For instance, Lithuania adopted legislative amendments to ensure that restrictions on the right to strike are limited to essential services in the strict sense of the term and so it did Costa Rica. In the Dominican Republic, measures are under consideration for the removal of certain industries, namely those relating to citrus and coconut production, from the list of essential services. See, International Labour Conference, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Freedom of association in practice: Lessons learned, 97th session, 2008, 46, par. 175.

²³⁸ For a practical application of the principle, International Labour Conference, Observation of the Committee of Experts, Jersey, 2011, 100th session.

²³⁹ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 70, par. 160.

²⁴⁰ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 71, par. 161.

²⁴¹ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 71, par. 161.

²⁴² Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 125, par. 611.

«the workers should be afforded adequate protection so as to compensate for the restrictions imposed on their freedom of action. Such protection should include, for example, impartial conciliation and eventually arbitration procedures which have the confidence of the parties, in which workers and their organizations could be associated. Such arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely»²⁴³.

2.1.4.4. Restrictions deriving from States' statutory intervention

Article 3 par. 2 of Convention n. 87 states that the public authorities shall refrain from any interference which would restrict or impede the lawful exercise by workers' and employers' organisations of their right²⁴⁴.

Nevertheless, it might happen that, under certain circumstances, a State decides to intervene in a collective dispute by adopting rules resulting in a prohibition of the legitimate exercise of the right to strike. Said intervention is normally not compatible with the standards set out by the ILO monitoring bodies²⁴⁵.

The event was examined by the Committee on Freedom of Association in case n. 1971 (Denmark)²⁴⁶.

On May 1998, the Danish Ministry of Labour introduced to Parliament Bill n. 86 imposing a renewal of certain collective agreements for a period of two years, together with a statutory peace obligation on the parties for the same duration. Thus, the collective agreements, renewed by statutory provisions, left no opportunity for the workers to enter into collective bargaining with their counterparts, in violation of the free functioning of collective bargaining. In addition, as noted by the Committee on Freedom of Association, the effect of the statutory intervention had been both to terminate the industrial action which had already begun and to prohibit any further industrial action which might have occurred in the relevant

²⁴³ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, 101st session, 2012, 147.

²⁴⁴ For a clarification of the political and social compromise condensed in the article, Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994, 49, par. 108.

²⁴⁵ Nor with the protection of the right to strike offered by the European Social Charter; see, to this extent, Chapter Two, Section II, par. 2.2.4.2.3.

²⁴⁶ Case n. 1971, Representation for the non-observance by the Government of Denmark presented by the Association of Salaried Employees in the Air Transport Sector and the Association of Cabin Crew at Maersk, Committee on Freedom of Association, 1999, Definitive Report n. 317, par. 1 seq.

sectors for the period by which the operation of the collective agreements were statutorily extended.

In this respect, the Committee recalled that the right to strike may be restricted or prohibited, but this principle should be applied in a very strict manner, only for public servants exercising authority in the name of the State or in essential services in the strict sense of the term. In the case, the Government tried to defend its position asserting that the provision affected, among others, a sector essential to the functioning of society, namely the transport sector, which included the complainant trade unions. The Committee recalled that it does not consider transport generally to constitute an essential service in the strict sense of the term.

The same Committee on Freedom of Association examined in 1988 a complaint brought by Icelandic trade unions. In this case, however, the observations of the supervisory body lead to quite opposite results due to the specific circumstances of the case.

The Government of Iceland introduced in the years between 1978 and 1988 certain legislative provisions that affected the exercise of collective social rights²⁴⁷. In particular, in May 1988, in order to face its serious economic problems, it adopted an Act preventing a trade union within a specific region from achieving amendments of collective wages and terms agreements by means of strikes. More specifically, article 4 of the Act prohibited «*lock-outs, strikes, including sympathy stoppages of work or other acts intended to force an alternative order of wages and terms affairs to that stipulated in the present Act*».

The Committee on Freedom of Association held that, *prima facie*, there was inconsistency between the provisions of the Icelandic Act and the principles of freedom of association.

However, it warned that «*the matter does not necessarily end there*».

Indeed, in the light of the acute economic crisis affecting the country, it concluded that, in specific serious circumstances, a restriction on the exercise of collective social rights could have been justified:

«the Committee considers that on balance the restrictions imposed were warranted by reasons of compelling national interest, were imposed only to the

²⁴⁷ Case n. 1458, Complaint presented by the Icelandic Federation of Labour against the Government of Iceland, Committee on Freedom of Association, 1989, Definitive Report n. 262, par. 124 seq.

extent necessary, operated only for a reasonable period, and were accompanied by adequate safeguards to protect workers' living standards»²⁴⁸.

A conclusion quite different than the one reached by the European Committee of Social Rights asked to review, in the light of the same circumstances, the compliance of the State's conduct with the provisions of the European Social Charter²⁴⁹.

2.1.4.5. Restrictions deriving from acts of the judicial authority

The ILO monitoring bodies recognised the essential role played by the judicial authority in ensuring the respect of international labour standards in the domestic legal system.

The Committee on Freedom of Association, for instance, expressed the view that any possible control over the internal acts of a trade union and the power to take measures for its suspension or dissolution should be exercised, *a posteriori*²⁵⁰, by the judicial authorities, in order to guarantee an impartial and objective procedure and to ensure the right of defence (which normal judicial procedure alone can guarantee), but also to avoid the risk that measures taken by the administrative authorities may appear to be arbitrary²⁵¹. Even in case it is necessary to define the level of minimum services, the Committee on Freedom of Association claimed that only the judicial authorities are in the position to issue a definitive ruling in so far as it depends, in particular, upon a thorough knowledge of the structure and functioning of the enterprises and establishments concerned and of the real impact of the strike action²⁵².

Nevertheless, the judicial intervention might turn to be insidious for the right to strike, being capable to impinge the very substance of the same²⁵³.

The Committee of Experts was overtly confronted with the problem in recent times, after two rulings issued by the European Court of Justice in 2007, Viking and Laval²⁵⁴.

²⁴⁸ Case n. 1458, Complaint presented by the Icelandic Federation of Labour against the Government of Iceland, Committee on Freedom of Association, 1989, Definitive Report n. 262, par. 153.

²⁴⁹ See, Chapter Two, Section II, par. 2.2.4.2.3.

²⁵⁰ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 63, par. 350.

²⁵¹ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 96-97, par. 464.

²⁵² Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 126, par. 614.

²⁵³ On the restriction to the right to strike deriving from acts of the judicial authority, Chapter two, Section II, par. 2.2.4.2.4 and Chapter Three, Section II, exp. par. 2.1.4 and 3.4.

Broadly speaking, in both cases the European Court of Justice held that the right to take collective action is a fundamental right but, when exercised in order to secure employees with the same working conditions after a company relocation or to force an undertaking to conclude a collective agreement with certain terms and conditions of employment, it constitutes a restriction to the freedom of establishment (Viking) or to the freedom to provide services (Laval), contrary to European Union law. The rulings had disruptive effects on the national systems of industrial relations, in particular because trade unions were asked to pay damages for having undertaken an industrial action subsequently declared unlawful under European Union law. Indeed, European Union Member States have the duty to comply with European Union law as interpreted by the European Court of Justice and to modify their national law and practice in case of contrast.

After the rulings of the European Court of Justice referred above, in the United Kingdom there was a dispute between the air pilots union BALPA and British Airways in relation to a planned set up of a subsidiary company in another Member State²⁵⁵. After BALPA's decision to initiate an industrial action, the airline decided to request an injunction alleging that the action would be unlawful according to European Union law, as interpreted in Viking and Laval. In addition, the employer claimed that, should the work stoppage take place, it would request damages estimated at £100 million per day. Under these circumstances, BALPA did not pursue the strike action, stating that it would risk bankruptcy if it were required to pay the damages claimed by the airline.

The Committee of Experts showed serious concern for the practical limitations on the effective exercise of the right to strike of the BALPA workers stating as follows:

«the Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the Viking and Laval judgements, creates a situation where the rights under the Convention cannot be exercised».

²⁵⁴ International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007; Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007. For a further examination of the cases in the European Union context see, Chapter Three, Section II.

²⁵⁵ International Labour Conference, Observation of the Committee of Experts, United Kingdom, 2010, 99th session.

It also repudiated the Government statement on the limited impact of the judgements to cases where freedom of establishment and free movement of services between Member States are at issue, whereas the vast majority of trade disputes in the United Kingdom are purely domestic and do not raise any cross-border issues.

On the contrary, it considered that the European Court of Justice doctrine, as it emerged from Viking and Laval, is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention. Cross-border disputes will be more frequent in the context of a globalised world, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating.

Similar observations were made by the Committee of Experts with regard to Sweden²⁵⁶.

First of all, after the European rulings, the Swedish court condemned trade unions to the payment of € 342,000 in punitive damages, litigation costs and interest in favour of the company Laval, as their collective action, legitimate under domestic law, turned to be unlawfully exercised under European Union law as interpreted by the Court of Justice.

In this specific case, the Committee recalled that:

«imposing sanctions on unions for leading a legitimate strike is a grave violation of the principles of freedom of association. The Committee considers that this principle is all the more relevant in the circumstances where the action was lawful at the time it was exercised».

In second place, following the European Court of Justice rulings, the Swedish government introduced specific amendments to the national legislation having the effect, among others, to restrict recourse to industrial action in particular for foreign workers. In this respect, the Committee considered that *«foreign workers should have the right to be represented by the organization of their own choosing with a view to defending their occupational interests and that the organization of their choice should be able to defend its members' interests, including by means of industrial action».*

In both of the cases referred above the Committee of Experts reiterated the principle that, when elaborating its position in relation to the permissible restrictions that may be placed

²⁵⁶ International Labour Conference, Observation of the Committee of Experts, Sweden, 2013, 102nd session.

upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. Therefore, in principle, judicial authorities should not investigate, in the light of economic values, whether the strike action is proportionate.

Albeit this firm assertion, it might seem that the strong emphasis put by the Committee of Experts on the clash between the European Court of Justice doctrine and ILO international labour standards²⁵⁷ is weakened by the following proposition:

«the Committee wishes to recall that its task is not to judge the correctness of the ECJ's holdings in Viking and Laval as they set out an interpretation of the European Union Law, based on varying and distinct rights in the Treaty of the European Community».

However, the statement should not be overestimated.

If the ILO labour standards are analysed in a broader context, it is possible to notice that they are more and more integrated into the human rights court's reasoning and analysis²⁵⁸, and in particular in the case-law of the European Court of Human Rights on article 11 of the European Convention on Human Rights²⁵⁹. After the entry into force of the Treaty of Lisbon in 2009²⁶⁰, the European Union shall not only accede to the European Convention on Human Rights but also, pursuant to article 53 of the Charter of Fundamental Rights of the European Union it shall grant fundamental rights the same level of protection as recognised by international agreements, including the European Convention on Human Rights. Therefore, it might be contrary to the primary law of the European Union to restrict the exercise of the right to strike in a manner contrary to international agreements, international labour standards alone or as integrated in the Council of Europe system of human rights protection.

²⁵⁷ «The conclusions of the Expert Committee monitoring ILO Conventions and recommendations illustrate that the clash between legal standards finally amounts to a clash between bodies enforcing or monitoring these standards»; see, F. Dorssemont, A judicial pathway to overcome Laval and Viking, OSE Research Paper n. 5, September 2011, 3.

²⁵⁸ F. C. Ebert, M. Oelz, Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts, Geneva, International Labour Organization, International Institute for Labour Studies, Discussion paper 212/2012, 3.

²⁵⁹ Chapter Two, Section II.

²⁶⁰ For a critical analysis, D. Ashiagbor, N. Countouris, I. Lianos, The European Union after the Treaty of Lisbon, Cambridge, Cambridge University Press, 2012.

2.1.4.6. Other sources of restriction

Each domestic legal system might impose other conditions to be fulfilled in order to render a strike lawful.

For the ILO monitoring bodies, said conditions are acceptable as far as they are reasonable, not so complicated as to make it practically impossible to declare a legal strike and in any event not such as to place a substantial limitation on the means of action open to trade union organizations²⁶¹.

The variety of cases examined by the supervisory bodies makes impossible to provide an exhaustive catalogue of the several sources of restriction of the right to strike; hence, it might be worthy to recall only the most recurring ones.

In a large number of countries, there is a requirement to comply with a notice period or a cooling-off period before calling a strike. Normally, these mechanisms are conceived to encourage the parties to engage in final negotiations before resorting to strike action, and to promote the development of voluntary bargaining. The obligation to give prior notice (i.e. 20 day period)²⁶² to the employer before calling a strike, or to respect the legal requirement of a cooling-off period (i.e. 40 days)²⁶³ before a strike is declared in an essential service, is compatible with the principle of freedom of association.

However, the Committee of Experts explained that the period of advance notice should not be an additional obstacle to bargaining, and should be shorter if it follows a compulsory prior mediation or conciliation procedure which itself is already lengthy. For example, the Committee has considered that advance notice of 60 days is excessive²⁶⁴.

With regard to mediation and conciliation procedures, even if in principle acceptable, they should be not so complex or slow that a lawful strike becomes impossible in practice, and the State should ensure that specific time limits are introduced for the exhaustion of said procedure²⁶⁵.

²⁶¹ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 114, par. 547-548.

²⁶² Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 114, par. 553.

²⁶³ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 115, par. 554.

²⁶⁴ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, 101st session, 2012, 58, par. 145.

²⁶⁵ International Labour Conference, Observation of the Committee of Experts, Kiribati, 2013, 102nd session.

Also voluntary arbitration mechanisms in industrial disputes before a strike may be called cannot be regarded as an infringement of freedom of association, provided that the recourse to arbitration is not compulsory and does not, in practice, prevent the calling of the strike²⁶⁶.

Another source of limitation might derive from the practice, present in some countries, to require the exhaustion of voting procedures and the fulfilment of certain quorum requirements prior the commencement of a strike, with an aim to protect the interests of workers against strikes not democratically mandated²⁶⁷.

The obligation to observe a certain quorum and to take strike decisions by secret ballot may be considered acceptable²⁶⁸, provided that it is contained into reasonable limits: for instance, a quorum of two-thirds of the total number of members of the union or branch concerned or the requirement of an absolute majority of the workers involved in order to declare a strike has considered an excessive limitation of the right to strike particularly in large enterprises or in the case of unions which group together a large number of members²⁶⁹.

Finally, the hiring of workers to replace strikers, back-to-work orders, the use of the military and requisitioning orders, the deduction of wages in an amount higher than the one corresponding to the period of the strike, and the dismissal of workers because of a strike, are also considered illegitimate restrictions to the exercise of the right to strike²⁷⁰.

2.2. UN Human Rights Committee

The International Covenant on Civil and Political Rights mentions only freedom of peaceful assembly in article 21 and freedom of association, including the right to form and join trade unions for the protection of interests, in article 22.

It does not set any express international protection for the right to strike, even if an examination of the preparatory works might led to the conclusion that the drafters did not

²⁶⁶ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 114, par. 549.

²⁶⁷ A. T. M. Jacobs, The law of strikes and lock-outs, in R. Blanpain, Comparative labour law and industrial relations in industrialised market economies, The Hague, Kluwer Law International, 2007, 678-679; R. Ben-Israel, Strikes, Lock-outs and other kinds of hostile actions, International Encyclopaedia of Comparative Law, Vol. XV, 1994, 47.

²⁶⁸ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 115, par. 559.

²⁶⁹ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 115, par. 556-557.

²⁷⁰ Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006, 129, par. 632 seq.

ignore that the concept of “*freedom of association*” includes also the right to take actions aimed to protect the interests of workers, irrespective of their economic or social character²⁷¹. However, the proposition was rejected by the early case-law of the Human Rights Committee.

2.2.1. An unpromising start: J.B. et al. v. Canada

In 1986 the case J.B. et al. v. Canada²⁷² was brought before the Human Rights Committee that, for the first time, had to deal with the key question as to what extent article 22 of the International Covenant on Civil and Political Rights protects the right to strike.

The applicants claimed that the prohibition to strike for provincial public employees in the Canadian Province of Alberta under the Alberta Public Service Employee Relations Act of 1977 constituted a breach of article 22 of the International Covenant on Civil and Political Rights. More specifically, the authors of the communication argued that freedom of association protected by article 22 of the International Covenant necessarily implies the right to strike, albeit not *expressis verbis* included. A strong support on this position derived from the decisions of ILO organs in interpreting the scope of ILO Constitution and the meaning of labour law treaties enacted under its auspices.

Said interpretation was not embraced by the majority of the HRC, that held the case incompatible with the provisions of the Covenant and thus inadmissible *ratione materiae* under article 3 of the Optional Protocol. Indeed, they argued, under an systematic and historical interpretation of article 22 it was not possible to conclude that it guaranteed the right to strike.

First of all, they held that each international treaty, including the International Covenant on Civil and Political Rights, has a life of its own and must be interpreted in a fair and just manner, if so provided, by the body entrusted with the monitoring of its provisions. Coherently, the Human Rights Committee accepted as correct and just the interpretation given by the ILO monitoring bodies but stated that this interpretation had no influence on the Human Rights Committee entrusted with the duty to interpret a different and autonomous treaty.

²⁷¹ Doc. A/2929, VI, par. 147.

²⁷² HRC, J.B. et al. v. Canada, inadmissibility decision of 18 July 1986, communication n. 118/1982, CCPR/C/OP/2, 34-39, doc. A/41/40, 1986, Annex IX, section B, 151-163.

Secondly, they considered the *travaux préparatoires* of the Covenant on Civil and Political Rights, from where they deduced that the drafters did not intend to guarantee the right to strike. Indeed, the discussion in the Commission on Human Rights and in the Third Committee of the General Assembly were based on the Universal Declaration of Human Rights that does not refer to the right to strike, the only amendment proposing its insertion was rejected. They supported this argument by noting that, while an amendment to the former draft of article 8 of the Covenant on Economic, Social and Cultural Rights was adopted including the «*the right to strike, provided that it is exercised in conformity with the laws of the particular country*», no similar amendment was introduced or discussed with respect to draft Covenant on Civil and Political Rights. This observations is surely true but it does not consider that, the choice to formulate the reference to the “*protection of his interests*” in article 22 in general terms was accompanied by the observation that trade union organisations must often struggle for the protection of the civil rights as well as the economic and social interests of their members²⁷³. One might ask what was the struggle they intended if it was not the right to strike.

Thirdly, they corroborated these conclusions by a comparative analysis of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights stating as follows:

«Article 8, paragraph 1 (d), of the International Covenant on Economic, Social and Cultural Rights recognizes the right to strike, in addition to the right of everyone to form and join trade unions for the promotion and protection of his economic and social interests, thereby making it clear that the right to strike cannot be considered as an implicit component of the right to form and join trade unions. Consequently, the fact that the International Covenant on Civil and Political Rights does not similarly provide expressly for the right to strike in article 22, paragraph 1, shows that this right is not included in the scope of this article, while it enjoys protection under the procedures and mechanisms of the International Covenant on Economic, Social and Cultural Rights subject to the specific restrictions mentioned in article 8 of that instrument».

The minority in its joint dissenting opinion underlined that:

«We therefore find that the travaux préparatoires are not determinative of the issue before the Committee. Where the intentions of the drafters are not absolutely

²⁷³ Doc. A/CR.3/SR.1086, par. 3 (B). The proposal to omit the words «*for the protection of his interests*» was in the end withdrew; see doc. A/C.37SR.1087, par. 5 (B).

clear in relation to the point at hand, article 31 of the Vienna Convention also directs us to the object and purpose of the treaty. This seems to us especially important in a treaty for the promotion of human rights, where limitation of the exercise of rights, or upon the competence of the Committee to review a prohibition by a State of a given activity, are not readily to be presumed.

We note that article 8 of the International Covenant on Economic, Social and Cultural Rights, having spoken of the right of everyone to form trade unions and join the union of his choice, goes on to speak of the "right to strike, provided that it is exercised in conformity with the laws of the particular country". While this latter phrase gives rise to some complex legal issues, it suffices for our present purpose that the specific aspect of freedom of association which is touched on as an individual right in article 22 of the Covenant on Civil and Political Rights, but dealt with as a set of distinctive rights in article 8, does not necessarily exclude the right to strike in all circumstances. We see no reason for interpreting this common matter differently in the two Covenants.

We are also aware that the ILO Committee on Freedom of Association, a body singularly well placed to pronounce authoritatively on such matters, has held that the general prohibition of strikes for public employees contained in the Alberta Public Employee Relations Act was not in harmony with article 10 of ILO Convention No. 87 "... since it constituted a considerable restriction on the opportunities open to trade unions to further and defend the interests of their members." While we do not at this stage purport to comment on the merits, we cannot fail to notice that the ILO finding is based on the furtherance and defence of interests of trade-union members; and article 22 also requires us to consider that the purpose of joining a trade union is to protect one's interests. Again, we see no reason to interpret article 22 in a manner different from ILO when addressing a comparable consideration. In this regard we note that article 22, paragraph 3, provides that nothing in that article authorizes a State party to ILO Convention No. 87 to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

We cannot see that a manner of exercising a right which has, under certain leading and widely ratified international instruments, been declared to be in principle lawful, should be declared to be incompatible with the Covenant on Civil and Political Rights».

Even if the case should not be underestimated because it is the only one issued on the right to strike, some authors tried to clarify that the different opinion on the point might be explained, on the one hand, with the desire of the majority not to infer in the mandate of the Committee on Economic, Social and Cultural Rights, while the minority was much more in keeping with the overall approach as to the manner in which the International Covenant on Civil and Political Rights should be interpreted, namely as a living instrument consistent with

its object and purpose²⁷⁴. Subsequent activity of the Human Rights Committee proves that the episode, even if significant, remained isolated and the interpretation of the Covenant turn to be inclusive of the right to strike, even if only a small number of cases deal with the issue.

2.2.2. Changing the view: freedom of association encompasses the right to strike

Seven years later the Human Rights Committee changed its view in the sense to extend the scope of the International Covenant on Civil and Political Rights also to include a protection of the right to strike.

In the course of the State reporting procedure with regard to Ireland it noted as follows:

«The Committee also notes that civil servants are unduly restricted with respect to their [...] the right to strike»²⁷⁵.

Later on, in relation to Chile, it explained that:

«The general prohibition imposed on the right of civil servants to organize a trade union and bargain collectively, as well as their right to strike, raises serious concerns, under article 22 of the Covenant. Therefore the State party should review the relevant provisions of laws and decrees in order to guarantee to civil servants the rights to join trade unions and to bargain collectively, guaranteed under article 22 of the Covenant»²⁷⁶.

Again, in 2007, the Human Rights Committee expressed its concern about continuous restrictions on trade union rights in Chile and, in particular, the replacement of striking workers. Therefore, it asked the State to remove all legislative and other obstacles to the full exercise of the rights established under article 22 of the Covenant²⁷⁷, thereby including in its scope also the right to strike.

More recently, with regard to Estonia, the Human Rights Committee said that:

²⁷⁴ H. Keller, G. Ulfstein, UN human Rights Treaty Bodies. Law and Legitimacy, Cambridge, Cambridge University Press, 2012, 251.

²⁷⁵ HRC, Session 48, Meeting 1259, Ireland, 28 July 1993, CCPR/C/79/Add.21, Summary record 1235; 1236; 1239.

²⁷⁶ HRC, Session 65, Meeting 1740, Chile, 30 March 1999, CCPR/C/79/Add.104, Summary record 1733; 1734.

²⁷⁷ HRC, Session 89, Meeting 2445, Chile, 26 March 2007, CCPR/C/CHL/CO/5, Summary record CCPR/C/SR.2429, CCPR/C/SR.2430.

«While noting that the present draft Public Service Act presented to Parliament includes a provision restricting the number of public servants not authorized to strike, the Committee is concerned that public servants who do not exercise public authority do not fully enjoy the right to strike (art. 22). The State party should ensure in its legislation that only the most limited number of public servants is denied the right to strike»²⁷⁸.

Therefore, the right to “*freedom of association with others, including the right to form and join trade unions for the protection of his interests*” shall mean also the right to further the occupational interests by means of strike actions.

2.2.3. The right to strike between freedom of association and freedom of peaceful assembly

The Human Rights Committee seems also to reconnect, albeit in an isolated case, the exercise of the right to strike to the protective sphere not only of article 22 but also of article 21 of the International Covenant on Civil and Political Rights.

In relation to Mexico, it expressed concern about *«the conditions in which the rights provided for in articles 21 and 22 of the Covenant are exercised, as evidenced by the severe repression of peaceful demonstrations by striking workers»²⁷⁹.*

The tendency to delineate the exercise of the right to strike as a “*demonstration*” and refer it not only as an aspect of the freedom of trade union association but also as the legitimate exercise of the right to freedom of peaceful assembly can be appreciated also in the case-law of the European Court of Human Rights dealing with article 11 of the European Convention on Human Rights²⁸⁰.

At the United Nations level, the trend finds a parallel in the first Report submitted by the Special Rapporteur on the rights to freedom of peaceful assembly and of association to the Human Rights Council²⁸¹. He underlines that the rights to freedom of peaceful assembly and of association are key human rights in international human rights law, enshrined in article 20

²⁷⁸ HRC, Session 99, Meeting 2736, Estonia, 27 July 2010, CCPR/C/EST/CO/3, Summary record CCPR/C/SR.2736.

²⁷⁹ HRC, Session 50, Meeting 1315, Mexico, 6 April 1994, CCPR/C/79/Add.32, Summary record 1302; 1303; 1304; 1305.

²⁸⁰ See, Chapter Two, Section II, par. 2.1.4.

²⁸¹ Doc. A/HRC/20/27, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 21 May 2012. The report introduces the activities of the Special Rapporteur over the period 1 May 2011 to 30 April 2012, and highlights best practices, including national practices and experiences, to promote and protect the rights to freedom of peaceful assembly and of association.

of the Universal Declaration of Human Rights, article 21 and 22 of the International Covenant on Civil and Political Rights and reflected in article 8 of the International Covenant on Economic, Social and Cultural Rights and in other specific international and regional human rights instruments.

Although the Report does not extensively consider the issue of the right to strike, it should be noted that the allusion to the right in question can be found in the part of the report dealing with best practices related to the right to freedom of peaceful assembly: the right to strike is included in the catalogue of activities that might fall under the definition of assembly.

On the contrary, the right to strike is considered as a component of the right to freedom of association in the Report drafted following the mission to United Kingdom and Northern Ireland²⁸². In the document the Special Rapporteur, echoing the ILO position on the point, emphasizes that:

«the right to strike is a legitimate and integral part of the activities of a trade union and [that] any restrictions have to meet the strict test set out in article 22 of the International Covenant on Civil and Political Rights. In this framework, he urges the visited country to take measures in order to “ensure that the law also protects the right to strike, including secondary strikes in conformity with international human rights law»²⁸³.

2.3. UN Committee on Economic, Social and Cultural Rights

Unlike the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights refers openly to the right to strike and obliges the States parties to guarantee its exercise.

During the drafting process, its insertion among the rights ensured by the document was troublesome, not only for reasons related to its collective nature and its intended use as a limited right of last resort, but also because no other international instrument did contain specific provisions regulating it. The compromised text adopted reflects its problematic birth. Article 8 par.1(d) does not elaborate the boundaries of the States obligation to ensure the right to strike nor it is possible to firmly derive them from the monitoring activity of the Committee on Economic, Social and Cultural Rights, that only recently, after the adoption of the Optional

²⁸² A/HRC/23/39/Add.1, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai. Addendum. Mission to the United Kingdom of Great Britain and Northern Ireland.

²⁸³ A/HRC/23/39/Add.1, 22.

Protocol, has been enabled to consider individual communications and develop its own case-law.

2.3.1. Some descriptive features of the right to strike

As a general comment, it is possible to underline that the Committee regards the freedom of workers to form independent trade unions to protect and advance their interests and to have recourse to strike as «*an indispensable right under the Covenant*»²⁸⁴.

However, the Committee does not enter into details on whether strike actions ensured by the Covenant are only those entailing an abstention from the working activity or if other forms of «*collective action by trade unions*»²⁸⁵ can be considered internationally protected. The abstention from any survey on the definition and characterisation of strike is a choice in line with the universal aspiration of the treaty and the respect for the domestic industrial relation systems, that can turn to be strategic to exit from any unproductive debate on the definition of strike actions under article 8.

Simply, the right to strike is regarded as a way of «*direct confrontation*» between workers and employers²⁸⁶ and a method of settlement of collective disputes²⁸⁷ irrespective of the reasons behind them. Even if generally exercised as a form of action taken by trade union, it is construed essentially as an individual right²⁸⁸: any authorization or endorsement upon its exercise by a trade union, especially when it is the only confederation representing workers, is considered to curtail severely the right to strike and the right to freedom of association²⁸⁹ and, consistently, individual workers should be protected from dismissals on this ground²⁹⁰.

However, the Committee seems to prioritise the dialogic moment of the industrial conflict, to be carried out by independent trade unions to protect and advance the interests of

²⁸⁴ CESCR, Session 16, Meeting 26, Libya Arab Jamahiriya, 16 May 1997, E/C.12/1/Add.15, Summary record 20; 21.

²⁸⁵ CESCR, Session 33, Meeting 56, Azerbaijan, 26 November 2004, E/C.12/1/Add.104, Summary record E/C.12/2004/SR.41, E/C.12/2004/SR.42, E/C.12/2004/SR.43.

²⁸⁶ CESCR, Session 15, Meeting 54, Portugal, Macau, 6 December 1996, E/C.12/1/Add.9, Summary record 31; 32; 33.

²⁸⁷ CESCR, Session 35, Meeting 58, Uzbekistan, 25 November 2005, E/C.12/UZB/CO/1, Summary record E/C.12/2005/SR.38, E/C.12/2005/SR.39, E/C.12/2005/SR.40.

²⁸⁸ M. C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights*, Oxford, Clarendon Press, 1995, 278.

²⁸⁹ CESCR, Session 20, Meeting 27, Tunisia, 14 May 1999, E/C.12/1/Add.36, Summary record 17; 18; 19.

²⁹⁰ CESCR, Session 39, Meeting 55, Belgium, 21 November 2007, E/C.12/BEL/CO/3, Summary record E/C.12/2007/SR.41, E/C.12/2007/SR.41; CESCR, Session 28, Meeting 25, United Kingdom and Northern Ireland, 16 May 2002, E/C.12/1/Add.79, Summary record E/C.12/2002/SR.11, 12, 13.

workers²⁹¹, pointing out that the right to strike should be exercised only as a right of last resort²⁹². In this regard, it might be questionable whether article 8 of the Covenant backs collective actions not performed as the ultimate weapon against the employer.

A further scrutiny on the work of the Committee on Economic, Social and Cultural Rights may help to trace some guidelines on how effectively fulfil the States' duty to ensure the right to strike under the Covenant.

2.3.2. The States' duty to inscribe the right to strike into the domestic legislation

To give effectiveness to the right to strike, the Committee is of the view that States Parties are under an obligation to explicitly inscribe the right to strike in the domestic legislation and define the permissible limitations on that right²⁹³, as it expressly recommended to Belgium in 1994²⁹⁴. In order to be compatible with article 8 of the Covenant, the laws governing industrial actions must be transparent, not to deprive States' authorities of inordinate discretion in determining the legality of strikes²⁹⁵.

The Committee disagrees with those States opposing that the provisions of the Covenant constitute principles and programmatic objectives rather than legal obligations, and that consequently they cannot be given legislative effect and directly invoked by complainants before courts and tribunals. On the contrary, it held them self-executing in nature²⁹⁶ and to this extent it recalled that in its General Comment n. 3 of 1990 on the nature of States parties' obligations under article 2 of the Covenant²⁹⁷, it refers to a number of provisions, such as those of article 8 on the right to strike and those of article 13 on the right to education, which seem to be capable of immediate application within the judicial system.

²⁹¹ CESCR, Session 16, Meeting 26, Libyan Arab Jamahiriya, 16 May 1997, E/C.12/1/Add.15, Summary record 20; 21.

²⁹² CESCR, Session 37, Meeting 58, Tajikistan, 23 November 2006, Summary record E/C.12/2006/SR.39, E/C.12/2006/SR.40, E/C.12/2006/SR.41.

²⁹³ CESCR, Session 36, Meeting 29, Liechtenstein, 19 May 2006, E/C.12/CO/LIE/1, Summary record E/C.12/2006/SR.6, E/C.12/2006/SR.7; CESCR, Session 45, Meeting 55, Netherlands, 19 November 2010, E/C.12/NDL/CO/4-5, Summary record E/C.12/2010/SR.43, E/C.12/2010/SR.44 and E/C.12/2010/SR.45.

²⁹⁴ CESCR, Session 10, Meeting 27, Belgium, 20 May 1994, E/C.12/1994/7, Summary record 15, 16, 17.

²⁹⁵ CESCR, Session 25, Meeting 26, Republic of Korea, 9 May 2001, E/C.12/1/Add.59, Summary record 12, 13, 14.

²⁹⁶ «*The Committee is of the view that any suggestion that the above-mentioned provisions are inherently non-self-executing seems to be difficult to sustain*»; see, CESCR, Session 10, Meeting 27, Belgium, 20 May 1994, E/C.12/1994/7, Summary record 15, 16, 17; CESCR, Session 19, Meeting 55, Switzerland, 3 December 1998, E/C.12/1/Add.30, Summary record 37, 38, 39.

²⁹⁷ Doc. E/1991/23, annex III, The nature of States parties' obligations, 5th session, 1990, 86.

The strict approach adopted by the Committee on the necessity to secure the right to strike with an explicit legislative or constitutional provision seems to contrast with the different view taken by the ILO Committee of Experts, which considers that the right to strike may be recognized either implicitly or explicitly in the local legislation²⁹⁸.

In addition, the Committee also requires the domestic legislators to include a “*right*” to strike in the national legal system and not only a mere “*freedom to strike*” and for this reason it regarded the British system in breach of article 8 par. 1(d) of the Covenant stating as follows:

«The Committee considers that the common law approach recognizing only the freedom to strike, and the concept that strike action constitutes a fundamental breach of contract justifying dismissal, is not consistent with protection of the right to strike. The Committee does not find satisfactory the proposal to enable employees who go on strike to have a remedy before a tribunal for unfair dismissal. Employees participating in a lawful strike should not ipso facto be regarded as having committed a breach of an employment contract»²⁹⁹.

For the same reasons, Jamaica was asked to amend its legislation to bring it in line with article 8 par. 1(d) of the Covenant³⁰⁰.

In the light of article 8 par. 3 of the Covenant, the legislative intervention required by the Committee for an effective guarantee of the right to strike heavily depends of the standards adopted by the monitoring bodies of the ILO in interpreting Convention n. 87. For instance, with regard to Kazakhstan, the Committee urged the State party to revise its legislation on the right to strike to bring it in line with *«the ILO Conventions relating to the right to strike»³⁰¹*. Also Cyprus was required to draft a law to regulate the right to strike *«to ensure that it*

²⁹⁸ Dao (ILO), E/C.12/1988/SR.4.

²⁹⁹ CESCR, Session 17, Meeting 53, United Kingdom and Northern Ireland, 4 December 1997, E/C.12/1/Add.19, Summary record 36, 37, 38.

³⁰⁰ Konate, E/C.12/1990, SR.11. The Jamaican report explained the domestic situation as follows: «The Supreme Court had come to the decision, based on some English common law decision, that there was in fact no right to strike as such [...] since it was an infringement of common law for a person to be compelled to work, slavery having been abolished, there must therefore be a freedom not to work. But if the consequences of exercising that freedom was that one withdrew services for which provision had been made in the contract, a case could arise were there was a breach of the contract of employment. From that it was inferred that there was a freedom to strike but not the right to strike. See, Rattray, E/C.12/1990, SR.15.

³⁰¹ CESCR, Session 44, Meeting 25, Kazakhstan, 20 May 2010, E/C.12/KAZ/CO/1, Summary record E/C.12/2010/SR.12, E/C.12/2010/SR.13, E/C.12/2010/SR.14.

*conforms fully with ILO Convention n. 87»*³⁰². The choice confirms the coherence of the system and the key role played by ILO standards in human rights protection³⁰³.

2.3.3. Permissible restrictions

The right to strike ensured by article 8 par. 1(d) of the Covenant is not an absolute one.

It is possible for the States to place some limitations, provided that the legislative measures undertaken do not entail a ban on its exercise³⁰⁴ or do not restrict the latter in a way apt to render it, *de facto*, impossible³⁰⁵.

The Covenant mention in explicit terms two kinds of limitations: (i) general limitations stemming from article 4, according to which «*the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society*»; and (ii) specific limitation deriving not only from article 8 par. 1(d), stating that the right to strike should be exercised in conformity with the laws of the particular country, but also from article 8 par. 2, allowing lawful restrictions on the exercise of the right placed on the members of the armed forces, of the police or of the administration of the State.

2.3.3.1. General restrictions

The Committee has yet to clarify what is exactly the content of the general limitation clause of article 4 in relation to the right to strike, even if some indications may derive from the 2006 general conclusions with regard to Canada, when the country was required to re-examine the restrictions on the right to strike imposed at the federal, provincial and territorial levels.

In the eyes of the Committee, restrictions on the right to industrial action should be eliminated when:

³⁰² CESCR, Session 19, Meeting 55, Cyprus, 3 December 1998, E/C.12/1/Add.28.

³⁰³ C.W. Jenks, *The International protection of trade union freedoms*, London, Steven and Sons, 1957, 561.

³⁰⁴ With regard to Curaçao and St. Maarten, see, CESCR, Session 45, Meeting 55, Netherlands, 19 November 2010, E/C.12/NDL/CO/4-5, Summary record E/C.12/2010/SR.43, E/C.12/2010/SR.44 and E/C.12/2010/SR.45; CESCR, Session 28, Meeting 24, Benin, 15 May 2002, E/C.12/1/Add.78, Summary record E/C.12/2002/SR.8, 9, and 10.

³⁰⁵ CESCR, Session 29, Meeting 56, Slovakia, 29 November 2002, E/C.12/1/Add.81, Summary record E/C.12/2002/SR.30-32.

«they are not strictly necessary for the promotion of the general welfare in a democratic society, for the protection of the interests of national security or public safety, public order, public health or the protection of the rights and freedoms of others, and where no other alternative can be found»³⁰⁶.

Notably it seems that, in cases where the right to strike is at stake, article 4 of the Covenant can be legitimately use as a mere residual prerogative of the States and it cannot be considered in isolation. Moreover, to render it meaningful it should be read in conjunction with the restrictions contained in article 8 of the Covenant.

2.3.3.2. Specific restrictions

The Committee dealt more profusely with the task to shape the specific limitations on the right to strike as deriving from article 8 par. 1(d) and article 8 par. 2 of the Covenant.

For the ease of exposition, it seems appropriate to classify the specific restrictions investigated by the Committee into five main groups, following the model adopted during the analysis of the case-law of the ILO supervisory bodies: (i) restrictions connected to the category of personnel involved in the strike action; (ii) restrictions connected to the nature of the services provided; (iii) restrictions deriving from State's statutory intervention; (iv) restrictions stemming from acts of the judicial authority; (v) other sources of limitations.

2.3.3.2.1. Restrictions connected to the category of personnel involved

Among the limitations connected to the category of personnel involved in the strike action, it is necessary to cite the repeated request of the Committee to modify domestic legislations totally prohibiting strikes for civil servants.

The Committee refused the idea, suggested by some States' Party, that a strike would be incompatible with the duty of loyalty placed upon this category of workers and would run counter to the purpose of a professional civil service. On the contrary, it clearly stated that this interpretation of "*the administration of the State*" mentioned in article 8 par. 2 of the

³⁰⁶ CESCR, Session 36, Meeting 29, Canada, 19 May 2006, E/C.12/CAN/CO/4-5, Summary record E/C.12/2006/SR.9, E/C.12/2006/SR.10, E/C.12/2006/SR.11, E/C.12/2006/SR.12.

Covenant should be rejected, also in the light of the more restrictive interpretations offered by the ILO and the European Court of Justice³⁰⁷.

A complete ban on the right to strike for all civil servant, to be obviously distinguished from a mere restriction, has been deemed incompatible with the provisions of the Covenant in a number of cases.

The Committee recommended the Republic of Korea to immediately amend its laws and regulations and take measures to ensure that teachers, civil servants and others have the right to form trade unions and to take strike action³⁰⁸. In the same vein, the Committee asked Liechtenstein to repeal the Civil Servants Act as far as it did not provide the enjoyment of the right to strike for the category of personnel under examination³⁰⁹. By contrast, the Committee observed with satisfaction that there are few restrictions on the right to join a trade union and the right to strike in either the private or the public sector in Slovenia, and that members of the armed forces and the police also enjoy these rights³¹⁰.

Restrictions on the right to strike placed only on certain specific category of civil servants are, in principle, permissible, provided that said limitations are in conformity with international norms³¹¹, the comments made by the ILO Committee of Experts³¹² and, as a general rule, are not generalised³¹³.

In the light to these principles, the Committee said that denying the generality of civil servants the right to strike - and according it only to few categories - is a situation that constitutes a violation of article 8 par. 2 of the Covenant³¹⁴. Workers of State-owned enterprises³¹⁵, federal couriers, communications, railway workers and municipal employees³¹⁶ cannot be considered civil servants for the purposes of the Convention. On the contrary, it

³⁰⁷ CESCR, Session 26, Meeting 58, Germany, 31 August 2001, E/C.12/1/Add.68, Summary record E/C.12/2001/SR.48 and 49.

³⁰⁸ CESCR, Session 12, Meeting 27, Republic of Korea, 18 May 1995, E/C.12/1995/3, Summary record 3, 4, 6.

³⁰⁹ CESCR, Session 36, Meeting 29, Liechtenstein, 19 May 2006, E/C.12/CO/LIE/1, Summary record E/C.12/2006/SR.6, E/C.12/2006/SR.7.

³¹⁰ CESCR, Session 35, Meeting 58, Slovenia, 25 November 2005, E/C.12/SVN/CO/1, Summary record E/C.12/2005/SR.30, E/C.12/2005/SR.31, E/C.12/2005/SR.32.

³¹¹ CESCR, Session 29, Meeting 56, 29 November 2002, E/C.12/1/Add.85, Summary record E/C.12/2002/SR.41-43.

³¹² CESCR, Session 43, Meeting 55, Republic of Korea, 19 November 2009, E/C.12/KOR/CO/3, Summary record E/C.12/2009/SR.42, E/C.12/2009/SR.43, E/C.12/2009/SR.44.

³¹³ CESCR, Session 48, Meeting 28, Slovakia, 18 May 2012, E/C.12/SVK/CO/2, Summary record E/C.12/2012/SR.3, E/C.12/2012/SR.4, E/C.12/2012/SR.5.

³¹⁴ CESCR, Session 19, Meeting 54, Germany, 2 December 1998, E/C.12/1/Add.29, Summary record 40, 41, 42.

³¹⁵ CESCR, Session 17, Meeting 52, Iraq, 4 December 1997, E/C.12/1/Add.17, Summary record 33, 34, 35.

³¹⁶ CESCR, Session 46, Meeting 29, Russian Federation, 20 May 2011, E/C.12/RUS/CO/5, Summary record E/C.12/2011/SR.15, E/C.12/2011/SR.16, E/C.12/2011/SR.17.

held possible to provide limitations to the right to strike for civil servants exercising a public authority, for those responsible of for keeping order³¹⁷ and for those involved in the performance of essential services³¹⁸.

2.3.3.2.2. Restrictions connected to the nature of the services provided

The second group of limitations pertains to all the restriction placed on the right to strike for workers performing essential services.

The Committee does not provide its own definition of an essential service but basically refers to the comments of the ILO Committee of Experts and regards as “*essential*” the services «*whose interruption is likely to endanger the life, personal safety or health of the whole or part of the population*»³¹⁹.

The qualification of a service as essential is, in principle, left to the margin of appreciation of the State concerned, even if a good practice, welcomed by the Committee, is the insertion of essential services in a specific list³²⁰.

Essential services are identified, for instance, in the services provided in the health, energy production, communications system sectors³²¹ while fire-fighting, sewerage and certain mining operations³²² are in principle not included in the category. In any case, public school teachers³²³, college and university professors³²⁴, researchers³²⁵, judges³²⁶, and postal workers³²⁷ cannot be considered as performing essential services.

³¹⁷ CESCR, Session 28, Meeting 24, Benin, 15 May 2002, E/C.12/1/Add.78, Summary record E/C.12/2002/SR.8, 9, 10.

³¹⁸ CESCR, Session 19, Meeting 54, Germany, 2 December 1998, E/C.12/1/Add.29, Summary record 40, 41, 42.

³¹⁹ CESCR, Session 10, Meeting 23, Mauritius, 18 May 1994, E/C.12/1994/8, Summary record 22, 23.

³²⁰ CESCR, Session 40, Meeting 25, India, 16 May 2008, E/C.12/IND/CO/5, Summary record E/C.12/2008/SR.14, E/C.12/2008/SR.15, E/C.12/2008/SR.16.

³²¹ CESCR, Session 21, Meeting 50; 51, Bulgaria, 30 November 1999, E/C.12/1/Add.37, Summary record 30, 31, 32.

³²² CESCR, Session 34, Meeting 27, Zambia, 3 May 2005, E/C.12/1/Add.106, Summary record E/C.12/2005/SR.3, E/C.12/2005/SR.4, E/C.12/2005/SR.5.

³²³ CESCR, Session 20, Meeting 26, Denmark, 12 May 1999, E/C.12/1/Add.34, Summary record 11, 12, 13; CESCR, Session 34, Meeting 27, Serbia and Montenegro, 13 May 2005, Summary record E/C.12/2005/SR.11, E/C.12/2005/SR.12, E/C.12/2005/SR.13.

³²⁴ CESCR, Session 36, Meeting 29, Canada, 19 May 2006, E/C.12/CAN/CO/4-5, Summary record E/C.12/2006/SR.9, E/C.12/2006/SR.10, E/C.12/2006/SR.11, E/C.12/2006/SR.12.

³²⁵ CESCR, Session 14, Meeting 22, Guinea, 5 May 1996, E/C.12/1/Add.5, Summary record 17, 22.

³²⁶ CESCR, Session 26, Meeting 58, Germany, 31 August 2001, E/C.12/1/Add.68, Summary record E/C.12/2001/SR.48 and 49.

³²⁷ CESCR, Session 34, Meeting 27, Serbia and Montenegro, 13 May 2005, Summary record E/C.12/2005/SR.11, E/C.12/2005/SR.12, E/C.12/2005/SR.13.

The identification of what services are essential cannot be too broad and it is in any case necessary to apply the rule according to which only a restriction of the right to strike for certain category of workers is tolerated while a total ban constitutes a breach of the Covenant's provisions.

2.3.3.2.3. Restrictions deriving from States' statutory intervention

Other limitations might derive from legal provisions introduced by the public authorities to prevent the exercise of the right to strike or to stop a current strike action for a certain period of time. In cases where these practices were examined, the Committee generally considered a statutory obligation to refer labour disputes to compulsory arbitration in breach of article 8 of the Covenant³²⁸.

However, the case-law of the Committee is not particularly rich on the point and therefore it is not clear whether these practices might be compatible with the Covenant in case the government's interference can be justified by the need to protect qualified interests of the States or the right and freedom of others, as it happens under article 6 par. 4 of the European Social Charter.

Nigeria deserves to be cited as a particular case of governments' statutory intervention limiting in practice the exercise of the right to strike. The Government not only adopted a policy of retrenchment aimed at expelling thousands of employees in the public sector without adequate compensation, but also the military Governor of the State of Kaduna issued a decree expelling twenty-two thousand workers of Kaduna State Civil Service when they went on strike³²⁹.

2.3.3.2.4. Restrictions deriving from acts of the judicial authority

Another form of limitation of the right to strike can stem from acts of the domestic judicial authority.

³²⁸ CESCR, Session 9, Meeting 49, Senegal, 10 December 1993, E/C.12/1993/18, Summary record 37; 38; CESCR, Session 33, Meeting 56, Malta, 26 November 2004, E/C.12/1/Add.101, Summary record E/C.12/2004/SR.32, E/C.12/2004/SR.33; CESCR, Session 35, Meeting 58, Libyan Arab Jamahiriya, 25 November 2005, E/C.12/LYB/CO/2, Summary record E/C.12/2005/SR.44, E/C.12/2005/SR.45, E/C.12/2005/SR.46; CESCR, Session 13, Meeting 55, Norway, 6 December 1995, E/C.12/1995/13, Summary record 34; 36; 37; CESCR, Session 10, Meeting 23, Mauritius, 18 May 1994, E/C.12/1994/8, Summary record 22; 23; CESCR, Session 46, Meeting 29, Russian Federation, 20 May 2011, E/C.12/RUS/CO/5, Summary record E/C.12/2011/SR.15, E/C.12/2011/SR.16, E/C.12/2011/SR.17.

³²⁹ CESCR, Session 18, Nigeria, E/C.12/1/Add.23, Summary record 6, 7, 8, 9.

Even if not particularly developed at the present stage, the review of the Committee on the internal judicial practice is of vital importance in countries where the participation in a strike is subject to the approval of a court - absent that the employees might be legitimately dismissed³³⁰ - or in States where the right to strike is not a positive right but it has just a judicial recognition. This is, for example, the case of the Netherlands whose legal system has been negatively reviewed because, in the absence of an explicit recognition of the right to strike in the legislation, its exercise has been made subject to the scrutiny of the courts³³¹.

Moreover, even in presence of a statutory recognition of the right to strike it might be possible that the judicial interpretation of the same have the effect to curtail its exercise or depriving it of its effectiveness.

In relation to Switzerland, the Committee noted as follows:

«The Committee notes with concern that, if the right to strike is provided by the legislation, it is being compromised in the State party by the interpretation of the principle of “reasonableness”. As a result, trade unionists have been given criminal sentences because of their involvement in a strike or a trade union campaign, due to the interpretation of the principle of “reasonableness” by the court. (art.8) The Committee requests that the State party undertake a comprehensive review of the right to strike in practice. It also requests that the State party ascertain that its interpretation of “reasonableness” is in conformity with international standards. The Committee requests the State party in its next periodic report, to provide detailed information regarding this concern»³³².

2.3.3.2.5. Other sources of restriction

A further group of restrictions comprises those limitations deriving from specific procedural requirements for exercise of the strike action.

In principle, legal provisions governing the exercise of the right to strike should be not considered in breach of article 8 par. 1(d) of the Covenant. However, certain rules, even if apparently neutral, might translate into administrative obstacles³³³ or requirements that are so strict or demanding to be difficult to fulfil. In practice, these requirements make difficult to

³³⁰ CESCR, Session 10, Meeting 23, Mauritius, 18 May 1994, E/C.12/1994/8, Summary record 22; 23.

³³¹ CESCR, Session 45, Meeting 55, Netherlands, 19 November 2010, E/C.12/NDL/CO/4-5, Summary record E/C.12/2010/SR.43, E/C.12/2010/SR.44 and E/C.12/2010/SR.45.

³³² CESCR, Session 45, Meeting 55, Switzerland, 19 November 2010, E/C.12/CHE/CO/2-3, Summary record E/C.12/2010/SR. 37, E/C.12/2010/SR.38 and E/C.12/2010/SR.39.

³³³ CESCR, Session 37, Meeting 53, El Salvador, 21 November 2006, E/C.12/SLV/CO/2, Summary record E/C.12/2006/SR.36, E/C.12/2006/SR.37.

effectively exercise the legal right to strike in the State Party³³⁴. The scrutiny activity of the Committee is concentrated on these kinds of rules.

In some countries like Britain, Ireland, Czech Republic, Chile, Japan and Canada the law provides the need to exhaust a voting procedure and to fulfil certain quorum requirements prior the commencement of a strike, with an aim to protect the interests of workers against strikes not democratically mandated³³⁵.

The Committee had a cautious albeit ambiguous approach toward said requirements³³⁶.

In some cases it held that the existence of a voting mechanism prior to strike is not, *per se*, incompatible with the Covenant but it required the State to lower the quorum necessary to take a legal industrial action. For instance, it held that denying workers the right to strike without the approval of two thirds of a trade union's membership infringes upon the rights of workers and jeopardise their right to strike³³⁷, or that requiring a quorum of two thirds of the total number of workers and the agreement of at least half of the workers present at the meeting to call a strike imposes undue restrictions on the right to strike³³⁸.

In other cases it embraced a more stringent approach, claiming that the quorum requirement was excessive and asking the State not only a review of the same but also its complete removal.

With regard to Australia, it expressed concern on the provisions of the Building and Construction Industry Improvement Act 2005³³⁹. The law seriously affected freedom of association of building and constructions workers, by imposing significant penalties for industrial actions, including six months of incarceration, and by requiring that, before workers can lawfully take industrial action, at least fifty per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action. In the view of the Committee, said quorum is unreasonable because it unduly restricts the right to strike, as laid

³³⁴ CESCR, Session 34, Meeting 27, Zambia, 3 May 2005, E/C.12/1/Add.106, Summary record E/C.12/2005/SR.3, E/C.12/2005/SR.4, E/C.12/2005/SR.5.

³³⁵ A. T. M. Jacobs, The law of strikes and lock-outs, in R. Blanpain, Comparative labour law and industrial relations in industrialised market economies, The Hague, Kluwer Law International, 2007, 678-679; R. Ben-Israel, Strikes, Lock-outs and other kinds of hostile actions, International Encyclopedia of Comparative Law, Vol. XV, 1994, 47.

³³⁶ CESCR, Session 21, Meeting 50; 51, Bulgaria, 30 November 1999, E/C.12/1/Add.37, Summary record 30; 31; 32.

³³⁷ CESCR, Session 22, Meeting 26, Egypt, 12 May 2000, E/C.12/1/Add.44, Summary record 12; 13; 14.

³³⁸ CESCR, Session 31, Meeting 56, Russian Federation, 28 November 2003, E/C.12/1/Add.94, Summary record E/C.12/2003/SR.41, 42 and 43.

³³⁹ CESCR, Session 42, Meeting 26, Australia, 20 May 2009, E/C.12/AUS/CO/4, Summary record E/C.12/2009/3, E/C.12/2009/4, E/C.12/2009/5.

down in article 8 of the Covenant and ILO Convention n. 87. However the consequence is that the State has «*to remove the secret ballot requirements for workers who wish to take industrial action*»³⁴⁰ and not only to review the legal quorum.

Other legal requirements, whose imposition seems to be in principle permitted, had been recognised in breach of the Covenant because capable of jeopardising the effectiveness of the right to strike due to their aptitude to limit, in practice, its exercise.

The Committee showed particular concern for the establishment of a 21-day cooling off period accompanied by compulsory arbitration procedure under the Mauritius Industrial Relations Act having the effect of making most strikes illegal³⁴¹. It also considered the legal requirement for 30 days of mediation prior to initiating a strike «*to be an excessive restriction of the workers' right to collective bargaining*»³⁴². In addition, also excessively lengthy procedures for declaring a strike legal might constitute a restriction on the right provided in article 8 par. 1(d) of the Covenant³⁴³.

Other forms of restrictions on the effective exercise of the right to strike - and of other fundamental rights internationally protected - can originate from intimidation, arrest, expulsion³⁴⁴, imprisonment or physical violence of the striking workers, as it happens among others in Guinea³⁴⁵, Azerbaijan³⁴⁶, Korea³⁴⁷, and Morocco, where some trade union activists had been detained in a secret prison³⁴⁸.

They can also derive from the imposition of criminal sanctions³⁴⁹, or compulsory labour³⁵⁰, from arbitrary dismissal³⁵¹, from significant interference of the employers in strikes or strike-

³⁴⁰ CESCR, Session 42, Meeting 26, Australia, 20 May 2009, E/C.12/AUS/CO/4, Summary record E/C.12/2009/3, E/C.12/2009/4, E/C.12/2009/5.

³⁴¹ CESCR, Session 10, Meeting 23, Mauritius, 18 May 1994, E/C.12/1994/8, Summary record 22; 23.

³⁴² CESCR, Session 37, Meeting 55, Albania, 22 November 2006, E/C.12/ALB/CO/1, Summary record E/C.12/2006/SR.45, E/C.12/2006/SR.46, E/C.12/2006/SR.47.

³⁴³ CESCR, Session 25, Meeting 28, Bolivia, 10 May 2001, E/C.12/1/Add.60, Summary record 15, 16, 17.

³⁴⁴ In case of migrant workers exercising the right to strike, see, CESCR, Session 44, Meeting 19, Mauritius, 17 May 2010, E/C.12/MUS/CO/4, Summary record E/C.12/2010/SR.9, E/C.12/2010/SR.10, E/C.12/2010/SR.11.

³⁴⁵ CESCR, Session 14, Meeting 22, Guinea, 5 May 1996, E/C.12/1/Add.5, Summary record 17; 22.

³⁴⁶ CESCR, Session 33, Meeting 56, Azerbaijan, 26 November 2004, E/C.12/1/Add.104, Summary record E/C.12/2004/SR.41, E/C.12/2004/SR.42, E/C.12/2004/SR.43.

³⁴⁷ CESCR, Session 25, Meeting 26, Republic of Korea, 9 May 2001, E/C.12/1/Add.59, Summary record 12, 13, 14.

³⁴⁸ CESCR, Session 10, Meeting 26, Morocco, 19 May 1994, E/C.12/1994/5, Summary record 8; 9; 10.

³⁴⁹ CESCR, Session 17, Meeting 52, Iraq, 4 December 1997, E/C.12/1/Add.17, Summary record 33; 34; 35.

³⁵⁰ CESCR, Session 45, Meeting 55, Sri Lanka, 19 November 2010, E/C.12/LKA/CO/2-4, Summary record E/C.12/2010/SR.40, E/C.12/2010/SR.41 and E/C.12/2010/SR.42.

³⁵¹ CESCR, Session 10, Meeting 26, Morocco, 19 May 1994, E/C.12/1994/5, Summary record 8; 9; 10; CESCR, Session 39, Meeting 55, Belgium, 21 November 2007, E/C.12/BEL/CO/3, Summary record E/C.12/2007/SR.41, E/C.12/2007/SR.41.

related activities, for instance by discouraging workers from forming trade unions³⁵², from the practice of employers to start legal proceedings in order to obtain a ban on certain strike-related activities³⁵³, from the possibility for the employer to temporarily release up to two per cent of his workers during a strike if they are considered to be potentially violent or disruptive³⁵⁴, and from the fact that the participation in a strike can lead not only to the suspension of wages but also of social security rights³⁵⁵.

SECTION III - The crisis of the right to strike

During the 101st International Labour Conference, an alarm bell rang³⁵⁶ in Geneva for the protection of the right to strike within the ILO system³⁵⁷.

In accordance with its usual practice, in June 2012 the Committee on the Application of Standards³⁵⁸ began its work with a discussion on the annual report of the Committee of Experts and considered the General Survey concerning the fundamental Conventions and entitled "*Giving globalization a human face*"³⁵⁹.

Following the general discussion, the Committee on the Application of Standards was called upon to hold a discussion on the list of individual cases on serious misapplications of ratified Conventions which have been the subject of observations by the Committee of Experts. The list of individual cases should be negotiated among the components of the Committee on the Application of Standards, namely Workers, Employers and Governments.

³⁵² CESCR, Session 23, Meeting 51, Kyrgyzstan, 29 August 2000, E/C.12/1/Add.49, Summary record 42, 43, 44.

³⁵³ CESCR, Session 39, Meeting 55, Belgium, 21 November 2007, E/C.12/BEL/CO/3, Summary record E/C.12/2007/SR.41, E/C.12/2007/SR.41.

³⁵⁴ CESCR, Session 37, Meeting 56, The former Yugoslav Republic of Macedonia, 22 November 2006, E/C.12/MKD/CO/1, Summary record E/C.12/2006/SR.42, E/C.12/2006/SR.43, E/C.12/2006/SR.44.

³⁵⁵ CESCR, Session 34, Meeting 27, Serbia and Montenegro, 13 May 2005, E/C.12/1/Add.108, Summary record E/C.12/2005/SR.11, E/C.12/2005/SR.12, E/C.12/2005/SR.13.

³⁵⁶ S. Sciarra, Un confronto a distanza: il diritto di sciopero nell'ordinamento globale, *Political del Diritto*, 2012, 2-3, 213, exp. 226 seq.

³⁵⁷ For an analysis of the Employers' position, K. D. Ewing, Myth and reality of the right to strike as a 'Fundamental labour right', *International Journal of comparative labour law and industrial relations*, 2013, 2, 145 seq.; L. Swepston, Crisis in the ILO supervisory system: dispute over the right to strike, *International Journal of Comparative Labour Law and Industrial Relations*, 2013, 2, 199 seq.; J. R. Bellace, The ILO and the right to strike, *International Labour Review*, 2014, 1, forthcoming; C. La Hovary, Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike, *Industrial Law Journal*, 2013, 4, 338 seq.

³⁵⁸ For the debate within the Committee on the Application of Standards, see, mainly, Committee on the Application of Standards, International Labour Conference, 101st Session, 2012, extracts from the record of proceedings, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_190828.pdf.

³⁵⁹ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, International Labour Conference, 101st session, 2012.

However, they were unable to negotiate a list of individual cases because the Employer members insisted that the list could not contain any cases concerning the right to strike, with the effect that the Committee on the Application of Standards was not able to complete its mandate.

The objection of the Employer members to draft a list of individual cases does not allegedly lie on the denial of the existence of a right to strike in general but it is focused on the role of the Committee of Experts, that, although not entitled to give an interpretation of the provisions of a Convention, it nevertheless derived an international protection of the right to strike from Convention n. 87³⁶⁰.

During the 4th sitting of the 101st International Labour Conference, Mr. Funes De Rioja, Chairperson of the Employers' group, stated as follows:

«in the Committee on the Application of Standards we raised an objective issue. For legal reasons, we raised the fact that we felt and continue to feel that the authority of the Committee of Experts to interpret standards is not duly established and even less so with regard to the right to strike. This is a right we fully recognize but its interpretation and scope remain not only within national sphere but also within the mandate of other enforcement bodies that have interpreted it on a case by case basis»³⁶¹.

The Employers' group observed that ILO standards were politically negotiated texts and it was not the role of the Committee of Experts to determine the development of standards application; moreover, they fundamentally objected to the Committee of Experts' opinions

³⁶⁰ In 1994, during the 81st International Labour Conference, the Employers' group raised a different objection that was not centred on the role of the Committee of Experts, as happened in 2012. In that occasion they specified that the text of Conventions n. 87 did not include the right to strike and expressed their disagreement *«with the scope given to this right by the Committee of Experts»*. They did not challenge *«the principle of the freedom to strike and lock-out, but they absolutely could not accept that the Committee of Experts deduced from the text of the Convention a right so universal, explicit and detailed, as it had done in this part of the survey»*. With regard to the role of the Committee of Experts, they claimed that. *«the Committee of Experts' function was to interpret existing provisions and not to substitute for legislators; it is not up to the Experts to create requirements with respect to questions upon which the technical committee could not agree. To base oneself on the part of Article 3 which states "Workers' and Employers' organizations shall have the right ... to organize their ... activities and to formulate their programs" is a very indirect and subjective method for concluding the existence of the right to strike in Convention No. 87»*; see, International Labour Conference, Record of Proceedings, 1994, 81st session, exp. par. 115-134 and speech of Mr. Wisskirchen, Employers' Adviser Germany - Employer Vice-Chairman of the Committee on the Application of Standards, 28/9. The Employers' position seems to be based on A. Wisskirchen, The standard setting and monitoring activity of the ILO: legal questions and practical experience, International Labour Review, 3, 2005, 253 seq.

³⁶¹ International Labour Conference, Provisional Record, 6 June 2012, 101st session, 4th sitting.

concerning the right to strike being received or promoted as soft law jurisprudence and that General Surveys were erroneously seen as being the position of the ILO³⁶².

During the 21st sitting of the 101st International Labour Conference Mr. Syder, Employer Vice-Chairperson of the Committee on the Application of Standards, additionally clarified their position:

«The employers' position is that Convention no. 87 is silent on the right to strike because there was no agreement at the time of its negotiation to include it in the Convention and, in the view of the Employers, it is therefore not an issue upon which the experts should express any opinion. In doing so, the experts are effectively making policy, which is the exclusive domain of the Governments, Worker and Employer representatives of the Organisation. The mandate of the experts is to comment on the application of Convention no. 87 and not to interpret a right to strike into Convention no. 87»³⁶³.

The Committee of Experts do not have any mandate to interpret Convention n. 87 because, when the Committee of Experts was created in 1926, it was defined as having:

«no judicial capacity, nor would it be competent to give interpretations of the provisions of a Convention, nor to decide in favour of one interpretation rather than of another»³⁶⁴.

Therefore, giving the fact that *«it is not possible to simply remove the experts' interpretations as the International Labour Office has already published a General Survey containing the experts' interpretation of the right to strike»³⁶⁵* and that *«an ILO right to strike standard would need to be politically agreed on a tripartite basis by the Conference»³⁶⁶*, the Employers' group proposed to insert in the future General Survey a clarification of the mandate of the Committee of Experts reading as follows:

«The General Survey is part of the regular supervisory process and is the result of the Committee of Experts' analysis. It is not an agreed or determinative text of the ILO tripartite Constituents»³⁶⁷.

³⁶² Committee on the Application of Standards, International Labour Conference, 101st Session, 2012, extracts from the record of proceedings, par. 47 seq.

³⁶³ International Labour Conference, Provisional Record, 14 June 2012, 101st session, 21st sitting.

³⁶⁴ International Labour Conference, Provisional Record, 14 June 2012, 101st session, 21st sitting.

³⁶⁵ International Labour Conference, Provisional Record, 14 June 2012, 101st session, 21st sitting.

³⁶⁶ International Labour Conference, Provisional Record, 14 June 2012, 101st session, 21st sitting.

³⁶⁷ Committee on the Application of Standards, International Labour Conference, 101st Session, 2012, extracts from the record of proceedings, par. 150.

In the absence of such a disclaimer inserted in the General Survey, they did not accept the supervision of cases that included interpretation by the Committee of Experts regarding the right to strike and the negotiations with the Workers on the list of individual cases to be examined by the Committee on the Application of Standards inevitably broke down.

On their part, Workers' representatives stressed the impossibility to agree on the inclusion of a disclaimer in the General Survey, because any decision on the point could not be unilaterally taken by Workers' or Employers' alone but it fell within the competence of all ILO constituents. The Workers could have eventually agreed to a joint statement on the divergence of views on the role and mandate of the Committee of Experts, upon appropriate discussions on the matter in the correct sit, namely the Governing Body³⁶⁸.

Overall, the Workers reaffirmed their confidence in the work of the Committee of Experts, expressed deep disappointment for what happened in the Committee on the Application of Standards³⁶⁹ and regretted the impossibility to examine the individual cases denouncing violations of the rights guaranteed by ILO Conventions.

They defined the Employers' position as a «*political manoeuvre of some of the Employers' group*»³⁷⁰ and recalled, by citing the relevant international and regional legal sources, that:

*«whether we like it or not, the right to strike is not just a national issue to be judged and dealt with in the light of temporal or economic circumstances [...]. National courts and tribunals, in their decision on this subject, must respect a hierarchy of sources of law which, beyond any shadow of doubt, place international treaties above national law and above ratifications»*³⁷¹.

During the 102nd International Labour Conference, the Committee of Experts had the chance to explain its position on the issues raised by the Employers in the previous year³⁷².

As to whether there is a right to strike at all under Convention n. 87, it confirmed its long-established interpretation of the Convention, emphasizing the fact it was faced with the need to determine, on a case-by-case basis, what the acceptable restrictions were, rather than

³⁶⁸ Committee on the Application of Standards, International Labour Conference, 101st Session, 2012, extracts from the record of proceedings, par. 186.

³⁶⁹ International Labour Conference, Provisional Record, 6 June 2012, 101st session, 4th sitting, speech of Mr. Cortebeeck, Chairperson of the Workers' group.

³⁷⁰ International Labour Conference, Provisional Record, 6 June 2012, 101st session, 4th sitting, speech of Mr. Cortebeeck, Chairperson of the Workers' group.

³⁷¹ International Labour Conference, Provisional Record, 14 June 2012, 101st session, 22nd sitting, speech of Mr. Leemans, Worker Vice-Chairperson of the Committee on the Application of Standards.

³⁷² International Labour Conference, Report of the Committee of Experts, 102nd Session, 2013, par. 26 seq.

leaving it as an absolute right, and that it did so in an impartial way, taking into account, but not merely relying on, the decisions of the Committee on Freedom of Association³⁷³.

Concerning its mandate, the Committee reminded its status of an impartial, objective, and independent body. Its mandate is to evaluate and assess the application and implementation of Conventions, and to do so it had to consider and express its views on the legal scope and meaning of the ILO Conventions, *«in terms that inevitably reflected an interpretive vocabulary»*³⁷⁴.

To assist the ILO constituents in their understanding of the Committee's work, it summarised the nature, goals and function of its activity under the following four principles³⁷⁵:

- (i) *«logically integral to application»*. In order to monitor the application of Conventions and Recommendations, the Committee of Experts examines, under its term of reference, a range of reports and information and must bring to the attention of the Committee on the Application of Standards any national laws or practices not in conformity with the Conventions. *«This logically and inevitably requires an assessment, which in turn involves a degree of interpretation of both the national legislation and the text of the Convention»*;
- (ii) *«equal treatment and uniformity assure predictability in application»*. To promote a level of certainty needed for the proper functioning of the ILO system, the approach is devoted to the achievement of equality of treatment for States and uniformity in practical application. *«This emphasis is essential to maintaining principles of legality, which encourage governments to accept the Committee of Experts' views on application of a Convention»*;
- (iii) *«composition»*. The independency, experience and expertise of the Committee of Experts' members is a further source of legitimacy within the ILO community;
- (iv) *«consequences»*. The nature of the Committee of Experts' observations, direct requests, and General Surveys helps Governments to structure their conduct in law and practice; therefore, undermine the position of the Committee of Experts might have the effect of

³⁷³ International Labour Conference, Report of the Committee of Experts, 102nd Session, 2013, par. 31-32.

³⁷⁴ International Labour Conference, Report of the Committee of Experts, 102nd Session, 2013, par. 26.

³⁷⁵ International Labour Conference, Report of the Committee of Experts, 102nd session, 2013, par. 33; see, for a further clarification of said concepts, General Survey concerning labour relations and collective bargaining in the public service, Report of the Committee of Experts on the Application of Conventions and Recommendations, 102nd session, 2013, par. 6-8.

indirectly encouraging certain countries to ignore its requests or invitations to comply, weakening orderly monitoring and predictable application of the standards.

With regard to the proposed insertion of a disclaimer in the documents of the Committee of Experts³⁷⁶, it expressed the view that said caveat is not necessary because its opinions are non-binding, nor they can be considered *res judicata*, even if its views are to be considered as valid and generally recognized (absent contradictory ruling from the International Court of Justice)³⁷⁷ and a source of guidance for the ILO member States³⁷⁸.

In addition, as the Committee of Experts does not participate in the ILO tripartite framework, the insertion of said disclaimer would interfere with its independence and impartiality.

The firm position adopted by the Employers on the right to strike had adverse consequences on the 2013 session of the Committee on the Application of Standards³⁷⁹, albeit the formal and informal meetings held between Employers and Workers to determine the list of individual cases ensured a “*quasi-normal*” functioning of the Committee on the Application of Standards. Indeed, the components were able to negotiate a list of 25 individual cases to be examined by supervisory body.

However, the way in which Workers and Employers reached said compromised, «*could neither be repeated nor generalized*», as clearly warned by the Workers’ group³⁸⁰.

In all the individual cases regarding the application of Convention n. 87, where possibly the right to strike was at stake, the Committee on the Application of Standards used the following formula:

³⁷⁶ International Labour Conference, Report of the Committee of Experts, 102nd session, 2013, par. 36.

³⁷⁷ Under article 37 par. 1 of the ILO Constitution, «*Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice*».

³⁷⁸ Like the work of independent supervisory bodies created within other UN organizations addressing human rights and labour rights, its non-binding opinions or conclusions «*are intended to guide the actions of ILO member States by virtue of their rationality and persuasiveness, their source of legitimacy (by which is meant the independence, experience, and expertise of the members), and their responsiveness to a set of national realities including the informational input of the social partners*»; see, International Labour Conference, Report of the Committee of Experts, 102nd session, 2013, par. 35.

³⁷⁹ Committee on the Application of Standards, International Labour Conference, 102nd Session, 2013, extracts from the record of proceedings. Both Employers and Workers substantially reiterated their previous positions. Employers, notably, communicated concern relating to how the mandate of the Committee of Experts was expressed to the tripartite constituents and the outside world and repeated their request to include in the reports what they called a “*statement of truth*”; see, Committee on the Application of Standards, International Labour Conference, 102nd Session, 2013, extracts from the record of proceedings, exp. par. 66 and 86.

³⁸⁰ Committee on the Application of Standards, International Labour Conference, 102nd Session, 2013, extracts from the record of proceedings, par. 231.

«The Committee did not address the right to strike in this case as the employers do not agree that there is a right to strike recognized in Convention No. 87»³⁸¹.

The compromise found, even if inevitable in the absence of a different agreement between the components of the supervisory body, might have the dangerous effect to weaken the credibility of international labour standards and their effectiveness, and reinforce the convictions that governments are legitimised to cease any effort to bring their national law and practices in line with well-established standards on strikes.

This approach seems to be suggested by Mr. Kloosterman, US Employer³⁸²:

«The phrase certainly is not perfect. It is absolutely a compromise and it is most likely an exemplar of what a compromise is. But the phrase makes two things transparent that have not been transparent in the past. First, there is no agreement in the Committee that Convention No. 87 recognizes a right to strike. Second, because there is an absence of consensus on this issue, the Committee recognizes that we are not in a position to ask governments to change their internal laws and practices with regard to strike issues»³⁸³.

On his part, Mr. Leemans, Workers Vice-Chairperson of the Committee on the Application of Standards, tried to stress the dangers inherent in the motion of the Employers against an ILO protection of the right to strike, and its contrast to other international and regional systems of human rights protection. He said:

«What we are talking about here is a war at the national level against trade unions and against social dialogue»³⁸⁴.

Workers expressed willingness to continue the discussions on the mandate of the Committee of Experts, *«but in the forums created for that purpose and in order to achieve sustainable responses that enabled the Committee on the Application of Standards to improve*

³⁸¹ International Labour Conference, Provisional record, 16, pt. II, 102nd Session, 2013. The individual cases refers to Bangladesh, Canada, Egypt, Fiji, Guatemala, Swaziland.

³⁸² For a further insight on the Employers' understanding of Convention n. 87 see the document prepared by the International Organization of Employers dated November 2013 commenting in details the Convention, IOE – ACT/EMP - Toolkit for employers on international labour standards. Freedom of association and protection of the right to organize convention, 1948 (no. 87), http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/international_labour_standards/EN/_2013-11-15_IOE_ACT_EMP_ILS_TOOLKIT_C87.pdf.

³⁸³ Committee on the Application of Standards, International Labour Conference, 102nd Session, 2013, extracts from the record of proceedings, 19/3, speech of Mr. Kloosterman, Employer, United States.

³⁸⁴ Committee on the Application of Standards, International Labour Conference, 102nd Session, 2013, extracts from the record of proceedings, 19/6, speech of Mr. Leemans, Worker Vice-Chairperson of the Committee on the Application of Standards.

the way it conducted its work»³⁸⁵. They proposed two procedural solutions to deal with the issue of the right to strike:

*«The issue of the right to strike could possibly be dealt with by means of recourse to the ICJ or by activating the mechanism enshrined in article 37(2) of the Constitution. In that regard, the Worker members were of the view that it was not viable simply to criticize certain aspects of the functioning of the supervisory bodies. If those who made such criticisms were sure of their case, they should make use of the existing remedies»*³⁸⁶.

In February 2013, the same International Labour Office indicated three possible solutions³⁸⁷, all of them feasible from a legal point of view, but nevertheless counterproductive for the maintenance of an open dialogue among the ILO constituents and, above all, problematic to implement from a political standpoint.

A first possibility is to appoint a tribunal pursuant to article 37 par. 2 of the ILO Constitution *«for the expeditious determination of any dispute or question»* relating to the interpretation of Convention n. 87. A second solution is to address the matter before the International Court of Justice. Under article 37 par. 1 of the ILO Constitution, the Court is entrusted to decide any question or dispute relating to the interpretation of ILO Conventions. A third solution, whose functioning is quite obscure, is to maintain the present supervision methods, and reinforce them with *«procedures under which constituents would be invited to express their views through the CAS on questions of interpretation arising for the Committee of Experts in the performance of its mandate, before any conclusions are reached by the Conference»*³⁸⁸.

Conclusions

The crisis in the ILO supervisory system with regard to the right to strike in Convention n. 87 and the competences of the Committee of Experts has not yet been overcome and it is

³⁸⁵ Committee on the Application of Standards, International Labour Conference, 102nd Session, 2013, extracts from the record of proceedings, par. 86.

³⁸⁶ Committee on the Application of Standards, International Labour Conference, 102nd Session, 2013, extracts from the record of proceedings, par. 86.

³⁸⁷ International Labour Office, Informal Tripartite Consultations, 19-20 February 2013.

³⁸⁸ Quoted by C. La Hovary, Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike, *Industrial Law Journal*, 2013, 4, 338 seq.

difficult to predict what the outcome will be, even if it might be appreciated that a state of real disagreement is much better than a state of mere mutual incomprehension³⁸⁹.

Swepston suggests that it would not be productive to judge the position of any constituent of the ILO in terms of right or wrong or to follow the procedural alternatives suggested by the Workers' group - and substantially replicated in the ILO solutions indicated above - because, on the one hand, the question raised by the Employers concerns the approach of the Committee of Experts and not the interpretation of a Convention and, on the other hand, it is not sufficiently precise for a ruling. On the contrary, it is more likely that Workers and Employers will find an agreement accompanied by the request, addressed to the various supervisory bodies, to constantly monitor the way in which they apply broad principles³⁹⁰.

Whatever the solution will be, the crisis of the right to strike protection at the ILO level suggests that, to overcome an unprecedented economic and financial crisis, the temptation might be to seek short-term solutions characterised by the request to have more independency from supranational regulations. The effect would be to fragment the coherent scenario hardly created into a number of individual and, possibly, conflicting systems.

As the Employers put:

«For the Employers reality suggests that the concept of the right to strike should be defined in practice by individual nations based on their national circumstances [...]. This is not a time in history to be espousing a general right to damage the economy, it is a time to strengthen the ability of economies to prosper and grow»³⁹¹.

There are grounds to rebut the position.

As it has been elaborated above, the concept of “*freedom of association*” referred to in various international legal sources encompass the right to resort to collective actions for the furtherance of economic and social interests and States voluntarily undertook binding legal obligations to respect said principle.

The drafting history of Convention n. 87 shows that there was a conscious decision of the ILO components to omit a reference to strike on the assumption that said reference was

³⁸⁹ The expression is used by Langille to describe the different approaches in addressing labour law's crisis; see, B. Langille, Labour law's theory of justice, in G. Davidov, B. Langille, The idea of labour law, Oxford, Oxford University Press, 2011, 102.

³⁹⁰ L. Swepston, Crisis in the ILO supervisory system: dispute over the right to strike, International Journal of Comparative Labour Law and Industrial Relations, 2013, 2, 217.

³⁹¹ Unpublished article quoted by L. Swepston, Crisis in the ILO supervisory system: dispute over the right to strike, International Journal of Comparative Labour Law and Industrial Relations, 2013, 2, 217.

redundant. The right to strike was already included in the concept of “*freedom of association*” inserted in the ILO Constitution and there was a clear understanding about the appropriateness to develop the concept through the case-law of the ILO monitoring bodies, *in primis* the Committee on Freedom of Association.

In any case, it should be observed that the ILO is just a part of the complex machinery for the international protection of social rights and it cannot be considered in isolation.

Who claims that the right to strike is an issue to be dealt with locally because it is not specifically included in ILO Conventions cannot see the wood for the trees.

Article 8 par. 1(d) of the International Covenant on Economic, Social and Cultural Rights recognizes «*The right to strike, provided that it is exercised in conformity with the laws of the particular country*». The Committee on Economic, Social and Cultural Rights began to develop its own case-law on the right to strike, that is not confined to verify the conformity of its exercise with national law but requires the domestic legislator to comply with minimum standards accepted at the international level.

The same Human Rights Committee derived a protection of the right to strike especially from article 22 of the International Covenant on Civil and Political Rights, albeit the document is silent on the matter.

Since these two instruments codify the Universal Declaration of Human Rights, there is another source where the right to strike might find legitimate international recognition. In turn, it would be unimaginable to have a UN system of human rights protection with one of its components, the ILO, establishing principles in conflict with the Universal Declaration of Human Rights³⁹².

In this regard, the Committee of Experts stated that the Universal Declaration is the main point of reference for human rights and the ILO standards give practical application to the general human rights aspirations made in the Universal Declaration:

«The Universal Declaration is now considered to reflect customary international law. It is generally accepted as a point of reference for human rights throughout the world, and as the basis for most of the standard setting that has been carried out in the United Nations and in many other organizations since then. The ILO's standards and practical activities on human rights are closely related to the universal values laid down in the Declaration, and are entirely consistent with it.

³⁹² N. Valticos, International labour standards and human rights: approaching the year 2000, *International Labour Review*, 198, 2 seq. See, also, L. Swepston, Crisis in the ILO supervisory system: dispute over the right to strike, *International Journal of Comparative Labour Law and Industrial Relations*, 2013, 2, 205.

[...] Most important, the ILO's standards on human rights along with the instruments adopted in the UN and in other international organizations give practical application to the general expressions of human aspirations made in the Universal Declaration, and have translated into binding terms the principles of that noble document»³⁹³.

The right to strike is also included in other regional systems of human right protection, such as article 6 par. 4 of the European Social Charter, that recognises *«the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into»* and article 8 par. 1(b) of the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights (Protocol of San Salvador), pursuant to which *«The States Parties shall ensure [...] the right to strike»*.

More recently, the European Union crystallised the concept into its primary law, namely article 28 of the Charter of Fundamental Rights of the European Union:

«Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action».

Supranational courts adopted the same stance.

The European Court of Human Rights claimed that the right to strike falls within the scope of article 11 of the European Convention on Human Rights protecting freedom of peaceful assembly and freedom of association and the European Court of Justice held the right to strike as a fundamental right.

The fact that the documents and bodies referred above might have partly based their arguments in favour of the right to strike on the standards developed by the most advanced system of labour rights protection (the ILO) cannot diminish the scope of their considerations, but on the contrary it guarantees their legitimacy and coherence.

In these times of economic uncertainty try to revert the inevitable process of juridical globalisation in favour of multiple domestic solutions would be counterproductive.

Empirical studies showed that global standards are not a damage for the economy and all countries, regardless of their level of development, culture and tradition, can gain from their

³⁹³ International Labour Conference, Report of the Committee of Experts, 86th session, 1998, par. 56-58 .

adoption and implementation. They improve economic efficiency by preventing destructive competition while promoting constructive competition in the labour market³⁹⁴.

Implementation of labour standards should be considered «*a form of investment in institution that in the long run not only has a positive effect for the workers and the economy but also a positive impact on the stability and development of society as a whole. In the era of globalization, it goes without saying that such regulation cannot stop at national borders but has to be international*»³⁹⁵.

Public and private actors slowly point toward this direction³⁹⁶.

As of 2013, 8,000 companies in 140 countries have joined the United Nations Global Compact³⁹⁷, a United Nations program for corporate sustainability launched in 2000, according to which enterprises may voluntarily align their operations and strategies with ten universally accepted principles. Principle 3 states that «*Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining*», which allows «*for industrial action to be taken by workers (and organizations) in defense of their economic and social interests*»³⁹⁸. The Global Compact's labour principles are derived from the 1998 ILO Declaration on Fundamental Principles and Rights at Work, that commits ILO Members to respect and promote principles and rights such as freedom of association and the effective recognition of the right to collective bargaining (Conventions n. 87 and n. 98), irrespective of the fact they have ratified the relevant Conventions.

The 2011 «*Guiding Principles on Business and Human Rights*»³⁹⁹, developed by the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations, John Ruggie, state that business enterprises have the responsibility to respect human rights (foundational principle n. 12). The core internationally recognized human rights are contained both in the International Bill of Human Rights (consisting of the

³⁹⁴ W. Sengenberger, *Globalization and social progress: the role and impact of international labour standards*, 2nd ed., Bonn, Friedrich-Ebert-Stiftung, 2005.

³⁹⁵ M. Weiss, *International labour standards: a complex public-private policy mix*, *International Journal of Comparative Labour Law and Industrial Relations*, 2013, 1, 8.

³⁹⁶ Even if, as it has been observed, in order to render these experiences meaningful and effective it is necessary to enhance the coherence of these instruments by defining the meaning of human rights at work, an activity that might be performed only by a body vested of international legitimacy; see, J. R. Bellace, *Deciding the Meaning of Human Rights at Work*, draft for the courtesy of the Author, forthcoming.

³⁹⁷ United Nations, *Global Corporate Sustainability Report*, September 2013, http://www.unglobalcompact.org/docs/about_the_gc/Global_Corporate_Sustainability_Report2013.pdf.

³⁹⁸ Global Compact, Principle 3, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle3.html>.

³⁹⁹ The principles implement the United Nations «*Protect, Respect and Remedy*» framework (A/HRC/17/31) and are endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011.

Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), and in the principles laid down, among others, in ILO Convention n. 87, as set out in the Declaration on Fundamental Principles and Rights at Work.

Enterprises started to insert said principles either in their Code of Conducts or in International and European Framework Agreements, the latter concluded between multinational enterprises and global union federations and setting out a background for their relationship. For instance, the “*Adidas Group Labour Rights Charta*” refers to the company’s commitment to implement human rights and core labour standards⁴⁰⁰. Nike Inc. “*Code Leadership Standard*” recalls the commitment to respect the ILO core Conventions and the Universal Declaration of Human Rights, providing a recognition - albeit light - of the right to strike⁴⁰¹. The recent “*Global Agreement between Telenor ASA and UNI Global Union*” states that the two parties respect the fundamental labour rights of employees in accordance with international standards and guiding principles, namely the UN Global Compact, the ILO fundamental Conventions and the UN Guiding Principles on Business and Human Rights⁴⁰². The same commitments are present in the “*Global framework agreement on social, societal and environmental responsibility between the Renault Group, the Renault Group Works’ Council and IndustriALL Global Union*”⁴⁰³.

Finally, if the right to strike ought to be considered a fundamental right then it should not be reduced to a mere damage for the economy (or a restraint of trade⁴⁰⁴) but regarded as a value in itself, promoting ongoing transformation in labour law and other fields.

Some authors propose to embrace a holistic perspective toward strikes instead of an economic one⁴⁰⁵. They offer some examples of how the right to strike can play a

⁴⁰⁰ Adidas Group Labour Rights Charta, http://www.adidas-group.com/media/filer_public/2013/07/31/adidas_group_labour_rights_charta_may_2011_en.pdf.

⁴⁰¹ Nike Inc. “Code Leadership Standard”, http://nikeinc.com/system/assets/6276/Nike_Code_Leadership_Standards_Jan2012_original.pdf?1325287549.

⁴⁰² Global Agreement between Telenor ASA and UNI Global Union, 18 January 2013, http://ec.europa.eu/employment_social/empl_portal/transnational_agreements/Telenor_Global_EN.pdf.

⁴⁰³ Global framework agreement on social, societal and environmental responsibility between the Renault Group, the Renault Group Works’ Council and IndustriALL Global Union, http://ec.europa.eu/employment_social/empl_portal/transnational_agreements/Renault_ACI_EN.pdf.

⁴⁰⁴ A. Jacobs, Collective self-regulation, in B. Hepple, The making of labour law in Europe. A comparative study of nine countries up to 1945, Oxford, Hart Publishing, 2010, 193.

⁴⁰⁵ J. Lopez, C. Chacartegui, C. G. Canton, From conflict to regulation: the transformative function of labour law, in G. Davidov, B. Langille, The idea of labour law, Oxford, Oxford University Press, 2011, 344 seq.

transformative role for the integration of social divergences and the transformation of labour regulation. In France and Spain, for instance, strike protests obliged governments to eliminate statutory regulation reducing labour rights⁴⁰⁶. In China, strikes directed against two multinational enterprises, Honda and Toyota, provoked a series of similar protests in other multinationals and determined Honda to offer some salary increases. This landmark event in the development of China's labour relations was beneficial not only for Chinese workers' right but also contributed to ground an academic debate of the realities of handling labour disputes which is necessary *«if China's labour laws are to be improved»*⁴⁰⁷.

The transformative attitude of the right to strike might be appreciated also in its capacity to engage a new debate at the international level, that should not be reduced to a competition for the primacy of parochial assumptions but it should be focused on deciding the meaning of human rights and the body legitimised to determine said meanings⁴⁰⁸. As Bellace points out, the twenty-first century environment in which fundamental principles are to be applied may determine the ILO constituents to arrive at consensus on how existing understandings should be modified, and induce *«a new debate on national sovereignty in an era of regional and trading bloc organizations, and even on the autonomy of the ILO in the face of other UN instruments such as the UN Global Compact or the Ruggie Principles»*⁴⁰⁹.

⁴⁰⁶ J. Lopez, C. Chacartegui, C. G. Canton, From conflict to regulation: the transformative function of labour law, in G. Davidov, B. Langille, The idea of labour law, Oxford, Oxford University Press, 2011, exp. 358-362.

⁴⁰⁷ C. Kai, Legitimacy and the Legal Regulation of Strikes in China: A Case Study of the Nanhai Honda Strike, International Journal of Comparative Labour Law and Industrial Relations, 2013, 2, 134.

⁴⁰⁸ J. R. Bellace, Deciding the Meaning of Human Rights at Work, draft for the courtesy of the Author, forthcoming.

⁴⁰⁹ J. R. Bellace, The ILO and the right to strike, International Labour Review, 2014, 1, forthcoming.

Chapter Two - The Council of Europe Framework

The Council of Europe decided to split the protection of civil and political rights and of socio-economic rights into separate documents: the European Convention on Human Rights and the European Social Charter. The first protects the right to “freedom of peaceful assembly” and to “freedom of association”, including the right to form and join trade unions for the protection of one’s interests. The second ensures, among others, the right to take collective action, including strike action, in cases of conflicts of interests. There is no clear-cut separation between the set of rights protected by the treaties. Recent judicial trends confirm the possibility to embrace the protection of socio-economic claims under the catalogue of civil and political rights. The European Court of Human Rights has been paying increased attention to the safeguard of collective social rights, including the right to strike, by referring to the European Social Charter and the ILO labour standards. The attitude might contribute to the creation of a fundamental social rights platform for the maintenance of workers’ rights, even though certain features of the right to strike still need to find a coherent understanding in the framework of the Council of Europe. Such circumstance could have repercussions on the standard to be applied within the European Union.

SECTION I - Legal Sources

1.1. The Council of Europe: a regional system for the protection of human rights

The protection and promotion of human rights lies at the heart of the Council of Europe and has been a fundamental focus of the same since its inception⁴¹⁰.

⁴¹⁰ For an overview on the Council of Europe and the European Convention on Human Rights, see, S. Bartole, P. De Sena, V. Zagrebelsky, Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, Milano, Cedam, 2012; D. Spielmann, M. Tsirli, P. Voyatzis. La Convention européenne des droits de l'homme, un instrument vivant: melanges en l'honneur de Christos L. Rozakis, Bruxelles : Bruylant, 2011; M. Bond, The Council of Europe and human rights: an introduction to the European Convention on Human Rights, Strasbourg, Council of Europe, 2010; E. Bates, The evolution of the European Convention on Human Rights: from its inception to the creation of a permanent court of human rights, Oxford, Oxford University Press, 2010; R. White, C. Ovey, Jacobs, White & Ovey: The European Convention on Human

After the second world war European States, inspired by a desire of peace, designed political initiatives to promote closer association and cooperation across the continent in response to the threat to fundamental rights and to political freedom which overwhelmed national states during the conflict.

As a remedy to the «*tragedy of Europe*»⁴¹¹, and with the intent to make all Europe «*free and happy*», on 19 September 1946 Sir Winston Churchill during a speech held at the University of Zurich proposed to «*build a kind of United States of Europe*» in order to «*re-create the European Family, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety and in freedom*». To this extent, the first practical step to re-create European families in a regional structure would have been to form a Council of Europe where France and Germany «*must take the lead together*».

The most important step for the creation of a Council of Europe and for the future of European human rights was the Congress of Europe held in The Hague in May 1948 and organised by the International Committee of Movements for European Unity, an independent body which comprised 750 delegates among eminent statesmen, prime ministers, foreign ministers, and other prominent professional figures, and chaired by Churchill as President of Honour⁴¹².

At the meeting, talks were held in three committees (political; economic and social; cultural). Each committee considered resolutions submitted to plenary sessions and then adopted.

In particular, the idea emerging from the «*Political resolution*»⁴¹³ was that the European nations «*must transfer and merge some portion of their sovereign rights so as to secure*

Rights, fifth edition, Oxford, Oxford University Press, 2010; D.J. Harris, M. O'Boyle, C. Warbrick, Law of the European convention on human rights, 2nd ed., Oxford, Oxford University press, 2009; L. Raimondi, Il Consiglio d'Europa e la Convenzione europea dei diritti dell'uomo, 2nd ed., Napoli, Editoriale scientifica, 2008; G. Letsas, A theory of interpretation of the European convention on human rights, Oxford, Oxford University Press, 2007; S. Greer, The European convention on human rights: achievements, problems and prospects, Cambridge, Cambridge University Press, 2006; P. van Dijk, A. Yutaka, Theory and practice of the European convention on human rights, 4th ed., Antwerpen, Intersentia, 2006; D. Gomien, Short guide to the European Convention on human rights, 3rd ed., Strasbourg, Council of Europe, 2005; M. De Salvia, La Convenzione europea dei diritti dell'uomo, 3rd ed., Napoli, Editoriale scientifica, 2001; R. Blackburn, J. Polakiewicz, Fundamental rights in Europe: the European Convention on Human Rights and its member States, 1950-2000, Oxford, Oxford University Press, 2001; M.W. Janis, R. S. Kay, Anthony W. Bradley, European Human Rights Law, Oxford, Clarendon Press, 1995.

⁴¹¹ All quotes are from the speech of Sir Winston Churchill, Zurich, 19 September 1946, http://assembly.coe.int/Main.asp?link=/AboutUs/zurich_e.htm.

⁴¹² E. Bates, The birth of the European Convention on Human Rights, in J. Christoffersen, M. Madsen, The European Court of Human Rights between law and politics, Oxford, Oxford University Press, 2011, 19.

⁴¹³ Political Resolution, <http://www.europeanmovement.eu/index.php?id=6788#c20680>.

common political and economic action for the integration and proper development of their common resources» and «undertake to respect a Charter of Human Rights».

In the same vein, the “*Cultural resolution*”⁴¹⁴ recognised human rights as the essential bases of the efforts for a United Europe, claiming that a Charter of Human Rights should be a sufficient protection for the same only in the event it is rendered legally binding by an agreement to be reached between the European states. To safeguard these rights, the resolution suggested to established a Supreme Court «*with supra-state jurisdiction to which citizens and groups can appeal, and which is capable of assuring the implementation of the Charter*».

The commitment to respect human rights pervaded also the “*Economic and Social resolution*”⁴¹⁵, in which it was said that the exigencies of modern economic development must be reconciled with the integrity of human personality, thereby presenting a germinal idea of integrating the social and economic dimensions, lately developed in the European Union with the Treaty of Lisbon. The resolution implicitly recognised the extensive influence of the workforce in the establishment of economic policies and claimed also for an active involvement of stakeholders (workers and their representative organisations) in the development of economic objectives, not only with the task to mainstream social goals, as it is presently recognised at the European Union level, but with a human rights oriented duty «*to avoid any tendency towards totalitarianism and to safe-guard the economic independence of the individual*».

During the meeting it was suggested to set up a Commission with the double task to draft a Human Rights Charter and to lay down standards to which a State must conform «*if it is to deserve the name of a democracy*»⁴¹⁶. A State would have been entitled to be called a democracy only in the event it guaranteed to its citizens «*liberty of thought, assembly and expression, as well as the right to form a political opposition*»⁴¹⁷. For the implementation of the Charter, it was proposed to establish a Court of Justice with the power to impose adequate sanctions and to give citizens of the associated countries redress before said court, at any time and with the least possible delay, in the event of violation of the rights formulated in the Charter⁴¹⁸.

⁴¹⁴ Cultural Resolution, <http://www.europeanmovement.eu/index.php?id=6788>.

⁴¹⁵ Economic and Social Resolution, <http://www.europeanmovement.eu/index.php?id=6788#c20680>.

⁴¹⁶ Political Resolution, <http://www.europeanmovement.eu/index.php?id=6788#c20680>.

⁴¹⁷ Political Resolution, <http://www.europeanmovement.eu/index.php?id=6788#c20680>.

⁴¹⁸ Political Resolution, <http://www.europeanmovement.eu/index.php?id=6788#c20680>.

The Statute of the Council of Europe⁴¹⁹ was signed on 5 May 1949 by ten founding members, namely Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom, with the aim to «*achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress*»⁴²⁰.

Article 1 b) of the Statute provides that that aim:

*«shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms»*⁴²¹.

The States of the Council of Europe are entrusted with a double task: on the one hand, they have to safeguard rights and freedoms from the arbitrary intervention of public powers; on the other hand, they have to develop their contents and insert them in binding legal documents whose observance should be checked by international organs⁴²².

At present, forty-seven countries are members of the Council of Europe⁴²³ and six States enjoy the status of observers⁴²⁴.

The current Council of Europe's political mandate has been defined by the third Summit of Heads of State and Government, held in Warsaw in May 2005 and consists in four objectives⁴²⁵:

- (i) to protect human rights, pluralist democracy and the rule of law;
- (ii) to promote awareness and encourage the development of Europe's cultural identity and diversity;
- (iii) to find common solutions to the challenges facing European society;

⁴¹⁹ Statute of the Council of Europe, <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

⁴²⁰ Article 1 a) of the Statute of the Council of Europe.

⁴²¹ Article 1 b) of the Statute of the Council of Europe.

⁴²² M. de Salvia, *La Convenzione Europea dei Diritti dell'Uomo*, 3rd ed., Napoli, Editoriale scientifica, 2001, 40.

⁴²³ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine, United Kingdom.

⁴²⁴ Canada, Holy See, Israel, Japan, Mexico, United States.

⁴²⁵ See, Warsaw Declaration, http://www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp and Action Plan of 17 May 2005, http://www.coe.int/t/dcr/summit/20050517_plan_action_en.asp.

(iv) to consolidate democratic stability in Europe by backing political, legislative and constitutional reform.

The Council of Europe operates through three organs: a decision-making body, the Committee of Ministers⁴²⁶, composed of the ministers of foreign affairs of each member state or their permanent diplomatic representatives in Strasbourg; a deliberative body, the Parliamentary Assembly (PACE)⁴²⁷, whose members are appointed by the national parliaments of each Member State with the task to initiate international treaties, helping to create a Europe-wide system of legislation; a consultative body added in 1994, the Congress of Local and Regional Authorities, composed of representatives of regions and municipalities and providing a forum to discuss common problems and to develop policies to strengthen democracy and improve services at local and regional level⁴²⁸.

The organs are served by the Secretariat of the Council of Europe⁴²⁹, that consists of a Secretary General, a Deputy Secretary General and the relevant staff⁴³⁰. The Secretary General is responsible to the Committee of Ministers for the work of the Secretariat.

Novitz underlines that the institutional structure of the Council of Europe, which differs from the ILO for the absence of any representation of interest group such as workers or employers, affected the drafting of both the European Convention on Human Rights and the European Social Charter⁴³¹. With regard to the first document, no official consultation with workers and employers were held. Similarly, the final decision on the content of the European Social Charter was left to the Committee of Ministers, albeit after the 1958 Tripartite Conference organised jointly by the Council of Europe and the International Labour Office.

Membership to the Council of Europe entails the obligations for the States to accept the principles of the rule of law and of the enjoyment by all persons within their jurisdiction of human rights and fundamental freedoms, and to collaborate sincerely and effectively in the

⁴²⁶ Chapter IV, articles 13 - 21 of the Statute of the Council of Europe.

⁴²⁷ Chapter V, articles 22 - 35 of the Statute of the Council of Europe.

⁴²⁸ Charter of the Congress of Local and Regional Authorities of Europe adopted on 14 January 1994, <http://www.cvce.eu/viewer/-/content/3e0ab85b-ce7c-4d14-be50-ab35a9f9ca0b/en>.

⁴²⁹ Article 10 of the Statute of the Council of Europe.

⁴³⁰ Chapter VI, articles 36 - 37 of the Statute of the Council of Europe. The Secretary General and Deputy Secretary General are appointed by the Consultative Assembly on the recommendation of the Committee of Ministers, while the remaining staff is appointed by the Secretary General. Their duties are to the Council of Europe and shall be performed uninfluenced by any national considerations, or instructions from any government or any authority external to the Council.

⁴³¹ T. Novitz, *International and European Protection of the Right to Strike*, Oxford, Oxford University Press, 2003, 129 seq.

realisation of the aim of the Council⁴³². Only the European States that are able and willing to fulfil said obligations may be invited to become a member of the Council of Europe by the Committee of Ministers or, under special circumstances, an associate member⁴³³.

Under article 8 of the Statute, should a member of the Council of Europe seriously violate his duties of collaboration in the realisation of the aim of the Council or its obligation to accept the principles of the rule of law and respect human rights and fundamental freedoms, it may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under article 7 of the Statute⁴³⁴. If such member does not comply with the request, the Committee of Ministers may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

The obligation to respect human rights in general as precondition to the membership of the Council of Europe highlights the shift from the regime of minority protection established by the League of Nations⁴³⁵ - and the idea that the safeguard of fundamental rights becomes a concern of international law only in the event the interest of the State is affected - to the conception that State's international obligations are engaged when it mistreats not only nationals of another State but also its own nationals or stateless groups⁴³⁶. As it has been noted, over the years the Council of Europe set up a system for the protection of human rights that can be regarded as one of the most advanced in the world⁴³⁷ whose work is mainly based on two documents: the European Convention on Human Rights and the European Social Charter.

⁴³² Article 3 of the Statute of the Council of Europe. For the admission requirements and procedures, in particular in relation to the problems arisen with the admission of States from Central and Eastern Europe see, K. Drzewicki, Future relations between Eastern Europe and the Council of Europe, in A. Bloed, W. De Jonge, Legal aspects of a new European legal infrastructure, Utrecht, Nederlands Helsinki Comité, 1992, 41 seq.

⁴³³ Articles 4 and 5 of the Statute of the Council of Europe.

⁴³⁴ Article 7 of the Statute of the Council of Europe provides as follows: «Any member of the Council of Europe may withdraw by formally notifying the Secretary General of its intention to do so. Such withdrawal shall take effect at the end of the financial year in which it is notified, if the notification is given during the first nine months of that financial year. If the notification is given in the last three months of the financial year, it shall take effect at the end of the next financial year».

⁴³⁵ J. Stone, International Guarantees of Minority Rights: Procedure of the Council of the League of Nations in Theory and Practice, London, 1932; L. Sohn, T. Buergenthal, International protection of human rights, Bobbs-Merrill, Indianapolis, 1973, 213. See, also, the letter from George Clemenceau to Ignacy Paderewsky of 24 June 1919 in Documents concerning the protection of minorities, League of Nations, Official Journal, Special supplement n. 73, 1929.

⁴³⁶ R. White, C. Ovey, Jacobs, White & Ovey: The European Convention on Human Rights, 5th ed., Oxford, Oxford University Press, 2010, 6; G. Letsas, A theory of interpretation of the European Convention on Human Rights, Oxford, Oxford University Press, 2007, 19; L. Sohn, The new international law: protection of the rights of individuals rather than States, American University International Law Review, 1982, 9, 9.

⁴³⁷ P. Leuprecht, Innovation in the European system of human rights protection: is enlargement compatible with reinforcement?, Transnational law and contemporary problems, 1998, 8, 313.

As it happened within the United Nations system, also the Council of Europe chose a «double-track»⁴³⁸ approach for the protection of fundamental human rights.

The European Convention on Human Rights (the Convention or the ECHR) guarantees civil and political rights and States are obliged to secure “*everyone within their jurisdiction*” the enjoyment of said rights. It adopts an enforcement mechanism of judicial nature, the European Court of Human Rights (the Court or the ECtHR), and provides for the possibility to bring individual complaints. The European Social Charter (the Charter or the ESC) guarantees the progressive promotion of economic, social and cultural rights and not their immediate guarantee. The enforcement of the ESC is supervised by a non-judicial body, the European Committee of Social Rights (the Committee) that, until 1998, was not allowed to hear specific cases and, even after, it has been attributed with the power to examine only collective complaints.

1.2. The European Convention on Human Rights (ECHR)

The Council of Europe first catalogue of substantive human rights and procedures for their protection is the European Convention on Human Rights that dates back to 4 November 1950⁴³⁹, one year after the establishment of the Council of Europe.

The drafting process started in July 1949, when the International Committee of Movements for European Unity published a document containing a proposed draft of the European Convention on Human Rights together with a draft Statute for a European Court of Human Rights⁴⁴⁰. The document was submitted to the Parliamentary Assembly during its first meeting on 19 August 1949⁴⁴¹ and the main content was incorporated into Recommendation

⁴³⁸ K. Drzewicki, European systems for the promotion and protection of human rights, in M. Scheinin, *International Protection of Human Rights: a textbook*, Turku, Abo Akademi University, 2012, 403.

⁴³⁹ At the 6th session of the Committee of Ministers held in Rome, Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Saar, Turkey and the UK signed the Convention for the Protection of Human Rights and Fundamental Freedoms that entered into force on 3 September 1953.

⁴⁴⁰ Plus some explanatory notes under the heading “*Examination of Criticism*”. For an analysis of the content of the draft Convention, see E. Bates, *The birth of the European Convention on Human Rights*, in J. Christoffersen, M. Madsen, *The European Court of Human Rights between law and politics*, Oxford, Oxford University Press, 2011, 20; E. Bates, *The Evolution of the European Convention on Human Rights From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 54 seq.

⁴⁴¹ The draft served as a source of inspiration for the Convention. Indeed, the Assembly recommended the Member States to accept the principle of collective responsibility for the maintenance of human rights and fundamental freedoms, and immediately conclude a convention by which each Member State would undertake: «*a. to maintain intact the Human Rights and fundamental freedoms assured by the constitution, laws and administrative practice actually existing in their respective countries at the date of the signature of the convention; and, b. to set up a European Commission of Human Rights and a European Court of Human Rights,*

n. 38⁴⁴², a formal Consultative Assembly Recommendation addressed to the Committee of Ministers to cause a draft of Convention⁴⁴³. Recommendation n. 38 functioned as a working framework and a source of inspiration for the selection of the rights to be inserted in the European catalogue⁴⁴⁴.

The most exacerbating discussions were held on the possible establishment of a Court for the judicial supervision of human rights, and on the right to individual petition. In 1950 the compromise was found in giving a prominent role to a “*Commission of Human Rights*”, while conveying for an “*optional*” Court, whose jurisdiction should have been specifically accepted by the States⁴⁴⁵, and for an “*optional*” right to individual petition (to be recognised only in case the State had declared the acceptance of the Commission's competence in the matter and had recognised the Court's jurisdiction)⁴⁴⁶.

for the purpose of assuring the observance of the above-mentioned convention». The matter was considered urgent and it was decided to request to an appropriate Committee of the Assembly to prepare a report for consideration by the Assembly which «*should not delay consideration by the Committee of Ministers of the proposed convention, which, in the opinion of the Assembly, can and must be concluded immediately*». See, Motion for a resolution, doc. 3, 19 August 1949, Organisation within the Council of Europe to ensure the collective guarantee of Human Rights, 1st session, 1949, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=3&lang=EN>.

⁴⁴² Recommendation n. 38, Human rights and fundamental freedoms, http://assembly.coe.int/Conferences/2009Anniversaire49/DocRef/Rec38_9.pdf. In particular article 29 set out the task of the Committee of Ministers to produce a report on the steps taken to follow up the Recommendation.

⁴⁴³ The Convention should have been designed «*to ensure the effective enjoyment of all persons residing within their territories of the rights and fundamental freedoms referred to in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations*»; Recommendation n. 38, Human rights and fundamental freedoms, http://assembly.coe.int/Conferences/2009Anniversaire49/DocRef/Rec38_9.pdf. To ensure the observance of these rights, the Recommendation provided also for the establishment of a “*European Commission for Human Rights*” with conciliation and consultative functions (articles 9 - 17 of the Recommendation) and of a “*European Court of Justice*” with judicial functions, to be exercised in the event of a failure of the conciliation procedure before the European Commission for Human Rights and as an alternative to a petition before the International Court of Justice (articles 18 - 20 of the Recommendation).

⁴⁴⁴ The Committee of Ministers entrusted a Committee of Legal Experts with the duty to re-draft a Convention proposal that was debated at a Conference of high official held in Strasbourg in the second week of June 1950.

⁴⁴⁵ Until 1998, with the entry into force of Protocol n. 11. the mechanism to supervise the respect of the Convention was divided into a tripartite structure: the Commission of Human Rights, with the responsibility to consider the admissibility of petitions, to establish the facts, to promote friendly settlements and, if appropriate, to give an opinion as to whether or not the petitions reveal a violation of the Convention; the Court of Human Rights, which was not established on a permanent basis, with the task to give a final and binding judgment on cases referred to it by the Commission or by a Contracting Party concerned; the Committee of Ministers with the mission to give a final and binding decision on cases which could not be referred to the Court or which, for one reason or another, were not referred to it. See, explanatory report to Protocol n. 11, par. 9, <http://conventions.coe.int/Treaty/en/Reports/Html/155.htm>.

⁴⁴⁶ Under former article 25 of the Convention, the Commission was entitled to receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of the rights set forth in the Convention, provided that the High Contracting Party against which the complaint was lodged had declared that it recognised the competence of the Commission to receive such petitions. In addition, under former article 46 of the Convention, High Contracting Parties had to declare they recognised the jurisdiction of the Court in all matters concerning the interpretation and application of the Convention. Nevertheless, also in the event the State had declared the acceptance of the Commission's competence in the matter and had recognised

The system was restructured and improved in the following years by means of two additional protocols: Protocol n. 9⁴⁴⁷, that consolidated the procedural capacity of individuals⁴⁴⁸ attributing them the possibility to bring their cases directly before the Court without restrictions once exhausted the available domestic remedies⁴⁴⁹; and Protocol n. 11⁴⁵⁰, that strengthened the judicial elements of the enforcement machinery by establishing a single Court functioning on a permanent basis⁴⁵¹ granted with jurisdiction in all matters concerning the interpretation and application of the Convention, including inter-State cases and individual applications⁴⁵². Due to the fact that acceptance of individual petition and of the

the Court's jurisdiction, a judicial decision on the same could have been absent because it was not referred to the Court either by the Commission or the State concerned and was left to be determined by the Committee of Ministers, so that the individual was dependent on the Commission or the State decision to refer the matter to the Court. In 1990, at the time when Protocol no. 9 was open for signature, all States Parties to the Convention already made declarations under both articles 25 and 46; see, Explanatory Report to Protocol n. 9, par. 12, <http://www.conventions.coe.int/Treaty/en/Reports/Html/140.htm>.

⁴⁴⁷ Entered into force on 1 October 1994 and repealed as from the date of entry into force of Protocol n. 11 on 1 November 1998 pursuant to article 2 par. 8 of the latter. See, <http://conventions.coe.int/Treaty/en/Treaties/Html/140.htm>.

⁴⁴⁸ By guaranteeing the right of individual application – one of the “*key components of the machinery*” for the protection of human rights (see, *Loizidou v. Turkey* (preliminary objections), application n. 15318/89, 23 March 1995, par. 70, and *Mamatkulov and Askarov v. Turkey*, applications n. 46827/99 and 46951/99, 4 February 2005, par. 100 and 122) - article 34 gives individuals a genuine right to take legal action at international level and preserves the effectiveness of the Convention system. The consolidation of individual procedural capacity as a subject of International law in the domain of human rights protection is seen as «*one of the most significant developments in international human rights law in the last six decades*»; in this sense, A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, 17, who provides for a deep analysis of the principle.

⁴⁴⁹ With a consequent abandonment of the role played by the Committee of Ministers pursuant to former article 32 of the Convention.

⁴⁵⁰ Entered into force on 1 November 1998; see, <http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm>. Protocol n. 11, conceived in the form of an amending protocol to the Convention in order to prevent the presence of two different mechanisms of control, one possibly characterized by the presence of two monitoring bodies (the Commission and the Court) and one consisting of a sole Court. As it is clearly expressed in the explanations to Protocol n. 11 «*such a parallelism would not be desirable because a homogeneous and clearly consistent development of case-law constitutes an important basis of human rights protection under the Convention*». In addition, «*the existence of two groups of States subject to two different supervisory mechanisms would invariably cause considerable procedural complications*» and run counter to the aim of increasing the efficiency of the control system.

⁴⁵¹ As a consequence, the Commission of Human Rights lost its function and was therefore abolished.

⁴⁵² The reform of the monitoring bodies was considered increasingly urgent in mid 1980s, as a growing number of complaints has been lodged with the Commission and new States have joined the system (the explanatory report to Protocol n. 11 states that the number of applications registered with the Commission increased from 404 in 1981 to 2,037 in 1993; see, <http://conventions.coe.int/Treaty/en/Reports/Html/155.htm>). The first time in which the idea to create a single Court by merging the Commission and the Court was raised at a political level occurred during the European Ministerial Conference on Human Rights held in Vienna on March 1985. In the following years, both the Committee of Ministers during its 92nd session on 14 May 1993 and the Parliamentary Assembly with Recommendation 1194 (1992), adopted on 6 October 1992, stressed the need for a urgent reform of the monitoring machine, which was emphasised by the Council of Europe's Heads of State and Government in the “*Vienna Declaration*” of 9 October 1993 (<https://wcd.coe.int/ViewDoc.jsp?id=621771&Site=COE>). In particular, Appendix I of the Declaration reads as follows: «*Since the Convention entered into force in 1953 the number of contracting States has almost tripled and more countries will accede after becoming members of the*

Court jurisdiction is now mandatory, it has been said that the High Contracting Parties are today consciously locked-in to a transnational system of rights protection, where the Convention and the Court have had a remarkable success in socialising the regime's members into the logics of collective, transnational rights protection and in enlisting participation into the Convention's expansionary dynamics⁴⁵³.

Further amendments to the Convention has been made by Protocol n. 14 entered into force on 1 June 2010, that provided for a more effective operation of the European Court of Human Rights increasing the Court's filtering capacity⁴⁵⁴ and introducing new admissibility criterion (article 35 of the Convention)⁴⁵⁵, and by Protocol n. 15⁴⁵⁶, opened for signature by member

Council of Europe. We are of the opinion that it has become urgently necessary to adapt the present control mechanism to this development in order to be able to maintain in the future effective international protection for human rights. The purpose of this reform is to enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection. To this end we have resolved to establish, as an integral part of the Convention, a single European Court of Human Rights to supersede the present controlling bodies».

⁴⁵³ H. Keller, A. Stone Sweet, *A Europe of rights. The impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2008, 6.

⁴⁵⁴ <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>. Under said Protocol, the Committee of Ministers is empowered, if it decides by a two-thirds majority to do so, to bring proceedings before the Court where a State refuses to comply with a judgment. The Committee of Ministers will also have a new power to ask the Court for an interpretation of a judgment (article 46 of the Convention). Pursuant to article 26 of the Convention as modified by Protocol n. 14, the Court is entitled to sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall also set up committees for a fixed period of time. The Court, sitting in a single judge formation, decides on the admissibility of a case where such a decision can be taken without further examination. If the single judge does not declare an application inadmissible or strike it out from the list of individual cases referred to the Court, that judge shall forward it to a committee or to a Chamber for further examination (article 27 of the Convention). The merits of applications are examined by a Committee (article 28 of the Convention) or by a Chamber (article 29 of the Convention) and, in cases with specified serious implications, by the Grand Chamber (article 30 of the Convention). The judgment of the Grand Chamber will be final, while the judgment of the Chamber become final when the parties declare that they will not request that the case be referred to the Grand Chamber or three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested or when the panel of the Grand Chamber rejects the request to refer the case (article 44 of the Convention). Final judgments are transmitted to the Committee of Ministers whose role is to supervise their execution. The Court is also at the disposal of the parties in order to secure a friendly settlement on the basis of respect for human rights (article 39 of the Convention). In addition, the Court is entrusted with the power to give advisory opinions when so requested by the Committee of Ministers (article 47 of the Convention). For a comment on the Protocol, P. Lemmens, W. Vandenhole, *Protocol n. 14 and the reform of the European Court of Human Rights*, Antwerp, Intersentia, 2005; L. Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, in *Human Rights Law Review*, 2006, 2, 403.

⁴⁵⁵ Article 35 of the Convention provides for the following admissibility criteria: (i) exhaustion of all domestic remedies, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken; (ii) clear indication of the parties (anonymous individual applications are not accepted); (iii) novelty of the issue to be discussed before the Court (the Court will not deal with any application that is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information). In addition, the Court shall declare inadmissible any individual application if it considers that: (i) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (ii) the applicant has not suffered a significant disadvantage, *«unless respect for human rights as defined in the Convention and the Protocols thereto requires*

States on 24 June 2013⁴⁵⁷, that inserted into the Preamble of the Convention an explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation.

The ECHR is composed of three sections: section I, headed “*Rights and freedoms*”, containing the most basic rights of individuals; section II, establishing the European Court of Human Rights and regulating its functioning; section III containing miscellaneous provisions such as, among others, the power of the Secretary General to ask States for explanation of the manner in which their domestic law ensures the effective implementation of the Convention (article 52) and the possibility for States to make a reservation in respect of any particular provision of the Convention (article 57).

The basic catalogue of legally binding rights contained in the Convention, drew upon the ones contained in the UN Universal Declaration of Human Rights 1948, has been increased by means of subsequent optional Protocols subject to separate ratification.

Protocol n. 1 of 1952 protects property, the right to education and the right to free elections⁴⁵⁸, Protocol n. 4 of 1963, prohibits imprisonment for debt, expulsion of nationals, collective expulsion of aliens and grants free movement of everyone lawfully within the territory of the State⁴⁵⁹, Protocol n. 6 of 1983⁴⁶⁰ and 13 of 2002⁴⁶¹, provides for the abolition

an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal». Should an individual application not fulfil said criteria, the Court shall reject it at any stage of the proceedings.

⁴⁵⁶ <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/213.htm>. During two High-level Conferences on the Future of the European Court of Human Rights held, respectively, in Interlaken, Switzerland, on 18-19 February 2010, and at Izmir, Turkey, on 26-27 April 2011, it was agreed to reform the Convention supervisory mechanism in order to ensure its long-term effectiveness. Following the Declaration adopted at the Conference held in Brighton, United Kingdom, on 19-20 April 2012 (see, <http://hub.coe.int/20120419-brighton-declaration>), the Committee of Ministers instructed the Steering Committee for Human Rights to prepare a draft amending protocol to the Convention. At its 123rd session, the Committee of Ministers examined and decided to adopt the draft as Protocol n. 15 to the Convention. The Protocol will enter into force once it has been ratified by all Member States. A recent analysis focused on the role of the Court, if it is the one of granting individual or constitutional justice, and led to the proposal to «*advocate ‘constitutional pluralism’ as the best analytical paradigm for the Convention system and also the best framework for the identification and pursuit of procedural and other reforms. In our view, any attempt to provide transnational legal protection for human rights in Europe is likely to be ineffective unless grounded in a full appreciation of the fact that, although a plurality of national and transnational legal and constitutional systems clearly exists, almost without exception they presuppose common constitutional fundamentals embodying democracy, the rule of law, and human rights, as exemplified by the Convention*»; see, S. Greer, L. Wildhaber, Revisiting the Debate about ‘constitutionalising’ the European Court of Human Rights, *Human Rights Law Review*, 2012, 4, 655, exp., 684. On the Brighton conference and protocol 15, A. Bultrini, *La Conferenza di Brighton sul futuro della Convenzione europea dei diritti dell'uomo*, *Quaderni Costituzionali*, 2012, 3, 668.

⁴⁵⁷ On 24 June 2013, Protocol n. 15 was signed by the following states: Armenia, Andorra, Cyprus, Denmark, Finland, France, Germany, Ireland, Italy, Liechtenstein, Luxembourg, Norway, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain and the United Kingdom. Austria and Sweden signed the Protocol on 25 June 2013.

⁴⁵⁸ <http://www.conventions.coe.int/Treaty/en/Treaties/Html/009.htm>.

⁴⁵⁹ <http://www.conventions.coe.int/Treaty/en/Treaties/Html/046.htm>.

⁴⁶⁰ <http://www.conventions.coe.int/Treaty/en/Treaties/Html/114.htm>.

of death penalty, even for acts committed in time of war or of imminent threat of war, Protocol n. 7 of 1984, requires procedural safeguards relating to expulsion of aliens, a right of appeal in criminal matters, compensation for wrongful conviction, the right not to be tried or punished twice, and the principle of equality between spouses⁴⁶², Protocol n. 12 of 2000, introduces a general prohibition of discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status⁴⁶³.

There is no hierarchy of rights in the text, which means that, in case of conflict, none of them takes precedence over the other⁴⁶⁴.

However, some of the rights can be limited under certain circumstances.

The structure of the Convention is designed around two main categories of rights: absolute or unqualified rights⁴⁶⁵ and qualified or derogable rights⁴⁶⁶. Absolute or unqualified rights cannot be derogated from under any circumstances, while qualified rights may be interfered

⁴⁶¹ <http://www.conventions.coe.int/Treaty/en/Treaties/Html/187.htm>.

⁴⁶² <http://www.conventions.coe.int/Treaty/en/Treaties/Html/117.htm>.

⁴⁶³ <http://www.conventions.coe.int/Treaty/en/Treaties/Html/177.htm>.

⁴⁶⁴ S. Greer, *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*, Strasbourg, Council of Europe, 2000, 28.

⁴⁶⁵ Such as the right to life (article 2), the prohibition of torture or of inhuman or degrading treatment or punishment (article 3), the prohibition of slavery and forced labour (article 4), the right to liberty and security (article 5), the right to a fair trial (article 6), the principle of no punishment without law (article 7), the right to marry (article 12), the right to an effective remedy (article 13), the prohibition of discrimination (article 14), the right to education and the right to free elections (article 3 Protocol n. 1), the prohibition of death penalty (Protocol 13), except under very exceptional circumstances (Protocol n. 6).

⁴⁶⁶ Qualified rights include the right to respect for private and family life (article 8), where interferences are admitted «*in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*»; the freedom of thought, conscience and religion (article 9), subject to limitations «*as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*»; freedom of expression (article 10), whose exercise «*may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*»; freedom of assembly and association (article 11), which can be restricted if the interferences «*are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State*»; protection of property (article 1 Protocol n. 1), under which «*no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*»; freedom of movement (article 2 Protocol n. 4), which cannot suffer restrictions «*other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*».

with, or derogated from, under limited circumstances, provided that limitations are prescribed by law, necessary in a democratic society, and aimed to protect recognised interests of the State concerned⁴⁶⁷.

Certain rights with social implications are included in the ECHR such as the freedom of association, including the right to form and join a trade union and the prohibition of slavery, servitude, forced and compulsory labour.

1.2.1. Article 11 ECHR: the right to freedom of peaceful assembly and association

The Convention does not contain any specific provision expressly referring to the right to strike. Article 11 refers to “*freedom of peaceful assembly*” and “*freedom of association*”, including the right to form and join trade unions:

«1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests».

The drafters of the Convention draw inspiration from articles 20 and 23 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948.

In August 1949, Pierre-Henri Teitgen laid before the Committee on the Legal and Administrative Questions certain proposal for a draft convention including the following passage, that reflects the intention to create an instrument inspired by the core rights contained in the 1948 Universal Declaration⁴⁶⁸:

«The Convention and the procedure to be determined later by the Committee will guarantee the fundamental right and freedoms listed below to every person residing within the metropolitan territory of a Member State:
- Freedom of meeting, as laid down in article 20 of the Declaration of the United Nations;
- Freedom of association, as laid down in article 20 of the Declaration of the United Nations;

⁴⁶⁷ R. White, C. Ovey, Jacobs, White & Ovey: The European Convention on Human Rights, fifth edition, Oxford, Oxford University Press, 2010, 8 seq.

⁴⁶⁸ DH(56) 16, Preparatory work on article 11 of the European Convention on Human Rights, 16 August 1956, 2, [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART11-DH\(56\)16-EN1693924.PDF](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART11-DH(56)16-EN1693924.PDF).

- *The right to combine in trade unions, as laid down in paragraph 4 of article 23 of the Declaration of the United Nations*»⁴⁶⁹.

On 8 September 1949, the Consultative Assembly embedded in its Recommendation the following text of draft article 2:

«In this Convention, the Member States shall undertake to ensure to all persons residing within their territories [...]
(7) freedom of assembly, in accordance with article 20 of the United Nations Declaration;
(8) freedom of association, in accordance with article 20 (par. 1 and 2) of the United Nations Declaration;
(9) Freedom to unite in trade unions in accordance with paragraph 4 of article 23 of the United Nations Declaration»⁴⁷⁰.

In November 1949 the Committee of Experts - entrusted by the Committee of Ministers to examine the draft convention - was instructed to pay due attention to *«the progress which had been achieved in this matter by the competent organs of the United Nations»*⁴⁷¹. Therefore, the “*Draft International Covenant on Human Rights*”, prepared by the United Nations Commission on Human Rights at its fifth session held at Lake Success on May-June 1949, was taken as a term of reference to write article 11 and particular allusions were made to draft articles 18 and 19 protecting freedom of association and freedom of peaceful assembly.

During the drafting process, the British Government had a specific role in shaping the present architecture of article 11 of the Convention. The decisions taken during this period influenced also the draft United Nations Covenants⁴⁷².

At its first meeting in February 1950, the Committee of Experts had before it an amendment proposed by Sir Oscar Dawson, United Kingdom, to replace the draft article 2 par. 7 with draft article 18 of the United Nations Covenant. Draft article 18 provided for the right to freedom of association subject to legal limitations necessary in specific circumstances (national security, public order, the protection of health and morals or the protection of rights

⁴⁶⁹ Article 20 of the Universal Declaration of Human Rights read as follows: *«(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association»*. Article 23 par. 4 provides that: *«Everyone has the right to form and to join trade unions for the protection of his interests»*.

⁴⁷⁰ Doc. AS (1) 77, 204-205.

⁴⁷¹ Doc. AS (1) 116, par. 6, 288-289.

⁴⁷² As it is argued by Novitz, T. Novitz, *International and European Protection of the Right to Strike*, Oxford, Oxford University Press, 2003, 135-136.

and freedoms of others) or for specific categories of personnel (members of the armed force, the police, the administration of the state)⁴⁷³.

Notwithstanding the indivisible and interdependent nature of all human rights⁴⁷⁴, confirmed also by the inclusion of socio-economic rights in article 22-26 of the Universal Declaration, there was reluctance, coming specifically from the UK, to give them recognition in the draft European Convention on Human Rights. Only those rights traditionally viewed as civil and political rights, such as the principles of freedom of association and peaceful assembly, could have found a place in the document.

Britain was of the opinion that « *the terms of the Covenant should define the obligations of States which accede to it in clear and precise terms* »⁴⁷⁵ and socio-economic rights are programmatic rights and cannot be defined in clear and precise terms.

The various British amendments to draft article 2 par. 7, 8 and 9 were examined by a drafting committee consisting of Sir Oscar Dawson and Mr. Le Quesne (United Kingdom), M. Dons Moeller (Denmark), and M. Salen (Sweden), which combined them in a single article worded as follows:

*«(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others.
(2) No restrictions shall be placed on the exercise of this right other than such as are prescribed by law and are necessary in the interests of national security, public safety, or for prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others; provided that the article shall not prevent the imposition of lawful restriction on the exercise of this right by members of the armed forces, the police or the administration of the state»*⁴⁷⁶.

At the end of its work, the Committee of Experts had two sets of provisions to be translated into article 11 of the European Convention on Human Rights: one modelled on the Universal Declaration of Human Rights, enumerating the rights and freedom to be

⁴⁷³ DH(56) 16, Preparatory work on article 11 of the European Convention on Human Rights, 16 August 1956, 6.

⁴⁷⁴ See, United Nations General Assembly resolution 32/130 of 16 December 1977, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/32/130&Lang=E&Area=RESOLUTION, which asserts that (a) all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights; (b) the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; (c) the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.

⁴⁷⁵ DH(56) 16, Preparatory work on article 11 of the European Convention on Human Rights, 16 August 1956, 5.

⁴⁷⁶ Doc. CM/WP I (50) 10, 4.

safeguarded and corresponding to the draft article 2 approved by the Consultative Assembly in September 1949 (alternatives A and A/2) and another one modelled on the British proposal and containing the precise definition of right and freedom to be safeguarded (alternatives B and B/2), combining freedom of assembly and association in one article.

In addition, the Committee of Experts explained that: «*The rights defined in this Article include the right to associate in trade unions*»⁴⁷⁷.

The choice between group alternatives A and B depended on considerations of a political character⁴⁷⁸. To this extent, the Committee of Ministers convened a meeting of Senior Officials who, on the instruction of their Governments, prepared the ground for the political decision, left to the Committee of Ministers⁴⁷⁹.

At the Conference of Senior Officials, UK leaded the way. The Conference merged the various alternatives but it chose alternative B as the basis of its work. The agreement was reached on the following text:

«(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

*(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security, public safety, or for the prevention of disorder or crime, for the protection of health or morals in a democratic society, or for the protection of the rights and freedom of others; provided that the article shall not prevent the imposition of lawful restriction on the exercise of this right by members of the armed forces, the police or the administration of the state»*⁴⁸⁰.

The Conference of Senior Officials considered the need to introduce an express reference to the right to form trade unions in order to adapt the draft text to the UN Declaration⁴⁸¹.

The explicit recognition of the right to trade union association in article 11 does not mean that it has been conferred a higher legal value than the right to freedom of association in general; any such construction would be in breach of the non-discrimination clause contained in article 14 of the Convention. On the contrary, far from willing to confer trade union rights a privileged position, drafters desired to single out the right to associate in trade unions, being

⁴⁷⁷ Doc. CM/WP I (50) 15, 22.

⁴⁷⁸ Doc. AS (2) 8, 571, par. 58.

⁴⁷⁹ Doc. AS (2) 8, 571, par. 59.

⁴⁸⁰ Doc. CM/WP 4 (50) 19, appendix, 7.

⁴⁸¹ Doc. CM/WP 4 (50) 19, 16.

aware that it had often been under threat in many countries⁴⁸². However, the recognition of the right in question remains confined to the right of individuals to associate in trade unions for the furtherance of their interests.

At the same time, the Conference of Senior Officials held undesirable to fully replicate the exact wording of article 20 of the UN Declaration and decided not to include in the draft of article 11 a reference to the negative freedom of association, namely the right not to join a trade union, due to the existence of a “*closed shop system*” in certain Member States of the Council of Europe⁴⁸³.

The express reference to the right to form and join trade unions contained in article 11 was objected by a certain number of delegates. In their view, the separation of the right to association in unions from the general freedom of association was redundant and the former should have been considered already included in the latter⁴⁸⁴.

However, the position was not endorsed and the wording of article 11 remained substantially unchanged.

The present text of article 11 leaves open for the interpreter the question on whether it is possible to call upon or defend the rights contained herein through the exercise of collective social rights (*i.e.* the right to strike) and, should this be the case, whether such rights can be considered included in the scope of article 11⁴⁸⁵.

⁴⁸² C. Tomuschat, Freedom of Association, in R. St. J. Macdonald, F. Matscher, H. Petzold, The European System for the Protection of Human Rights, Dordrecht, Martinus Nijhoff Publishers, 1993, 494.

⁴⁸³ DH(56) 16, Preparatory work on article 11 of the European Convention on Human Rights, 16 August 1956, 11, [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART11-DH\(56\)16-EN1693924.PDF](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART11-DH(56)16-EN1693924.PDF). On the right not to join a trade union as expressed in the travaux préparatoires, see Young, James and Webster v. The United Kingdom, application n. 7601/76; 7806/77, 13 August 1981, par. 51 - 52.

⁴⁸⁴ Whether freedom of association for trade unions purposes should be regarded as simply a manifestation of the right to freedom of association or as a fundamental right *sui generis* is a matter of some debate; see, B. Creighton, Freedom of Association, in R. Blanpain, Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 8th ed., The Hague, Kluwer Law International, 2004, 233. The former European Commission on Human Rights in the case X. v. Sweden gave a broad definition of freedom of association suitable for describing associations in general, including trade unions associations: «*Freedom of association is a general capacity for the citizens to join without undue interference by the State in associations in order to attain various ends. However, a right to the successful attainment of such ends is not guaranteed by Article 11*»; see, Decision of the Commission, X v. Sweden, application n. 6094/73, 6 July 1977, par. 52.

⁴⁸⁵ It is debated if the right to industrial action should be intended as a species of the right to freedom of association or if it should be regarded as a mean of furthering the right to freedom of association. See, S. Leader, Can you derive a right to strike from the right to freedom of association? Canadian Labour and Employment Law Journal, 2010, 2, 271 seq.; G. Bronzini, Diritto alla contrattazione collettiva e diritto di sciopero entrano nell'alveo protettivo della CEDU: una nuova frontiera per il garantismo sociale in Europa?, in Rivista Italiana di Diritto del Lavoro, 2009, 2, 981, footnote 12; B. Hepple, Labour Laws and Global Trade, Oxford, Hart Publishing, 2005; S. Leader, Freedom of Association: A Study in Labor Law and Political Theory, New Haven, London, Yale University Press, 1992.

A negative answer can be derived from an analysis of the first part of article 11. The possibility for “*everyone*” to form and join trade unions seems to secure the right to a private and static dimension, limited to the establishment of trade union associations, hence excluding the collective dimension of the phenomena, connected to the exercise of trade unions’ activity and to the conduct of trade unions⁴⁸⁶.

A positive option might derive from the second part of the article, that links the right to trade union association to the “*protection of his interests*”. The connection might prospects, by means of judicial interpretation, the inclusion in the Convention catalogue of fundamental rights of activities (such as strikes) corollary to the concept of freedom of association, and necessary or interrelated to the need to protect the interests of persons forming or joining trade unions.

Contrary to what happens in other international treaties⁴⁸⁷, article 11 does not qualify what are the “*interests*” to be protected, nor the means to reach said end, a characteristic that theoretically leaves room to include any kind of interest, provided that it is apt to pass the test contained in par. 2.

Nevertheless, in the wording of article 11 it is inherent a “*defensive*” recognition of the right to form and join trade unions for the protection of one’s interests. Indeed, its exercise must have the end to “*protect*” the interests of the affiliated person, so that activities aimed to promote and further the relevant interests of individuals should fall outside the protection accorded by the ECHR. Said “*defensive*” recognition is not provided in other international documents. For instance, article 8 of the International Covenant on Economic, Social and Cultural Rights encompasses the “*promotion*” and article 10 of the ILO Convention n. 87 extends to activities aimed at “*furthering*” the interests of workers or of employers.

The analysis of the European Court of Human Rights case-law is intended to contribute to a definition of the concept of freedom of association and the right to strike enshrined in article 11 of the Convention.

⁴⁸⁶ F. Dorssemont, The right to form and to join trade unions for the protection of his interests under article 11 of the ECHR. An attempt “to Digest” the case law (1975-2009) of the European Court on Human Rights, *European Labour Law Journal*, 2010, 1, 186.

⁴⁸⁷ Article 5 of the European Social Charter protects the right of workers and employers to organise «*for the protection of their economic and social interests*»; article 8 of the International Covenant on Economic, Social and Cultural Rights secures the right to form and join trade unions «*for the promotion and protection of his economic and social interests*»; article 10 of the ILO Convention n. 87 recognises the right of workers or of employers to organise «*for furthering and defending the interests of workers or of employers*».

1.3. The European Social Charter (ESC) and its Revised version (RESC)

The shift toward an integration of economic and social rights in the Council of Europe happened in 1961, with the adoption of the European Social Charter⁴⁸⁸.

Article 1 a) of the Statute of the Council of Europe established the necessity to facilitate the Member States economic and social progress. The study process to reach such a goal started on 10 August 1950, when the Consultative Assembly referred to the Committee on Social Questions a motion relating to the adoption by Member States of a common policy in the social field⁴⁸⁹.

On 26 November 1951 the Assembly instructed its Committee on Social Questions to study for inclusion in the programme of a common social policy⁴⁹⁰ which led to the adoption by the Assembly of two recommendations: Recommendation n. 14⁴⁹¹, adopted at the thirty-fourth sitting of the Assembly on 7 December 1951, for the incorporation of a common policy in social matters, welcomed as an essential step in the progressive unification of Europe, and Recommendation n. 27, adopted on 26 September 1952, for the creation of a Social

⁴⁸⁸ For an overview of the ESC see, O. De Schutter, *The European Social Charter: a social constitution for Europe*, Bruxelles, Bruylant, 2011; O. De Schutter, *The European Social Charter*, in C. Krause, M. Scheinin, *International Protection of Human Rights: a textbook*, Turku, Abo Akademi University, 2012, 463; G. Gori, *Il Comitato europeo dei Diritti sociali: il ruolo e l'azione dell'organo di controllo della Carta sociale europea*, in F. Bestagno, *I diritti economici, sociali e culturali – promozione e tutela nella comunità internazionale*, Vita & Pensiero, Milano, 2009; R. Birk, *The Historical Development of the European Social Charter*, in R. Blanpain, M. Colucci, *International Encyclopaedia for Labour Law and Industrial Relations*, The Hague, Kluwer Law International, 2007, 27; A. M. Swiatkowski, *Charter of Social Rights of the Council of Europe*, The Hague, Kluwer Law International, 2007; G. De Burca, B. De Witte, *Social Rights in Europe*, Oxford, Oxford University Press, 2005; L. Samuel, *Fundamental social rights. Case law of the European Social Charter*, 2nd ed., Strasbourg, Council of Europe, 2002; D. Harris, J. Darcy, *The European Social Charter*, 2nd ed., New York, Ardsley, 2001; F. Vandamme, *The Revision of the European Social Charter*, *International Labour Review*, 1994, 5-6, 635. For an early comment on the ESC, D. Harris, *The European Social Charter*, *International and Comparative Law Quarterly*, 1964, 13, 1076; H. Wiebringhaus, *La Charte Sociale Européenne*, in *Annuaire français de droit international*, 1963, 9, 709; N. Valticos, *La Charte Social Européenne: sa structure, son contenu, le controle del son application*, *Droit Social*, 1963, VIII, 466; Anonymous, *The European Social Charter and International Labour Standards: I*, *International Labour Review*, 1961, 354; Anonymous, *The European Social Charter and International Labour Standards: II*, *International Labour Review*, 1961, 462.

⁴⁸⁹ Doc. 38, 10 August 1950, 2nd session, Adoption by Member States of a common policy in social matters, at <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=102&lang=EN>.

⁴⁹⁰ Doc. 67 of 26 November 1951, Adoption by Member States of the Council of Europe of a common policy in social matters, Social, Health and Family Affairs Committee, at <http://www.assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=279&lang=EN>.

⁴⁹¹ Recommendation n. 14, 1951, Adoption by Member States of the Council of Europe of a common policy in social matters, at <http://www.assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=13959&lang=EN>. The Recommendation was adopted by the Assembly at its 34th sitting, 7 December 1951.

Committee for liaison and joint discussion on social matters between the Council of Europe and the relevant departments for social administration of the Member States⁴⁹².

In pursuance of Recommendation 14, the Committee of Ministers asked the Secretariat-General to make a study of the possible Council of Europe activities in the social sphere taking the form of a memorandum dated 11 May 1953⁴⁹³.

Said memorandum stressed the importance to define and develop common social principles in the form of a European Social Charter laying down «*general principles and their limitations clearly defined as was done in the Human Rights Convention in respect of civil and political rights*»⁴⁹⁴. The document, together with the Convention, would constitute a solemn declaration by the European States of the spiritual values underlying western civilisation and serve as a guide for the future action of the Council of Europe in the realisation of social progress and in the achievement of greater unity between its Members.

Chapter I of the Memorandum developed the idea of such a Charter in more details, stressing the conviction that European social policy should aim at maintaining a social environment which is conducive to the fullest development of the individual:

«[it] should leave room for man to develop and make use of his own powers in order to improve the conditions in which he lives, whether acting individually, in the family, or in the free organisations through which he may further his interests in the framework of a democratic society»⁴⁹⁵.

To this extent, it concentrated explicitly on actions affecting labour conditions based on the ILO Conventions and Recommendations, such as, among others, workers participation in the management of industries, the right to organisation and to collective bargaining⁴⁹⁶.

⁴⁹² Recommendation n. 27, 1952, Creation of a "Social Committee", <http://www.assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=14001&lang=EN>. The Recommendation was adopted by the Assembly at its twenty-first sitting of 26 September 1952.

⁴⁹³ Doc. 140 of 11 May 1953, Memorandum by the Secretariat-General concerning the activities which the Council of Europe could properly carry out in the social sphere, at <http://www.assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=462&lang=EN>.

⁴⁹⁴ Doc. 140 of 11 May 1953, Memorandum by the Secretariat-General concerning the activities which the Council of Europe could properly carry out in the social sphere, par. 30.

⁴⁹⁵ Doc. 140 of 11 May 1953, Memorandum by the Secretariat-General concerning the activities which the Council of Europe could properly carry out in the social sphere, par. 20.

⁴⁹⁶ Doc. 140 of 11 May 1953, Memorandum by the Secretariat-General concerning the activities which the Council of Europe could properly carry out in the social sphere, par. 36. Labour conditions were considered «*a wide range of questions such as hours of work, rest periods, holidays with pay, minimum age of employment in various industries, regulation of night work in the case of women and young persons, maternity protection, employment services, protection against accidents, proper labour inspection, medical examination of workers, questions relating to the fixing of wages*». The Assembly accepted the principle of the elaboration of a European Social Charter suggesting the establishment of an «*appropriate organ*» for the implementation of the plan,

However, the general acceptance of the idea of drafting a European Social Charter did not prevent the Assembly and the Committee of Ministers to prepare two parallel and slightly different proposals. The Assembly's one⁴⁹⁷ oriented to the creation of «*provisions binding upon the signatories*»⁴⁹⁸ setting out «*the social principles that correspond to individual rights*»⁴⁹⁹ and based on the United Nations Draft Covenant on Economic, Social and Cultural Rights⁵⁰⁰; the Committee of Ministers one, more reluctant in making the Charter binding and judicially enforceable⁵⁰¹ and prone in creating a text seeking common denominator between States, likely to be ratified by the great majority of the same⁵⁰².

It was the latter draft, prepared by the governmental Social Committee⁵⁰³, to be submitted to a Tripartite Conference organised jointly by the Council of Europe and the International Labour Office and held at Strasbourg from 1 to 12 December 1958. The Conference brought together Governments, Workers' and Employers' delegates for each state belonging both to the ILO and to the Council of Europe⁵⁰⁴.

The result was a compromise text based on the ILO standards in force at that time⁵⁰⁵. The document provided for specific and derogable obligations in the social field suitable for

identified in the Social Committee of high-ranking officials as suggested in Recommendation 27, which should vest the form of a semi-permanent body meeting two or three times a year, whose high-ranking officials should be free to appoint substitutes or call in other social experts to assist them and should work in close liaison with the ILO. See, in this respect, Opinion n. 5, 1953, Memorandum by the Secretariat-General concerning the activities which the Council of Europe could properly carry out in the social sphere, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=13744&lang=EN>, in particular par. 8 and 9. The Opinion was adopted by the Assembly at its 21st sitting, on 23 September 1953.

⁴⁹⁷ Doc. 312 of 22 September 1954, Preparation of a European Social Charter, Social, Health and Family Affairs Committee, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=634&lang=EN>.

⁴⁹⁸ In the eyes of the Assembly, such a circumstance «*would greatly increase the value of the document and would inspire confidence in the Council of Europe as a stimulating and uniting factor in European social policy*»; Doc. 312 of 22 September 1954, Preparation of a European Social Charter, Social, Health and Family Affairs Committee, par. 2.

⁴⁹⁹ Doc. 312 of 22 September 1954, Preparation of a European Social Charter, Social, Health and Family Affairs Committee, par. 6.

⁵⁰⁰ Doc. 312 of 22 September 1954, Preparation of a European Social Charter, Social, Health and Family Affairs Committee, par. 4.

⁵⁰¹ T. Novitz, *International and European Protection of the Right to Strike*, Oxford, Oxford University Press, 2003, 138.

⁵⁰² Anonymous, *The European Social Charter and International Labour standards: I*, *International Labour Review*, 1961, 355.

⁵⁰³ Doc. 927 of 12 January 1959, Draft European Social Charter, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=1246&lang=en>.

⁵⁰⁴ Tripartite conference convened by the International Labour Organisation at the request of the Council of Europe: record of proceedings, Geneva, 1959. See also, Opinion n. 32, Draft European Social Charter, <http://www.assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=13771&lang=EN>. The text was adopted by the Assembly on 21 January 1960, after amendments.

⁵⁰⁵ Anonymous, *The European Social Charter and International Labour standards: I*, *International Labour Review*, 1961, exp. 355 and 462; N. Valticos, *La Charte Sociale Européenne: sa structure, son contenu, le contrôle de son application*, *Droit Social*, 1963, VIII, 466; H. G. Bartolomei De La Cruz, *International Labour*

ratification by a large number of States thanks to a mechanism of “*opt-in*” - according to which States could choose the obligations they wanted to be bound by -, but at the same time setting more distant social objectives to be reached by all appropriate means⁵⁰⁶.

In line with the idea that social rights, unlike civil rights, do not lend themselves to definition with the precision necessary to enforce them in a court of law⁵⁰⁷, it was decided for a supervisory system of non-judicial nature centred on a mechanism of reports to be periodically submitted by the States to a Committee of Experts appointed by the Committee of Ministers. Once the Committee of Experts have examined the reports and adopted the relevant conclusions, the Committee of Ministers was entitled to make to each Contracting Party any necessary recommendations⁵⁰⁸. The recommendations of the Committee of Ministers were not compulsory, a circumstance capable to weaken the effectiveness and influence of the rights protected by Charter and the credibility of its supervisory body, because the Committee of Ministers could have decided to make no recommendation to the State.

Further Protocols were added to the Charter in the following years: the Additional Protocol of 1988, entered into force on 4 September 1992, extending the protection of the social and economic rights guaranteed by the ESC⁵⁰⁹, the Additional Protocol of 1991, clarifying the functions of the organs of control⁵¹⁰, and the Additional Protocol of 1995, entered into force on 1 July 1998, that entitles social partners and non-governmental organisations to lodge collective complaints for violations of the Charter to be examined by the European Committee of Social Rights⁵¹¹.

The introduction of a collective complaint procedure was of particular importance because it made possible the development of jurisprudence over the Charter that enables the Committee to elaborate more precise standards. As it has been observed:

Law: Renewal or Decline?, *International Journal of Comparative Labour Law and Industrial Relations*, 1994, 3, 213-214.

⁵⁰⁶ Article 20 reflects this double nature of the 1961 Charter providing as follows: «*Each of the Contracting Parties undertakes: to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part; to consider itself bound by at least five of the following articles of Part II of this Charter: Articles 1, 5, 6, 12, 13, 16 and 19; in addition to the articles selected by it in accordance with the preceding sub-paragraph, to consider itself bound by such a number of articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs*».

⁵⁰⁷ D. Harris, *The European Social Charter*, *International and comparative law quarterly*, 1964, 13, 1076 seq.

⁵⁰⁸ Articles 21-29, ESC 1961.

⁵⁰⁹ <http://conventions.coe.int/Treaty/en/Treaties/Html/128.htm>.

⁵¹⁰ <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=142&CM=8&CL=ENG>.

⁵¹¹ <http://conventions.coe.int/Treaty/en/Treaties/Html/158.htm>.

«without the development of a case law, there is always a danger that social rights will remain vague, uncertain and undefined»⁵¹².

In addition, it increased the effectiveness of the system of social rights protection under the Charter. Article 9 of the 1995 Additional Protocol abolished the discretionary power of the Committee of Ministers to issue recommendations and provides that the latter shall adopt a resolution closing the procedure on the basis of the report of the European Committee of Social Rights and, where the European Committee of Social Rights has found a violation of the Charter, the Committee of Ministers shall adopt a recommendation addressed to the State Party concerned.

In 1996, a revision procedure led to the adoption of the Revised European Social Charter (Revised Charter), which came into force in 1999⁵¹³, and is gradually replacing the initial 1961 treaty.

The Revised European Social Charter, which maintains the same supervisory machinery as the 1961 treaty, takes account of developments in labour law and social policies and brings together all the rights guaranteed in the former Charter and the 1988 Additional Protocol, along with other amendments. The instrument is autonomous as it does not provide for denunciation of the former Charter, but if a Contracting State accepts the provisions of the Revised Charter, the corresponding provisions of the initial Charter and its Protocol cease to apply to that State.

Part I of the Revised Charter sets out the policy aims to be pursued by ratifying States while part II describes the international obligations they would assume, with a large part occupied by provisions affecting the rights of workers.

As it happened with the 1961 Charter, ratification is not tied to acceptance of all the obligations contained in part II. Under article A, Parties undertake to consider part I as a declaration of the aims and to deem themselves bound by at least six of the following nine articles: 1, 5, 6, 7, 12, 13, 16, 19 and 20. A system *à la carte* that eases the ratification process but can result in inconsistencies and gaps in protection: due to the overlap between certain

⁵¹² C. O’Cinneide, *Social rights and the European Social Charter - New challenges and fresh opportunities*, in O. De Schutter, *The European Social Charter: a social constitution for Europe*, Bruxelles, Bruylant, 2010, 170.

⁵¹³ <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>.

Charter rights, a State that opted out from a particular provision might find itself bound by similar obligations in force of another treaty provision⁵¹⁴.

In the framework of the Charter revision process, there was a proposal coming from the organisations representing management and labour and addressed to the ad-hoc Committee on the European Social Charter (CHARTE-REL Committee) to make article 5 and article 6 compulsory, having regard to the particular and fundamental importance they have always had for the protection of economic and social rights. No State could have ratified the Revised Charter without agreeing to be bound by these two provisions, the latter of which includes a recognition of the right to strike and take collective action.

Also the Committee of Independent Experts endorsed such a proposal:

«The Committee considered that it was important that, in the context of the revision of the substantive content of the Charter currently being undertaken by the Committee on the Social Charter (CHARTE-REL Committee), consideration be given to making acceptance of Articles 5 and 6 compulsory»⁵¹⁵.

However, the Committee finally decided not to make the acceptance of articles 5 and 6 mandatory for mainly two reasons: the first is connected with the decision to maintain the existing flexibility of the legal instrument, which is entirely constructed on an *à la carte* basis; the second is associated with the fear that making acceptance of articles 5 and 6 compulsory might have slow down the ratification of the treaty.

Nevertheless, States that ratify the Revised Charter must take all possible steps to accept articles 5 and 6 as rapidly as possible⁵¹⁶.

1.3.1. The right to strike under article 6 par. 4 ESC

Differently than the Convention, collective labour relations are specifically protected by the ESC.

⁵¹⁴ Article 1 par. 4 of the 1961 ESC provides for the obligation to promote «*vocational guidance, training and rehabilitation*». Similar provisions are contained in article 9 (vocational guidance) and article 10 (vocational training). In this respect, see C. O'Conneide, *Social rights and the European Social Charter - New challenges and fresh opportunities*, in O. De Schutter, *The European Social Charter: a social constitution for Europe*, Bruxelles, Bruylant, 2010, 173.

⁵¹⁵ Conclusions XIII-1, 22.

⁵¹⁶ Explanatory Report to the Revised ESC, par. 124, <http://conventions.coe.int/Treaty/en/Reports/Html/163.htm>.

Article 5 secures the right of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations.

Article 6 ensures the effective exercise of the right to bargain collectively, dealing in its four paragraphs with different aspects of industrial relations, such as joint consultation between workers and employers, the promotion of voluntary negotiations mechanisms between employers or employers' organisations and workers' organisations, the establishment and use of appropriate systems for conciliation and voluntary arbitration for the settlement of labour disputes and the right to collective action including the right to strike.

The inclusion of the latter provision in the Charter is of particular importance because it represents the first instance of the right to strike being expressly recognised in an international treaty with binding effects. The only previous reference is contained in the Inter-American Charter of Social Guarantees 1948 (Bogotá Charter), that merely proclaimed as follows:

«workers have the right to strike. The law shall regulate the conditions and exercise of that right».

The Bogotá Charter did not create a supervisory machinery to verify the compliance of the High Contracting Parties to the convention, empowered to make the necessary recommendations in case of possible violations⁵¹⁷, a characteristic that renders the European Social Charter provisions more effective, in particular after the adoption of the 1995 Additional Protocol that abolished the discretionary power of the Committee of Ministers to issue recommendations.

The text of article 6 par. 4 underwent various amendments during the drafting process.

In October 1955 the wording proposed by the Assembly was the following:

«Every worker has the right to strike. The High Contracting Parties undertake to introduce the necessary legislative measures to regulate the conditions and exercise of that right and, in particular, to establish conciliation procedure and put at the disposal of the parties a procedure of arbitration to prevent labour disputes or find a rapid solution to them»⁵¹⁸.

⁵¹⁷ See, Collected "travaux préparatoires", (provisional edition), 1955, vol. II, 42, 56, Strasbourg, Council of Europe, 1953-1960.

⁵¹⁸ Doc. 403 of 26 October 1955, European Social Charter and European Economic and Social Council, Social, Health and Family Affairs Committee, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=725&lang=EN>.

What can be noted is that, since the beginning, the prevailing attitude was to have a right subject to legislative measures regulating its exercise. Moreover, it was proposed to insert a provision according to which conciliation and arbitration procedures aimed to prevent or find a solution to labour disputes would have become the privileged channel to settle industrial conflict.

The draft was modified⁵¹⁹ and discussed during the Tripartite Conference of 1958 until its final version. At present, under article 6 par. 4 the Contracting Parties undertake to recognise:

«the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into».

Without considering at this stage the case-law developed by the European Committee of Social Rights⁵²⁰, three observations on the mere wording of article 6 par. 4 seems to be appropriate.

First, the protection accorded by the Charter seems to cover actions taken by “*workers and employers*”, so that lock-outs should fall within the scope of article 6 par. 4⁵²¹, albeit the absence of an overt recognition of the same.

Said interpretation finds some ground in the *travaux preparatoires* of the Charter. As pointed out by Evju⁵²², in 1957 Italy filed a reservation against the inclusion of lock-outs, a circumstance that might prove that early drafts encompassed not only workers but, similarly, employers collective actions.

One year later - at the Tripartite Conference of 1958 -, employers tried to embed an explicit mention of lock-outs in the body of article 6, an attempt that was strongly opposed by workers and subsequently examined by the Social Committee of the Committee of Ministers at its eleven session in December in 1960. Here it was agreed that the right to lock-out was inherent in the concept of “*collective action*”, without any need to specifically mention it.

⁵¹⁹ A right to strike was not even mentioned in the first Committee of Ministers draft; see, T. Novitz, *International and European Protection of the Right to Strike*, Oxford, Oxford University Press, 2003, 141 and footnotes.

⁵²⁰ See, Section II, par. 2.2. seq. of this Chapter.

⁵²¹ C. Briggs, *Lockout Law in a Comparative Perspective: Corporatism, Pluralism and Neo-Liberalism*, *International Journal of Comparative Labour Law and Industrial Relations*, 2005, 3, 492.

⁵²² S. Evju, *The right to collective action under the European Social Charter*, in *European Labour Law Journal*, 2011, 2, 201.

In this regard some commentators argued that a lock out is an industrial action usually carried out by a single employer and therefore it should not be considered as a “*collective action*” protected by the Charter⁵²³. Albeit the fact article 6 par. 4 speaks about “*employers*” and in a number of countries such actions are indeed prohibited, the exclusion of lock-outs from the scope of the Charter does not find any support in the preparatory works of the treaty⁵²⁴, nor it was endorsed by the European Committee of Social Rights⁵²⁵.

A corollary remark concerns the beneficiaries of the rights granted under article 6 par. 4 or, in other words, if the right to industrial action can be enjoyed by workers and employers as individuals, or by workers and employers collectively.

The organic doctrine postulates that strike is a right or freedom at the disposal of the trade unions and it is justified by the proposition that individual employees use trade unions simply as a device to put them on equal footing with the employer during the bargaining process. In this framework, the decision to call a strike is a collective operation but the abstention from work is performed by individual strikers.

By contrast, the individualistic doctrine claims that the right to strike is an individual right of the striking workers that does not provide any guarantee on the collective activity.

Even if in the practice an industrial action is normally an operation involving both trade unions and individuals⁵²⁶, opting for one or the other theory is not without consequences, in particular in terms of the protection accorded to strikers.

If we accept that the rights contained in article 6 par. 4 can be enjoyed by individuals, it means that they might be authorised to call a strike without the involvement of trade unions. The same individuals would be the only ones protected once the right is exercised, while trade unions would be left without protection. On the other hand, if the organic doctrine prevails, only trade unions might be entitled to call industrial action and receive the relevant protection, while individual strikers would be left without protection⁵²⁷.

⁵²³ See, D. Harris, J. Darcy, *The European social charter*, New York, Ardsley, 2001, 105, at note 537.

⁵²⁴ S. Evju, *The right to collective action under the European Social Charter*, in *European Labour Law Journal*, 2011, 2, 202.

⁵²⁵ See, Section II, par. 2.2.2. of this Chapter.

⁵²⁶ R. Ben-Israel, *Strikes, Lock-outs and other kinds of hostile actions*, *International Encyclopedia of Comparative Law*, Vol. XV, 1994, 37 seq.

⁵²⁷ R. Ben-Israel, *Strikes, Lock-outs and other kinds of hostile actions*, *International Encyclopedia of Comparative Law*, Vol. XV, 1994, 37 seq.; S. Evju, *The right to collective action under the European Social Charter*, in *European Labour Law Journal*, 2011, 2, 214; E. Kovacs, *The right to strike in the European Social Charter*, *Comparative Labour Law and Policy Journal*, 2005, 26, 445, exp. 457 - 458, for whom a state must apply both doctrines simultaneously to make it possible for both employees and their organisations to perform their own tasks and ensure the entire exercise of the right to strike.

Secondly, article 6 par. 4 contains a generic reference to «*collective action [...] including the right to strike*». The vague wording seems to be appropriate in order to include in the protection accorded by the Charter different forms of industrial action - other than the complete stoppage from work for a certain period of time normally intended as strike - and respect the nuanced reality present in the different countries within the Council of Europe⁵²⁸. As underlined above, if from the preparatory works emerge the intention of the High Contracting Parties to encompass lock-outs, the term “*collective action*” is suitable to include also various workers’ operations such as working to rule, go slow, boycotts, blockades and picketing. The view is confirmed by the case-law of the European Committee of Social Rights⁵²⁹.

A third aspect to be analysed is represented by the decision to safeguard the right to collective action and strike “*in cases of conflict of interests*” and not in case of conflict of rights, a distinction quite familiar to German-Nordic countries. A conflict of interests exists on matters not covered by collective agreements or statutory obligations while a conflict of rights might arise over the interpretation and application of existing contractual or statutory obligations.

Since the I supervisory cycle, the European Committee of Social Rights stated that «*a strike concerning the existence, validity or interpretation of a collective agreement, or its violation, eg. through action taken during its currency with a view to the revision to its contents*»⁵³⁰ (conflict of rights) falls outside the scope of the Charter. For instance, it considered Finnish legislation in compliance with the Charter because, on the one hand, employees and employers bound by a collective agreement cannot take collective actions directed against the collective agreement as a whole or any of its provisions during its period of validity, while «*in [case of] conflicts of interest there is in principle freedom to initiate collective action*»⁵³¹. The Committee however welcomes jurisdictions, such as the Italian one, granting the right to strike also in case of conflict of rights⁵³².

The prohibition to take strike action in case of conflict of rights during the period of validity of a collective agreement should be limited only to the issues settled by the latter or to

⁵²⁸ S. Evju, The right to collective action under the European Social Charter, in *European Labour Law Journal*, 2011, 2, 203.

⁵²⁹ See, Section II par. 2.2.2 of this Chapter.

⁵³⁰ Conclusions I, 38.

⁵³¹ Conclusions XV-1, vol. 1, Finland, 198; conclusions XIII-3, Netherlanders Antilles, 136.

⁵³² Conclusions XV-1, vol. 2, Italy, 367.

matters that had been subject to bargaining before signature⁵³³. On the contrary, matters raised during negotiations but not covered by the agreement should be considered falling outside the concept of conflict of rights⁵³⁴.

The need to distinguish between conflict of rights and conflict of interests is particularly important in presence of an obligation to refrain from taking collective industrial actions related to issues covered by a collective agreement. This aspect is strictly connected to the limitations to the exercise of strikes.

Indeed, the right to collective industrial actions is subject to two sources of limitations.

The first is already expressed in article 6 par. 4 which subjects the right to collective actions and strikes to the obligations that might arise out of collective agreements previously entered into.

The limitation is consistent with the request of the employers at the time of the Tripartite Conference to have a Charter mentioning not only rights but also duties⁵³⁵, but it does not explain, for instance, whether it applies only for matters specifically regulated by a collective agreement previously entered into or also for matters related to the content of a collective agreement but not expressly regulated by the same.

The second limitation is contained in the Appendix to the Charter reading as follows:

«It is understood that each Contracting Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31».

The Revised Charter adopts a nearly identical wording, with the exception that it makes reference to article G instead of article 31⁵³⁶. Both article 31 and article G recall the test of legality and necessity already present in article 11 par. 2 ECHR, as any limitations to the rights set forth in part II of the Charter should be deemed lawful if these are:

«prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. The restrictions permitted under this Charter to

⁵³³ Conclusions XIII-5, Finland, 60.

⁵³⁴ Conclusions XIII-3, Malta, 135-136.

⁵³⁵ T. Novitz, *International and European Protection of the Right to Strike*, Oxford, Oxford University Press, 2003, 143.

⁵³⁶ Therefore, any consideration about the limitations stemming from article 31 can be applied also to article G.

the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed».

As Evju notes, the restriction contained in article 31 and in article G are addressed to the States: none in the articles should be applied to restrict the competence of the social partners to enter into collective agreements⁵³⁷.

1.4. The relationship between the ECHR and the ESC

In the paragraphs above it has been claimed that the Council of Europe decided to split the protection of civil and political rights and of socio-economic rights in two separate documents. It has been said that European Convention on Human Rights has a higher status than the European Social Charter, not only because it secures to everyone the enjoyment of human rights but remarkably because it adopts an enforcement mechanism of judicial nature and provides for the possibility to bring individual complaints.

One might have the impression that there is no permeability between the Convention and the Charter and indeed the proposition was true for a number of years, in which the jurisprudence underlined the division between the two legal instruments. On the contrary, in recent times there is a tendency to claim economic, social and cultural rights through civil and political rights whenever the system does not offer an effective protection of the forms. The trend seems to be more in line with the original idea to have two documents, the Convention and the Charter, complementing each other.

The 1953 memorandum concerning the activities which the Council of Europe could carry out in the social sphere⁵³⁸ highlighted the intention of Member Governments to achieve greater unity and closer economic co-operation through the establishment of common social concepts. Their enunciation was warranted in the form of a European Social Charter, to be read in conjunction and not as opposed to the Convention, whose principles would serve as a guide for the future action of the whole Council of Europe in the realisation of social progress. The same Preamble to the Revised Charter refers to the indivisible nature of all

⁵³⁷ S. Evju, The right to collective action under the European Social Charter, in *European Labour Law Journal*, 2011, 2, 211.

⁵³⁸ Doc. 140 of 11 May 1953, Memorandum by the Secretariat-General concerning the activities which the Council of Europe could properly carry out in the social sphere, at <http://www.assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=462&lang=EN>.

human rights, be they civil, political, economic, social or cultural⁵³⁹, so that the Charter and the European Convention should be considered as a whole.

In recent times, the case-law of the European Court of Human Rights shows a greater attention for the safeguard of social rights and, in order to wider their protection, reference is made to other international legal instruments such as the ILO labour standards and, notably, the European Social Charter.

1.4.1. The separation between civil and political and socio-economic rights

One of the central assertions of international human rights law concerns the indivisible and interdependent nature of all human rights⁵⁴⁰, meaning that both civil and political, and economic, social and cultural rights should apply to all individuals on the basis of equality and without discrimination, that they should be justiciable and create specific governmental obligations.

Nevertheless, the inclusion of civil and political rights in one international instrument (the ECHR) and of economic and social rights in another (the ESC) seems to reinforce the conviction that said categories of rights has often been divorced instead of merged. This tendency is partly present in certain case-law of the European Court of Human Rights or of the former European Commission of Human Rights⁵⁴¹, in particular the one dealing with work-related rights. Some examples would suffice to prove the preposition.

In *Jazvinsky v. Slovak Republic*⁵⁴² the Court stressed that the Convention does not guarantee the right to work, to social security or to protection of a person's health, so that these complaints should be considered incompatible *ratione materiae* with the Convention. In the same vein, in *X. v. the Federal Republic of Germany*⁵⁴³, the application was deemed

⁵³⁹ A characteristic underlined also by the Ministerial Conference on Human Rights held in Rome on 5 November 1990.

⁵⁴⁰ See, United Nations General Assembly resolution 32/130 of 16 December 1977, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/32/130&Lang=E&Area=RESOLUTION, which asserts that (a) all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights; (b) the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; (c) the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.

⁵⁴¹ Until the reform of the ECHR monitoring bodies by means of Protocol 11.

⁵⁴² ECtHR, *Anton Jazvinsky v. the Slovak Republic*, partial decision Application n. 33088/96, 52236/99, 52451/99 - 52453/99, 52455/99, 52457/99 - 52459/99, 7 September 2000, esp. par. 7.

⁵⁴³ Decision of the Commission, *X. v. the Federal Republic of Germany*, application n. 4984/71, 5 October 1972.

incompatible *ratione materiae* with the provisions of the Convention because the right to work, as invoked by the applicant, was declared not included among the rights and freedoms guaranteed by the treaty. Likewise, in *Pertti Kajanan and Pekka Tuomaala v. Finland*⁵⁴⁴, the Strasbourg judges considered article 6 par. 1 of the Convention not applicable to disputes concerning the applicant judges' salary.

Another good illustration of the tendency to draw a distinction between civil and political rights - protected by the Convention - and the economic, social and cultural rights - preserved by the Charter - is represented by cases about trade union rights. In this line of cases the Court stressed the autonomy of every single Council of Europe international treaty, each one covering a specific and distinct matter.

For instance, the disciplinary action taken against the applicant for having participated in a strike or a strike-like action was not regarded as a violation of the applicant's right to freedom of association under article 11 of the Convention⁵⁴⁵, nor the domestic ban on civil servants to enjoy the right to strike was considered falling under the protection accorded to freedom of association⁵⁴⁶.

In *Schmidt and Dahlström v. Sweden*⁵⁴⁷ the Court found no violation of article 11 because a right to strike was considered not expressly enshrined in the Convention, while guaranteed, subject to regulations and restrictions, by the Charter.

The same stance was taken with regard to the right to collective bargaining. Even if the Court recognised the importance of collective agreements as a means of protecting union members' interests it said that article 11 of the Convention neither «*guarantee a right for a trade union to maintain a collective agreement on a particular matter for an indefinite period*»⁵⁴⁸ nor it covers a right to strike or an obligation on employers to engage in collective

⁵⁴⁴ ECtHR, *Pertti Kajanan and Pekka Tuomaala v. Finland*, Application n. 36401/97, 19 October 2000, esp. par. 1.

⁵⁴⁵ Decision of the Commission, *S. v. the Federal Republic of Germany*, Application n. 10365/83, 5 July 1984.

⁵⁴⁶ Decision of the Commission, *Mehmet Agko v. Greece*, Application n. 31117/96, 20 October 1997. See, also, decision of the Commission, *Ahmet Imam and others v. Greece*, Application n. 29764/96, 20 October 1997; decision of the Commission, *The National association of teachers in further and higher education v. the United Kingdom*, Application n. 28910/95, 16 April 1998, where it was also stated that the obligation set out by British law to reveal the names of the trade union members participating in a ballot before taking industrial action does not interfere with their union's rights under article 11 of the Convention.

⁵⁴⁷ ECtHR, *Schmidt and Dahlstrom v. Sweden*, Application n. 5589/72, 6 February 1976.

⁵⁴⁸ ECtHR, *Swedish transport workers' union v. Sweden*, Application n. 53507/99, 30 November 2004, par. D. The unions did not actually claim a right to maintain a clause contained in a collective agreement for an indefinite period of time, but their right to extend, by means of collective bargaining, a protection clause contained in a collective labour agreement and aimed at preventing the circumvention of salary arrangements, to member companies hiring contractors not covered by said agreement. In the case, the Swedish Competition

bargaining⁵⁴⁹. At most, «*article 11 may be regarded as safeguarding the freedom of trade unions to protect the occupational interests of their members*»⁵⁵⁰.

Similarly, in *National Union of Belgian Police v. Belgium* the Strasbourg judges stated that:

[trade union matters] «*are dealt with in detail in another convention, also drawn up within the framework of the Council of Europe, namely the Social Charter of 18 October 1961. Article 6 para. 1 of the Charter binds the Contracting States “to promote joint consultation between workers and employers”. The prudence of the terms used shows that the Charter does not provide for a real right to consultation. Besides, Article 20 permits a ratifying State not to accept the undertaking in Article 6 para. 1. Thus it cannot be supposed that such a right derives by implication from Article 11 para. 1 of the 1950 Convention*»⁵⁵¹.

1.4.2. A different trend: the absence of a water-tight division between different categories of rights

Nonetheless, in a number of cases the Court, having recognised that the Convention sets forth essentially civil and political rights, was apt to give an interpretation of the document to include social rights into its scope.

Such line of cases unveil an encouraging option to claim economic, social and cultural rights through civil and political rights where the human rights system does not offer an effective protection of the former category of rights.

In an early landmark case, *Airey v. Ireland*⁵⁵², the ECtHR affirmed that the Convention sets forth essentially civil and political rights, although many of them have implications of a social or economic nature. It therefore considered that:

«the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention».

In a later case, the Court recalled the *Airey* doctrine and considered that:

Authority ordered member companies to discontinue its application, finding that it hampered competition in a manner contrary to section 6 of the Swedish Competition Act.

⁵⁴⁹ ECtHR, *UNISON v. The United Kingdom*, Application n. 53574/99, 10 January 2002.

⁵⁵⁰ ECtHR, *Federation of Offshore Workers' Trade Unions and others v. Norway*, Application n. 38190/97, 27 June 2002.

⁵⁵¹ ECtHR, *National Union of Belgian Police v. Belgium*, Application n. 4464/70, 27 October 1975, par. 38.

⁵⁵² ECtHR, *Airey v. Ireland*, Application no. 6289/73, 9 October 1979, par. 26.

«to hold that a right to a non-contributory benefit falls within the scope of Article 1 of Protocol No. 1 no more renders otiose the provisions of the Social Charter than to reach the same conclusion in respect of a contributory benefit»⁵⁵³.

For the Court, a right can be regarded as “civil”, and therefore fall within the scope the Convention, irrespective of its legal classification but having regard to the substantive content and effects of the right under the domestic law of the State concerned, taking also into account the Convention’s object and purpose and the national legal systems of the other contracting States⁵⁵⁴.

For instance, the Court took an expansive interpretation of article 6 par. 1 of the Convention, that protects the right of the individual to a fair and public hearing within a reasonable time only in case his civil rights and obligations are at stake (so that, in case of social rights, article 6 should in principle not apply).

In *Feldbrugge v. the Netherlands*⁵⁵⁵ and *Deumeland v. Germany*⁵⁵⁶ the Court considered that certain forms of social security allowances, such as sickness allowances and widow’s supplementary pension on the basis of a compulsory insurance for industrial accidents, should be considered civil rights falling within the scope of article 6 par. 1 of the Convention and thus justiciable in the terms of the Convention’s article. Such a trend was consolidated in the latter case *Schuler-Zgraggen v. Switzerland*⁵⁵⁷, where the Court recognised as a civil right also the right to enjoy a pension for incapacity in the framework of a compulsory invalidity insurance scheme.

Similarly, in other cases the Court adjudicated the protection of the right to health through article 3⁵⁵⁸, prohibiting torture or inhuman or degrading treatment or punishment and, on rare occasions, through article 2, protecting the right to life⁵⁵⁹.

⁵⁵³ ECtHR, *STEC and Others v. the United Kingdom*, Applications n. 65731/01 and 65900/01, 5 September 2005, par. 52.

⁵⁵⁴ ECtHR, *Konig v. Germany*, Application n. 6232/73, 28 June 1978, par. 89.

⁵⁵⁵ ECtHR, *Feldbrugge v. the Netherlands*, Application n. 8562/79, 29 May 1986.

⁵⁵⁶ ECtHR, *Deumeland v. Germany*, Application no. 9384/81, 29 May 1986.

⁵⁵⁷ ECtHR, *Schuler-Zgraggen v. Switzerland*, Application n. 14518/89, 24 June 1993.

⁵⁵⁸ ECtHR, *D. v. The United Kingdom*, Application n. 30240/96, 2 May 1997; ECtHR, *Kudla v. Poland*, Application n. 30210/96, 26 October 2000; ECtHR, *Kalashnikov v. Russia*, Application n. 47095/99, 15 October 2002; ECtHR, *Poltoratskiy v. Ukraine*, Application no. 38812/97, 29 April 2003.

⁵⁵⁹ ECtHR, *William and Anita POWELL v. The United Kingdom*, Application n. 45305/99, 4 May 2000, rejected. In the case the Court stated that, under article 2 of the Convention, the State has to take appropriate steps to safeguard the lives of those within its jurisdiction and that it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2.

Article 8 of the Convention protecting private and family life has been also interpreted by the Court to include into its scope social rights such as housing and environmental rights.

In *Gillow v. the United Kingdom*⁵⁶⁰, the Court ruled that Mr. Gillow's obligation to obtain a licence to live in his own house, the institution of criminal proceedings against him for unlawful occupation of his property and his subsequent conviction, constituted interferences with the exercise of the applicants' right to respect for his private and family life, disproportionate to the legitimate aim pursued by British legislation and thus in violation of article 8 of the Convention.

The same approach on article 8 of the Convention was applied in the case *Lopez Ostra v. Spain*⁵⁶¹. The Court found that severe environmental pollution might affect individuals' well-being and influence their private and family life adversely, without, however, seriously endangering their health. In addition, the Court considered that the State, despite the margin of appreciation left to it, did not succeed in striking a fair balance between the interest of the community's economic well-being and the applicant's effective enjoyment of the right to respect for home and private and family life⁵⁶².

More recently in *Demir and Baykara v. Turkey*⁵⁶³ the Strasbourg Court included in the scope of article 11 of the Convention the right to bargain collectively and to enter into collective agreements. It considered the European Convention on Human Rights as a "*living instrument*" placed in the context of a broader international system of protection⁵⁶⁴. It analysed the international legal sources protecting collective social rights such as ILO Convention n. 98 concerning the right to organise and bargain collectively⁵⁶⁵, ILO Convention n. 151 on labour relations in the public service⁵⁶⁶, article 6 par. 2 of the European Social Charter, that affords to all workers and unions the right to bargain collectively and impose on public authorities the obligation to promote a culture of dialogue and negotiation in economy⁵⁶⁷, article 28 of the Charter of Fundamental Rights of the European Union, providing that workers and employers have the right to negotiate and conclude collective

⁵⁶⁰ ECtHR, *Gillow v. The United Kingdom*, Application n. 9063/80, 24 November 1986.

⁵⁶¹ ECtHR, *Lopez Ostra v. Spain*, Application n. 16798/90, 9 December 1994.

⁵⁶² On the necessity to strike a fair balance between competing interests of the individual and of the community as a whole, see, ECtHR, *Powell and Rayner v. The United Kingdom*, Application n. 9310/81, 21 February 1990, in particular par. 41.

⁵⁶³ ECtHR, *Demir and Baykara v. Turkey*, Application n. 34503/97, 12 November 2008.

⁵⁶⁴ V. Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, *Human Rights Law Review*, 2013, 13, 529 seq.

⁵⁶⁵ ECtHR, *Demir and Baykara v. Turkey*, Application n. 34503/97, 12 November 2008, par. 147.

⁵⁶⁶ ECtHR, *Demir and Baykara v. Turkey*, Application n. 34503/97, 12 November 2008, par. 148.

⁵⁶⁷ ECtHR, *Demir and Baykara v. Turkey*, Application n. 34503/97, 12 November 2008, par. 149.

agreements at the appropriate levels⁵⁶⁸. In addition, the Court stressed that the right to collective bargaining is recognised by the national practice of the majority of European States⁵⁶⁹. In the light of the above, the ECtHR, sitting as Gran Chamber, reconsidered its previous case-law and stated that:

«the right to bargain collectively with the employer has, in principle, become one of the essential elements of the ‘right to form and join trade unions for the protection of [one’s] interests’ set forth in article 11 of the Convention»⁵⁷⁰.

Analogous considerations are present in *Enerji Yapı-Yol Sen v. Turkey*⁵⁷¹. Here the Court extended the scope of article 11 of the Convention in order to include the right to strike. To do so, it considered international legal instruments other than the Convention, such as the jurisprudence of the supervisory bodies of the ILO, that regard strikes as intrinsic corollary of the right to freedom of association, and the European Social Charter, that recognises the right to strike as a means of ensuring the effective exercise of the right to collective bargaining⁵⁷².

Another example of the new trend can be derived from the case *Karacay v. Turkey*, where the Court stated that the applicant striker was exercising his “*freedom of peaceful assembly*” by reference to article 5 of the European Social Charter protecting the “*right to organise*”⁵⁷³.

The protection accorded to certain social rights via the Convention does not mean that it is possible to bring a claim before the Court directly alleging a violation of provisions belonging to another international treaty possibly protecting social rights. In *Zehnalova and Zehnal v. the Czech Republic*, the applicants raised complaints, among others, under articles 12 and 13 of the European Social Charter. In such occasion, the Court held the complaint incompatible *ratione materiae* with the provisions of the Convention and rejected it, pointing out that:

«it is not its task to review governments’ compliance with instruments other than the European Convention on Human Rights and its Protocols, even if, like other international treaties, the European Social Charter (which, like the Convention itself, was drawn up within the Council of Europe) may provide it with a source of inspiration»⁵⁷⁴.

⁵⁶⁸ ECtHR, *Demir and Baykara v. Turkey*, Application n. 34503/97, 12 November 2008, par. 150.

⁵⁶⁹ ECtHR, *Demir and Baykara v. Turkey*, Application n. 34503/97, 12 November 2008, par. 151.

⁵⁷⁰ ECtHR, *Demir and Baykara v. Turkey*, Application n. 34503/97, 12 November 2008, par. 153.

⁵⁷¹ ECtHR, *Enerji Yapı-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009.

⁵⁷² See, Section II, par. 2.1.3. of this Chapter.

⁵⁷³ ECtHR, *Karacay v. Turkey*, Application n. 6615/03, 27 June 2007.

⁵⁷⁴ ECtHR, *Zehnalova and Zehnal v. The Czech Republic*, Application n. 38621/97, 14 May 2002.

The principles established in the case-law of the other human rights supervisory body are taken into account also by the Committee.

In the collective complaint International Federation for Human Rights (FIDH) v. Greece⁵⁷⁵, the right to health and healthy environment as guaranteed in article 11 of the Charter is examined in the light of the Court's case-law, that regarded it as complementary to article 2 and 3 of the European Convention on Human Rights⁵⁷⁶. Also in the Statement of Interpretation of article 11, the Committee stressed that there is a normative partnership between the Convention and the Charter, able to impose positive obligations to secure the effective protection of social rights⁵⁷⁷.

The Charter is indeed envisaged as a human rights instrument «*to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention on Human Rights*»⁵⁷⁸.

Furthermore, the Committee has pointed out that:

*«the obligation under Article 16 to promote the economic, legal and social protection of family life and hence the full development of the family is closely linked to the obligation to secure respect for family life enshrined in Article 8 of the European Convention on Human Rights»*⁵⁷⁹.

To verify the compliance of the Greek social security system with the Charter, the Committee referred not only to the relationship between pension entitlements and human rights as discussed by the Court in its case-law concerning article 1 of Protocol n. 1 to the Convention - safeguarding the peaceful enjoyment of possessions -, but also to the ILO Convention n. 102 and the relevant interpretation of the ILO Committee of Experts⁵⁸⁰.

⁵⁷⁵ Collective complaint n. 72/2011, International Federation for Human Rights (FIDH) v. Greece, decision on the merits, 23 January 2013.

⁵⁷⁶ In the same vein, Collective complaint n. 30/2005, Marangopoulos Foundation for Human Rights (MFHR) v. Greece, decision on the merits, 6 December 2006, par. 195-196.

⁵⁷⁷ Conclusions 2005, Statement of Interpretation on Article 11, par. 5.

⁵⁷⁸ Collective complaint n. 14/2003, International Federation of Human Rights Leagues (FIDH) v. France, decision on the merits, 8 September 2004.

⁵⁷⁹ Collective complaint n. 82/2012, European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France, decision on admissibility and the merits, 19 March 2013.

⁵⁸⁰ Collective complaint n. 77/2012, Panhellenic Federation of Public Service Pensioners (POPS) v. Greece, decision on the merits, 7 December 2012.

The complementarity of the actions between the two monitoring bodies might be also appreciated in the request of the Committee addressed to Ukraine regarding the procedural requirements to be fulfilled before a strike takes place⁵⁸¹. The case *Trofimchuk v. Ukraine* was decided before the European Court of Human Rights on 28 October 2010. The succumbing applicant did not challenge the conformity of the procedure made available in domestic law to the requirements of article 11 of the Convention. Nevertheless, the European Committee of Social Rights is interested to know whether said procedural requirement are in line with the Charter, in a manner apt to render interdependent and synergic the action of the Court and the Committee for the enhancement of collective social rights.

A final reference should be made to the case *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*⁵⁸² decided before the European Committee of Social Rights. Here the protection of the right to bargain collectively and the right to collective action guaranteed by Charter are reinforced by reference to various international instruments. As the Committee notes:

«the right to collective bargaining and action receives constitutional recognition at national level in the vast majority of the Council of Europe's member States, as well as in a significant number of binding legal instruments at the United Nations and EU level. In this respect, reference is made inter alia to Article 8 of the International Covenant on Economic, Social and Cultural Rights, the relevant provisions of the ILO conventions Nos. 87, 98 and 154 as well as the EU Charter of Fundamental Rights, Directive 2006/123/EC on services in the internal market (cf. Article 1§7) and the Directive 2008/104/EC on temporary agency work - recital 19»⁵⁸³.

SECTION II - The Case-Law

An investigation on the jurisprudence of the Council of Europe judicial and supervisory bodies can help to clarify the content of freedom of association and the right to strike. For the ease of the exposition, the analysis will be organised taking into consideration, first, the case-law of the European Court of Human Rights and, secondly, the one of the European Committee of Social Rights.

⁵⁸¹ Conclusions 2010, Ukraine.

⁵⁸² Collective complaint n. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, decision on the admissibility and the merits, 3 July 2013.

⁵⁸³ Collective complaint n. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, decision on the admissibility and the merits, 3 July 2013, par. 110.

The decision to present the jurisprudence of the two control machineries in separate paragraphs does not imply the existence of a clear-cut separation between the set of rights protected by the treaties or the absence of a dialogue among the monitoring bodies. Especially in recent times, the ECtHR seems to take into consideration legal instruments different than the Convention to wider the protection accorded to certain social rights under the ECHR.

2.1. The European Court of Human Rights

The Convention does not specifically guarantee social rights. In a manner consistent with this idea, it is seems obvious that the right to strike should not, in principle, find any protection before the Court. Nevertheless, in a number of cases Strasbourg judges had to deal with strike-related matters and to face with the central question as to whether it is possible to derive a protection of said right from article 11 ECHR, covering the right to freedom of assembly and association, including trade unions association⁵⁸⁴.

2.1.1. The exclusion of the right to strike from the scope of article 11 ECHR

An early case of 1975, *National Union of Belgian Police v. Belgium*⁵⁸⁵, provides some interesting elements to start the analysis of the scope of article 11.

The applicant trade union submitted that Belgian legislation was violating, among others, article 11 of the Convention because it did not recognise the union as one of the most representative organisations that the Ministry of the Interior was required to consult to bargain workers' employment conditions. The consequence was a great restriction of the union field of action and an alleged violation of the freedom of trade union association of the members of the municipal police, *de facto* compelled to join other organisations considered to be “*representative*” but having, according to the applicant, a “*political*” character incompatible with the special vocation of the police.

The Court showed a certain attention for including in the scope of article 11 rights other than the mere freedom to form and join trade unions. In particular it said that, while consultation is one of the means to protect the occupational interests of workers, *<there are*

⁵⁸⁴ For a comprehensive analysis of the ECtHR case-law on article 11 ECHR, see, F. Dorssemont, *The right to form and to join trade unions for the protection of his interests under article 11 of the ECHR. An attempt “to Digest” the case law (1975-2009) of the European Court on Human Rights*, *European Labour Law Journal*, 2010, 1, 185 seq., on which the following paragraphs are partly based.

⁵⁸⁵ ECtHR, *National Union of Belgian Police v. Belgium*, Application n. 4464/70, 27 October 1975.

others»⁵⁸⁶, thereby leaving room for including in the scope of article 11 different means that enable trade unions «*to strive for the protection of their members' interests*»⁵⁸⁷.

One year later, with *Schimdt and Dahlstrom v. Sweden*⁵⁸⁸ the Court clarified its view.

The applicants were members of trade unions affiliated to two of the main federations representing Swedish State employees (SACO and SR) that called selective strikes not affecting the sectors in which they worked.

Mr. Schimdt and Mr. Dahlstrom complained that, as members of organisations having proclaimed selective strikes, on conclusion of a new collective agreement they were denied retroactivity of certain benefits paid to members of other trade unions and to non-unionised employees who had not participated in the strikes, even though they themselves had not gone on strike. It was therefore alleged a violation of article 11 ECHR due to the detrimental treatment they received.

The Court recalled its previous doctrine stating that the Convention requires that workers should be enabled «*to strive through the medium of their organisations for the protection of their occupational interests*»⁵⁸⁹. Although «*without any doubt*» the right to strike is one of the most important means to protect workers interests, it is not provided with a protected status under article 11 of the Convention, and each State has great discretion to identify what are the means to promote trade unions action. In this sense, the applicants were not deprived of their capacity to struggle for their interests because, as the Court points out, other means were available to defend workers interests⁵⁹⁰.

In *Wilson and Palmer v. the United Kingdom*⁵⁹¹, where individual applicants claimed that the requirement to sign the personal contract and lose union rights or accept a lower pay rise was contrary to article 11 of the Convention, the Court endorsed the principle according to which each State has a free choice of the means to be used to secure the right of workers to be heard.

The decision corroborates the idea that when a domestic legal system makes available measures other than strike to further the interests of workers there is no violation of article 11

⁵⁸⁶ ECtHR, *National Union of Belgian Police v. Belgium*, Application n. 4464/70, 27 October 1975, par. 39.

⁵⁸⁷ ECtHR, *National Union of Belgian Police v. Belgium*, Application n. 4464/70, 27 October 1975, par. 39. In this sense, A.C.L. Davies, *Perspectives on Labour Law*, Cambridge, Cambridge University Press, 2004, 221.

⁵⁸⁸ ECtHR, *Schmidt and Dahlstrom v. Sweden*, Application n. 5589/72, 6 February 1976.

⁵⁸⁹ ECtHR, *Schmidt and Dahlstrom v. Sweden*, Application n. 5589/72, 6 February 1976, par. 36.

⁵⁹⁰ ECtHR, *Schmidt and Dahlstrom v. Sweden*, Application n. 5589/72, 6 February 1976, par. 36.

⁵⁹¹ ECtHR, *Wilson, National Union of Journalists and others v. The United Kingdom*, Applications n. 30668/96, 30671/96 and 30678/96, 2 October 2002.

of the Convention⁵⁹². The right to strike, that still remains «*one of the most important of the means by which the State may secure a trade union's freedom to protect its members' occupational interests*»⁵⁹³, falls outside the scope of article 11.

2.1.2. The need to justify restrictions on strikes under article 11 par. 2 ECHR

A slightly different approach was taken to decide the admissibility of the application lodged by Unison v. the United Kingdom⁵⁹⁴.

The applicant Unison is a union for public service employees whose members were employed by the University College Hospital (UCLH). In 1998, UCLH was negotiating to transfer a part or parts of its business to a consortium of private companies (primary transfer) that would have subsequently transferred parts of the business to other private companies (secondary transfers). Further transfers to private companies were included in the business project (tertiary and subsequent transfers). The transfers would have involved most employees of UCLH.

Unison sought protection of its members to secure them the same employment conditions for a period of time after the transfers, but UCLH refused to offer any protection different than the minimum provided by the law. The applicant called for strike and UCLH brought proceedings applying for an injunction to prevent the strike from taking place. The British Court upheld the injunction because, in the absence of a dispute related to current terms and conditions of employment, it was not possible to qualify the case as a “*trade dispute*” pursuant to section 244 of the Trade Union and Labour Relations (Consolidation) Act 1992 and, consequently, grant unions with statutory protection from the tort of inducing the breach of contracts of the employees concerned.

Before the Court, the trade union complained under article 11 of the Convention that the effect of the domestic judgment was to deny statutory protection (and hence freedom) for industrial actions proposed or taken in contemplation or furtherance of a dispute in which the union and workers seek the protection of terms and conditions of employment after the transfer of a business or part of a business from an existing employer to a new one.

⁵⁹² ECtHR, Wilson, National Union of Journalists and others v. The United Kingdom, Applications n. 30668/96, 30671/96 and 30678/96, 2 October 2002, par. 45.

⁵⁹³ ECtHR, Wilson, National Union of Journalists and others v. The United Kingdom, Applications n. 30668/96, 30671/96 and 30678/96, 2 October 2002, par. 45.

⁵⁹⁴ ECtHR, UNISON v. The United Kingdom, 10 January 2002, Application n. 53574/99.

At first sight, the judgement appears to be a validation of the Court established doctrine on the margin of appreciation: States have great discretion to decide how the freedom of trade unions ought to be safeguarded. In the justification of the ruling, the Court repeated its mantra that measures, other than strike, are at the disposal of trade unions to protect the occupational interest of workers. For the Strasbourg judges, there is no express inclusion of the right to strike in the scope of article 11 of the Convention, notwithstanding the ability to strike represents one of the most important means by which trade unions can fulfil their protective function.

Having said that, the Court went on to further assess whether the prohibition of the strike must be regarded as a restriction on the applicant's power to protect the occupational interests of workers and the freedom of association. To this extent, and contrary to what happened in the previous case-law, it submitted the British legislation on strike to the proportionality test provided by article 11 par. 2 of the Convention. This means that the requirements of article 11 are not necessarily satisfied when the domestic legal system offers measures, other than strike, to further the interests of workers: in case the right to strike is not provided or it is restricted, the Contracting Party has to justify so under article 11 par. 2 ECHR.

The application of these principles can be appreciated in two other decisions leading to opposite results.

In *Federation of Offshore Workers v. Norway*⁵⁹⁵, the Court concluded for the inadmissibility of the application because the national legislation did not exceed the margin of appreciation left to States pursuant to article 11 par. 2.

In 1994, negotiations over a new collective agreement took place between the Federation of Offshore Workers (OFS) and the Norwegian Oil and Industry Association (Oljeindustriens Landsforening, OLF). Following the breakdown of negotiations, strike action was notified for a selected group of OFS members. This was soon followed up by a warning by OLF that it would lock out OFS members at all fixed installations on the Norwegian continental shelf.

The dispute was then brought before the State Mediator. Mediation failed, strike action was taken, and the Minister of Local Government and Labour recommended that the Government should issue a provisional ordinance imposing compulsory arbitration of the dispute.

⁵⁹⁵ ECtHR, *Federation of Offshore Workers' Trade Unions and others v. Norway*, Application n. 38190/97, 27 June 2002.

The applicant OFS complained that the provisional ordinance imposing compulsory arbitration violated article 11 of the Convention because it prevented unions to exercise the right to protect workers' interests.

In its decision the Court confirmed that States have a certain degree of freedom as to how the rights of trade unions ought to be safeguarded. Restrictions imposed on the exercise of the right to strike do not alone give rise to an issue under article 11, provided that they are apt to pass the test of article 11 par. 2 ECHR.

To this extent, the Court held that, during the negotiation process, OFS had been allowed to exercise its right to «*protect the occupational interests*» of its members by means of collective bargaining, compulsory mediation, and the right to strike for a certain, albeit short, period of time. To ascertain if the Norwegian authorities were justified, in the light of the Convention, in resorting to compulsory arbitration – or whether the arbitration amounted to an unfair restriction on the union's right to protect the occupational interests of workers - the Court balanced the right of the applicants under article 11 par. 1 with:

- (i) the consequences of a complete stoppage of work;
- (ii) the fact that the motive behind the government's intervention was not purely economic;
- (iii) the fact that the strike involved workers belonging to the oil sector, characterised by high salary levels.

Consequently, it found that:

«the impugned measure [the compulsory arbitration] was supported by relevant and sufficient reasons and that there was a reasonable relationship of proportionality between the interference with the Article 11 rights of the applicants and the legitimate aims pursued» [by the Government].

However, the Court made reservations with regards to the general application of this decision on proportionality in all cases of compulsory arbitration in Norway.

A different stance was taken in *Dilek and others v. Turkey*⁵⁹⁶, where the domestic regime was found in breach of article 11 due to the fact that the Government did not offer any convincing justification on the national ban of strike action for civil servants.

⁵⁹⁶ ECtHR, *Dilek and others v. Turkey*, Applications n. 74611/01, 26876/02 and 27628/02, 30 January 2008.

The applicants, working at the toll booth of the Bosphorus Bridge in Istanbul, were members of the union Yapı Yol Sen (Enerji Yapı Yol Sen at the time), a member of the Federation of Public-Sector Trade Unions.

To protest against the working conditions applicable to them, they participated for a period of three hours in a work slowdown action («*action de ralentissement du travail*») organised by the trade union. During this event, motorists passed the toll booth without paying. As Turkish law does not provide for a right of civil servants to have recourse to any kind of collective action, the High Court of Üsküdar condemned them for the relevant damages.

The applicants therefore complained that the decision of the High Court infringed their rights to freedom of assembly and association. The Government contested the argument because the applicants were not prevented from participating in a strike or other lawful activities of their union and commitment to their civil liability was not based on being a union member or trade union activity.

The Court confirmed that States have great discretion to identify the means to promote trade unions action. So, when a domestic legal system makes available measures other than strike to further the interests of workers, there is in principle no violation of article 11⁵⁹⁷.

However, differently than in *Unison v. the United Kingdom* (where British law provided for a “*restriction*”⁵⁹⁸ but not a complete ban on trade union activity), the central point here is that Turkish law prohibited civil servants to have recourse to any kind of industrial action. A complete ban that could, hardly, be qualified as a mere restriction.

The Court submitted the domestic legislation to the test contained in article 11 par. 2 ECHR and concluded for a violation of the Convention. The Turkish Government did not offer any explanation on the opportunity to ban strike actions and on the possibility for the trade unions to defend the interests of workers by other peaceful means⁵⁹⁹.

Unlike what has been affirmed⁶⁰⁰, the latter case does not seem to firmly anchor the right to strike or to take collective action to the provision of article 11 of the Convention. Even if the Court avoids to speculate about the extent to which article 11 of the Convention grants the

⁵⁹⁷ ECtHR, *Dilek and others v. Turkey*, Applications n. 74611/01, 26876/02 and 27628/02, 30 January 2008, par. 66.

⁵⁹⁸ ECtHR, *UNISON v. The United Kingdom*, 10 January 2002, Application n. 53574/99.

⁵⁹⁹ ECtHR, *Dilek and others v. Turkey*, Applications n. 74611/01, 26876/02 and 27628/02, 30 January 2008, par. 72.

⁶⁰⁰ N. Countouris, M. Freedland, *Injunctions, Cyanamid, and the corrosion of the right to strike in the UK*, *European Labour Law Journal*, 2010, 4, 4, for whom this case, together with others, has «*firmly anchored the right to strike on the substantive provisions of Article 11 of the European Convention on Human Rights*».

right to strike («*sans spéculer sur le point de savoir dans quelle mesure l'article 11 de la Convention octroie le droit à la grève et quelle est la définition de ce droit dans le cadre de cet article*»⁶⁰¹), finally it expressly denies a protection of said right under article 11.

*«la Cour rappelle que si l'article 11 ne le consacre pas expressément son octroi représente sans nul doute l'un des plus importants des droits syndicaux, mais il y en a d'autres. De surcroît, les États contractants ont le choix des moyens à employer pour garantir la liberté syndicale»*⁶⁰².

In sum, despite the fact that a clear recognition of the right to strike cannot be derived from the cases analysed above, the need to justify a restriction on its exercise represents an important judicial rift that established the basis for the recent development in the protection of industrial actions under article 11 of the Convention. To verify whether a State has secured trade union freedom the Court has to take into consideration the totality of the domestic measures, subject to the State's margin of appreciation⁶⁰³.

2.1.3. The hesitant inclusion of the right to strike in the scope of article 11 ECHR

Until 2009, the case-law of the Court dealing with strike-related matters was lined-up around the following understanding:

- (i) article 11 of the Convention does not guarantee the right to strike as such;
- (ii) the Convention only requires that workers should be enabled “*to strive through the medium of their organisations for the protection of their occupational interests*”;
- (iii) the right to strike is one of the most important means to protect workers interests;
- (iv) there are means other than strike to protect workers interests;
- (v) States have great discretion to identify what are the means to promote trade unions action;
- (vi) therefore, when a domestic legal system makes available measures other than strike to further the interests of workers, there is no violation of article 11 ECHR;
- (vii) in case the right to strike is not provided or it is restricted, States have to justify so under article 11 par. 2 ECHR.

⁶⁰¹ ECtHR, *Dilek and others v. Turkey*, Applications n. 74611/01, 26876/02 and 27628/02, 30 January 2008, par. 57.

⁶⁰² ECtHR, *Dilek and others v. Turkey*, Applications n. 74611/01, 26876/02 and 27628/02, 30 January 2008, par. 68.

⁶⁰³ ECtHR, *Danilenkov and others v. Russia*, Application n. 67336/01, 10 December 2009.

In *Enerji Yapı-Yol Sen v. Turkey*⁶⁰⁴ said concepts had been developed in a way apt to enhance - until a certain extent - the protection of the right to take industrial action under the Convention.

Enerji Yapı-Yol Sen is a union of civil servants based in Ankara and member of the Federation of Public-Sector Trade Unions. In 1996 the Turkish Prime Minister's Public-Service Staff Directorate published a circular, which, *inter alia*, prohibited public-sector employees from taking part in a national one-day strike organised in connection with events planned by the Federation to secure the right to a collective-bargaining agreement.

Some of the trade union's board members took part in the strike. As a result, they received disciplinary sanctions.

All the complaints lodge before the local courts by the trade union were dismissed because the Turkish courts considered that the aim of the impugned circular was not to prohibit the participation in the strike but to remind public servants of the legislative provisions governing their conduct.

In the case, the Court was asked to answer two questions: first, if the circular prohibiting employees of the public sector to strike amounted to an interference with the exercise of the right to freedom of association and, second, if the interference was justified pursuant to article 11 par. 2.

The Court primary looked at the aims of the strike action and noted that the circular forbade public employees to participate in a national day of strike organised for the recognition of the right to collective bargaining of public servants (*«organisée dans le cadre des actions programmées [par la Fédération des syndicats du secteur public] pour la reconnaissance du droit à une convention collective des fonctionnaires»*⁶⁰⁵).

The analysis of the aims of the strike action allowed the Court to open a way to subsume the case under the doctrine established in *Demir and Baykara v. Turkey*, where it included in the scope of article 11 ECHR the right to bargain collectively and to enter into collective agreements⁶⁰⁶. Indeed, a ban on the exercise of the right to strike aimed to foster the right to collective bargaining can tantamount to a ban on the right to collective bargaining itself⁶⁰⁷.

⁶⁰⁴ ECtHR, *Enerji Yapı-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009.

⁶⁰⁵ ECtHR, *Enerji Yapı-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009, par. 24.

⁶⁰⁶ ECtHR, *Demir and Baykara v. Turkey*, Application n. 34503/97, 12 November 2008. See, K.D. Ewing, J. Hendy, *The Dramatic Implications of Demir and Baykara*, *Industrial Law Journal*, 2010, 1, 2 seq.; F. Dorssemont, *How the European Court of Human Rights gave us Enerji to cope with Viking and Laval*, M-A.

Once established a link with the exercise of the right to collective bargaining, it continued by saying that the Convention requires that the law should allow unions to fight for the protection of the interests of their members, thereby confirming its previous view on the point.

However, in this occasion the Court does not observe that strike is just one of the means that permit a union to make its voice heard⁶⁰⁸ but it recognises it as an important aspect for union members to foster their interests (*«La grève, qui permet à un syndicat de faire entendre sa voix, constitue un aspect important pour les membres d'un syndicat dans la protection de leurs intérêts»*⁶⁰⁹).

It also notes that the right to strike is recognised by international instruments other than the Convention. The supervisory bodies of the ILO regard it as the intrinsic corollary of the right to freedom of association protected by ILO Convention n. 87 and the European Social Charter recognises the right to strike as a means of ensuring, among others, the effective exercise of the right to collective bargaining⁶¹⁰.

Given the above, scholars pointed out that in *Enerji* the Strasbourg Court *«did regard the right to strike as essential, as being an indissociable corollary of the right to collective bargaining»* so that a *«breach of the right to strike alone was a breach of Article 11(1)»*⁶¹¹.

2.1.4. The right to strike between freedom of association and freedom of peaceful assembly

The interpretation of the right to strike in the light of other international legal sources accomplished by the Court in *Enerji* might support a new and stronger consideration of the right to strike under the Convention, at least when the restriction on its use prevents workers from the exercise of the right to collective bargaining. The latter was recognised in *Demir and Baykara v. Turkey* as one of the essential elements of the right to form and join trade unions for the protection of [one's] interests under article 11 of the Convention.

Moreau, *Before and After the Economic Crisis. What implications for the European Social Model?*, Cheltenham, Edward Elgar Publishing, 2011, 217 seq.

⁶⁰⁷ F. Dorsemont, *The right to form and to join trade unions for the protection of his interests under article 11 of the ECHR. An attempt "to Digest" the case-law (1975-2009) of the European Court on Human Rights*, *European Labour Law Journal*, 2010, 1, 186.

⁶⁰⁸ See, Section II. Par. 2.1.1. and 2.1.2 of this Chapter.

⁶⁰⁹ ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009, par. 24.

⁶¹⁰ See Section II, par. 2.2.2 and 2.2.3 of this Chapter.

⁶¹¹ K.D. Ewing, J. Hendy, *The Dramatic Implications of Demir and Baykara*, *Industrial Law Journal*, 2010, 1, 15.

However, it is questionable whether it might be possible to reach the same conclusion in case of a strike action exercised outside a collective bargaining dynamic, namely with an aim different than the recognition of the right to collective negotiation.

In such an event, it does not seem that the case-law of the Court supports the general conclusion that a breach of the right to strike alone is a breach of article 11 par. 1 ECHR.

In particular, some jurisprudence undermines the proposition according to which, at present, the right to strike can be definitely regarded as «*an essential component of the right to associate*»⁶¹².

On the contrary, in number of cases the Court was prone to avoid the use of the term “*strike*” and subsumed collective actions under the right to freedom of peaceful assembly⁶¹³.

Enerji itself shows the hesitancy of the Court on this point. When the Court decides that the circular should be considered an interference not justified pursuant to article 11 par. 2 - because the ban on strike placed on all the civil servants was disproportionate - it also suggests that the participation in the day of action by the applicant union can be regarded as the exercise of freedom of peaceful assembly («*les membres du conseil d'administration du syndicat requérant n'ont fait qu'user de leur liberté de réunion pacifique*»⁶¹⁴).

The reluctance of the Court to clearly address the issue of the right to strike is evident in a number of cases where collective activities that, *de facto*, might be considered “*strike*” are not called with this name and placed in the framework of the right to freedom of assembly. This jurisprudence shows a preference for the avoidance of any speculation about the extent to which article 11 of the Convention grants the right to strike and what is the relevant definition, as the Court stated in *Dilek and others v. Turkey* («*sans spéculer sur le point de savoir dans quelle mesure l'article 11 de la Convention octroie le droit à la grève et quelle est la définition de ce droit dans le cadre de cet article*»⁶¹⁵).

In *Karacay v. Turkey*⁶¹⁶ the applicant alleged that the warning received as a disciplinary sanction for having participated in a national day of strike to protest against the low salary level of the civil servants constituted an interference with his right to freedom of association,

⁶¹² V. Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, *Human Rights Law Review*, 2013, 26.

⁶¹³ F. Dorsemont, *The right to form and to join trade unions for the protection of his interests under article 11 of the ECHR. An attempt “to Digest” the case-law (1975-2009) of the European Court on Human Rights*, *European Labour Law Journal*, 2010, 1, 232.

⁶¹⁴ ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009, par. 32.

⁶¹⁵ ECtHR, *Dilek and others v. Turkey*, Applications n. 74611/01, 26876/02 and 27628/02, 30 January 2008, par. 57.

⁶¹⁶ ECtHR, *Karacay v. Turkey*, Application n. 6615/03, 27 June 2007.

contrary to international commitments and national provisions protecting the right to organise.

The Court “*adjusts*” the complaint as the applicant was asking to decide whether the warning received for participating “*in a demonstration*” («à une manifestation»⁶¹⁷) constituted an infringement of article 11 of the Convention. Lately in the text, the decision oscillates between addressing the industrial action as a «*journées de grèv*»⁶¹⁸ (day of strike) or a «*journée d'action*» (day of action)⁶¹⁹. Finally it is recognised that the applicant was exercising his freedom of peaceful assembly («*le requérant usa de sa liberté de réunion pacifique*»⁶²⁰) protected by article 11 of the Convention.

It should be noted that to reach this conclusion the Court refers only to article 5 of the European Social Charter heading “*right to organise*” and not article 6 par. 4 of the same international treaty protecting collective actions and the right to strike⁶²¹. An approach quite dissimilar than the one taken in Enerji.

In Kaya and Seyhan v. Turkey⁶²² the Court reached similar conclusions.

Albeit the applicants complained that their right to “*freedom of association*” had been violated («*Les requérants allèguent que leur droit à la liberté d'association a été méconnu*»⁶²³) - because they received disciplinary warnings for having participated in a “*national day of action*” to protest against the draft law affecting the public sector -, the Court examined the issue in light of the right to freedom of peaceful assembly⁶²⁴. It ruled that there was a disproportionate interference with the applicants’ effective enjoyment of the right to freedom to manifest («*liberté de manifester*»⁶²⁵) within the meaning of article 11 ECHR.

In comparable terms, the Court refused to address manifestly the issue of the right to strike in Urcan and others v. Turkey⁶²⁶.

⁶¹⁷ ECtHR, Karaçay v. Turkey, Application n. 6615/03, 27 June 2007, par. 18.

⁶¹⁸ ECtHR, Karaçay v. Turkey, Application n. 6615/03, 27 June 2007, par. 37.

⁶¹⁹ ECtHR, Karaçay v. Turkey, Application n. 6615/03, 27 June 2007, par. 36, 37.

⁶²⁰ ECtHR, Karaçay v. Turkey, Application n. 6615/03, 27 June 2007, par. 36.

⁶²¹ ECtHR, Urcan and others v. Turkey, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, also refers to article 5 ESC.

⁶²² ECtHR, Kaya and Seyhan v. Turkey, Application n. 30946/04, 15 December 2009.

⁶²³ ECtHR, Kaya and Seyhan v. Turkey, Application n. 30946/04, 15 December 2009, par. 15.

⁶²⁴ ECtHR, Kaya and Seyhan v. Turkey, Application n. 30946/04, 15 December 2009, par. 30.

⁶²⁵ ECtHR, Kaya and Seyhan v. Turkey, Application n. 30946/04, 15 December 2009, par. 31.

⁶²⁶ ECtHR, Urcan and others v. Turkey, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008. In the same vein, also, ECtHR, Saime Ozcan v. Turkey, Application n. 22943/04, 15 December 2009.

The applicants, all professional teachers, participated in a day of general strike organised by the union Eđitim-Sen to demand improved working conditions of teachers in the public service. As a consequence, they were prosecuted for collective abandonment of their workstation and convicted to imprisonment for a period of three months and ten days, to the payment of a criminal fine, and excluded from the public service for a period of three months.

The Court refers to the abstention from work to participate in the strike action in the sense of «réunions»⁶²⁷ (meetings) or «rassemblements pacifiques»⁶²⁸ (peaceful gatherings), expression of the right to freedom of peaceful assembly. It links the “national day of action” («la journée d’action nationale»⁶²⁹) with the exercise of the freedom of assembly and recalls that the right to express one’s view through this freedom is among the fundamental values of a democratic society. It also attributes to the strike action aimed to improve the teachers’ working condition the value of “political ideas which challenge the established order” («idées politiques qui contestent l’ordre établi»⁶³⁰). According to the Court, if these ideas are advocated by peaceful means, the State should offer a reasonable opportunity to express them through the exercise of freedom of assembly and by other legal means in order not to deprive article 11 ECHR of its content⁶³¹.

More recently, in *Trofimchuk v. Ukraine*⁶³², the applicant complained that she had been dismissed from work because of her involvement in the creation of a new trade union and for her participation in a picket operation.

The Court reconnected the applicant’s participation in the picketing activity with the exercise of the right to freedom of peaceful assembly. However, it ruled that the State interference with the applicant’s right to freedom of peaceful assembly was justified, thereby reaching quite different conclusions than the Turkish cases.

Indeed, while in Turkey the domestic legal system did not grant the exercise of any trade union activity to certain categories of employees (a complete ban), Ukrainian law provides for the right to strike subject to specific procedures (a restriction) and workers participating in a

⁶²⁷ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 33.

⁶²⁸ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

⁶²⁹ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

⁶³⁰ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

⁶³¹ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

⁶³² ECtHR, *Trofimchuk v. Ukraine*, Application n. 4241/03, 28 January 2011.

lawful strike are granted with an immunity from possible disciplinary actions. Therefore, failure to follow strike procedures rendered the applicant's absence from work unjustified and subject to legitimate disciplinary actions.

The applicant, on her part, did not challenge the conformity of the procedure made available in domestic law to the requirements of article 11 of the Convention. The question, if introduced, would have been interesting for a further clarification of the scope of article 11.

Nevertheless⁶³³, it should be mentioned that the European Committee of Social Rights is interested to know whether said procedural requirements are in line with the ESC, in a manner apt to render interdependent and synergic the action of the Court and the Committee for the enhancement of collective social rights.

Albeit the fact that both the right to freedom of (trade union) association and the right to freedom of peaceful assembly are included in the scope of article 11 of the ECHR - so that, in both cases, the right to strike does not change its status of fundamental human right -, freedom of association and freedom of peaceful assembly are two different aspects of article 11 of the Convention.

The circumstance may lead to opposite results in terms of what "*kind*" of right to strike the Court is trying to construe and protect.

First of all, if the right to strike is expression of the right to freedom of (trade union) association, then theoretically the European Court of Human Rights should reject any form of protection of those strikes that are not organised or endorsed by a trade union or performed by non-unionised workers (wildcat strike).

Should this be the case, its jurisprudence would be in contrast with the stance taken by the European Committee of Social Rights, that includes this form of strikes in the scope of article 6 par. 4 ESC. Moreover, it would be in contrast with the case-law of the Committee on Freedom of Association that refused, since 1954, to give an opinion «*on the question as to how far the right to strike in general [...] should be regarded as constituting a trade union right*»⁶³⁴.

On the contrary, if the right to strike is expression of the right to freedom of peaceful assembly, then there may be grounds to construe a right to strike that includes wildcat strikes.

⁶³³ Conclusions 2010, Ukraine.

⁶³⁴ Case n. 60, Complaints presented by the World Federation of Trade Unions and by the General Council of Trade Unions of Japan against the Government of Japan, 8th Report of the International Labour Organisation to the United Nations, 1954, 212, par. 55, [http://www.ilo.org/public/libdoc/ilo/P/09618/09618\(1954-8\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09618/09618(1954-8).pdf).

Secondly, if the right to strike is expression of the right to freedom of (trade union) association, then the State is bound only by a negative duty not to interfere, as provided by article 11 par. 2 stating that: «*No restrictions shall be placed on the exercise of these rights [...]*».

If, adversely, the right to strike is expression of the right to freedom of peaceful assembly, then the State will not only have a general duty of abstention but, according to the case-law of the ECtHR, it would have an obligation to take reasonable and appropriate measures to enable those demonstrations.

In *Alekseyev v. Russia*, the Court stated that⁶³⁵:

*«The Court has previously stressed in this connection that freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote [...]. It is thus the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully [...]. The Court reiterates that the guarantees of Article 11 of the Convention apply to all assemblies except those where the organisers and participants have violent intentions or otherwise deny the foundations of a “democratic society” [...]. As the Court stated in *Sergey Kuznetsov v. Russia* (no. 10877/04, § 45, 23 October 2008): “any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it”».*

Thirdly, if the right to strike is expression of the right to freedom of (trade union) association, then, according to the case-law of the Court, the strike should be limited to the “*protection*” of workers interests and exercised only as an *extrema ratio*, and when the interests of workers are under a serious and immediate threat⁶³⁶.

On the contrary, it seems that in cases where the right to strike has been linked to the exercise of the right to freedom of peaceful assembly, then it was not limited to the “*protection*” of workers interests. As underlined above, in *Urcan and others v. Turkey*, the Court attributed to the strike action aimed to improve teachers’ working conditions the value of “*political ideas which challenge the established order*” («*idées politiques qui contestent*

⁶³⁵ ECtHR, *Alekseyev v. Russia*, Applications ns. 4916/07, 25924/08 and 14599/09, 11 April 2011, par. 73 and 80; see, also, ECtHR, *Platform “Ärtze fur das leben” v. Austria*, Application n. 10126/82, 21 June 1988, par. 32, 34; ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Applications nos. 29221/95 and 29225/95, 2 January 2002; ECtHR, *Sergey Kuznetsov v. Russia*, Application n. 10877/04, 23 January 2009.

⁶³⁶ ECtHR, *UNISON v. The United Kingdom*, 10 January 2002, Application n. 53574/99.

l'ordre établi»⁶³⁷). If these ideas are advocated by peaceful means, the State should offer a reasonable opportunity to express them through the exercise of freedom of assembly⁶³⁸. Moreover, the workers' condition should not necessarily be under a serious and immediate threat: in *Kaya and Seyhan v. Turkey*⁶³⁹ a collective action aimed to protest against a labour legislation not yet entered into force but just under discussion in the Parliament was deemed as falling under the definition of freedom of peaceful assembly.

Looking beyond the European Court of Human Rights, the Human Rights Committee, albeit in one isolated case related to Mexico⁶⁴⁰, seems to reconnect the exercise of the right to strike to the protective sphere of article 22 (freedom of association) and article 21 (freedom of peaceful assembly) of the International Covenant on Civil and Political Rights. The same combination is present in the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association to the Human Rights Council⁶⁴¹.

There are no evidences about the reasons underlying the characterisation developed by the Court and the jurisprudence is still quite scarce on the point. In any case, it seems that if the right to strike is considered under the heading "*freedom of peaceful assembly*" then it may be necessary to regard it as a social phenomenon *sui generis* decoupled from its traditional link with the employment relationship and capable to transform the established idea of collective labour law into one of a very different kind⁶⁴².

2.1.5. Different forms of "strikes"

The refusal of the Court to clearly address the issue of strike and collective action under the Convention and the preference to adopt an ambiguous terminology on the same might

⁶³⁷ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

⁶³⁸ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

⁶³⁹ ECtHR, *Kaya and Seyhan v. Turkey*, Application n. 30946/04, 15 December 2009.

⁶⁴⁰ HRC, Session 50, Meeting 1315, 6 April 1994, CCPR/C/79/Add.32, Summary record 1302; 1303; 1304; 1305; see, Chapter One, Section II, par. 2.2.3.

⁶⁴¹ Doc. A/HRC/20/27, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 21 May 2012. The report introduces the activities of the Special Rapporteur over the period 1 May 2011 to 30 April 2012, and highlights, what he considers best practices, including national practices and experiences, that promote and protect the rights to freedom of peaceful assembly and of association.

⁶⁴² H. Arthurs, *Labour law after labour*, in G. Davidov, B. Langille, *The Idea of Labour Law*, Oxford, Oxford University Press, 2011, 23-24.

seem in contrast with the more courageous stance taken in *Enerji*, were an express reference to the right to strike as an intrinsic corollary of the right to freedom of association was made.

However, in the long run such option might prove to be fruitful for strengthening the recognition of strikes and collective actions under the Convention.

The avoidance of any survey on the scope and definition of strike present in the Turkish cases (and absent in *Enerji*, where the Court investigates the aim of the action to establish a precise link between the right to strike and the right to collective bargaining) might open up the possibility to include in the scope of article 11 different kind of “*actions*”, notably under the heading “*right to freedom of peaceful assembly*”.

So far, it seems possible to mention actions aimed to protest against low salary levels (*Karakay v. Turkey*), missing salaries (*Trofimchuk v. Ukraine*), legislation negatively affecting workers situation (*Kaya et Seyhan v. Turkey*) and for achieving better working conditions (*Urcan and others v. Turkey*).

In addition there might be a prospect also to encompass under article 11 ECHR actions aimed to challenge the established order and expressing political ideas, as it may be argued from a broad interpretation of the decision *Urcan and others v. Turkey*⁶⁴³. Also an “*opération escargot*” (snail operation) exercised in the in the context of a national day of action organised by a confederation of trade union of transport workers might fall within the scope of article 11 ECHR. In *Barraco v. France*⁶⁴⁴ the Court had no doubt to subsume the collective action under the right to freedom of peaceful assembly, which includes the freedom to demonstrate⁶⁴⁵, and subject the State’s interference to the test contained in article 11 par. 2 ECHR.

It still remains to see how the Court will treat cases where the domestic legal system provides for means to grant the exercise of trade union activity but it is argued they are not in compliance with the requirements of article 11 ECHR because excessively restrictive on the right to take industrial action (see, *a contrario*, *Trofimchuk v. Ukraine*). To this extent, it should be monitor how the Court will decide the pending case *RMT v. the United Kingdom*⁶⁴⁶, where the National Union of Rail, Maritime and Transport Workers complained

⁶⁴³ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

⁶⁴⁴ ECtHR, *Barraco v. France*, Application n. 31684/05, 5 June 2009.

⁶⁴⁵ ECtHR, *Barraco v. France*, Application n. 31684/05, 5 June 2009, par. 39.

⁶⁴⁶ *National Union of Rail, Maritime and Transport Workers (RMT) v. the United Kingdom*, application n. 31045/10, lodged on 1 June 2010.

about the right to take industrial action being excessively circumscribed in the UK, in particular with regard to the cases of ballot and solidarity action.

No clear position has been taken by the Court with regard to boycotts.

In *Gustafsson v. Sweden*⁶⁴⁷ the question whether boycotts may fall under article 11 of the Convention was not directly addressed, as the judgement focused on the exercise of negative freedom of association of the employer.

Nonetheless, from the case emerges that the Court highly regards the exercise of collective social rights, even in case their exercise entail «*inconvenience or damage caused by the union action to the applicant's business*»⁶⁴⁸. It is claimed that States have a margin of appreciation to elect the proper means to secure the exercise of trade union rights, in particular in the field of collective bargaining. Nevertheless, it is stressed the crucial function exercised by collective bargaining activity, firmly recognised by a number of international instruments, in particular article 6 of the ESC, article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights and ILO Conventions n. 87 and 98⁶⁴⁹. A stance at odds with the position taken by the European Court of Justice in the infamous cases *Viking* and *Laval*⁶⁵⁰.

2.1.6. Permissible restrictions

The right to strike does not have an absolute character. If we admit it is included in the scope of article 11 of the Convention, then it should be also subject to the restrictions provided by article 11 par. 2 ECHR. Said limitations cannot amount to a total ban⁶⁵¹ but shall be prescribed by law and necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

Some useful suggestions on the content of the restrictions can be derived from the case-law of the Court.

⁶⁴⁷ ECtHR, *Gustafsson v. Sweden*, Application n. 15573/89, 25 April 1996. See, also, *AB Kurt Kellerman v. Sweden*, Application n. 41579/98, 26 January 2005.

⁶⁴⁸ ECtHR, *Gustafsson v. Sweden*, Application n. 15573/89, 25 April 1996, par. 44.

⁶⁴⁹ ECtHR, *Gustafsson v. Sweden*, Application n. 15573/89, 25 April 1996, par. 53, 54.

⁶⁵⁰ *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, Case C-341/05, 18 December 2007.

⁶⁵¹ ECtHR, *Dilek and others v. Turkey*, Applications nos 74611/01, 26876/02 et 27628/02, 30 January 2008, par. 68.

A first group of restrictions is connected with the category of employees to whom the strikers belong. In *Enerji* the Court said that the principle of trade union freedom is compatible with a ban on the right to strike placed on officials exercising public authority on behalf of the State, provided that the restriction does not affect officials in general, such as public servants of commercial or industrial companies belonging to the State⁶⁵².

A second group of restrictions might derive from acts of the public authority.

In *Federation of Offshore Workers v. Norway*⁶⁵³, the State interfered with the applicants' right to strike by introducing a compulsory arbitration regime. The introduction of compulsory arbitration passed the test of article 11 par. 2 ECHR because the intervention was proportionate and supported by relevant and sufficient reasons (considering the consequences of a complete stoppage of work and the economic and non-economic reasons grounding State's intervention), even if the Court made reservations with regards to the general application of the decision on proportionality in all cases of compulsory arbitration in Norway.

A third group of restrictions is associated with the scope of the industrial actions.

As said, in the wording of article 11 it seems inherent a "*defensive*" recognition of the right to form and join trade unions for the protection of one's interests. The literal interpretation suggests that its exercise must have the end to "*protect*" the interests of the affiliated person when they are under threat, but it does not clarify whether the "*threat*" should have an immediate realisation or it can be a future event. The case-law is not helpful on the point.

In *Unison v. the United Kingdom* the Strasbourg Court took the first option.

The Court claimed that restrictions on the exercise of the right to strike do not breach the Convention in so far as the workers' employment conditions are not «*at any real and immediate risk of detriment or of being left defenceless against future attempt to downgrade pay or conditions*». It considered that the domestic legislation encouraging private companies to transfer part of their business to private entities (with subsequent foreseeable wage cuts and reduction in the workforce) did not entail a real and immediate threat to the workers' interests because trade unions remained free to strike or to take any other step in the future, when the detrimental treatment would have realised⁶⁵⁴.

⁶⁵² ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009, par. 32.

⁶⁵³ ECtHR, *Federation of Offshore Workers' Trade Unions and others v. Norway*, Application n. 38190/97, 27 June 2002.

⁶⁵⁴ Conversely, a possible future threat to the economic interests of the State was sufficient to declare a ban on industrial action in compliance with the Convention. In *Federation of Offshore Workers v. Norway* the fact that

The second option was endorsed in *Kaya et Seyhan v. Turkey*.

The Court did not deem necessary to have a real and immediate threat to the working conditions and considered falling within the scope of article 11 ECHR an action aimed to protest against a labour legislation not yet entered into force but just under discussion in the Parliament.

A fourth group of restrictions are related to the respect for the exercise of the rights of others.

An example is represented by *Federation of Offshore Workers v. Norway*. Here the workers' interests were balanced against the reasons - which in the end prevailed - supporting the State intervention on strike action, in particular the consequences of a complete stoppage of work, the fact that the motive behind the government's intervention was not purely economic and the fact that the strike involved workers belonging to the oil sector, characterised by high salary levels.

Finally, it is worthy to note that the rights and interests of the employer, even if not specifically qualified, might be capable to restrict the exercise of the right to strike or to take industrial action. A lesson can be learned from *Trofimchuk v. Ukrain*.

The Court observed that the pre-strike notice given by the applicant to the local authorities did not contain an indication of the planned duration of the picket, nor it did suggest that the applicant intended to strike or would otherwise be absent from work because of her participation in the picket. For the employer, due to the nature of the applicant's work responsibilities, her two-hour absence from work and the failure to give advance notice of her absence allegedly resulted in serious disruption to workplace processes. On her part, the applicant was not able to prove she took all the necessary steps to ensure that she exercised her freedom of peaceful assembly *«in accordance with the due respect to the rights and interests of her employer»*⁶⁵⁵. Remarkably, the concern for the preservation of the rights of the employer was not present in the former case-law of the Court: in *Gustafsson v. Sweden*, the Court appeared willing to protect the exercise of collective bargaining even in case it entails

the action *«was likely to go on for a lengthy period»* was sufficient to say that the strike was likely to have serious implications for the State concerned, such as loss of revenues, loss of international credibility as gas supplier, difficulties in the implementation of transnational agreements between suppliers and buyers involving investments of an extraordinary nature and risks for the technical installations, health, safety and the environment.

⁶⁵⁵ ECtHR, *Trofimchuk v. Ukraine*, Application n. 4241/03, 28 January 2011, par. 46.

«inconvenience or damage caused by the union action to the applicant's business»⁶⁵⁶. This recent tendency, if confirmed, might lead to the paradoxical result to jeopardise the very nature of the industrial actions, which is to affect the same rights and interests that the Court claims should be preserved.

2.2. The European Committee of Social Rights

Article 6 par. 4 of the ESC recognises:

«the right of workers and employers to collective action in cases of conflict of interests, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into».

An investigation of the conclusions and the decision of the European Committee of Social Rights⁶⁵⁷ might help to clarify some of the issues emerged from the analysis of the mere wording of the article conducted above (in particular whether the right to strike and to take collective action are individual or collective rights, what kind of industrial actions are covered by the provision of the Charter, when said actions can be considered lawfully exercised, and what are the permissible limitations).

2.2.1. Individual or collective right?

In its case-law the Committee had to deal with the question whether the right to take industrial action is an individual or a collective right, namely if it can be lawfully exercised only when organised or endorsed by a trade union or also by non-unionised workers, as a group or as individuals (wildcat strike).

Since its early revision cycles the wording of article 6 par. 4 (recognition of the right of «workers and employers to collective action in cases of conflicts of interest, including the right to strike») was interpreted in the sense that trade unions do not have a monopoly on calling a strike⁶⁵⁸.

⁶⁵⁶ ECtHR, *Gustafsson v. Sweden*, Application n. 15573/89, 25 April 1996, par. 44.

⁶⁵⁷ In respect of national reports, the Committee adopts conclusions, in respect of collective complaints, it adopts decisions.

⁶⁵⁸ Conclusions IV, 50; Conclusions XIII-4, 361; Conclusions XIII-5, Finland, 62.

On the contrary, the Committee stressed the importance that the right to strike should be enjoyed also:

- (i) by individuals or groups of employees who are not members of a trade union⁶⁵⁹;
- (ii) by non-recognised⁶⁶⁰ or non-representative trade unions⁶⁶¹; or
- (iii) by unions not holding a negotiating licence⁶⁶².

The recognition of the right to strike as individual and collective right is of particular importance in terms of protection against liability: indeed, strikers and unions should be protected both in case the industrial action is called by unions or in case it is exercised by individuals or group of employees, irrespective of their unionisation.

Ideally, States should conform their national legislations to said interpretation.

Ireland was found in breach of the Charter because protection against civil action taken by the employer in the event of a strike was afforded only to trade unions holding a negotiating licence and to their members⁶⁶³. Cyprus was not in conformity with the Revised Charter on the grounds that, in accordance with the Trade Unions Laws 1965-1996, the decision to call a strike should have been endorsed by the executive committee of a trade union⁶⁶⁴. Portugal was asked to amend Act n. 65 of 1977 on strikes in order to comply with the Charter «*since only unions have the right to call strikes in companies where the majority of workers are trade union members, and since, in other companies only workers' assemblies have the right to do so*»⁶⁶⁵.

The Committee took a more functional approach to the interpretation of article 6 par. 4 since the XV supervisory cycle. It started to tolerate the fact that in certain States strike action

⁶⁵⁹ Conclusions XII-1, Iceland, 85.

⁶⁶⁰ Conclusions XIII-3, Netherlands Antilles, 136, where the Committee expressed concern about the fact that only strikes called by a “*recognised*” trade union were referred to as being lawful.

⁶⁶¹ Conclusions XV-1, vol. 1, France, 251. The Committee considered «*that the requirement that a strike must be initiated by one of the trade unions that are most representative at the national level, in the professional category or in the firm, organisation or department concerned, in order for a public sector strike to be lawful, amounts to a restriction of the right to collective action that is not compatible with Article 6 para. 4 of the Charter*». See, also European Social Charter (Revised), Conclusions 2002, France, 31.

⁶⁶² Conclusions XIII-1, Ireland, 149. The Committee noted that, «*according to the 1990 Industrial Relations Act, protection against civil action taken by the employer in the event of a strike continued to be afforded only to trade unions holding a negotiating licence and to their members. While noting the Government's information that the great majority of workers were members of trade unions holding negotiating licences, the Committee considered that the absence of protection for members of trade unions not holding such a licence and workers who were not members of a trade union was not compatible with the provisions of Article 6 para. 4*». See, also, European Social Charter (Revised), Conclusions 2004, Ireland, 265.

⁶⁶³ Conclusions XIII-3, Ireland, 132.

⁶⁶⁴ European Social Charter (Revised), Conclusions 2004, Cyprus, 97.

⁶⁶⁵ Conclusions XIII-5, Portugal, 180.

must possess a certain degree of collectiveness and there must be a common intent, whether this is represented by an organisation or a group of non-unionised workers⁶⁶⁶.

In the evaluation of the Finnish domestic system, the Committee recalled that all workers, including an ordinary group of workers without legal status, must be given the right to strike.

However, it stated that:

«given the fact that trade unions or associations may be formed without undue formalities or requirements, including for the purpose of initiating collective action, the Committee finds that the situation is in this case in conformity with Article 6 para. 4 of the Charter»⁶⁶⁷.

The same view was taken with regard to Iceland. Even if only trade unions have the right to call a strike, at the same time the domestic legislation does not provide for formal conditions to establish a trade union, a situation that was found in compliance with the provisions of the Charter⁶⁶⁸.

In this framework, the Committee started to exercise a stricter control on the countries to verify if the possibility to form a trade union was effective or, due to particular circumstances, it had the result to undermine the exercise of the right to strike.

The situation of Portugal during the XVI supervisory cycle might be an example of the deeper control exercised by the Committee.

On the one hand, the monitoring body confirmed its former doctrine according to which the legal system is in conformity with the Charter if the right to strike is granted only to trade unions but it is possible to constitute one without particular formalities. Accordingly, it found that Portuguese workers who were not affiliated to an existing trade union *«may exercise the right to strike only through a trade union that they have constituted for that purpose»*.

⁶⁶⁶ Conclusions XV-1, vol. 1, Finland, 197. See also Italy where the Committee accepted that the right to strike is conceived as an individual right which, however, must be exercised collectively; Conclusions, XV-2, vol. 2, Italy, 366.

⁶⁶⁷ Conclusions, XV-1, vol. 1, Finland, 200.

⁶⁶⁸ Conclusions, XV-1, vol. 1, Iceland, 330. In the same vein, Addendum to Conclusions XV-2, Slovakia, 167. The Committee observed that a ban on strikes not called or endorsed by a trade union at the outset is in principle in breach of article 6 par. 4, but it requested *«clarification as to whether a group of workers without any specific legal status, i.e. not constituting “the trade union body” in the meaning of the Collective Bargaining Act, may lawfully call a strike. If this is not the case, the Committee asks whether such workers may easily and without undue delays or formalities form a trade union for the purpose of calling a strike»*.

On the other hand, it paid due attention to the time frame in which a union can be constituted and considered that a period of thirty days to confer legal personality to unions was excessive. Therefore, Portugal was not in conformity with the Charter in this respect⁶⁶⁹.

The Committee departed from said construction during the 2002 supervisory cycle in the conclusions against Sweden. It noted that the domestic legislation and practice was not in conformity with the provision of the Charter because the right to call a strike lied only with those capable of being parties to a collective agreement, so that a group of non-unionised workers could not have called a lawful strike⁶⁷⁰.

On this point, Mr. Evju, one of the members of the Committee, formulated a dissenting opinion. He found that:

«assessment under Article 6§4 on this point cannot be based solely on the formal appearance of national law. A functional approach like that applied by the Committee in its Conclusions XV-1 is appropriate. Moreover, absent any new circumstances of law or fact the departure from the assessment made in the previous Cycle by itself is in my view not warranted»⁶⁷¹.

A part from the Swedish case, the Committee maintained the former functional approach also in the subsequent revision cycles. In the 2010 conclusions against Azerbaijan it recalled that:

«the decision to call a strike can be taken only by a trade union provided that forming a trade union is not subject to excessive formalities and that once a strike has been called, any employee concerned, irrespective of whether he is a member of the trade union having called the strike or not, has the right to participate in the strike»⁶⁷².

The same approach was confirmed also with regard to Macedonia⁶⁷³.

⁶⁶⁹ Conclusions XVI-1, vol. 2, Portugal, 578.

⁶⁷⁰ European Social Charter (Revised), Conclusions 2002, Sweden, 185.

⁶⁷¹ European Social Charter (Revised), Conclusions 2002, Sweden, Dissenting Opinion of Mr. Evju, 206. In conformity, Conclusions XVI-1, Iceland, Dissenting opinion of Mr. Evju joined by Mr. Birk, 332.

⁶⁷² European Social Charter (Revised), Conclusions 2010, Azerbaijan, 125 - 126.

⁶⁷³ When the decision to call a strike can be taken only by a trade union, the forming of a trade union must not be subject to excessive formalities. It recalls from its conclusion under Article 5 that *«trade unions and employers' associations can be founded without prior authorisation. They obtain legal personality upon registration. The registers of trade unions and employers' associations are kept by the Ministry of Labour and Social Policy. Applications for registration must include: the decision to establish the organisation; the minutes from the founding meeting; the statute, name of founders and members of the executive body; the name of the person entitled to represent the organisation; data on the number of members of the trade union based on paid*

2.2.2. Different forms of “strikes”

The Committee always considered the protection of the right to strike as particularly important, since the Charter is the only instrument that explicitly guarantees this right⁶⁷⁴.

In addition, it gave an extensive and flexible interpretation of the term “*collective actions*” in order to cover different collective operations such as picketing (not only the ones at the worker’s own place of work)⁶⁷⁵, ban on overtime⁶⁷⁶, work to rule⁶⁷⁷, go slows⁶⁷⁸, rotating strikes⁶⁷⁹, warning strikes⁶⁸⁰ and other forms of collective activities.

Also lock-outs fall within the scope of article 6 par. 4.

The case-law of the European Committee of Social Rights mirrors the choice took in 1960 in the framework of the Social Committee of the Committee of Ministers during the drafting process of the Charter where it was agreed that the right to lock-out was inherent in the concept of “*collective action*”, without any need to specifically mention it in the body of the Charter. Since the I supervisory cycle, the Committee held lock-outs as the basic - if not the only - mean of protecting the employer’s interests against the excessive demands made by workers and trade unions. It stated as follows:

«it is clear from the text that this provision relates to both strikes and lock-outs - even though the latter are not explicitly mentioned in the text of Article 6 para. 4 of the Charter, or in the gloss to this provision in the Appendix. The Committee came to this conclusion because the lock-out is the principle, if not the only, form of collective action which employers can take in defence of their interests»⁶⁸¹.

However, the Charter

«does not necessarily imply that legislation and case-law should establish full legal equality between the right to strike [...] and the right to call a lock-out».

membership. The Committee asks how long it takes to register a trade union. The Committee seeks confirmation that non-union members may participate in a strike»; Conclusions XIX-3, “The former Yugoslav Republic of Macedonia”, 241.

⁶⁷⁴ Conclusions XIII-1, 24.

⁶⁷⁵ Conclusions XII-1, United Kingdom, 88; Conclusions XIII-1, United Kingdom, 153-154.

⁶⁷⁶ Conclusions XV-1, vol. 1, Cyprus, 117.

⁶⁷⁷ Conclusions XV-1, vol. 1, Cyprus, 117.

⁶⁷⁸ Conclusions XV-1, vol. 1, Cyprus, 117. See, also, Conclusions XV-1, vol. 2, Spain, 520.

⁶⁷⁹ Conclusions XV-1, vol. 2, Spain, 520.

⁶⁸⁰ European Social Charter (Revised), Conclusions 2002, Romania, 106.

⁶⁸¹ Conclusions I, 38-39.

Therefore, the domestic system is in compliance with the Charter even if there is no legislation expressly protecting the right to lock-out⁶⁸².

In addition to ordinary strikes performed in the framework of a dispute between the employees and their direct employer, the Committee was of the opinion that also sympathy strikes and solidarity strikes should fall within the scope of the Charter⁶⁸³.

During the XII, XIII⁶⁸⁴ and XVI⁶⁸⁵ supervisory cycles it held right to strike or to take other industrial action in the United Kingdom subject to serious limitation. In particular, the fact that secondary action is not lawful prevents unions from taking action «*against the de facto employer if this is not the immediate employer*». The Committee noted that:

«the courts have interpreted the law so as to also exclude action concerning a future employer and future terms and conditions of employment, in the context of a transfer of part of a business (University College London NHS Trust v UNISON). The scope for workers to defend their interests through lawful collective action is thus excessively circumscribed in the United Kingdom»⁶⁸⁶.

The evaluation of the Committee is totally in contrast with the decision of the Strasbourg Court in the case Unison v. United Kingdom⁶⁸⁷. In that occasion, the Court claimed that domestic restrictions on the exercise of the right to strike do not breach the Convention in so far as the workers' employment conditions are not «*at any real and immediate risk of detriment or of being left defenceless against future attempt to downgrade pay or conditions*».

The Court considered that the British legislation encouraging private companies to transfer part of their business to private entities (with subsequent foreseeable wage cuts and reduction in the workforce) did not entail a real and immediate threat to the workers' interests because trade unions remained free to strike or to take any other step in the future, when the detrimental treatment would have realised.

Notwithstanding the stance taken with regard to sympathy strikes, the Committee made clear that the Charter does not cover political strikes. Since the II supervisory cycle, it pointed out that:

⁶⁸² Conclusions II, Cyprus, 187; Conclusions XV-1, vol. 2, Italy, 366-367.

⁶⁸³ European Social Charter (Revised), Conclusions 2002, Romania, 106.

⁶⁸⁴ Conclusions XII-1, United Kingdom, 88; Conclusions XIII-1, United Kingdom, 153-154.

⁶⁸⁵ Conclusions XVI-1, vol.2, United Kingdom, 688-689.

⁶⁸⁶ Conclusions XVI-1, vol.2, United Kingdom, 688-689.

⁶⁸⁷ ECtHR, UNISON v. The United Kingdom, 10 January 2002, Application n. 53574/99.

«article 6 para. 4 could not be relied upon to justify strike action taken for political ends»⁶⁸⁸

because

«article 6 [which] is designed to protect the right to bargain collectively, such strikes being obviously quite outside the purview of collective bargaining»⁶⁸⁹.

Some recent case-law of the Strasbourg Court seems to be in contrast with the position taken by the Committee. As said, a broad interpretation of the decision *Urcan and others v. Turkey*⁶⁹⁰ might be successfully used to claim the inclusion of actions aimed to challenge the established order and expressing political ideas in the scope of article 11 ECHR. In addition, if the Committee does not include political strikes in the scope of the Charter because they fall *«quite outside the purview of collective bargaining»* it seems inconsistent to admit strikes *«in order to follow-up a judgement of the labour court»⁶⁹¹*, a situation falling quite outside collective bargaining dynamics.

2.2.3. Strikes not aimed at the conclusion of a collective agreement

Article 6 par. 4 of the Charter does not constrain the exercise of the right to strike or to take collective action to the aim of achieving the signature of a collective agreement.

The Committee recalled that:

«in order to be in conformity with Article 6§4 the right to strike should be guaranteed in the context of any negotiation between employers and employees in order to settle an industrial dispute and that prohibiting strikes not aimed at concluding a collective agreement is not in conformity with Article 6§4»⁶⁹².

⁶⁸⁸ Conclusions II, p. 28. See, also, Conclusions XIII-4, Germany, 351.

⁶⁸⁹ Conclusions II, 27; Conclusions XIII-4, Germany, 351. However, see also, Conclusions XV-1, vol. 2, Spain, 520, where the Committee seems to support the option taken by Spanish law, according to which strikes to express opposition to the government's economic and social policy are lawful, while only political strikes aimed at subverting the constitutional order are illegal.

⁶⁹⁰ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

⁶⁹¹ Conclusions XV-1, vol. 1, Ireland, 330.

⁶⁹² Conclusions 2006, Finland, 248.

On this issue, the Committee has criticised the German situation since the early cycles of supervision. The domestic ban on all strikes not aimed at achieving a collective agreement and not called or endorsed (*Übernahme*) by a trade union was deemed inconsistent with the requirements of article 6 par. 4 of the Charter⁶⁹³. Consequently, the Committee of Ministers of the Council of Europe addressed to Germany recommendation n. R ChS (98) 2, asking the German authorities to take appropriate account of the Committee's negative conclusion. The absence of a statutory intervention on the point did not prevent the Federal Labour Court, in a ruling of 10 December 2002, to explicitly refer to the Committee's conclusions on the situation in Germany as regards the prohibition of strikes not aimed at the conclusion of collective agreements. The national Court held that the statement according to which strikes are only permitted in order to achieve collective agreement objectives may require a review in the light of article 6 par. 4 of the European Social Charter⁶⁹⁴. The decision of the Federal Labour Court represents an important indication of the commitment of domestic judges toward the respect of international legal sources and their interpretation.

The principle according to which, under the Charter, the right to strike cannot be restricted solely to strikes aimed at the conclusion of a collective agreement was reiterated by the Committee also with regard to other countries. Slovakia was found in breach of the Charter because, under Section 16 of Act n. 2/1991 on collective bargaining (Collective Bargaining Act), a strike could have been declared lawfully exercised only in the framework of a dispute relating to the conclusion of a collective agreement and provided that it was exercised as an «*extreme means*», once exhausted other remedies such as mediation or arbitration procedures⁶⁹⁵. In the same vein, Czech Republic was criticised because the legislation regulated only strike actions in the context of collective bargaining. With regards to strikes aimed to reach different goals, the Committee questioned the absence of legal certainty for their legitimate exercise. It held that the possibility for the courts to establish their legality on a case by case basis by virtue of the principle that «*everybody may do anything not prohibited by law*» was insufficient to protect the right to strike⁶⁹⁶.

⁶⁹³ Conclusions XIII-4, Germany, 351; Conclusions XIV-1, vol. 1, Germany, 313.

⁶⁹⁴ Conclusions XVIII-1, vol. 1, Germany, 305.

⁶⁹⁵ Addendum to Conclusions XV-2, Slovakia, 165-166.

⁶⁹⁶ Conclusions XVI, vol. 1, Czech Republic, 140.

2.2.4. Permissible restrictions

Albeit its nature of fundamental right, the right to take collective action is not an absolute right but it is subject to two express sources of restrictions: specific restrictions arising out of collective agreements previously entered into (article 6 par. 4) and general restrictions prescribed by law and necessary in a democratic society «*for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*» (article 31 ESC and article G RESC).

2.2.4.1. Specific restrictions: restriction arising out of collective agreements

It might happen that a collective agreement contains a promise that there will be no strike or lock-out during the period of validity of the agreement itself. In many countries, most of these obligations are relative, or, in other words, industrial action remains possible during the period of validity of the collective agreement on matters not covered by the same⁶⁹⁷.

When describing the difference between “*conflict of rights*” and “*conflict of interests*” it was already underlined that, for the Committee, the prohibition to take strike action during the period of validity of a collective agreement is normally considered compatible with the Charter⁶⁹⁸. Nevertheless, the duty to refrain from strike should be limited only to the issues settled by the agreement or to matters which had been subject to bargaining before signature⁶⁹⁹ and cannot apply to matters raised during negotiations but not covered by the agreement⁷⁰⁰.

During the various revision cycles, the Committee notably considered the compatibility of cooling off periods and peace obligations with the provisions of the Charter without questioning whether trade unions are entitled or not to restrict the individual right of workers to strike by entering into a collective agreement containing said clauses⁷⁰¹.

⁶⁹⁷ A. T. M. Jacobs, The law of strikes and lock-outs, in R. Blanpain, Comparative labour law and industrial relations in industrialised market economies, The Hague, Kluwer Law International, 2007, 644. Peace obligations are central legal concepts in four of the seven States being the first to ratify the Charter, notably Scandinavian countries and Germany.

⁶⁹⁸ Conclusions I, 38.

⁶⁹⁹ Conclusions XIII-5, Finland, 60.

⁷⁰⁰ Conclusions XIII-3, Malta, 135-136.

⁷⁰¹ The debate over the possibility for a collective agreement to limit the exercise of the individual right to strike is present, for instance, in Italy. The circumstance that Committee of Social Rights does not even question this aspect is taken by Corazza to support the idea of a compatibility between the fundamental nature of the right to strike and the trade union power to dispose of individual rights of workers; see, L. Corazza, Il nuovo conflitto

The issue of the conformity of peace obligations with the provisions of the Charter arose particularly with regard to Nordic countries. For instance, in the Norwegian system of industrial relations, collective agreements are seen as a social peace treaty of fixed duration during which strikes are prohibited. In this framework, the peace obligation is a contractual obligation imposed by statute law and it is also relative, since it applies only to disputes concerning the existence, validity, interpretation and application of a collective agreement, as well as to disputes pertaining to claims based on the agreement. It also applies to matters regulated and sought to be regulated by collective agreement⁷⁰².

Since the I supervisory cycle, the Committee recognised the compatibility of said provision with the Charter, taking into account the distinction between “*conflicts of interest*” and “*conflicts of right*”, and the connected notion of “*peace obligation*” as understood in various national legal contexts⁷⁰³. Unexpectedly, it changed its view during the XVI supervisory cycle. Danish system of industrial relations was held not in conformity with article 6 par. 4 of the Charter due to the fact that:

«a peace obligation is assumed to be inherent in a collective agreement independently of any stipulating clause»⁷⁰⁴.

The Committee considered that under the Charter a peace obligation

«must not be imposed by statute or by case law, but should be stipulated by the parties to an agreement themselves. The only cases where this principle may be deviated from are those foreseen by Article 31 of the Charter»⁷⁰⁵.

The stance taken by the Committee was strongly opposed by three of its members, Evju, Grillberger and Birk, because it failed to properly take into consideration the role and nature of the collective agreement as a legal instrument and the industrial relations traditions of those countries, that had been considered in compliance with the Charter for more than thirty years⁷⁰⁶.

collettivo. Clausole di tregua, conciliazione e arbitrato nel declino dello sciopero, Milano, Franco Angeli, 2012, 116-117.

⁷⁰² Conclusions 2006, Norway, 628.

⁷⁰³ Conclusions I, 38.

⁷⁰⁴ Conclusions XVI-1, vol. 1, Denmark, 179.

⁷⁰⁵ Conclusions XVI -1, vol. 2, Malta, 416. In similar terms also for Germany, Malta, and Norway.

⁷⁰⁶ Dissenting opinion of Mr. Evju, joined by Mr. Grillberger and Mr. Birk, conclusions XVI-1, vol. 2, 426 seq.

During the next supervisory cycle, the Committee reconsidered its opinion on peace obligations and held their compatibility with the Charter, provided that strikes remain possible outside the framework of matters regulated and sought to be regulated by a collective agreement (i.e. to protest against a collective redundancy or dismissal of a trade union representative)⁷⁰⁷.

With regard to cooling-off periods, the Committee recalled that, in principle, these are compatible with the Charter because they do not impose a real restriction on the right to collective action, but simply regulate the exercise thereof⁷⁰⁸. However, it also clarified that their compatibility with the Charter heavily depends on the duration of the cooling off period. During the XIII supervisory cycle it asked the Netherlands to provide detailed information regarding the duration of the non-strike period that was fixed in a maximum of ninety days for key industries inserted in a specific list and in thirty days for the others⁷⁰⁹. On this specific aspect, the Committee found that the national legislation of the Netherlands Antilles did not raise any problem of compliance with the provision of the Charter as far as it provided for a cooling off period in a maximum of thirty days⁷¹⁰.

2.2.4.2. General restrictions under article 31 ESC (or G RESC)

The Charter expressly admits in the Appendix that there may be limitations to the rights guaranteed under article 6 par. 4 if these are «*prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*». In its case-law, the Committee accepted that, in a particularly serious economic situation, or in case of need to maintain essential services, or in other exceptional circumstances, a government might be able to set certain limits to the right to strike. Nevertheless, it stated that:

[a ban] «*over an extended period of time cannot be accepted and in any such situation, covering the whole or part only of the workforce, a government must justify its actions on the basis of Article 31*»⁷¹¹.

⁷⁰⁷ Conclusions 2004, Norway, 404; Conclusions 2006, Norway, 628.

⁷⁰⁸ Conclusion II, 187; Conclusions XIV-1, vol. 1, 150.

⁷⁰⁹ Conclusions XIII-3, The Netherlands, 137.

⁷¹⁰ Conclusions XIV-1, vol. 2, Antilles, 140.

⁷¹¹ Conclusions XII-1, 13.

Broadly speaking, limitations investigated by the Committee on a case-by-case basis might be classified into four categories: (i) restrictions connected to the category of personnel involved in the collective action; (ii) restrictions connected to the nature of the services provided; (iii) restrictions deriving from State's statutory intervention; (iv) restrictions stemming from acts of the domestic judicial authority.

2.2.4.2.1. Restrictions connected to the category of personnel involved

The case-law of the Committee related to the ban placed on public servants over strike action falls under the first group of limitations.

On the one hand, the Committee regarded a ban on the right to strike for all public servants as incompatible with the Charter because it could have hardly being considered as a mere "restriction".

With regard to Denmark, the Committee recalled that the State failed to comply with the provision of the Charter due to the fact that civil servants are denied the right to strike. It admitted that the right to strike of certain categories of civil servants may be restricted, including that of members of the police and armed forces, judges and senior civil servants, but the denial of the right to strike to all civil servants cannot be regarded as compatible with the Charter⁷¹².

The same happened in relation to Bulgaria. Bulgarian law only allows public officials to declare symbolic strikes and does not grant them the right to collectively withdraw their labour. As a consequence, the Committee considered that:

«this amounts to a complete withdrawal of the right to strike for all public officials, which is incompatible with Article 6§4 of the Revised Charter»⁷¹³.

On the other hand, it seems compatible with the Charter a situation in which the right to strike is denied to certain categories of public servants inserted in specific lists and limited to some members of the staff. Iceland, for instance, was asked to provide further information on

⁷¹² Conclusions I, 38; Conclusions XII-1, Denmark, 84.

⁷¹³ Conclusions 2004, Bulgaria, 44; Conclusions 2010, vol. 1, Bulgaria, 186-187. The issue was at the centre of collective complaint n. 32/2005, Confederation of Independent Trade Unions in Bulgaria, Confederation of Labour "Podkrepa" and European Trade Union Confederation v. Bulgaria, decision on the merits, 16 October 2006. The Committee ruled that «allowing civil servants to only engage in symbolic action which the law qualifies as strike and prohibiting them from collectively withdrawing their labour (Section 47 of the Civil Service Act) constitutes a violation of Article 6§4 of the Revised Charter».

its domestic practice as to why workers in apparently non-essential positions were denied the right to strike but, in principle, its domestic rules were not deemed incompatible with article 6 par. 4 ESC⁷¹⁴.

A particular position was taken with regard to Germany. The State made a declaration on 28 September 1961 to the effect that civil servants were excluded from the right to strike. The exclusion concerned also civil servants employed by German railways (*Deutschen Bundesbahn*) and postal services (*Deutsche Bundespost*) as far as these services were considered “*public*”. Nevertheless, once these establishment had been privatised, the ban on strike action remained, a situation incompatible with the rights guaranteed by the ESC⁷¹⁵.

2.2.4.2.2. Restrictions connected to the nature of the services provided

A second group of restrictions relates to the “*essential nature*” of the services provided. The Committee avoids to provide for a definition of “*essential services*” but it leaves to the States’ margin of appreciation the possibility to qualify certain activities as essential to the community.

In principle, a partial or total withdrawal of the right to strike in the case of services that are essential to the community (such as energy, telecommunications and health sectors⁷¹⁶) is in conformity with the Charter as long as it satisfies the requirements of article 31⁷¹⁷. However simply banning strikes, even in essential sectors, cannot be considered proportionate to said specific requirements and therefore necessary in a democratic society.

In the opinion of the Committee, the most that might be considered in conformity would be the introduction of a minimum service requirement in specific vital sectors. In this regard, Spain can be cited as good practice to safeguard the right to strike in essential public and economic services.

Spanish legal system provides for judicial review and negotiations between government and the two sides of industry to determine which staff should be co-opted to provide minimum services. The Committee considered the oversight exercised by the administrative

⁷¹⁴ Conclusions XII-1, Iceland, 85.

⁷¹⁵ Conclusions XII-2, Germany, 89; conclusions XIV-1, vol. 1, 311-314.

⁷¹⁶ Conclusions 2004, Bulgaria, 44; conclusions 2004, Lithuania, 351.

⁷¹⁷ Or article G under the Revised ESC, which authorises restrictions on the right to strike that are prescribed by law, serve a legitimate purpose and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. See, conclusions I, 40.

and judicial courts, as well as by the Constitutional Court, consistent with article 6 par. 4 of the Charter⁷¹⁸. On the contrary, the criminal sanctions imposed in Italy on workers in essential sectors who fail to conform to the decision to ensure a minimum level of services were considered contrary to the prohibition of forced labour in so far as the restrictions thereby imposed on the right to strike were not justifiable under article 31 ESC⁷¹⁹.

2.2.4.2.3. Restrictions deriving from States' statutory intervention

A third group of restrictions entails limitations deriving from acts of the State.

Said intervention might consist in the temporary adoption of rules directly prohibiting strikes as a reaction to an actual period of industrial dispute or in order to prevent collective actions.

In 1987 Denmark adopted a number of acts aimed to stop collective action and to prolong existing collective agreements. Due to the existence of a statutory peace obligation for the duration of a collective agreement, the State intervention had the effect of prohibiting strikes for the duration of these agreements, in contrast with the provisions of the Charter⁷²⁰.

Iceland resorted to similar measures in the period 1978-1988 for economic related reasons. In particular, Act n. 14/1988 prohibited all strikes and other industrial actions for a period of eleven months. The intervention was held in contrast with the Charter and also brought before ILO's Committee on Freedom of Association under case n. 1458⁷²¹. Indeed, a complete denial of the right to strike can hardly be considered as a "*restriction*" which might be justified under article 31⁷²².

Portugal, by contrast, was positively reviewed by the Committee for the introduction of a resolution affecting strikers court officers. The disposition required the maintenance of a minimum floor of services - such as bringing preventive detainees before the courts, the execution of orders safeguarding individual liberty, the taking of measures whose deferral could have jeopardised the interests of minors and the performance of the necessary

⁷¹⁸ Conclusions XVI-1, vol. 2, Spain, 614.

⁷¹⁹ Conclusions XIII-1, Italy, 46.

⁷²⁰ Conclusions XII-1, Denmark, 85.

⁷²¹ See, Chapter One, Section II, par. 2.1.4.4.

⁷²² Conclusions XII-1, Iceland, 84.

associated tasks - in order to protect the right to liberty and habeas corpus⁷²³, thereby correctly balancing the exercise of collective social rights with rights and freedoms of others.

It might also happen that the State intervention does not directly prohibit industrial action but, through the introduction of compulsory arbitration, mediation or conciliation procedure, the interference can, *de facto*, restrict the exercise of the right to strike in a manner contrary to the State international obligations.

To end a strike in the health sector, the Norwegian Government passed a law obliging nurses to enter into compulsory arbitration. The Committee criticised the legislative action because it had not been justifiable within the terms of article 31. It considered that:

*«the apparent absence of any limitation on the government's power to intervene in strike action, and the consequent absence of any protection of workers in itself constitutes a breach of Article 6 para. 4, since without any such protection there is no real recognition of the right to strike as required by this provision of the Charter»*⁷²⁴.

The balancing exercise conducted by the Committee between the workers' right to strike and the rights and freedoms of others and the protection of public health ended in favour of the first category. From the facts submitted, it appeared that the strike represented an inconvenience for a number of patients who were awaiting planned surgery (which might have been postponed had the strike continued), but not a threat to their rights and freedoms. In fact, there was *«no question of cancelling or postponing any emergency operation»* so that it could not be contended that rights and interests of others were in need of State protection in the terms of the government's interference. In addition, it was found that the Government intervened at the very beginning of the strike, before its effect could be validly assessed⁷²⁵.

In the same vein, during 2006 Norway terminated strikes in the financial and public health sector. The reasons for the intervention in the first conflict lied in the fear that the industrial dispute would cause a close-down of practically all bank activities *«and this would immediately result in serious problems for recipients of national insurance benefits, for individual consumers, for trade and industry, and interfere with people's ability to meet their daily basic needs»*⁷²⁶. The necessity to preserve the health of livestock and the health of the

⁷²³ Conclusions XV-1, vol. 2, Portugal, 481.

⁷²⁴ Conclusions XII-1, Norway, 87.

⁷²⁵ Conclusions XII-1, Norway, 86-87.

⁷²⁶ Conclusions 2010, Norway, 475.

population grounded the Government interference in the second strike. The Committee held the recourse to compulsory arbitration in breach of the Charter because it exceeded the limits of article G of the Revised Charter. Indeed,

«even though the strikes in the cases at hand may have had important consequences on the economy and animal welfare, these being the primary considerations on which state intervention to terminate the strikes was based, [...] it has not been sufficiently established that the intervention was necessary, the allegations being very vague, for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals»⁷²⁷.

During the same reference period a compulsory arbitration proceeding was introduced to end a dispute in the health sector concerning air ambulance pilots. In this case, the Committee considered the dispute in compliance with the Revised Charter and decided to no longer consider as part of the reporting procedure situations in which arbitration has been imposed by Parliament to end a strike in the sectors which are prima facie covered by article G⁷²⁸.

Slightly different solutions were adopted in relation to Denmark. The State intervened to stop a strike by nurses and other health care personnel by adopting a bill on the extension and renewal of the relevant collective agreements. However, to give the parties an opportunity to discuss issues which had for some time made collective bargaining between them difficult, the act contained also a provision for the establishment of a fact-finding committee composed by representatives of the social parties and chaired by a president elected by them. The task of the committee was to make proposals upon which resume negotiations with a view to concluding a collective agreement. However, in case of failure, the chairman was empowered (as he did) to make a decision binding on the parties. The Committee noted that the procedure amounted to compulsory arbitration, which is in principle contrary to the Charter unless the conditions of article 6. par. 4 and article 31 are satisfied⁷²⁹.

A statutory intervention to ban strike actions for a specific period of conciliation proceedings are, in principle, not a real restriction on the right to strike and merely regulate its exercise, provided that the effectiveness of the strike is not affected⁷³⁰.

⁷²⁷ Conclusions 2010, Norway, 474-476.

⁷²⁸ Conclusions 2010, Norway, 474-476.

⁷²⁹ Conclusions XIV-1, vol. 1, Denmark, 185.

⁷³⁰ Conclusions I, 38; Conclusions XIII-5, Finland, 61; Conclusions XVII-1, Czech Republic, 100.

The Croatian legislation, according to which a strike can lawfully commence only after the exhaustion of mediation procedure regulated by the law or upon completion of other alternative dispute resolution mechanisms agreed upon by the parties, was held in conformity with the Charter, provided that collective actions are permitted when said procedures totally or partially fail⁷³¹. In such cases, a deadline for the conclusions of the mediation and conciliation procedures is necessary, otherwise the domestic legal system might be held in breach of the Charter⁷³². For instance, the Committee criticised Czech Republic for having established the maximum length of the mediation period in thirty days, a time frame considered excessive⁷³³. The dissenting opinion of Evju, Birk and Mikkola correctly underlined that the stance taken was in contrast with the Committee's conclusion with regard to cooling off periods, accepted by the established case-law for a duration of thirty days⁷³⁴.

2.2.4.2.4. Restrictions deriving from acts of the judicial authority

A fourth and final group of restrictions includes limitations stemming from acts of the domestic judicial authority.

Indeed, the review of the Committee is not limited to ascertain whether positive law is in compliance with the requirements of the Charter but it also focuses its intervention on the domestic courts practices, the latter being capable to have the effect of unlawfully restrict the exercise of the right to take industrial action⁷³⁵.

[The Committee] «has indeed a responsibility to ensure that domestic courts act reasonably and that in particular their interventions do not strike at the very substance of the right to strike, thus depriving it of its effectiveness»⁷³⁶.

This revision is particularly important in countries where statutory law does not recognise the right to strike but it is guaranteed through an established case-law of the domestic highest courts.

⁷³¹ Conclusions XVIII-1 vol. 1, Croatia, 138.

⁷³² Conclusions Revised ESC, 2002, Romania, 107.

⁷³³ Conclusions XVIII-1, vol. 1, Czech Republic, 227-228.

⁷³⁴ Dissenting opinion of Mr. Evju, joined by Mr. Birk and Mr. Mikkola, conclusions XVIII-1, vol.1, Czech Republic, 247; conclusions XIV-I, the Netherlands Antilles, 595.

⁷³⁵ Decision on the merits, 15 May 2003, collective complaint n. 12/2002, Confederation of Swedish Enterprises v. Sweden, par. 43; Conclusions XII-1, The Netherlands, 85. The State was asked to provide a full translation of the Supreme Court ruling of 23 April 1988 into one of the Council of Europe's official languages, together with any other relevant details of Netherlands' case-law on the application of article 6 par. 4.

⁷³⁶ Conclusions XVII-1 vol. 1, Germany, 205.

Belgium can be cited as an example.

Here judges use the concept of abuse of right or the proportionality criterion to evaluate the appropriateness - and consequently the lawfulness - of strike actions. Through the application of said criteria, the Court is allowed to impose a ban on strikes in the event their harmful effects are considered disproportionate or in case it is ascertain that collective actions could have been organised at a less damaging time with the same effectiveness.

In this eyes of the Committee, the judicial practice restricts the exercise of the right to strike beyond the limits set forth in article 31 of the Charter, because it is not on the judge's side to evaluate the opportunity and the appropriateness of collective actions⁷³⁷.

The danger inherent in the Court's judicial discretion for the protection of social rights lies at the heart of a collective complaint filed by Belgian trade unions in 2009.

They claimed that courts' intervention in collective disputes since 1987 under the so called "*unilateral application procedure*" - particularly in the form of restrictions on the activities of strike pickets - was in breach of the right to strike and to collective action in a manner incompatible with the provisions of the Charter and exceeding the permitted restrictions pursuant to article G⁷³⁸. Under the abovementioned procedure, the Court has the duty to verify the facts as presented by the applicant employer and it is allowed to take a decision *inaudita altera parte*.

De facto, unions may intervene in the procedure after an initial binding decision has been taken and the collective action has been stopped. As a result, unions may be obliged to initiate collective action again, or they must go through a time-consuming appeal procedure.

The Committee considered that the material exclusion of unions from the so called "*unilateral application procedure*" poses the risk that their legitimate interests are not taken into consideration and may lead to the risk of producing unfair or arbitrary results. In this respect, the Committee pointed out that the expression «*prescribed by law*» in article 31 or G of the Charter shall include the requirement that fair procedures exist, a characteristic not mirrored in the Belgian "*unilateral application procedure*". As a consequence, such restrictions to the right to strike cannot even be considered as being «*prescribed by law*».

⁷³⁷ Conclusions XVI-1, vol. 1, Belgium, 71.

⁷³⁸ Collective complaint n. 59/2009, European Trade Union Confederation (ETUC)/Centrale générale des syndicats libéraux de Belgique (CGSLB)/Confédération des syndicats chrétiens de Belgique (CSC)/Fédération générale du travail de Belgique (FGTB) v. Belgium.

Furthermore, in its practical operation the procedure went beyond what was necessary to protect the rights of others by reason of the potential lack of procedural fairness⁷³⁹. On 4 April 2012, the Committee of Ministers adopted the relevant resolution inviting Belgium to bring the domestic situation into conformity with the Charter⁷⁴⁰.

The Committee also reacted against certain domestic judicial practices de facto allowing the judge to exercise certain trade unions prerogatives with the effect of impinging the very substance of the right to strike.

In Germany, for instance, the case-law developed from the principles of “*proportionality*” and “*fairness*” certain rules to be applied in strike cases. Notably from the principle of proportionality, the Federal Labour Court derived three essential requirements to deem a strike lawfully exercised:

«a) the strike must be an adequate and necessary means to achieve lawful objectives in a dispute and bring about labour peace. Furthermore, the strike weapon must only be used as a last resort (ultima ratio); b) the strike must be carried out according to the rules of a fair dispute and must not aim at the elimination of the opponent, however, this does not mean that only the softest means must be used; c) upon termination of the strike, both parties to the collective agreement must contribute to re-establishing labour peace as quickly and as comprehensively as possible».

The application of the principle of proportionality enables German judges to balance the possible benefits deriving from strikes against the harm caused vis-à-vis the employer. According to the Committee, said judicial practice is contrary to the Charter because it has the effect of supplanting the social partners in assessing the appropriateness of taking collective action in view of the circumstances and the interests at stake⁷⁴¹.

Also the Netherlands was criticised for its misuse of the proportionality principle. In the country, a strike may only occur as a last resort and, as a consequence, a Dutch judge is entitled to decide on whether collective action is premature. For the Committee, this practice represents an illegitimate restriction on the right to strike contrary to the Charter because it

⁷³⁹ Decision on the merits, 13 September 2011, Collective complaint n. 59/2009, European Trade Union Confederation (ETUC)/Centrale générale des syndicats libéraux de Belgique (CGSLB)/Confédération des syndicats chrétiens de Belgique (CSC)/Fédération générale du travail de Belgique (FGTB) v. Belgium.

⁷⁴⁰ Resolution CM/ResChs(2012)3, adopted by the Committee of Ministers on 4 April 2012.

⁷⁴¹ Conclusions XVI-1, vol. 1, Germany, 248-249; see, also, concurring opinion of Mr. Aliprantis, conclusions XVII-1 vol. 1, Germany, 225; Conclusions XVI-1, vol.1, The Netherlands, 472-473.

materially allows the judge *«to exercise one of the trade unions' key prerogatives, that of deciding whether and when a strike is necessary»*⁷⁴².

A corollary problem arises in case the Committee is invited to evaluate a situation in which it is alleged a restriction on the right to strike and to take collective action as a consequence of a binding decisions of an international court, not subject to the Council of Europe system.

On 27 June 2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) filed a collective complaint against Sweden on the development of freedom of association and right to take collective action after the European Court of Justice (ECJ) judgement in the Laval case⁷⁴³.

In 2005, a domestic dispute over a collective action - lawful under the Swedish domestic legislation - was brought before the ECJ on the ground that the domestic judge doubted whether national law and practice were compatible with rules of the EC Treaty on the freedom to provide services. The ECJ hold that the right to take collective action is a fundamental right but, when exercised in order to force an undertaking to conclude a collective agreement with certain terms and conditions of employment, it constitutes a restriction on the freedom to provide services. Following the ruling, the Swedish government had to intervene on its domestic legislation - in particular the Swedish Co-determination Act and the Act on Posting of Workers - in order to render it compliant with EU law, as interpreted by the ECJ. The legislative changes had the effect to restrict the right of trade union to resort to collective action, in violation, among others, of article 6 par. 4 of the Revised ESC.

In the case the Committee substantially considered the doctrine established by the European Court of Justice a violation of the principles protected by the Charter and directly challenged the authority of the ECJ:

«The Committee further considers that legal rules relating to the exercise of economic freedoms established by State Parties either directly through national law or indirectly through EU law should be interpreted in such a way as to not impose disproportionate restrictions upon the exercise of labour rights as set forth by, further to the Charter, national laws, EU law, and other international binding standards. [...]

⁷⁴² Conclusions XVII-1, vol. 2, The Netherlands, 319.

⁷⁴³ Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007.

Consequently, the facilitation of free cross-border movement of services [...] cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers. In addition, any restrictions that are imposed on the enjoyment of this right should not prevent trade unions from engaging in collective action to improve the employment conditions, including wage levels, of workers irrespective of their nationality»⁷⁴⁴.

SECTION III - Discrepancies in the protection of the right to strike

The dialogue between the Court and the Committee can certainly reinforce the protection accorded to collective social rights, strengthening the effectiveness and influence of the rights protected by the Convention and the Charter.

For instance, the analysis of the relevant case-law shows that both the Court and the Committee seem prone to include in the scope of the treaties a wide range of collective actions, irrespective of their definition and legal classification.

In this sense, the Committee lead the way: since the Charter is the only instrument that explicitly guarantees the right to strike, its protection has always been considered a fundamental commitment of the supervisory body, whatever the term “*strike*” could mean⁷⁴⁵. An extensive and flexible interpretation of the term “*collective actions*” permitted a protection of different collective operations such as picketing (not only the ones at the worker's own place of work)⁷⁴⁶, ban on overtime⁷⁴⁷, work to rule⁷⁴⁸, go slows⁷⁴⁹, rotating strikes⁷⁵⁰, warning strikes⁷⁵¹.

The European Court of Human Rights, notwithstanding its immature case-law on the topic, took a stance possibly leading to the same result.

In *Dilek and others v. Turkey* it manifestly chose not to speculate about the extent to which article 11 of the Convention grants the right to strike and what is the relevant definition

⁷⁴⁴ Collective complaint n. 85/2012, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, decision on the admissibility and the merits, 3 July 2013, par. 121-122.

⁷⁴⁵ Conclusions XIII-1, 24.

⁷⁴⁶ Conclusions XII-1, United Kingdom, 88; Conclusions XIII-1, United Kingdom, 153-154.

⁷⁴⁷ Conclusions XV-1, vol. 1, Cyprus, 117.

⁷⁴⁸ Conclusions XV-1, vol. 1, Cyprus, 117.

⁷⁴⁹ Conclusions XV-1, vol. 1, Cyprus, 117. See, also, Conclusions XV-1, vol. 2, Spain, 520.

⁷⁵⁰ Conclusions XV-1, vol. 2, Spain, 520.

⁷⁵¹ European Social Charter (Revised), Conclusions 2002, Romania, 106.

(«sans spéculer sur le point de savoir dans quelle mesure l'article 11 de la Convention octroie le droit à la grève et quelle est la définition de ce droit dans le cadre de cet article»⁷⁵²).

However, there are some inconsistencies in the way the two bodies approach certain aspects of the right to take collective actions. This situation can weaken not only the important achievements of the Council of Europe in the social field, but it can also determine a judicial and legislative turmoil in the domestic legal systems, and reduce the coherence and the degree of credibility of the monitoring bodies. Some example can better clarify the claim.

First, there is discordance between the Court and the Committee in the way they handle certain forms of industrial actions, in particular secondary action and political strikes.

The Committee held that secondary actions are covered by the Charter and that any legislation preventing employees from taking industrial action against the *de facto* employer or concerning a future employer and future terms and conditions of employment is in breach of said treaty⁷⁵³. Adversely, the Strasbourg judges supported a “*defensive*” reading of the right to strike. In *Unison* they held that, in the event workers’ employment conditions are not «*at any real and immediate risk of detriment or of being left defenceless against future attempt to downgrade pay or conditions*»⁷⁵⁴, restrictions on strike actions are permissible. In such line of cases, trade unions allegedly remain free to strike or to take any other step in the future, at the time of materialisation of the detrimental treatment.

The established case-law of the Committee provides that article 6 par. 4 of the Charter cannot be relied upon to justify strike action taken for “*political ends*”⁷⁵⁵. An exception to this principle can be derived from the conclusions against Spain, where the Committee seems to support the option taken by Spanish law, according to which strikes to express opposition to the government’s economic and social policy are lawful, while political strikes aimed at subverting the constitutional order are illegal⁷⁵⁶. At a closer look, the interpretation reminds the distinction made by the ILO supervisory bodies between strikes relating to the Government’s economic and social policies, or to protest against major social and economic policy trends which have a direct impact on the workforce, and purely political strikes, the latter falling outside the scope of the principle of freedom of association.

⁷⁵² ECtHR, *Dilek and others v. Turkey*, Applications n. 74611/01, 26876/02 and 27628/02, 30 January 2008, par. 57.

⁷⁵³ Conclusions XII-1, United Kingdom, 88; Conclusions XIII-1, United Kingdom, 153-154; Conclusions XVI-1, vol.2, United Kingdom, 688-689.

⁷⁵⁴ ECtHR, *UNISON v. The United Kingdom*, Application n. 53574/99, 10 January 2002.

⁷⁵⁵ Conclusions II, p. 28. See, also, Conclusions XIII-4, Germany, 351.

⁷⁵⁶ Conclusions XV-1, vol. 2, Spain, 520.

On the contrary, it is still doubtful the Court's approach to actions of a political character. It has been already underlined that at the heart of *Urcan and others v. Turkey*⁷⁵⁷ lies a strike action interpreted by the Court as "*political ideas which challenge the established order*" (*«idées politiques qui contestent l'ordre établi»*⁷⁵⁸). According to the Court, if these ideas are advocated by peaceful means, the State should offer a reasonable opportunity to express them through the exercise of freedom of assembly and by other legal means in order not to deprive article 11 of its content⁷⁵⁹. However, the case-law is too scarce to argue how far the Court could go in the definition and inclusion of political strikes in the scope of article 11 and whether they would be regarded as the exercise of the right to freedom of association or, as the only case on the topic suggests, as the exercise of the right to freedom of peaceful assembly.

A second source of divergence is connected with the permitted restrictions, with particular regard to the timing in which a restriction to the right to strike is introduced.

It has been said that both monitoring bodies consider that a total ban placed on strikes represents a breach of the Council of Europe treaties.

Restrictions, however, are normally tolerated, provided that they satisfy the requirements established by article 11 par. 2 of the Convention and articles 31, G or 6 par. 4 of the Charter⁷⁶⁰. In *Enerji*, for instance, the Court said that a ban on the right to strike placed on officials exercising public authority on behalf of the State is tolerable, provided that it is applied in a narrow sense⁷⁶¹. What does it mean in practice?

A solution is offered by the jurisprudence of the Committee: it held compatible with the Charter a situation in which the right to strike is denied to certain categories of public servants inserted in specific lists and limited to some members of the staff⁷⁶². In the same vein, compulsory arbitration mechanisms to handle strike actions are generally accepted, provided

⁷⁵⁷ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008. In the same vein, also, ECtHR, *Saime Ozcan v. Turkey*, Application n. 22943/04, 15 December 2009.

⁷⁵⁸ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

⁷⁵⁹ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, ar. 32.

⁷⁶⁰ ECtHR, *Dilek and others v. Turkey*, Applications n. 74611/01, 26876/02 et 27628/02, 30 January 2008; ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009, par. 32; Conclusions I, 38; conclusions XII-1, Denmark, 84; Conclusions 2004, Bulgaria, 44; Conclusions 2010, vol. 1, Bulgaria, 186-187.

⁷⁶¹ ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009, par. 32.

⁷⁶² Conclusions XII-1, Iceland, 85.

that the government interference is a proportionate response to the safeguard of rights and freedoms of others and aimed to protect qualified interests of the country⁷⁶³.

The question is at what stage the State is legitimately entitled to intervene.

During the XII supervisory cycle, the Committee considered the Norwegian intervention to end nurses' strike through the statutory establishment of compulsory arbitration not justifiable within the terms of the Charter. One of the reasons was that the Government intervened at the very beginning of the strike, before its effect could be validly assessed⁷⁶⁴.

One might therefore expect that the State should not be entitled to intervene at the very beginning of the strike, when its effect are not validly assessed. But this is not the case.

The Court took a different view in a similar case, *Federation of Offshore Workers v. Norway*⁷⁶⁵. Here the Strasbourg judges held that the State intervention at the beginning of the strike was justified, among others, because the unions had in any case the chance to exercise - for a certain, albeit short, period of time - their rights. Differently than the Committee, the Court did not look at whether the intervention of the State was premature with regard to the concrete effect of the strike action, but limited its evaluation to the fact that workers got the possibility to strike, irrespective of the length of the action.

Since the timing of the intervention seems to make the difference, it would be advisable a clearer description of a common set of elements to take into consideration to determine the proportionality of the State's intervention.

Finally, a further aspect to be considered is the description of the right to strike as an aspect of freedom of association or of freedom of peaceful assembly.

In the paragraphs above it has been argued that, while the Committee is unambiguous in considering the right to strike a corollary of the right to freedom of association, the Court did not take the same approach. In *Enerji*, the strike action is subsumed under the concept of freedom of association. In other cases, the Court does not qualify the abstention from the working activity in terms of "*strike*" but prefers to regard generically in the sense of "*day of action*" under the concept of freedom of peaceful assembly.

⁷⁶³ ECtHR, *Federation of Offshore Workers' Trade Unions and others v. Norway*, Application n. 38190/97, 27 June 2002; Conclusions XII-1, Norway, 86-87; Conclusions 2010, Norway, 474-476.

⁷⁶⁴ Conclusions XII-1, Norway, 86-87.

⁷⁶⁵ ECtHR, *Federation of Offshore Workers' Trade Unions and others v. Norway*, Application n. 38190/97, 27 June 2002.

It would be preferable to have a straightforward approach to the right to strike in order to avoid a different understanding of what a legitimate strike is and construe a consistent system of human rights protection.

Conclusions

In 1979 Valticos claimed for a closer co-operation between different organisations such as the United Nations and the Council of Europe to ensure that *«too many international standards dealing with the same subjects, combined with insufficient co-ordination, do not result eventually in confusion and contradictions»*⁷⁶⁶.

The plea seems to be even more valid in the present days of severe economic and financial crisis, when the battle for the maintenance of workers' rights, often sacrificed for the enhancement of economic competitiveness, is played in a transnational field, in which different actors try to impose their own view for the benefit of particular short-term interests.

As Swiatkowski suggests, in order to cope with the negative effects of the economic globalisation it may be necessary to put the best efforts in the creation of a *«fundamental social rights platform»*⁷⁶⁷ and the Council of Europe seems to have an appropriate armoury to contribute to the project and enhance the protection of social rights.

For some years, their safeguard has been left to a often ignored European Social Charter, deprived of the support of a Court or of a system of individual complaint. However, as it has been affirmed, the ECtHR and its judges *«do not operate in the splendid isolation of an ivory tower built with materials originating solely from the ECHR's interpretative inventions or those of the States party to the Convention»*⁷⁶⁸.

More recently, the Court undertook a judicial approach embracing the protection of socio-economic claims under the catalogue of civil and political rights. In this scenario, ILO international standards had and continue to have an invaluable role to play as a source of both guidance and formal obligations for the creation of a coherent international system of social rights protection. The same role is increasingly played by the other United Nation legal

⁷⁶⁶ N. Valticos, The future prospects for international labour standards, *International Labour Review*, 1979, 6, 695.

⁷⁶⁷ A. Swiatkowski, Resocialising Europe through a European right to strike modelled on the Social Charter?, in N. Countouris, M. Freedland, *Resocialising Europe in a time of crisis*, Cambridge, Cambridge University Press, 2013, 390.

⁷⁶⁸ V. Mantouvalou, Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation, *Human Rights Law Review*, 2013, 3, 529 seq., quoting Rozakis, The European Judge as a Comparatist, *Tulane Law Review*, 2005, 278-279.

sources. Indeed, if the principles developed by the European Committee of Social Rights are compared with the ones established by the Human Rights Treaty Bodies and with the ILO monitoring bodies, it might be possible to see how close their views are in depicting the right to strike.

There are still some discrepancies between the ECtHR and Committee on certain features of the right to strike. Above all, it is not clear whether the Court considers the right to strike as a corollary of the right to freedom of association or whether it should be linked to the right to freedom of peaceful assembly.

Nevertheless, the jurisprudence of the Court is very undeveloped on the topic and such uncertainties can be remedied in the course of the activity in favour of the most protective standard⁷⁶⁹.

The result seems to be desirable for the creation of a coherent regional system capable to fulfil the primary task of the Council of Europe that is *«to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress»*⁷⁷⁰.

⁷⁶⁹ As required by article 32 of the Charter and H of the Revised Charter, reading as follows: *«the provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected»*.

⁷⁷⁰ Article 1 a) of the Statute of the Council of Europe.

Chapter Three - The European Union Framework

The question regarding the relationship between economic freedoms and collective social rights, notably the right to take collective action including strike action, has been raised in the recent years by two cases decided before the European Court of Justice, Viking and Laval. The rulings confirmed the fundamental nature of the rights but construed them as “restrictions” to the exercise of Treaty freedoms, thereby requiring justifications for their exercise also in terms of suitability, necessity and proportionality. Lisbon might have changed this scenario. Freedom of association and the right to strike are fundamental rights protected by the Charter of Fundamental Rights of the European Union. They should be justified as such and their meaning should be the same as they have within supranational systems of human rights protection. A comparative analysis with the international sources and their interpretation might contribute to clarify what kind of right to take collective action and strike should be protected as a fundamental right at the European Union level.

SECTION I - Legal Sources

1.1. The European project and social rights: a functionalist approach

The complete collapse of Europe during the Second World War and its political and economic deterioration created favourable conditions for the establishment of a new European order. In May 1948, during the Congress of Europe in The Hague, representatives of the civil society subscribed the general idea of creating a European Union, committed to the respect of the principles of democracy, justice and human rights. However, there were vague visions of the constitutional contours of the new structure⁷⁷¹, essentially grouped around two rival concepts: federalism and functionalism.

The supporters of the more radical path of federalism were convinced that a political union was the right answer to overcome the consequences of the war period and that a federalist system should have replaced the existing states systems. Some others, notably the French

⁷⁷¹ D. Dinan, *Europe Recast. A history of the European Union*, Houndmills, Palgrave Macmillan, 2004, 23.

politicians Robert Schuman and Jean Monnet, did not dispute the legitimacy of the nation-state but supported the idea of a closer cooperation between European countries in some key economic sectors, whose spill over effect could have possibly led, in the long run, to a political union⁷⁷².

The functionalist approach was formalised in the Schuman plan presented in May 1950⁷⁷³, when the French Foreign Minister proposed to place the Franco-German production of coal and steel under a common High Authority, within the framework of an organization, the future European Coal and Steel Community, open to the participation of the other countries of Europe⁷⁷⁴. He acknowledged that «*Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity*» and, consequently, he maintained that the proposal was not an end in itself⁷⁷⁵, since it would have led «*to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace*».

The failure of the European Defence Community⁷⁷⁶ determined a new impetus for the use of the functionalist method to support the process of economic integration of the European countries as a pre-condition for their future political unity⁷⁷⁷.

At the 1955 Messina Conference, the members of the European Coal and Steel Community turned back to economics⁷⁷⁸ and entrusted an international committee of experts, chaired by the Belgian politician Paul-Henry Spaak, with the task to study the setting up of a common market and the creation of an organisation to supervise the peaceful development of nuclear energy in Europe. The committee reported its conclusions in the so-called “*Spaak Report*”⁷⁷⁹ that influenced the drafting of the Treaties of Rome, signed on 25 March 1957 and entered into force on 1 January 1958, establishing the European Economic Community and the European Atomic Energy Community.

⁷⁷² A. Reinisch, *Essentials of EU Law*, 2nd ed., Cambridge, Cambridge University Press, 2012, 3-4.

⁷⁷³ The full text of the Schuman Declaration can be found at http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm.

⁷⁷⁴ The founding Treaty of the European Coal and Steel Community was concluded on 18 April 1951 in Paris by Belgium, Germany, France, Italy, Luxembourg and the Netherlands for a period of fifty years, and lately incorporated into the European Community at its expiry on 23 July 2002.

⁷⁷⁵ A. Rosas, L. Armati, *EU Constitutional law. An introduction*, 2nd ed., Oxford, Hart Publishing, 2012, 9.

⁷⁷⁶ For an overview of the historical and political reasons that determined the failure of the European Defence Community, R. McAllister, *European Union. An historical and political survey*, 2nd ed., London, Routledge, 2010, 10 seq.

⁷⁷⁷ U. Villani, *Istituzioni di diritto dell'Unione Europea*, 3rd ed., Bari, Cacucci, 2013, 7.

⁷⁷⁸ W. Schwimmer, *The European Dream*, London, Continuum Publishing, 2004, 78.

⁷⁷⁹ *Rapport de Chefs de Delegation aux Ministres des affaires Etrangères*, 21 April 1956.

The Spaak Report conceptualised the idea that the primary focus of the European Economic Community should have been the removal of obstacles to the free movement of labour, goods and capital and, to this extent, it envisaged limited intervention in the social field for the creation of the common market. The basic idea, crystallised in article 117 EEC (article 151 TFEU), was that social progress would have been determined by market mechanism rather than by European legislative intervention, the latter limited to the approximation of domestic provisions:

«Member States agree upon the need to promote improved working conditions and an improved standard of living for workers [...]. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from [...] the approximation of provisions laid down by law, regulation or administrative action».

Deakin provides, among others, for an historical reading of the reasons behind the choice:

«In the mid-1950s, all of the Member States were committed to the maintenance of strong welfare states and the use of legal means to underpin collective bargaining. Most of them had adopted post-war constitutions which recognized the existence of fundamental social rights on a par with (or at least broadly equivalent to) civil and political rights. Cost levels in the national economies of the original six Member States were also broadly aligned»⁷⁸⁰.

The Spaak Report derives many of its conceptions against statutory European intervention in the social field from the earlier Ohlin Report of the ILO Committee of Experts⁷⁸¹.

Notably, the Ohlin Report concerned with the social problems connected to the envisaged closer economic co-operation between European countries, such as:

*«(1) the question whether international differences in labour costs and especially in social charges do or do not constitute an obstacle to the establishment of freer international markets;
(2) the question of what can be done to reduce to a minimum the hardships that closer economic co-operation may involve for persons engaged in particular industries;*

⁷⁸⁰ S. Deakin, Regulatory competition in Europe after Laval, Centre for Business Research, University of Cambridge, Working Paper n. 364, June 2008, 19.

⁷⁸¹ International Labour Office, Social Aspects of European Economic Co-operation, International Labour Review, 1956, 74, 99 seq.

(3) *the question whether, if a freer international market were established, it might be necessary for the countries of Europe to shape and carry out their social policies with a greater degree of international consultation and co-operation than at present ; and*
 (4) *the social problems connected with freer international movement of labour»*⁷⁸².

The Report assumes the existence of a widespread feeling that closer economic co-operation might expose European industries to the risk that competition from countries with lower labour standards may be “*unfair*”. However, it rejects the need of a complete harmonization in social policies because it would be the market itself to level the differences - generally connected to differences in productivity - by letting the price level fall as productivity increases, by fresh investment in export industries, or by revision of the rate of exchange, in a way apt to prevent any phenomenon of lowering labour standards in order to enhance economic competition.

The Report considered that the market adjustment mechanisms would not work in case of genuine “*unfair competition*”, namely when one industry pays much lower wages and social charges than other industries in the same country because it is, to some extent, subsidised. In such circumstances there would have been a case for harmonisation of social conditions and policy in the industry in question⁷⁸³.

The principle was accepted by the Spaak Report and, as it has been noted, it «*became the justification for the inclusion within the Treaty of the well-known provisions relating to equal pay, as well as the largely forgotten and superseded ones concerning working time*»⁷⁸⁴.

The Spaak Report identifies as primary source of market distortion, appropriate for harmonising interventions, differences in salary between men and women, working hour, paid leave and paid overtime:

«parmi le facteur de distorsion, on peut citer, a titre d'exemple, le disparites qui relevent [...] des conditions du travail telles que la relation des salaire

⁷⁸² International Labour Office, Social Aspects of European Economic Co-operation, International Labour Review, 1956, 74, 99-100.

⁷⁸³ International Labour Office, Social Aspects of European Economic Co-operation, International Labour Review, 1956, 74, 104-105.

⁷⁸⁴ C. Barnard, S. Deakin, European Labour Law after Laval, in M. Moreau, Before and after the economic crisis. What implications for the ‘European Social Model’?, Cheltenham, Edward Elgar, 2011, 252 seq., exp. 254.

masculins et feminins, la regime de la duree du travail, des heures supplementaires ou de congè payes»⁷⁸⁵.

Trade union activity was regarded by the founding fathers of the European Union as playing a role for the correct functioning of the common market. It is worth noting that the Spaak Report maintained that, in the framework of the progressive establishment of a common market, the spontaneous harmonisation of social systems and salary levels would be levelled up thanks also to trade union action aimed to obtain the alignment of working conditions⁷⁸⁶. However, the condition for its exercise would have been a matter for the domestic legislator.

1.2. The threat of social dumping

The Ohlin Report recognised that the domestic labour law systems should maintain a specific and autonomous role in fostering the rise of social progress, a principle that affected the subsequent construction of the (rather absent) European intervention in key aspects of labour law.

Indeed, since its early days, the construction of the European Union provides that domestic legal systems should remain the primary sources of social policy initiatives and crucial social rights such as freedom of association and the right to strike are excluded from the Union competences enclosed in the “*Social Policy Title*” of the Treaty on the Functioning of the European Union (TFEU).

In the Ohlin Report it was argued that, albeit international discussions of social problems could have stimulated a desire for social progress particularly for less social developed countries, there was no serious economic argument to sustain neither the need for a “*federal*” intervention in the social field nor that its absence would have favoured a “*race to the bottom*” in domestic labour standards with an aim to compete with other countries with a less developed social conscience⁷⁸⁷. On the contrary, a combination of trade union activity and statutory intervention at the national level would have discouraged such an effect:

⁷⁸⁵ Rapport de Chefs de Delegation aux Ministres des affaires Etrangères, 21 April 1956, 63.

⁷⁸⁶ Rapport de Chefs de Delegation aux Ministres des affaires Etrangères, 21 April 1956, 65.

⁷⁸⁷ International Labour Office, Social Aspects of European Economic Co-operation, International Labour Review, 1956, 74, 110-112.

«more important than this tendency in its effects on workers' living standards [...] would be the more rapid growth of productivity to be expected as a result of the more efficient international division of labour. This would be amply sufficient [...], when account is taken of the strength of the trade union movement in European countries and of the sympathy of European governments for social aspirations, to ensure that labour conditions would improve and not deteriorate»⁷⁸⁸.

The position remained substantially unchanged even after the 1970s, with the adoption of European regulation and directives in the labour law field. These measures, confined to specific aspects of social policy, touched national labour legislation only by introducing the notion of a “*floor of rights*” to be respected transnationally in order to discourage a “*race to the bottom*” between Member States and the threat of “*social dumping*”, possible consequences of the differences in national labour costs. Deakin believes that the term social dumping is quite imprecise phrase to describe a process *«whereby differences in the forms and levels of labour law regulation between countries within a single trading bloc, such as the EC, encourage firms to seek out sources of under-valued labour within less highly-regulated systems. This in turn put pressure on countries with more advanced systems of protection to reduce costs imposed on firms»⁷⁸⁹*. In 1996 he evaluated that greater labour mobility and the gradual implementation of a monetary union would have made “*social dumping*” a more realistic possibility⁷⁹⁰, an assumption that turned to be dramatically true in the present days, sharpened by the eastern enlargement of the European Union to states with lower labour standards and employment costs⁷⁹¹.

⁷⁸⁸ International Labour Office, *Social Aspects of European Economic Co-operation*, International Labour Review, 1956, 74, 112.

⁷⁸⁹ S. Deakin, *Labour Law as market regulation: the economic foundation of the European social policy*, in P. Davies, A. Lyon-Caen, S. Sciarra, S. Simitis, *European Community Labour Law: principles and perspectives*, Oxford, Clarendon Press, 1996, 63 seq., exp. 82.

⁷⁹⁰ S. Deakin, *Labour Law as market regulation: the economic foundation of the European social policy*, in P. Davies, A. Lyon-Caen, S. Sciarra, S. Simitis, *European Community Labour Law: principles and perspectives*, Oxford, Clarendon Press, 1996, 63 seq., exp. 82.

⁷⁹¹ A. Perulli, *Globalizzazione e social dumping: quali rimedi?* in *Lavoro e Diritto*, 2011, 1, 13; S. Sciarra, *Notions of Solidarity in Times of Economic Uncertainty*, in *Industrial Law Journal*, 2010, 3, 223; F. Hendrickx, *Beyond Viking and Laval: The Evolving European Context*, *Comparative Labour Law and Policy Journal*, 2010 - 2011, 1055; C. Barnard, ‘*British Jobs for British Workers*’: *The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market*, in *Industrial Law Journal*, 2009, 3, 245; A. Lo Faro, *La contrattazione collettiva nei paesi newcomers e il modello sociale europeo*, in *Diritti Lavori e Mercati*, 2009, 2, 309; A. Riley, *The Vaxholm Case of Swedish ‘Social Dumping’*, Centre for European Policy Studies, 2008; C. Barnard, *Social dumping or dumping socialism?* in *Cambridge Law Journal*, 2008, 2, 262; J. Malmberg - T. Sigeman, *Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice*, *Common Market Law Review*, 2008, 4, 1115; G. Orlandini, *Autonomia collettiva e libertà economiche: alla ricerca dell’equilibrio perduto in un mercato aperto e in libera concorrenza*, in *WP C.S.D.L.E. “Massimo D’Antona”* 66/2008; B. Uladzislau, *The case of Laval in the Context*

Advocate General Poiares Maduro depicted the impact of social dumping on the labour market as a «*painful consequence*», stemming, inevitably, from the realisation of economic progress through intra-Community trade. However, the same intra-Community trade is the cure for the problem: to sweeten the pill, he clarifies that the market has a capacity to «*generate overall benefits*» and does not turn a blind eye to the workers who are adversely affected by its negative traits. The negative consequences of market integration (which are «*recurring*») should be accepted by workers throughout Europe as «*inherent to the common market's creation of increasing prosperity*»⁷⁹².

Hendrickx distinguishes three types of social dumping, all of them blatantly bearing negative consequences for countries with high working standards⁷⁹³:

- (i) dismantlement, namely the creation of a competitive advantage among Member States through the lowering of labour standards;
- (ii) replacement, namely the creation of a competitive advantage through the replacement of high-cost producers by low-cost producers from countries with lower labour costs;
- (iii) delocalization, namely the creation of a competitive advantage through business relocation, or the threat of business relocation in order to put pressure on collective social partners with an aim to decrease social costs.

Dismantlement, replacement and delocalization are mechanisms for the creation of a competitive advantage to the benefit of public and private actors, acceptable under the institutional construction of the European project. Dismantlement might operate in those fields of labour law that are not affected by European social regulation - such as the consequences of unfair dismissals -, replacement could be regarded as the implementation and legitimate use of the free movement of services protected by article 56 TFEU, delocalization is not more than the exercise of the freedom of establishment pursuant to article 49 TFEU. Nevertheless, their effective implementation has the capacity to transform domestic social law. As it was observed:

of the Post-Enlargement EC Law Development, in German Law Journal, 2008, 2279; P. Davies, Posted Workers: Single Market Or Protection of National Labour Law Systems?, in Common Market Law Review, 1997, 3, 571.

⁷⁹² Opinion of Advocate General Poiares Maduro in International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 57 - 59. On the "sociophageus" nature of economic freedoms, U. Carabelli, Unione Europea e libertà economiche "sociofaghe" (ovvero, quando le libertà di circolazione dei servizi e di stabilimento si alimentano del dumping sociale), in R. Foglia - R. Cosio, Il diritto del lavoro nell'Unione europea, Milano, 2011, 233.

⁷⁹³ F. Hendrickx, Beyond Viking and Laval: The Evolving European Context, Comparative Labour Law and Policy Journal, 2010 - 2011, 1065.

«the common rules relating to the establishment of the common market and its operation have a direct effect on national social policies. Although it was, and still is, proclaimed, the autonomy of these policies is no more than relative given that they are made subject to the rules of the market [...]. In short, national social laws are being eroded in the name of the demands of competition. The erosion is visible and disturbing, and has yet there is no knowing where it will end»⁷⁹⁴.

Already in 1978 Jacobs perceived that the working of the Common Market undermined the national countervailing power of the trade unions⁷⁹⁵. He claimed that:

«in the possibility of diverting production abroad to circumvent the consequences of a strike at home, not only the multinational company but every employer is aided by the creation of the Common Market. The establishment of the free movement of goods, services, capital and persons [...] makes it easier for the employer to temporarily divert his production abroad or to maintain production by making use of foreign labour»⁷⁹⁶.

Moreover, the serious impact of economic freedoms on the labour conditions poses major threats to the so called “*European Social Model*”, a variable concept built upon the principles of good economic performance, high social standards, an eclectic range of policies and separated from the social model of the national systems⁷⁹⁷. Lord Wedderburn doubted about the tightness of European economic and social aspirations in case conflict between labour and capital:

«the social can of course contribute to competitiveness, but when it conflicts with the economic, whatever the rhetoric, it has few friends»⁷⁹⁸.

Recent European developments confirmed that Lord Wedderburn analysis was accurate, and now scholars are questioning themselves on how “*re-socialise*” Europe before it is destined *«to grind to a halt and decay»⁷⁹⁹*.

⁷⁹⁴ S. Simitis, A. Leon-Caen, Community labour law: a critical introduction to its history, in P. Davies, A. Lyon-Caen, S. Sciarra, S. Simitis, European Community Labour Law: principles and perspectives, Oxford, Clarendon Press, 1996, 1 seq., exp. 10-11.

⁷⁹⁵ A. Jacobs, Towards Community action on strike law, in Common Market Law Review, 1978, 133 seq.

⁷⁹⁶ A. Jacobs, Towards Community action on strike law, in Common Market Law Review, 1978, 136.

⁷⁹⁷ C. Barnard, EU Employment law, 4th ed., Oxford, Oxford University Press, 2012, 34-35.

⁷⁹⁸ Lord Wedderburn, Labour law and freedom: further essays in labour law, Lawrence and Wishart, London, 1995, 391.

⁷⁹⁹ N. Countouris, M. Freedland, Resocialising Europe - looking back and thinking forward, in N. Countouris, M. Freedland, Resocialising Europe in a time of crisis, Cambridge, Cambridge University Press, 2013, 494.

1.3. The role of the European Court of Justice (ECJ) in market integration

It should be mentioned that the compression of social rights and the corresponding expansion of economic freedoms found a supporter and protagonist in the European Court of Justice and in the way it developed its legal reasoning in internal market cases, in a manner consistent with the “*economic credo*”⁸⁰⁰ of the European project. In this line of cases, the avoidance of social dumping, if any, becomes not a goal in itself but a possible “*side-effect*” of the correct application of internal market principles.

The reasoning of the Luxembourg Court in internal market cases follows mainly two methodologies: the discrimination approach and the market access or restriction approach⁸⁰¹.

The first is characterised by the application by the ECJ of the anti-discrimination principle on the ground of nationality. European law requires Member States to treat equally - and, therefore, avoid any restriction on - domestic and foreign goods, persons, services and capitals. All the protectionist practices dominating the international arena should be removed⁸⁰², so that domestic and foreign situations would benefit from the same treatment in a given country⁸⁰³.

To ascertain whether a national regulation is discriminatory, the ECJ focuses on the domestic rule and, within the boundaries of the legal system under scrutiny, it compares the position of the locals and the foreigners⁸⁰⁴. If the outcome of the comparison is an impair treatment of the latter, due to the interference of the national regulation in his ability to exercise a freedom protected by the Treaty, then the rule of law should be removed. However, once it is provided that there is no discrimination, how the States regulate the treatment

⁸⁰⁰ R. Blanpain, *European Labour Law*, 12th edition, The Hague, Kluwer Law International, 2010, 204.

⁸⁰¹ C. Barnard, *The substantive law of the EU*, 3rd ed., Oxford, Oxford University Press, 2010, 17.

⁸⁰² M. Poiares Maduro, *We, the Court. The European Court of Justice and the European Economic Constitution*, Oxford, Hart Publishing, 1998, 36.

⁸⁰³ Purely domestic situations remain outside the scope of Union law. See, *Volker Steen v Deutsche Bundespost*, case C-132/93, 16 June 1994; *Hoefner and Elser v Macroton Gesellschaft fuer Datenfassungssysteme mit beschaerlen Haftung*, case C-41/90, 23 April 1991; *Morson and Jhanjan v State of the Netherlands*, joined Cases 35-36/82, 27 October 1982; *Regina v Saunders*, case 155/78, 10 June 1980.

⁸⁰⁴ Even if it is not easy to establish a comparison between situations that should not be comparable by definition, in this sense, C. Barnard, *Restricting restrictions: lessons for the EU from the US?*, *Comparative Law Journal*, 2009, 3, 583; D. Wilsher, *Does Keck discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market*, *European Law Review*, 2008, 1, 3.

remains a purely domestic matter and therefore the autonomy of the national labour systems is respected⁸⁰⁵.

For instance, the French Code du Travail Maritime required that the majority of the crew of a ship must be of French nationality⁸⁰⁶. The Luxembourg Court found this was a direct discrimination because the provision determined an impair treatment of nationals of other Member States, who were prevented from exercising their right to free movement pursuant to article 48 of the Treaty (article 45 TFEU). It took into consideration the requirement imposed by the French legislation, the position of French workers and the one of foreign workers, the fact that, in relation to the French rule under scrutiny, the position of the latter was impair due to the element of nationality and, finally, that the nationality requirement was in breach of Treaty provisions. According to the Court, the abolition of any discrimination based on nationality has a double effect: to allow in each State *«equal access to employment to the nationals of other Member States»* and to avoid social dumping, by *«guaranteeing to the State's own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other member states of conditions of employment or remuneration less advantageous than those obtaining under national law, since such acceptance is prohibited»*⁸⁰⁷.

A more refined version of the discrimination approach is considered the double burden theory. According to this theory, only one set of rules should apply to the migrant element, otherwise it would have to satisfy both the regulatory standards of the Member State of origin

⁸⁰⁵ Under the discrimination approach, there is a “*hand off*” attitude of the Court, because a discrimination theory necessarily implies a *«recognition of the legitimacy of national regulation per se and in its own right, independently of the specific substantive values that an individual piece of regulation might embody»*; see, N. Bernard, *Discrimination and Free Movement in EC Law*, *International and Comparative Law Quarterly*, 1996, 1, 103. For a further analysis of the non-discrimination test, G. De Burca, *Unpacking the concept of discrimination in EC and International trade law*, in C. Barnard and J. Scott, *The Law of the Single European Market: Unpacking the Premises*, Oxford, Hart Publishing, 2002, 181.

⁸⁰⁶ *Commission of the European Communities v French Republic*, case 167/73, 4 April 1974.

⁸⁰⁷ *Commission of the European Communities v French Republic*, case 167/73, 4 April 1974, par. 45. The same approach is used in the event of indirect discrimination. The Grand Duchy of Luxembourg made the payment of childbirth and maternity allowances conditional upon requirement of prior residence on its territory for a period of at least one year. The Court, focusing again on the domestic legal system under scrutiny, held that such a requirement affected both national and migrant workers but, in practice, nationals could more easily meet the obligation. Therefore, it concluded that the residence requirement was, among others, in breach of article 52 of the Treaty (article 49 TFEU) that *«confers on nationals of one Member State who wish to pursue activities as self-employed persons in another Member State the benefit of the same treatment as the host State's own nationals and prohibits any discrimination based on nationality»*. As a consequence, any measure that *«hinders nationals of other Member States in their pursuit of an activity as a self-employed person by treating nationals of other Member States differently from nationals of the country concerned»* should be prohibited; see, *Commission of the European Communities v Grand Duchy of Luxembourg*, case C-111/91, 10 March 1993, exp. par. 10, 17.

and those of the Member State of destination⁸⁰⁸. Generally, the double burden theory encounters limits in free movement of workers and freedom of establishment cases. Once the migration is completed, said cases cease to be regulated by the country of origin, so that the Court's interpretation should be limited to ascertain the existence of a discrimination⁸⁰⁹.

The second approach affecting the reasoning of the ECJ is the market access or restrictions approach⁸¹⁰. It is considered the pivotal concept in free movement cases⁸¹¹, even if it is doubtful whether the new approach entirely superseded the discrimination model «*although it may be true that much of the conceptual work of the core discrimination principle identifying impermissible trade barriers was done in the earlier of the years of the Community existence*»⁸¹².

According to this theory, internal market requires the elimination not only of any discrimination but also of any “*restriction*” imposed on economic actors which might prevent them from *access* the market of another Member State to exercise their economic activity. Advocate General Jacobs explained that, from the point of view of the Treaty's concern to establish a single market, discrimination is not a helpful criterion because «*restrictions on*

⁸⁰⁸ E. Spaventa, From Gebhard to Carpenter: towards a (non) economic European constitution, in *Common Market Law Review*, 2004, 3, 745. For example, in *ASBL v Willy van Wesemael and others* more than one set of rules (domestic and foreign) applied to the French service provider. A Belgian national was charged for having resorted to a fee-charging employment agency situated in France for the purpose of engaging entertainers, the operator of which did not hold a specific license required in Belgium to place a person in employment. Likewise, the French national was charged for having placed persons in employment in Belgium without acting through an agency holding a specific license in that territory. By applying the double burden theory, the Court stated that when the pursuit of an activity is made subject, in the country of origin, to certain requirements, that host State may not impose on a service provider established in another member state any obligation to satisfy that requirements, provided the requirements existent in the country of origin are comparable to those of the host State and the activities are subject «*to proper supervision covering all employment agency activity whatever may be the member state in which the service is provided*». See, *ASBL v Willy van Wesemael and others*, joined cases 110-111/78, 18 January 1979, exp. par. 39.

⁸⁰⁹ E. Spaventa, From Gebhard to Carpenter: towards a (non) economic European constitution, in *Common Market Law Review*, 2004, 3, 746.

⁸¹⁰ The terms are synonymous, as emphasised in *Commission v Republic of Italy*, case C-518/06, 28 April 2009, par. 64. See also, E. Johnson, D. O'Keefe, From discrimination to obstacles to free movement: recent developments concerning the free movement of workers 1989-1994, in *Common Market Law Review*, 1994, 6, 1331.

⁸¹¹ S. Weatherill, After Keck: some thoughts on how to clarify the clarification, *Common Market Law Review*, 1996, 33, 885; C. Barnard, Fitting the remaining pieces into the goods and persons jigsaw?, *European Law Review*, 2001, 1, 35; M. Poiars Maduro, Harmony and Dissonance in Free Movement, in M. Andenas, W. Roth, *Services and Free Movement in EU Law*, Oxford, Oxford University Press, 2001, 41; *contra*, J. Snell, The notion of market access: a concept or a slogan?, *Common Market Law Review*, 2010, 47, 437.

⁸¹² G. De Burca, Unpacking the concept of discrimination in EC and International trade law, in C. Barnard and J. Scott, *The Law of the Single European Market: Unpacking the Premises*, Oxford, Hart Publishing, 2002, 183. In the same sense, C. Hilson, Discrimination in Community free movement law, in *European Law Review*, 1999, 24, 445 who believes more appropriate to apply a discrimination test in certain case and a market access test in others.

*trade should not be tested against local conditions [...] but against the aim of access to the entire Community market»*⁸¹³.

Briefly, to apply the rule of reason the case has to:

- (i) present a transnational element, otherwise it is considered a purely domestic matter, and the application of Community law is precluded⁸¹⁴.

However, in internal market cases, an actual inter-state movement is not anymore necessary as far as it is possible to determine it even potentially⁸¹⁵. In the field of goods, the Court claimed that Treaty provisions on free movement cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member State⁸¹⁶. It is the potential for market entry that counts and that Member States must maintain at all times⁸¹⁷. The approach taken by the Court is very broad and might leave up the possibility to invoke the breach of Treaty provisions to challenge a rule also when it presents a “*potential*” - instead of an actual - cross border element, consequently allowing the ECJ to verify whether the rule determines a restriction of the economic freedoms. The risk inherent in the possible wide application of the principle⁸¹⁸ was caught by the European legislator in the early draft of the Monti II Regulation⁸¹⁹. Article 2 par. 3 of the proposed Regulation stated that:

⁸¹³ Opinion of Advocate General Jacobs in *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA*, case C-412/93, 9 February 1995, par. 40

⁸¹⁴ A. Tryfonidou, *The Free Movement of Goods, the Overseas Countries and Territories, and the EU's Outermost Regions: Some Problematic Aspects*, *Legal Issues of Economic Integration*, 2010, 4, 325; A. Tryfonidou, *In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?*, *Common Market Law Review*, 2009, 5, 1594; I. Kvesko, *Is there Anything Left Outside the Reach of the European Court of Justice?*, *Legal Issues of Economic Integration*, 2006, 4, 405; C. Ritter, *Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234*, *European Law Review*, 2006, 5, 690-710; N. Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*, *Common Market Law Review*, 2002, 4, 731.

⁸¹⁵ *Alpine Investments BV v Minister van Financiën*, case C-384/93, 10 May 1995; *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo*, joined cases C-51/96 and C-191/97, 11 April 2000; *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*, case C-405/98, 8 March 2001; *Freskot AE v Elliniko Dimosio*, case C-355/00, 22 May 2003; *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, case C-36/02, 14 October 2004.

⁸¹⁶ *Jacques Pistre*, joined cases C-321/94, C-322/94, C-323/94 and C-324/94, 7 May 1997, par. 44 - 45.

⁸¹⁷ *S. Enchelmaier*, *Always at your service (within limits): the ECJ's case-law on article 56 TFEU (2006-11)*, *European Law Review*, 2011, 618.

⁸¹⁸ C. Barnard, *EU Employment law*, Oxford, Oxford University Press, 2012, 211.

⁸¹⁹ *Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services*, 2011/EMP/093, http://www.cgil.it/Archivio/Giuridico/Draft_Monti_Regulation.pdf, accessed on 11 April 2013.

«when cross border elements are lacking or hypothetical, any collective or industrial action shall be assumed prima facie not to constitute a violation of the freedom of establishment or the freedom to provide services and therefore in principle be legitimate and lawful under Union law. This presumption is rebuttable and without prejudice to the conformity of the collective action with national law and practices».

The article was deleted in the later proposal of 21 March 2013⁸²⁰;

- (ii) fall within the scope of European law;
- (iii) comprise a measure allegedly restricting market access. In *Säger*⁸²¹ the Court made clear that article 49 of the Treaty (article 56 TFEU) requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any *restriction*, even if not discriminatory, *«when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services»*⁸²². In the event a Member State makes the provision of services in its territory subject to compliance with all the national conditions required for establishment, the same free movement principle would be deprived of its practical effectiveness⁸²³.

Under the restriction approach the ECJ identifies, as the principal regulator, the country of origin instead of the host State, so that the model would better apply in goods and services cases rather than in cases regarding free movement of workers and freedom of establishment⁸²⁴ in which, once the migration is completed, the Court's interpretation should, in principle, be limited to ascertain the existence of a discrimination.

⁸²⁰ Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM 2012 130 final.

⁸²¹ The case regards a UK company providing a patent-renewal alert service, that offered its assistance in Germany without holding the special licence required in that State to pursue the activity; see, *Manfred Säger v Dennemeyer & Co. Ltd.*, case C-76/90, 25 July 1991. An early idea of this approach was expressed in *Webb*, case 279/80, 17 December 1981, par. 16 - 17, where the Court stated that *«it does not mean that all national legislation applicable to nationals of that state and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other member states. [...] The freedom to provide services is one of the fundamental principles of the treaty and may be restricted only by provisions which are justified by the general good and which are imposed on all persons or undertakings operating in the said state in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the member state of his establishment».*

⁸²² *Manfred Säger v Dennemeyer & Co. Ltd.*, case C-76/90, 25 July 1991, par. 12.

⁸²³ Notably the ECJ said that: *«in particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services»*; *Manfred Säger v Dennemeyer & Co. Ltd.*, case C-76/90, 25 July 1991, par. 13.

⁸²⁴ C. Barnard *Internal Market v. Labour Market: a Brief History*, in M. De Vos, *European Union Internal Market and Labour Law: Friends or Foes?*, Intersentia, Antwerp-Oxford, 2009, 24; L. Daniele, *Non-discriminatory restrictions to free movement of persons*, *European Law Review*, 1997, 3, 191.

Nonetheless, the Court applied the approach in question also in free movement of workers and freedom of establishment cases.

*Commission v Denmark*⁸²⁵ is an example of the application of the principle in free movement of workers cases. Danish government required company cars registered abroad to pay a tax prior to circulate in the country. Said tax could have discouraged undertakings established in other Member States from employing workers resident in Denmark due to the additional labour costs deriving from the tax and for this reason Danish rules were found in breach of free movement provisions because of their capacity to affect the access of workers to the labour market⁸²⁶.

As far as freedom of establishment is concerned, in *Kraus*⁸²⁷ the ECJ observed that the freedom of establishment precludes any national measure that would constitute a restriction by reason of its *potential* adverse repercussions on the economic attractiveness of pursuing certain occupations⁸²⁸; indeed, any measure «*liable to hamper or to render less attractive*»⁸²⁹ the exercise of the freedom by Community nationals should be removed.

So construed, a market access test is highly intrusive in the domestic legal systems, since it is capable to subject all social regulation to judicial scrutiny because «*all such measure by their very nature have an impact on trade*»⁸³⁰. While under the discrimination test the scrutiny of the Court is limited to the discriminatory element with the aim to harmonise the market by depriving Member States of protectionist practices, under the restriction test any rule imposed by a State could be a restriction to economic freedoms.

Moreover, recent internal market cases endorsed the principle according to which individuals are entitled to directly invoke the breach of free movement provisions against other private entities (direct horizontal effect).

Normally, in internal market cases the interlocutor of the Court should be the State or, at the latest, a body having public nature; indeed, free movement provisions are addressed to the Member States and, in principle, it is against the State that a possible infringement of Treaty provisions should be enforced. On the contrary in *Angonese* the Court held article 45 TFEU directly applicable to individual employers because

⁸²⁵ *Commission v Kingdom of Denmark*, case C-464/02, 15 September 2005.

⁸²⁶ *Commission v Kingdom of Denmark*, case C-464/02, 15 September 2005, par. 36.

⁸²⁷ *Dieter Kraus v Land Baden-Württemberg*, case C-19/92, 31 March 1993.

⁸²⁸ *Dieter Kraus v Land Baden-Württemberg*, case C-19/92, 31 March 1993, par. 21 - 22.

⁸²⁹ *Dieter Kraus v Land Baden-Württemberg*, case C-19/92, 31 March 1993, par. 32.

⁸³⁰ M. Poiares Maduro, *Reforming the market or the State? Article 30 and the European Economic Constitution: Economic freedom and Political process*, in *European Law Journal*, 1997, 3, 57.

«the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down»⁸³¹.

Accordingly, in relation to a provision of the Treaty which was mandatory in nature, it was said that the prohibition of discrimination applies *«equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals»⁸³².*

Other cases in which the ECJ claimed for the horizontal direct applicability of Treaty freedoms concerned sporting associations⁸³³, because, even if not governed by public law, they exercise a certain degree of legal autonomy as private regulatory body in the sport's field, or trade unions⁸³⁴.

⁸³¹ Roman Angonese v Cassa di Risparmio di Bolzano SpA, case C-281/98, 6 June 2000, exp. par. 34.

⁸³² Roman Angonese v Cassa di Risparmio di Bolzano SpA, case C-281/98, June 2000, exp. par. 34.

⁸³³ See, Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman, case C-415/93, 15 December 1995; J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, interveners: Raad van de Balies van de Europese Gemeenschap, case C-309/99, 19 February 2000; B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo, case 36/74, 12 December 1974; Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue Belge de judo ASBL, Union européenne de judo and François Pacqué, joined cases C-51/96 and C-191/97, 11 April 2000.

⁸³⁴ International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007; Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet's avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007. In Viking, Advocate General Póitares Maduro devoted 27 paragraphs (from 29 to 56) to explain why the provisions on free movement should directly apply to private parties such as the trade unions. He relied in particular on the previous case-law of the Court and on the alleged nature of the trade unions as quasi-public bodies. In Laval, Advocate General Mengozzi came at the same conclusion of Viking, mainly through a particular reading of the 96/71 Directive as a "specific interpretation" of article 49 EC Treaty in the light of the case-law of the Court. On the problem concerning the direct applicability of the principles of freedom of establishment and freedom to provide services, see, among others, A. Dashwood, Viking and Laval: issues of horizontal direct effect, Cambridge Law Journal, 2007 - 2008, 525; A. C. L. Davies, Right to Strike versus Freedom of Establishment in EC Law: The Battle Commences, Industrial Law Journal, 2006, 1, 75; C. Barnard, Viking and Laval: An Introduction, Cambridge Yearbook of European Legal Studies, 2007-2008, 1, 463; T. Novitz, A Human Rights Analysis of the Viking and Laval Judgments, Cambridge Yearbook of European Legal Studies, 2007-2008, 1, 541; J. Malmberg - T. Sigeman, Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice, Common Market Law Review, 2008, 4, 1115; C. Krenn, A Missing Piece in the Horizontal Effect Jigsaw: Horizontal Direct Effect and the Free Movement of Goods, Common Market Law Review, 2012, 1, 177; R. O'Donoghue, B. Carr, Dealing with Viking and Laval: From Theory to Practice, Cambridge Yearbook of European Legal Studies, 2008 - 2009, 123; M. Ronnmar, Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the Laval Case from a Swedish and Nordic Perspective; Cambridge Yearbook of European Legal Studies, 2007-2008, 493.

The horizontal application of articles 49 and 56 TFEU endorsed in *Viking* and *Laval*⁸³⁵ turned to be detrimental to the effectiveness of the right to take collective action since it opened up the possibility to claim trade unions liability (instead of State liability) for the violation of Treaty freedoms⁸³⁶.

The potential domestic application of this principle came in early 2008⁸³⁷.

British Airways decided to set up a subsidiary based in France called OpenSkies with the purpose of flying Europe-US routes. The British Airline Pilot Association (BALPA) opposed the relocation and, in the framework of specific conciliation procedures, tried to find an agreement with the company on terms and conditions of employment following the implementation of the said business project⁸³⁸. The conciliation failed and BALPA promoted strike action, with the vast majority of employees voting in favour of the strike.

The airline company decided to request an injunction before the High Court, based upon the argument that the action would be unlawful according to Community law, as interpreted in *Viking* and *Laval*. BALPA did not accept this argument and, rather than announce strike dates, referred itself the matter to the High Court to seek a declaratory ruling regarding the lawfulness of the strike action. In analogy with the principle expressed in *Viking* and *Laval*,

⁸³⁵ International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007; Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007.

⁸³⁶ K. Apps, Damage claims against trade unions after *Viking* and *Laval*, in *European Law Review*, 2009, 1, 141; E. Saccà, Nuovi scenari nazionali del caso *Laval*. L'ordinamento svedese tra responsabilità per danno "da sciopero" e innovazioni legislative (indotte), in WP C.S.D.L.E. "Massimo D'Antona", 86/2010; M. Ronnmar, *Laval* Returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms, *Industrial Law Journal*, 2010, 3, 280; J. Malmberg, Trade Union Liability for Eu-Unlawful Collective Action, *European Labour Law Journal*, 2012, 1, 5; J. Malmberg, N. Bruun, Sanctions for 'EU-unlawful' Collective Action, FORMULA Working Paper, 37/2012, <http://www.jus.uio.no/ifp/english/research/projects/freemov/publications/papers/2012/WP37-Malmberg-Bruun.pdf>, accessed on 11 April 2013; P. A. Perinotto, *Viking* and *Laval*: an Italian perspective. A case of no impact, in *European Labour Law Journal*, 2012, 4, special issue.

⁸³⁷ K. D. Ewing, Decisions of the European Court of Justice: Implications for UK labour law, Institute of employment rights, 2009, http://www.ier.org.uk/system/files/Decisions+of+the+ECJ+and+implications+for+UK+laws_0.pdf, accessed on 11 April 2013; K.D. Ewing - J. Hendy, The Dramatic Implications of *Demir* and *Baykara*, *Industrial Law Journal*, 1, 2010, 44-46; G. Orlandini, Gli effetti della sentenza *Viking* ovvero l'insostenibile incertezza delle regole, in A. Andreoni, B. Veneziani, Libertà economiche e diritti sociali nell'Unione Europea. Dopo le sentenze *Laval*, *Viking*, *Ruffert* e *Lussemburgo*, Roma, Ediesse, 2009, 180; N. Countouris, M. Freedland, Injunctions, cyanamid and the corrosion of the right to strike in the UK, *European Labour Law Journal*, 2010, 4, 489; J. Prassi, To Strike, to Serve? Industrial Action at British Airways. *British Airways plc v Unite the Union* (Nos 1 and 2), *Industrial Law Journal*, 2011, 82; R. Zimmer, Labour market politics through jurisprudence: the influence of the judgements of the European Court of Justice (*Viking*, *Laval*, *Ruffert*, Luxembourg) on labour market policies, *German policy studies*, 2011, 7, 211; A. De Salvia, La proposta di Regolamento Monti II in materia di sciopero, in *Rivista Italiana di Diritto del Lavoro*, 2012, 3, 265.

⁸³⁸ The arbitration and conciliation procedure was held before ACAS, a UK advisory and conciliation service.

British Airways opposed that the Court should determine the legitimacy and proportionality of the strike action and that, should the strike take place, it would claim damages estimated at £100 million per day. BALPA withdrew the dispute and the threatened strike action, stating that it would risk bankruptcy if it were required to pay the purported damages.

Some national Courts expressed concern regarding the horizontal direct applicability of Treaty freedoms. The Swedish Judge Kurt Eriksson, member of the Swedish Labour Court that decided on the amount of damages the Swedish trade unions had to pay to Laval for the harm caused by the industrial action taken in violation of Community law⁸³⁹, rendered the following dissenting opinion:

«the EC-Treaty is directed primarily to the Member States. It therefore is not give that statements made in judgements by the European Court of Justice as to the Member States' liability for the damages as against private parties in the event of violation of a Treaty by the State can directly be transferred to the situation in the case concerning damage liability between private parties in the event of violation of a treaty»⁸⁴⁰.

In Caixa Bank⁸⁴¹ Advocate General Tizzano warned the Court that said interpretation of Treaty freedoms would offer private actors significant leeway to abuse of them *«in order to oppose any national measure that, solely because it regulated the conditions for pursuing an economic activity, could in the final analysis narrow profit margins and hence reduce the attractiveness of pursuing that particular economic activity»⁸⁴²*. A purpose for which the Treaty was not intended and that could determine private actors to target all Member States markets on the basis of their home regulation, and pick the Member State with the lowest regulatory requirements for their establishment⁸⁴³.

⁸³⁹ Stockholm Labour Court, judgment n. 89/09, case n. A 268/04, 2 December 2009, in M. Ronnmar, Labour law, fundamental rights and social Europe, Oxford, Hart Publishing, 2011, 227 seq.

⁸⁴⁰ See, courtesy translation of the case by Laura Carlson in M. Ronnmar, Labour law, fundamental rights and social Europe, Oxford, Hart Publishing, 2011, 274 - 275.

⁸⁴¹ CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie, case C-442/02, 5 October 2004.

⁸⁴² Opinion of Advocate General Tizzano, CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie, case C-442/02, 5 October 2004, par. 62.

⁸⁴³ S. K. Schmidt, Who cares about nationality? The path-dependence case-law of the ECJ from goods to citizens, Journal of European Public Policy, Special Issue, 2012, 1, 11. See also, F. W. Scharpf, The asymmetry of European integration, or why the EU cannot be a 'social market economy', in Socioeconomic Review, 2010, 2, 211; S. Deakin, Regulatory Competition in Europe after Laval, ESRC Centre for Business Research, Working Paper 364/2008; S. Deakin, Legal Diversity and Regulatory Competition: Which Model for Europe?, European Law Journal, 2006, 4, 440; C. M. Radaelli, The Puzzle of Regulatory Competition, Journal of Public Policy, 2004, 1, 1; J. Sun, J. Pelkmans, Regulatory competition in the single market, Journal of Common Market Studies, 1995, 1, 67.

Moreover, the principle would have a disruptive effect on the contractual freedom of private parties in establishing rules regulating their conducts. Orlandini criticised the ECJ for having equalised a collective agreement to a restriction of market freedoms. He observed that an agreement arising from bargaining between a foreign undertaking and national trade unions cannot be considered restricting the access to the market, because, in this case, *«the undertaking whose economic and market freedom is restricted is a party to the same agreement. Stating that the agreement is unlawful, because of its “restricting” a market freedom, is equivalent to arguing that this freedom cannot be restricted, not even by a voluntary act of disposition of the undertaking entitled to that freedom. Hence, the rule of the Treaty would not only have a horizontal direct effect, but it would also acquire the value of a ‘mandatory rule’»*⁸⁴⁴.

Advocate General Tizzano tried to make a distinction between measures which directly affect market access and measures that have the effect to reduce profits and to render the exercise of an economic activity less attractive, arguing that only in the first case (measures directly affecting market access) it would be possible to claim a restriction of economic freedoms⁸⁴⁵. In his view, the approach above described *«makes it possible to reconcile the objective of merging the different national markets into a single common market with the continuation of Member States’ general powers to regulate economic activities»*⁸⁴⁶.

Nevertheless, the ECJ remained on the path that not only the direct influence of a measure on market access but, also, its attitude to render it less attractive, may determine a violation of Treaty freedoms⁸⁴⁷. However, it also acknowledged that the potential broad application of the market access test required an adequate filtering mechanism for the judicial review⁸⁴⁸.

⁸⁴⁴ G. Orlandini, Trade unions rights and market freedoms: the European Court of Justice sets out the rule, in *Comparative Labour Law and Policy Journal*, 2007-2008, 593.

⁸⁴⁵ In this sense, also *Alpine Investments BV v Minister van Financiën*, case C-384/93, 10 May 1995; *Volker Graf v Filzmoser Maschinenbau GmbH*, case C-190/98, 27 January 2000.

⁸⁴⁶ Opinion of Advocate General Tizzano, *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie*, case C-442/02, 5 October 2004, par. 68.

⁸⁴⁷ *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94, 30 November 1995, par. 37. See also *Dieter Kraus v Land Baden-Württemberg*, case C-19/92, 31 March 1993, par. 32; *Arblade and Others*, joined cases C-369/96 and C-376/96, 23 November 1999, par. 33; *Centros Ltd v Erhvervs - og Selskabsstyrelsen*, case C-212/97, 9 March 1999, par. 34; *Finalarte Sociedade de Construção Civil Lda and Others v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft and Others*, joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, 25 October 2001, par. 28-30; *Mazzoleni and Inter Surveillance Assistance SARL*, case C-165/98, 15 March 2001, par. 22; *Portugaia Construções Lda*, case C-164/99, 24 January 2002, par. 16.

⁸⁴⁸ T. Tridimas, *The general principles of EU law*, 2nd edition, Oxford, Oxford University Press, 2006, 139. See also, T. Harbo, *The Function of the Proportionality Principle in EU Law*, *European Law Journal*, 2010, 16, 2,

To this extent, in Gebhard⁸⁴⁹ the Court listed four conditions that national rules have to fulfil to be considered compatible with Treaty freedoms:

- (i) they should be applied in a non-discriminatory manner. In addition, national rules whose effect of Treaty freedoms is too uncertain and indirect cannot be regarded as liable to hinder the access to the market⁸⁵⁰;
- (ii) they should be justified by imperative requirements in the general interest. The Court considered acceptable justifications the protection of workers⁸⁵¹, the prevention of social dumping or unfair competition⁸⁵² and the protection of the labour market from disturbances⁸⁵³;
- (iii) they should be suitable for securing the attainment of the objective which they pursue;
- (iv) they should not go beyond what is necessary in order to attain it. The condition has a double implication: the measure should be *necessary* - no less restrictive alternatives are available to achieve the same result (the least restrictive alternative test) - and it should *not go beyond* what is necessary - in other words, it does not have to impose on the individual a disproportionate or excessive burden (so called proportionality *stricto sensu*). Authors noted that while the concepts of suitability and necessity are more clearly determined, proportionality *stricto sensu* is much nebulous principle, that potentially leaves great room for the Court to inform the proportionality analysis with a strong substantial bias of merging different markets into a common one⁸⁵⁴. Although proportionality gives the Court a constraint in terms of procedure to be followed, it allows a great margin of discretion to decide a case either way.

The rule of reasoning adopted by the Court in cases where four freedoms are at stake is a powerful tool for merging different markets into a single one but it has also a potential disruptive effect on social rights. If a strict market access analysis is used in cases of conflict between the economic and the social, there is a risk that matters left to the competence of the

158; E. Ellis, *The principle of proportionality in the laws of Europe*, Oxford, Hart publishing, 1999; G. de Burca, *The principle of proportionality and its application in EC Law*, Yearbook of European Law, 1993, 113.

⁸⁴⁹ Dieter Kraus v Land Baden-Württemberg, case C-19/92, 31 March 1993, par. 32; Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, 30 November 1995, par. 37.

⁸⁵⁰ Volker Graf v Filzmoser Maschinenbau GmbH, case C-190/98, 27 January 2000.

⁸⁵¹ Alfred John Webb, case 279/80, 17 December 1981; Rush Portuguesa Lda v Office national d'immigration, case C-113/89, 27 March 1990.

⁸⁵² Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix, case C-60/03, 12 October 2004; Commission of the European Communities v Federal Republic of Germany, case C-244/04, 19 January 2006.

⁸⁵³ Commission of the European Communities v Grand Duchy of Luxembourg, case C-445/03, 21 October 2004.

⁸⁵⁴ T. Tridimas, *The general principles of EU law*, 2nd ed., Oxford, Oxford University Press, 2006, 193; P. Craig - G. de Burca, *The evolution of EU Law*, Oxford, Oxford University Press, 2011, 371-380.

Member States, such as the exercise of collective social rights, would *de facto* receive a European (de)regulation via the back door, in breach of the “*institutional balance*” the Court has to assure⁸⁵⁵.

The reforms undertaken in Nordic countries in order to comply with the ECJ decisions in Viking and Laval can be cited as an example⁸⁵⁶.

The principles established in said cases determined Sweden to set up a Governmental Committee (the Laval Committee) to study possible amendments to the Swedish Co-Determination Act 1976 and the Posting of Workers Act 1999, in a way to reconcile the Swedish interest in preserving its labour system and the European free movement of services principle. In November 2009, the Swedish Government put forward a legislative proposal approved by the Swedish parliament on 24 March 2010 (Lex Laval). Under the new legislation, industrial actions against foreign companies operating in Sweden in support of the rights of posted workers are justified if the conditions demanded by trade unions correspond to the minimum “*core conditions*” laid down in collective agreements generally applied in the relevant sector as provided by article 3 par. 8 of the 96/71 Directive. On the contrary, collective action is not justified if posted workers enjoy in their home countries of conditions similar to the ones established by Swedish collective agreements. The burden of proof to show the similar treatment is on the employer’s side.

Also in Denmark a “*Laval Commission*” was established after the judgements. The Commission proposed amendments to the Danish Posting of Workers Act in order to comply with the restrictions imposed on the right to strike by the Luxembourg Court.

The new regulation - entered into force on 1 January 2009 - allows Danish trade unions to use collective action against foreign employers aimed to conclude a collective agreement on pay. The action is lawful if (i) the demanded wage corresponds to the one paid for similar

⁸⁵⁵ P. Syrpis, *Theorising the relationship between the judiciary and the legislature in the EU internal market*, in P. Syrpis, *The judiciary, the legislature and the EU internal market*, Cambridge, Cambridge University Press, 2012, 3 seq., exp. 14.

⁸⁵⁶ See, N. Bruun and C. M. Jonsson, *Country report - Nordic countries*, in A. Bückler - W. Warneck, *Viking – Laval – Ruffert: Consequences and policy perspectives*, <http://www.etui.org/Publications>, 18; K. Ahlberg, *Laval case brings new Swedish law*, *Nordic Labour Journal*, April 2010; B. Nystrom, *Final decision in the Laval case*, *European Labour Law Journal*, 2010, 1, 276; R. Zimmer, *Labour market politics through jurisprudence: the influence of the judgements of the European Court of Justice (Viking, Laval, Ruffert, Luxembourg) on labour market policies*, *German policy studies*, 2011, 7, 211; E. Saccà, *Nuovi scenari nazionali del caso Laval. L’ordinamento svedese tra responsabilità per danno “da sciopero” e innovazioni legislative (indotte)*, in WP C.S.D.L.E. “Massimo D’Antona”, 86/2010; A. De Salvia, *Le conseguenze del caso Laval sul sistema svedese di relazioni industriali*, in *Sociologia del Diritto*, 2011, 3, 92.

works in Denmark, (ii) pay is clearly regulated by a nationwide collective agreement, (iii) the terms of which are communicated to the foreign service provider.

Some scholars endorsed the market-based construction of social rights claiming that, even in the event social rights are attracted in the principles regulating the internal market, Community competences do not take the place of national competences but they allow Member States to evaluate their policies in a transnational context and adapt the same to the objectives of integration⁸⁵⁷.

On the contrary, some others hold that the European integration created asymmetry between social and market policies, and while economic policies have been progressively “Europeanized”, social policies remained at the national level. The effect is that *«national welfare states are constitutionally constrained by the ‘supremacy’ of all European rules of economic integration, liberalization and competition law»*⁸⁵⁸. To re-establish an equilibrium between social and market policies it would be necessary to re-establish a constitutional parity between the rules of the European economic integration and the national rules in the social field, since uniform European social policy is not politically feasible or even desirable⁸⁵⁹.

Fredman argues that *«the power of the market will always subordinate social rights where there is a conflict with efficiency, unless there is a bedrock of fundamental rights which owe their genesis to fairness and justice for its own sake»*⁸⁶⁰.

Only in recent times the European Union started to commit itself to the effective respect of fundamental rights, including freedom of association and the right to strike, by means of their codification. However, the process began under different auspices.

⁸⁵⁷ J. Weiler, *The constitution of Europe : Do the new clothes have an emperor? and other essays on European integration*, Cambridge University press, 1999, 47 – 50; L. Azoulay, *The court of justice and the social market economy: the emergence of an ideal and the conditions for its realization*, *Common Market Law Review*, 2008, 5, 1342. The approach underpins the outcome of Viking and Laval rulings; see, M. Dani, *I diritti dei lavoratori tra costituzionalismo statale e diritto del mercato unico Europeo*, in S. Borelli - A. Guazzarotti - S. Lorenzon, *I diritti dei lavoratori nelle carte europee dei diritti fondamentali*, Jovene, Napoli, 2012, 99.

⁸⁵⁸ F. Scharpf, *The European social model: coping with the challenges of diversity*, *Journal of common market studies*, 2002, 4, 666.

⁸⁵⁹ F. Scharpf, *The European social model: coping with the challenges of diversity*, *Journal of common market studies*, 2002, 4, 645.

⁸⁶⁰ S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford, Oxford University Press, 2008, 66-67.

1.4. The exclusion of the right to strike from the European social policy

The Community excluded the right to strike from its social policy granting it a sort of “immunity” from European intervention.

During the 1970s there was a significant attempt to redress the European project toward social objectives and support the evolution of the common market into a genuine Community «with a human face»⁸⁶¹. The social policy was «for too long been the Cinderella of European Community policy»⁸⁶² and the 1974 Social Action Programme⁸⁶³ was seen as the major turning point toward the attainment of full and better employment, improvement of living and working conditions and increased involvement of management and labour in the economic and social decisions of the Community, and of workers in the life of undertakings.

Political attempts to introduce European norms on strike law were experienced. On December 1974, the Communist member of the European Parliament Carpentier, proposed the following amendment to the draft Resolution on multinational undertaking and Community regulation:

«11a) Requests that European legislator should eliminate the obstacles existing in certain countries to manifestations of solidarity between trade unions, in particular those taking the form of sympathy strikes»⁸⁶⁴.

The proposal - which echoed the voice of certain scholars arguing that «the logical correlative of a freedom of trans-national movement for ‘capital’ would be a legal right of trans-national collective industrial action for ‘labour’»⁸⁶⁵ - did not receive support, but the “social wave” brought into the European scene a number of directives to lay down minimum

⁸⁶¹ M. Shanks, Introductory article: the social policy of the European Communities, *Common Market Law Review*, 1977, 4, 375 seq., at 378.

⁸⁶² M. Shanks, Introductory article: the social policy of the European Communities, *Common Market Law Review*, 1977, 4, 375.

⁸⁶³ Council Resolution of 21 January 1974 concerning a social action programme, OJ C 13, 12 February 1974.

⁸⁶⁴ A. Jacobs, Towards Community action on strike law, *Common Market Law Review*, 1978, 141.

⁸⁶⁵ Lord Wedderburn, Multi-national Enterprise and National Labour Law, *Industrial Law Journal*, 1972, 19.

standard in matters such as collective dismissals⁸⁶⁶, transfer of undertaking⁸⁶⁷ and insolvency events⁸⁶⁸.

In addition, during this period the Commission studied solutions to reinforce the protection of fundamental rights at European level and reached the conclusion that the accession of the European Communities to the European Convention on Human Rights was the desirable option to choose⁸⁶⁹.

The proposal would have accommodated the ideals of those who claimed for a Community action on strike law and suggested that, if European institutions were unable to define the scope of the right to strike, then a solution would have been to refer the Member States to the authoritative interpretation of the European Court of Human Rights, provided that the latter was available to revise its jurisprudence on article 11 of the Convention⁸⁷⁰.

However, the strong commitment to the creation of a more social Europe faded away in some years due to the political opposition of the UK conservative government⁸⁷¹, and it was only at the end of the 1980s, along the lines of the new social vigour brought by the 1986 Single European Act, that the idea to create a catalogue of basic social received fresh impetus⁸⁷².

In 1989, the Charter of the Fundamental Social Rights of Workers was signed by all Member States except UK and embedded a commitment towards the respect of basic social rights.

Article 11 of the Charter recognised the right of employers and workers to constitute professional organisations or trade unions *«for the defence of their economic and social interests»* and the freedom to join or not to join such organisations. Article 12 provided for the right to negotiate and conclude collective agreements *«under the conditions laid down by national legislation and practice»*. The Charter acknowledged also the right to resort to strike

⁸⁶⁶ Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 048, 22 February 1975.

⁸⁶⁷ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61, 5 March 1977.

⁸⁶⁸ Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 283, 28 October 1980.

⁸⁶⁹ Commission Memorandum, Accession of the Communities to the European Convention on human rights, Bulletin of the European Communities, Supplement 2/79, COM (79) 210 final, 2 May 1979.

⁸⁷⁰ A. Jacobs, Towards Community action on strike law, Common Market Law Review, 1978, 149-150.

⁸⁷¹ C. Barnard, EU Employment law, Oxford, Oxford University Press, 2012, 9 seq.

⁸⁷² J. Kenner, EU Employment law. From Rome to Amsterdam and beyond, Oxford, Hart Publishing, 2003, exp. 109 seq.

limited, on the model of German-Nordic countries, to the case of conflict of interests. Its exercise was made subject only to domestic law and collective agreements, and the Community was deprived of any power of intervention. Article 13 provided that:

«the right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements».

The Charter encouraged also the establishment and utilisation of conciliation, mediation and arbitration procedures in order to facilitate the settlement of industrial disputes.

Notwithstanding the Charter of the Fundamental Social Rights of Workers was not provided with binding legal effects⁸⁷³ it constituted a programmatic document for the social policy initiatives undertaken by the Commission during early 90's⁸⁷⁴.

Article 28 of the Charter provided for further actions to be taken in order to implement the basic rights contained in the document:

«The European Council invites the Commission to submit as soon as possible initiatives which fall within its powers, as provided for in the Treaties, with a view to the adoption of legal instruments for the effective implementation, as and when the internal market is completed, of those rights, which come within the Community's area of competence».

In the communication concerning its action programme for the implementation of the Charter of the Fundamental Social Rights of Workers⁸⁷⁵, the Commission explained that its proposals *«relate to only part of the issues raised in certain articles of the draft Charter»* and the right to freedom of association and strike were not included into the catalogue. The Commission decided to respect the autonomy of the Member States in these fields because *«the affirmation of these principles is vital in the field of industrial relations which largely control relations between the two sides of industry in firms and more widely on the labour market»*⁸⁷⁶. The Community legislator showed deference for trade unions activity and for the role of the Member States in defining the rules regulating the exercises of collective rights

⁸⁷³ L. Betten, The EU Charter of Fundamental Rights: a Trojan Horse or a Mouse?, International Journal of Comparative Labour Law and Industrial Relations, 2001, 157-158.

⁸⁷⁴ S. Giubboni, I diritti sociali fondamentali nell'ordinamento comunitario. Una rilettura alla luce della carta di Nizza, Diritto dell'Unione Europea, 2003, 2-3, 325.

⁸⁷⁵ Communication from the Commission concerning its action programme relating to the implementation of the community charter of basic social rights for workers, COM/89/568 final.

⁸⁷⁶ Communication from the Commission concerning its action programme relating to the implementation of the community charter of basic social rights for workers, COM/89/568 final.

and it claimed that the problems deriving from the application of these principles should have been settled directly by the two sides of industry or, where appropriate, by the Member States⁸⁷⁷.

The subsequent 1992 Agreement on Social Policy, annexed to the Social Policy Protocol to the Treaty on the European Union, formalised the exclusion of those matter from European intervention. It acknowledge the desire of the Member State to implement the Charter of the Fundamental Social Rights of Workers and entrusted the Community with the power to support and complement the activities of the Member States in a number of social fields, excluding the areas of pay, right of association, right to strike or right to impose lock-outs (article 2 par. 6 of the Agreement on Social Policy).

It appears that a political rather than a legislative decision⁸⁷⁸ lies at the heart of the marginalisation of those core labour matters from receiving a European dimension. The clause was embodied in the Treaty to persuade Britain to agree to the Social Chapter and, even when it was clear it would not agree, the provision remained because the «*majority of the Member States were untroubled by the prospect of inactivity in this area*»⁸⁷⁹.

Article 137 par. 6 of the Amsterdam Treaty (now article 153 par. 5 TFEU) preserved the rationale and the wording of article 2 par. 6 of the Agreement on Social Policy, although it refers as a source of inspiration to reach the social aims of the Community both to the Charter of the Fundamental Social Rights of Workers and the European Social Charter.

As it has been argued, the reference made by the Amsterdam Treaty to these two documents underpins a certain degree of inconsistency in the construction of the European

⁸⁷⁷ The asserted “*hand off*” attitude of the Commission in the field of industrial relations seems to clash with the path taken by the ECJ in Viking and Laval, where the Court did not consider the right to strike exempt from judicial scrutiny and provided national judges not only with the tools to address the internal case but, de facto, with a well-refined decision on the merit. Tridimas defines Viking as a “*guidance*” case, namely a case where the ECJ sets parameters and provides the national court with guidelines which it must take into account in resolving the dispute; see. T. Tridimas, Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction, International journal of constitutional law, 2011, 3, 737.

⁸⁷⁸ See on this point, S. Sciarra, Collective agreements in the hierarchy of European Community sources, in P. Davies - A. Lyon-Caen - S. Sciarra - S. Simitis, European Community labour law: principles and perspectives, Liber amicorum Lord Wedderburn of Charlton, Oxford, Clarendon Press, 1996, who reminds that the ambiguity of the Social Chapter lies in the British dislike for it and it was «*the eventual outcome of a long and often hard battle fought by two protagonists of the 1980s: Jacques Delor on one side and Margaret Thatcher on the other, both of them simultaneously symbols and protagonists of political commitment and strong, albeit opposing beliefs on social policy*», 193.

⁸⁷⁹ B. Ryan, Pay, trade union rights and European Community law, International Journal of Comparative Labour Law and Industrial Relations, 1997, 13, 308 - 309.

social plan⁸⁸⁰. The European Social Charter provides a central role for the effective exercise of collective social rights, protects the right of workers and employers to take collective action and to strike within the limits set forth by collective agreements⁸⁸¹, and entails the States' obligation to actively pursue the effective realisation of said rights by all appropriate means, both national and international in character⁸⁸².

So, while the European Union should theoretically refrain from any form of intervention on industrial action, at the same time it should foster its social aims under the influence of documents requiring a direct statutory intervention for the enhancement of socio-economic rights⁸⁸³.

In this sense, it should be cited a further attempt to give strike law a European dimension.

In January 1997, before the signing of the Amsterdam Treaty, the European Parliament presented to the Committee on Social Affairs and Employment a study conducted by Professor Bercusson on "*Trade union rights in the EU Member States*" together with a "*Draft Report on trade union rights*" containing the request to delete from the Treaty the exclusion of European competences on strike⁸⁸⁴ and the request to insert the following amendment:

«The right to resort to collective action in the event of a conflict of interests shall include the right to strike at national and transnational level, in particular when transfrontier workers are affected by employment policies pursued by the undertaking where they are employed. In order to facilitate the settlement of transnational industrial disputes the establishment and utilisation at the appropriate levels of conciliation, mediation and arbitration procedures should be encouraged»⁸⁸⁵.

However, the proposed amendments were not integrated in the Amsterdam Treaty and the list of exclusions remained unaltered.

⁸⁸⁰ B. Ryan, Pay, trade union rights and European Community law, in *International Journal of Comparative Labour Law and Industrial Relations*, 1997, 13, 309; C. Barnard, *EC Employment law*, Oxford, Oxford University Press, 2000, 18; T. Novitz, *International and European protection of the right to strike*, Oxford, Oxford University Press, 2003, 161.

⁸⁸¹ European Social Charter, article 6 par. 4.

⁸⁸² European Social Charter, part I.

⁸⁸³ The tension between the Union duty of abstention on industrial actions and a theoretical call for intervention remained unvaried in the Treaty of Nice, that amended only the paragraph number, from par. 6 to par. 5 of article 137 EC Treaty, now article 153 par. 5 TFEU.

⁸⁸⁴ S. Clauwaert, *European Framework Agreements: "nomina nuda tenemus" or what's in a name? Experiences of the European Social Dialogue*, in I. Schomann, R. Jagodzinski, G. Boni, S. Clauwaert, V. Glassner, T. Jasper, *Transnational collective bargaining at company level. A new component of European Industrial relations?*, Brussels, European Trade Union Institute, 2012, 117 seq., exp. 145-148.

⁸⁸⁵ Quoted by S. Clauwaert, *International / Transnational Primary and Secondary Collective Action*, DWP 2002.01.01 (E), 16.

1.5. Multiple readings on article 153 par. 5 TFEU

More specifically, article 153 TFEU provides that, with a view to achieving the objectives of article 151 TFEU⁸⁸⁶, the Union shall support and complement the activities of the Member States in a number of social fields such as working environment, working conditions, social security and social protection of workers, termination of the employment relationship, information and consultation, collective defence of the interests of workers and employers, equality between men and women with regard to labour market opportunities and treatment at work and so on. To this end, the European Parliament and the Council may adopt, through specific legislative procedures, measures to encourage cooperation between Member States (excluding any harmonisation of the laws and regulations of the Member States) or directives laying down minimum requirements for gradual implementation.

In particular, paragraph 5 reads as follow:

«the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs».

The formula is by no means clear and it is questionable whether it should be intended as it is providing a total exemption of the Community action in the field, among others, of strike and lock-out, or if it has to be read in a narrow sense, so that the Union enjoys the opportunity to intervene on the base of Treaty provisions different than article 153 TFEU or in the field of collective actions different than strike and lock-out.

Opinions on this point are divergent.

⁸⁸⁶ According to article 151 TFEU *«The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy. They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action».*

According to one view⁸⁸⁷, article 153 par. 5 TFEU should be interpreted in a broad way as excluding, *inter alia*, the right to take collective action from any form of European intervention, an idea in principle compatible with the choice expressed by the Member States in the Agreement on Social Policy⁸⁸⁸ and in the Charter of the Fundamental Social Rights of Workers⁸⁸⁹.

Secondary Community legislation supports, to a certain extent, said interpretation.

Recital 4 of the 2679/98 Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States (so called Monti I Regulation)⁸⁹⁰ provides that the measures facilitating the free movement of goods «*must not affect the exercise of fundamental rights, including the right or freedom to strike*».

Article 2 of the Regulation states as follows:

«the Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States».

In similar terms, the Recital 22 of the 96/71 Directive concerning the posting of workers in the framework of the provision of services⁸⁹¹ says:

«this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions».

⁸⁸⁷ U. Carabelli, Il contrasto tra le libertà economiche fondamentali e i diritti di sciopero e di contrattazione collettiva nella recente giurisprudenza della Corte di giustizia: il sostrato ideologico e le implicazioni giuridiche del principio di equivalenza gerarchica, Studi sull'integrazione europea, 2011, 2, 225. According to the Author, Viking and Laval should have been dismissed by the ECJ because the "logical reading" of article 137 par. 5 is that it excludes any regulatory competence of the Union on strike. In his view, the Court also interpreted article 28 of the Charter of Fundamental Rights of the European Union in a specious way. In the same vein, also M. V. Ballestrero, Europa dei mercati e promozione dei diritti, in WP C.S.D.L.E. "Massimo D'Antona", 55/2007, 15; G. Fontana, Libertà sindacale in Italia e in Europa. Dai principi ai conflitti, in WP C.S.D.L.E. "Massimo D'Antona", 78/2010, 55; A. Andreoni, Sciopero, contratto collettivo e diritti dell'economia: la svolta politica della Corte di Giustizia, in A. Andreoni - B. Veneziani, cit., 85, who holds an exclusive competence of the Member States on strike pursuant to article 137 par. 5.

⁸⁸⁸ Article 2 par. 6 of the Agreement on Social Policy.

⁸⁸⁹ Article 13 of the Charter states that the right to resort to collective action, including the right to strike, shall be subject only to the obligations «*arising under national regulations and collective agreements*».

⁸⁹⁰ Council Regulation (EC) n. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, OJ L 337, 12 December 1998.

⁸⁹¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21 January 1997.

Finally, also the Recital 14 of the 2006/123 Directive on services in the internal market⁸⁹² excludes any impact on the relations between social partners, including the right to strike and to take industrial action exercised «*in accordance with national law and practices which respect Community law*».

Therefore, if possible limits to the right to strike could derive only from the legislation of the Member States, then the right to strike should fall outside the scope of European law and be ring-fenced from market dynamics resulting from the exercise of Treaty provisions such as freedom of establishment and freedom to provide services.

According to a second view⁸⁹³, article 153 par. 5 TFEU has to be interpreted in a narrow sense, as an exception to the general rule providing for European intervention in the social field⁸⁹⁴. The effect is that, in principle, article 153 par. 5 TFEU would not totally prevent uniform regulation on strike, being possible to base the intervention on other Treaty provisions. Possible grounds for a (theoretical) construction of said intervention are identified in article 115 TFEU (article 94 EC Treaty) or article 352 TFEU (article 308 EC Treaty)⁸⁹⁵.

This view seems confirmed by certain line of cases which favoured a restrictive interpretation of article 153 par. 5 TFEU⁸⁹⁶:

«According to Article 2(6) of the agreement on social policy, which is reproduced in Article 137(5) EC, as amended by the Treaty of Nice, the provisions of that article 'shall not apply to pay, the right of association, the right to strike or the

⁸⁹² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27 December 2006.

⁸⁹³ See, B. Ryan, Pay, trade union rights and European Community law, *International Journal of Comparative Labour Law and Industrial Relations*, 1997, 13, 314; C. Barnard, S. Deakin, In search of coherence: social policy, the single market and fundamental rights, in *Industrial Relations Journal*, 2000, 4, 335; B. Ryan, The Charter and collective labour law, in T. Hervey - J. Kenner, *Economic and social rights under the EU charter of fundamental rights: a legal perspective*, Oxford, Hart Publishing, 2003, 85; T. Novitz, *International and European protection of the right to strike*, Oxford, Oxford University Press, 2003, 162, who anyway warns that «*the principle that the specialised treaty base should prevail makes this course of action unlikely and potentially open to challenge by Member States*»; T. Novitz, *The European Union and international labour standards: the dynamics of dialogue between EU and the ILO*, in P. Alston, *Labour rights as human rights*, Oxford, Oxford University Press, 2005, 218; B. Bercusson, *European labour law*, 2nd edition, Cambridge, Cambridge University Press, 2009, 243.

⁸⁹⁴ R. Blanpain, *European Labour Law*, The Hague, Wolters Kluwer, 2010, 154.

⁸⁹⁵ However, under article 156 TFEU, with a view to achieving the objectives of article 151 TFEU, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields in matters such as the right of association. The possibility may temper the exclusion of the right of association from EU competences. In this sense, B. Bercusson, *European Labour Law and the EU Charter of Fundamental Rights*, Baden-Baden, Nomos, 2006, 158-159.

⁸⁹⁶ Lotti and Matteucci, *Joined Cases C-395/08, C-396/08*, 10 June 2010, par. 35; Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud, *Case C-307/05*, 13 September 2007 par. 39; *Impact v Minister for Agriculture and Food and Others*, *Case C-268/06*, 15 April 2008, par. 122.

right to impose lock-outs'. However, as the Court has already held in relation to Article 137(5) EC, since that provision derogates from paragraphs 1 to 4 of that article, the matters reserved by paragraph 5 must be interpreted strictly so as not to affect unduly the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 136 EC»⁸⁹⁷.

Advocate General Mengozzi in his opinion in Laval⁸⁹⁸ endorsed a more nuanced view on article 153 par. 5 TFEU.

In his opinion, the wording and the part of the Treaty in which article 153 par. 5 TFEU is located suggests a narrow interpretation of the same, in the sense that it seeks only to exclude the right to strike from measures adopted by the European institutions in the matters listed in article 153 par. 1 TFEU and, in any case, according to the procedure described in article 153 par. 2 TFEU⁸⁹⁹. The list of exclusions should be considered exhaustive, with no possibility to extend the alleged immunity more generally to all collective action⁹⁰⁰. Moreover, if, *per absurdum*, it were permissible to interpret the reference to the right to strike and to impose lock-outs as extending more generally to the right to take collective action, the provision would only exclude the adoption by the Community institutions of directives laying down minimum requirements governing the right to take collective action. On top, he doubts there are other permissible legal bases in the Treaty to adopt measures designed to approximate the laws of the Member States in this field *«if the effectiveness of article 137 (5) EC is to be upheld»*⁹⁰¹.

These readings of article 153 par. 5 TFEU present some limitations.

Regarding the first view, even if the absolute exclusion of the right to strike from European intervention might respond to the institutional construction of the European project and has the effect to protect the industrial relations traditions of the Member States, it does not seem consistent with the letter of norm stating that:

⁸⁹⁷ Lotti and Matteucci, Joined Cases C-395/08, C-396/08, 10 June 2010, par. 35.

⁸⁹⁸ Opinion of Advocate General Mengozzi in Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 54 - 57.

⁸⁹⁹ Opinion of Advocate General Mengozzi in Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 54.

⁹⁰⁰ Opinion of Advocate General Mengozzi in Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 56.

⁹⁰¹ Opinion of Advocate General Mengozzi in Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 57.

«the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs».

Article 153 par. 5 does not say that the provisions of “*this Treaty*” shall not apply to the right to strike, hence, the literal argument runs against a total ban on “*federal*” intervention on industrial actions. Indeed the exclusion of the right to strike was inserted in a specific separate agreement, the Agreement on Social Policy, and it might be claimed that the incorporation of the same in the Treaty does not automatically reconnect the list of exclusions to the whole Treaty provisions, save expressly provided.

In addition, the possible reference to secondary Community legislation to support a broad interpretation of article 153 par. 5 TFEU seems quite fragile⁹⁰².

First of all, with regard to the ban on Community intervention on pay, it should be considered that the same Recital 16 of the 96/71 Directive provides as follows:

«there should also be some flexibility in application of the provisions concerning minimum rates of pay and the minimum length of paid annual holidays».

To assure a certain degree of flexibility, the Directive states that:

«when the length of the posting is not more than one month, Member States may, under certain conditions, derogate from the provisions concerning minimum rates of pay or provide for the possibility of derogation by means of collective agreements».

Of course, the Directive does not directly provide a transnational regulation on pay; however it shows that the topic, although equally included in article 153 par. 5 TFEU, is not absolutely shielded from Community influence⁹⁰³.

Secondly, it is worthy to recall that the proposal for the 2679/98 Regulation submitted by the Commission on 26 November 1997⁹⁰⁴ did not mention any exclusion of European powers in the field of industrial action; on the contrary, it expressly provided a mechanism by which

⁹⁰² G. Orlandini, The free movement of goods as possible ‘Community’ limitation on industrial conflict, *European Law Journal*, 2000, 4, 341, who welcomes the exclusion of the right to strike contained in Monti Regulation but, at the same time, he sees market integration as a possible source of corrosion of the same.

⁹⁰³ In this sense, but referring to directives on equal pay and equal treatment adopted on the base of article 308 EC Treaty, see B. Bercusson, *European labour law*, 2nd ed., Cambridge, Cambridge University Press, 2009, 243.

⁹⁰⁴ Proposal for a Council Regulation (EC) creating a mechanism whereby the Commission can intervene in order to remove certain obstacles to trade, COM(97) 619 final.

the Community was entitled to intervene in order to remove obstacles to trade. In case the principle of free movement of goods was not ensured *«in particular, where the action is taken by private individuals and the Member State fails to implement any necessary and proportionate measure available to it for safeguarding the free movement of goods»*⁹⁰⁵, it was possible for the Commission to *«address a decision to the Member State directing it to take the necessary and proportionate measures to remove the said obstacles, within a period which it shall fix»*⁹⁰⁶.

In the same vein, also the very first draft of the 96/71 Directive did not provide for a specific immunity of collective action from Community competences⁹⁰⁷. Moreover, Recital 14 of the 2006/123 Directive on services prescribes that the right to take industrial action should be exercised in accordance with national law and practices *«which respect Community law»*. Therefore, it might be held that, even if apparently the European Union does not have power of direct intervention on industrial action, there are rooms for - at least - a possible European scrutiny on the exercise of collective social rights limited to the compatibility between European law and national rules and practices regulating labour conflicts.

Finally, article 28 of the Charter of Fundamental Rights of the European Union states that:

«workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action».

If it was true that article 153 par. 5 TFEU provided an absolute interdiction of Community competences on the right to strike, then there would have been no need to include the reference to “*Union law*” in article 28 of the Charter of Fundamental Rights of the European Union. Moreover, the explanation on article 28 of the Charter clarifies that the article is based on article 6 of the European Social Charter and on points 12 to 14 of the Community Charter of the Fundamental Social Rights of Workers⁹⁰⁸. Both documents claim for statutory protection and intervention in order to secure the effective exercise of the right to strike and

⁹⁰⁵ Recital 4 of the Proposal.

⁹⁰⁶ Article 2 of the Proposal.

⁹⁰⁷ Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM (91) 230 final.

⁹⁰⁸ Explanations relating to the Charter of Fundamental Rights, 14 December 2007, 2007/C 303/02.

are recalled by article 152 TFEU as a source of inspiration for the social actions to be undertaken pursuant to article 153 TFEU.

Also the second reading of article 153 par. 5 TFEU as allowing a (theoretical) federal intervention on the right to strike on the base of article 115 TFEU (article 94 EC Treaty) or article 352 TFEU (article 308 EC Treaty) has some uncertain points.

As a general rule, the Union is entitled to exercise its powers «*within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*»⁹⁰⁹.

The “*check list*”⁹¹⁰ of EU “*social*” powers is contained in a specialised session, namely title X (headed “*Social Policy*”), whose article 153 par. 5 TFEU excludes the right to strike from positive Community measures, at least if adopted under article 153 TFEU itself.

In principle, article 115 TFEU (article 94 EC Treaty) allows the Council «*acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market*».

However, article 115 TFEU (article 94 EC Treaty) is contained in title VII, providing «*common rules on competition, taxation and approximation of laws*». Therefore it might be questionable whether it is possible to intervene on social matters by means of an instrument enclosed in a Treaty session different than Title X. And even if it would be possible to accept social directives based on article 115 TFEU (article 94 EC Treaty), they would be issued “*for the approximation*” of laws, regulations or administrative provisions of the Member States, an aim that can hardly fit with the ban for the Council to adopt “*harmonising*” measures, as contained in Title X, article 153 par. 2 a) TFEU⁹¹¹.

The same European legislator does not seem to endorse the use of article 115 TFEU. The recent Monti II Regulation⁹¹², meant as a remedy for Viking and Laval, based a possible

⁹⁰⁹ Article 5 TUE (former article 5 EC Treaty).

⁹¹⁰ A. Dashwood, The limits of European Community powers, *European Law Review*, 1996, 2, 116.

⁹¹¹ The terms approximation and harmonisation are interchangeable. Dashwood, explicitly states: «*I had better say at once that, if the authors of the Treaty meant something different by the terms “harmonisation” and “approximation”, which are used in different Articles, they were too clever for the Community legislator, for the Court of Justice and for me. In practice, the terms are entirely interchangeable*»; see, A. Dashwood, The limits of European Community powers, *European Law Review*, 1996, 2, 120.

⁹¹² Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM (2012), 130 final. The proposal was withdrawn in September 2012. See, M. Rocca, Proposal for a (so-called) Monti II Regulation on the Exercise of

European intervention on article 352 TFEU (former article 308 EC Treaty)⁹¹³. The justification for such a choice is the case-law of the ECJ that *«have clearly shown that the fact that Article 153 [TFEU] does not apply to the right to strike does not as such exclude collective action from the scope of EU law»*⁹¹⁴.

However, the argument proposed for the use of article 352 TFEU is not convincing for a number of reasons.

First, because article 352 TFEU anchors the Union action to the *«framework of the policies defined in the Treaties»* and the Proposed Regulation does not refer to any of the policies defined in the Treaties⁹¹⁵ but it has to ground the use of article 352 TFEU on the case-law.

Secondly, because the fact that in Viking and Laval the ECJ included collective actions in the scope of EU law does not automatically entail there are ground for a positive intervention on the matter on the base of Treaty provisions such as article 352 TFEU.

It is however true that the same Treaty base was used for adoption of the 2679/98 Regulation. On this point the Economic and Social Committee in his opinion on the proposed Regulation⁹¹⁶ opposed the use of article 235 (now article 352 TFEU) as a legal basis. It said:

the Right to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services: Changing without Reversing, Regulating without Affecting, European Labour Law Journal, 2012, 1, 19; A. De Salvia, La proposta di Regolamento Monti II in materia di sciopero, Rivista Italiana di Diritto del Lavoro, 2012, 3, 265; F. Fabbrini - K. Granat, «Yellow Card, But No Foul»: The Commission Proposal for an EU Regulation on the Right to Strike and the Reaction of the National Parliaments under the Subsidiarity Protocol, Common Market Law Review, 2013, 115.

⁹¹³ Article 352 TFEU provides that: *«If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union»*. The Proposal justified the adoption of article 352 TFEU in the following sense: *«Article 352 TFEU (reserved for cases where the Treaties do not provide the necessary powers to implement actions necessary, under the policies defined in the Treaties, to attain one of the objectives of the Treaties) is the appropriate legal basis for the proposed measure»*; see Proposal, 10.

⁹¹⁴ Proposal, above, 11.

⁹¹⁵ The European legislator seems aware of the necessity to refer to the policies of the Treaty. In page 3 of the Proposed Regulation it explained: *«in defining and implementing its policies and activities, the European Union must take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection and the fight against social exclusion. Moreover, with the Treaty of Lisbon, the enshrinement of fundamental rights in primary law has been strengthened by the fact that the Charter of Fundamental Rights of the European Union now has the same legal value as the Treaty»*.

«in the ESC's view, the Commission - in conjunction with the Member States - should frame arrangements to make prompt use of the procedure provided for in Treaty Article 169⁹¹⁷, especially in cases of obstacles to trade requiring a speedy solution, instead of opting for Article 235 as legal basis. Article 235 should not be used, purely and simply because of its subsidiary nature».

Furthermore, some considerations should be formulated also in relation to the interpretation of Mengozzi regarding article 153 par. 5 TFEU.

In order to support his conclusions in *Laval*, he claims that *«it is not certain that the reservation in article 137 par. 5 EC [...] extends more generally to all collective action»*⁹¹⁸ without giving a precise definition of what a strike or a collective action is. In addition, to give a more solid ground to his interpretation, he tries with a *contrario* argument and takes into consideration the possibility that the reference to the right to strike in article 153 par. 5 would extend more generally to the right to take collective action⁹¹⁹. Even in such case, he believes that the provision would only exclude the adoption, by Community institutions, of directives laying down minimum requirements governing the right to take collective action. He does not say, however, which other measures might be permissible and how these measures should work, keeping in mind that under article 153 par. 5 TFEU the Council may adopt or directives or other measures, provided the latter do not foster any harmonisation of the law of the Member States.

The weakness inherent in the construction of article 153 par. 5 turned to be a fertile ground for the expansion of market integration mechanisms in a field, such as the one of collective social rights, which was originally designed to be left to the competence of the Member

⁹¹⁶ See, Opinion of the Economic and Social Committee on the Proposal for a Council Regulation creating a mechanism whereby the Commission can intervene in order to remove certain obstacles to trade, 98/C - 214/24.

⁹¹⁷ If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

⁹¹⁸ Opinion of Advocate General Mengozzi in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, Case C-341/05, 18 December 2007, par. 56.

⁹¹⁹ Opinion of Advocate General Mengozzi in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, Case C-341/05, 18 December 2007, par. 57.

States⁹²⁰. However, the Treaty of Lisbon opened new scenarios for the enhancement the right to strike in a European dimension.

1.6. The protection of fundamental rights in the European Union

The codification of fundamental rights at the European Union level is relatively a recent phenomenon, that could constitute a bedrock to contain the power of market dynamics⁹²¹.

According to Cartabia⁹²², the lack of a catalogue of fundamental rights in the founding Treaties of the European Communities might be ascribed, on the one hand, to the limited scope of the treaties and their prevalent economic nature⁹²³ and, on the other hand, to the desire of the founding father of the European Union to attribute to the Member States the power to guarantee the respect of fundamental rights through their national Constitutions, the constitutional courts and their judicial apparatus. Before *Van Gend & Loos*⁹²⁴ and *Costa v. Enel*⁹²⁵, there was no express principle stating the primacy of European law over national constitutions, so that it was possible to maintain the primacy of constitutional norms over European law, including in fields falling within the scope of Community competences.

Moreover, the different national standards of fundamental rights protection, in particular with regard to socio-economic rights, could have impeded an agreement on the draft of a European Bill of Rights.

Nonetheless, the establishment of the principle of the primacy of European law over national constitutional norms determined national judges to claim before the Luxembourg Court for the safeguard of fundamental rights vis-à-vis Community norms and permitted the Court of Justice to inaugurate a body of case-law to guarantee a protection of said rights. In the lack of *ad hoc* Treaty provisions, litigation played a pioneering role in the profile and

⁹²⁰ *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007.

⁹²¹ S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford, Oxford University Press, 2008, 66-67.

⁹²² M. Cartabia, *L'ora dei diritti fondamentali nell'Unione Europea*, in M. Cartabia, *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti Europee*, Bologna, Il Mulino, 2007, 13 seq., exp. 15-18.

⁹²³ In this sense, also, R. Cosio, *I diritti fondamentali nell'Unione Europea*, in R. Cosio, R. Foglia, *Il diritto europeo nel dialogo delle Corti*, Milano, Giuffrè, 2013, 47 seq., exp. 49.

⁹²⁴ *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, 5 February 1963.

⁹²⁵ *Flaminio Costa v E.N.E.L.*, Case 6-64, 15 July 1964.

enforcement of fundamental rights⁹²⁶, contributing to the creation of a European «*unwritten Bill of Rights*»⁹²⁷.

1.6.1. The judicial protection of fundamental rights

The European Court of Justice did not consider the issue of fundamental rights in its early case-law.

In *Sgarlata v. Commission*⁹²⁸ the applicants, producers of citrus fruits, claimed for the annulment of a European regulation fixing the reference prices for said products. Article 173 of the EEC Treaty (article 263 TFEU) provides that any natural or legal person may institute proceedings against the European act only in the event the measure is of direct and individual concern to the applicant, and, in order to be individually concerned, the person making the application must have been affected by the measure in question by reason of certain attributes which are peculiar to him or by reason of circumstances in which he is differentiated from all other persons. However, since the annual and uniform fixing of reference prices did not concern the applicants individually but it was directed to a multiplicity of citizens of the Community as a whole, it was not possible to institute proceedings under article 263 TFEU.

The applicant objected that a restrictive interpretation of its wording would have deprived individuals of their fundamental right to have recourse to a judicial remedy, as recognised in all Member States. In the case, however, the Court refused to consider the issue of fundamental rights:

*«these considerations, which will not be discussed here, cannot be allowed to override the clearly restrictive wording of Article 173, which it is the Court's task to apply»*⁹²⁹.

The denial to guarantee the respect of fundamental rights recognised in the Constitution of the Member States can be appreciated also in *Geitling v High Authority of the European Coal and Steel Community*⁹³⁰.

⁹²⁶ S. Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, *Human Rights Law Review*, 2011, 4, 649; K. Riesenhuber, *European employment law*, Intersentia, Cambridge, 2012, 56.

⁹²⁷ F. Mancini, *The making of a constitution for Europe*, *Common Market Law Review*, 1989, 4, 595.

⁹²⁸ *Marcello Sgarlata and others v Commission of the EEC*, Case 40-64, 1 April 1965.

⁹²⁹ *Marcello Sgarlata and others v Commission of the EEC*, Case 40-64, 1 April 1965, 227.

The joint selling agencies of the Ruhr and the Nold brought an action against the High Authority claiming, among others, that the Authority unilateral decision to lower the quantitative criteria of coal to be sold to wholesale purchasers determined a violation of the fundamental right to private property protected by article 14 of the Basic Law of the Federal Republic of Germany. The Nold applicant stressed that, since it is a fundamental right which is involved, the Court should have interpreted the Treaty in a manner consistent with the principles of national law.

The Court concluded for the inadmissibility of the claim put forward by the Nold undertaking stating as follows:

«It is not for the Court [...] to ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected. Therefore the Court may neither interpret nor apply Article 14 of the German Basic Law in examining the legality of a decision of the High Authority. Moreover Community law [...] does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights»⁹³¹.

The disruptive effect of *Van Gend & Loos*⁹³² and *Costa v. Enel*⁹³³ on the relationship between European system and national systems was opposed by some national Constitutional Courts⁹³⁴, which rejected the primacy of European law when fundamental rights could have been at stake⁹³⁵.

The reaction of the European Court of Justice arrived with *Stauder*⁹³⁶.

The question concerned whether human dignity and the principle of equality had been violated because of the obligation to reveal the name placed on the recipient of a welfare benefit for war victims established with a European decision. Although the Court of Justice came to the conclusion that the provision in question did not require the identification of

⁹³⁰ *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community*, joined cases 36, 37, 38-59 and 40-59, 15 July 1960.

⁹³¹ *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community*, joined cases 36, 37, 38-59 and 40-59, 15 July 1960, 438-439.

⁹³² *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, 5 February 1963.

⁹³³ *Flaminio Costa v E.N.E.L.*, Case 6-64, 15 July 1964.

⁹³⁴ F. Curcuruto, *L'integrazione europea tra Bundesverfassungsgericht e Corte di Giustizia*, in R. Cosio, R. Foglia, *Il diritto europeo nel dialogo delle Corti*, Milano, Giuffrè, 2013, 11 seq.

⁹³⁵ M. Hilf, *The protection of fundamental rights in the Community*, in F. G. Jacobs, *European law and the individual*, Amsterdam, North Holland Publishing, 1976, 145 seq.

⁹³⁶ *Erich Stauder v City of Ulm – Sozialamt*, Case 29-69, 12 November 1969.

beneficiaries by name – so that no issue of human rights protection was at stake – the ECJ established for the first time the principle according to which fundamental human rights are enshrined in the general principles of Community law and protected by the Court⁹³⁷.

One year after, in *Internationale Handelsgesellschaft*⁹³⁸, the Court added some other elements to the principle explained in *Stauder* and said that fundamental rights are not only general principles of law but also that their protection, inspired by the «*constitutional traditions common to the Member States*», «*must be ensured within the framework of the structure and objectives of the Community*»⁹³⁹.

However, constitutional traditions among member States varies considerably. In *Schmidberger*⁹⁴⁰, Advocate General Jacobs catches the point with the following words:

*«It must moreover be borne in mind that despite a basic consensus reflected in the European Convention on Human Rights about a core of rights which must be regarded as fundamental, there are a number of divergences between the fundamental rights catalogues of the Member States, which often reflect the history and particular political culture of a given Member State»*⁹⁴¹.

For instance, the right to strike is guaranteed by the Constitution of some Member States such as Italy and France, while in other Member States, such as United Kingdom, it does not receive any protection as a constitutional right but as a freedom. This poses the question as to whether the Community would have denied to the right to strike the status of fundamental right because it does not appear in some national constitutions or because it is not considered to be a right at all in some Member States⁹⁴².

⁹³⁷ *Erich Stauder v City of Ulm – Sozialamt*, Case 29-69, 12 November 1969, par. 7.

⁹³⁸ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70, 17 December 1970.

⁹³⁹ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70, 17 December 1970, par. 4.

⁹⁴⁰ *Eugen Schmidberger, Internationale Transporte und Planzüge and Republik Österreich*, Case C-112/00, 12 June 2003; Opinion of Advocate General Jacobs, 11 July 2002.

⁹⁴¹ Opinion of Advocate General Jacobs in *Eugen Schmidberger, Internationale Transporte und Planzüge and Republik Österreich*, Case C-112/00, par. 97.

⁹⁴² A. C. L. Davies, *Should the EU have the power to set minimum standards for collective labour rights in the Member States?*, in P. Alston, *Labour rights as human rights*, Oxford, Oxford University Press, 2005, 177 seq., exp. 201-202.

The acknowledgement of differences among fundamental values within the Member States underpins the decision to insert the “*acts of public international law*” as a source of reference of human rights protection since Nold⁹⁴³, in order to enhance uniformity of views.

Here the Court confirmed that fundamental rights, such as the protection of property ownership, form an integral part of the general principles of law, and for their protection the Court is bound to draw inspiration from constitutional traditions common to the Member States. Additionally, other sources, such as «*international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law*»⁹⁴⁴.

From this time on, the ECJ started to fill the gap of human rights protection at Community level by reference, *in primis*, to the European Convention on Human Rights⁹⁴⁵ and its case-law⁹⁴⁶, and to a plurality of international sources such as the International Covenant on Civil and Political Rights⁹⁴⁷, the Convention on the Rights of the Child⁹⁴⁸, the Geneva Convention on the Status of Refugees⁹⁴⁹ and the Universal Declaration on Human Rights⁹⁵⁰.

In Albany⁹⁵¹, the Advocate General referred to the case-law developed by the European Court of Human Rights on freedom of association and the right to strike stating as follows:

«As regards the right of trade unions to take collective action, the European Court of Human Rights relied on the phrase ‘for the protection of his interests’ in Article 11(1) of the European Convention on Human Rights in holding that

⁹⁴³ J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, Case 4-73, 14 May 1974.

⁹⁴⁴ J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, Case 4-73, 14 May 1974, par. 13.

⁹⁴⁵ Roland Rutili v Ministre de l'intérieur, Case 36-75, 28 October 1975.

⁹⁴⁶ Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities, Case C-94/00, 22 October 2002. In par. 26 the Court states as follows: «*For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in Colas Est and Others v. France, not yet published in the Reports of Judgments and Decisions, § 41) and, second, the right of interference established by Article 8(2) of the ECHR ‘might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case’ (Niemietz v. Germany, cited above, § 31)*».

⁹⁴⁷ Orkem v Commission of the European Communities, Case 374/87, 18 October 1989.

⁹⁴⁸ European Parliament v Council of the European Union, Case C-540/03, 27 June 2006.

⁹⁴⁹ Mervett Khalil (C-95/99), Issa Chaaban (C-96/99) and Hassan Osseili (C-97/99) v Bundesanstalt für Arbeit and Mohamad Nasser (C-98/99) v Landeshauptstadt Stuttgart and Meriem Addou (C-180/99) v Land Nordrhein-Westfalen, Joined cases C-95/99 to C-98/99 and C-180/99, 11 October 2001.

⁹⁵⁰ Piera Scaramuzza v Commission of the European Communities, Case C-76/93 P, 20 October 1994.

⁹⁵¹ Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, Case C-67/96, 21 September 1999.

freedom of association included the rights that were 'indispensable for the effective enjoyment' or 'necessarily inherent elements' of trade union freedom. Article 11 therefore also 'safeguards the freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible'. However, that apparently broad statement seems to cover only a core of specific activities. [...] Article 11 [does not] necessarily imply a right to strike, since the interests of the members can be furthered by other means»⁹⁵².

Nevertheless, the Court made soon clear that it had no power to examine the compatibility between fundamental rights and national legislation in the event the latter falls outside the scope of Union law⁹⁵³, save in case such legislation enters the field of application of Community law, where the Court is the sole arbiter in the matter⁹⁵⁴.

For instance, national rules guaranteeing the exercise of fundamental rights may enter the field of application of European law in the event they affect to some extent the exercise of fundamental freedoms. If the field of application of fundamental rights is identical to the field of application of fundamental freedoms, but the values they protect are totally different in scope, - so that the Court would be in the position to opt for one solution or the other – it might be argued that the prevalence of Treaty freedoms would be compatible with the European economic construction.

In this framework, some scholars contended that *«in the cases in which the Court has adopted fundamental rights discourse, it has been the general Community rule or the Community objective which has prevailed against claims as to the violation of fundamental rights»⁹⁵⁵.*

The general prevalence of Treaty provisions over fundamental rights might be imputed to the scope the Community had to pursue and, consequently, to the perspective from which the Court examines fundamental rights. It has been observed that the ECJ can examine an

⁹⁵² Opinion of Advocate General Jacobs in *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96, 28 January 1999, par. 144-145.

⁹⁵³ *Cinéthèque SA and others v Fédération nationale des cinémas français*, joined cases 60 and 61/84, 11 July 1985; *Meryem Demirel v Stadt Schwäbisch Gmünd*, Case 12/86, 30 September 1987.

⁹⁵⁴ *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Case C-260/89, 18 June 1991.

⁹⁵⁵ J. Coppel - A. O'Neill, *The European Court of Justice: Taking Rights Seriously?*, *Common Market Law Review*, 1992, 4, 669 seq., exp. 682. Similarly, A. Andreoni, *Sciopero, contratto collettivo e diritti dell'economia: la svolta politica della Corte di Giustizia*, in A. Andreoni - B. Veneziani, *Libertà economiche e diritti sociali nell'Unione Europea*, Ediesse, Roma, 2009, in particular 114 – 115; A.L. Young, *The Charter, Constitution and Human Rights: is this the Beginning or the End for Human Rights Protections by Community law?*, *European Public Law*, 2005, 11, 219; *contra*, J.H.H Weiler, Nicolas J.S. Lockhart, 'Taking rights seriously' seriously: *The European Court and its fundamental rights jurisprudence*, *Common Market Law Review*, 1995, 1, 51-94 and 2, 579-627.

infringement of fundamental rights «*at least to the extent to which the fundamental right alleged to have been infringed may involve the protection of an economic right which is among the specific objects of the Treaty. In fact, if there were no such connexion, State action affecting individuals would be incapable of coming under the Community system, under any available procedure*»⁹⁵⁶.

Nonetheless, the fact the ECJ may look at fundamental rights only when fundamental freedoms come into play does not necessarily mean that a protection of the same cannot be guaranteed⁹⁵⁷ if they pursue a “*legitimate interest*” which, in principle, may justify a “*restriction*” of free movement provisions⁹⁵⁸.

What is disturbing is that the ECJ fundamental rights discourse is functional to the maintenance of the mechanism according to which fundamental rights can be examined only from an economic point of view, in a way apt to depict human rights as “*restrictions*” to economic freedoms.

This idea should be combined with the judicial use, in internal market cases, of the filtering mechanism called proportionality test, under which it is necessary to assess whether the exercise of the fundamental rights is justified, suitable and necessary to reach the objective, and it does not impose an excessive burden on the individual. However, a fundamental right does not need justifications for its exercise; on the contrary, it would be the conflicting element in the need to present a justification for its attitude to restrict the same fundamental rights. This possible construction does not entail the idea that fundamental rights are absolute rights, as it is blatantly clear from the study conducted in the previous chapters. However, in order not to deprive fundamental rights of their nature, it might be claimed that when human rights are at stake the judicial analysis should consider the legitimacy of any “*restriction*” to the human right and not the legitimacy of the exercise of the human right itself.

⁹⁵⁶ Opinion of Advocate General Trabucchi in Lynne Watson e Alessandro Belmann, Case 118/75, / July 1976, 1207.

⁹⁵⁷ N. Rogers - R. Scannel - J. Walsh, *Free movement of persons in the enlarged European Union*, London, Sweet and Maxwell, 2012, 47; V. Skouris, *Fundamental rights and fundamental freedoms: the challenge of striking a delicate balance*, *European Business Law Review*, 2006, 2, 225 seq.

⁹⁵⁸ *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007, par. 45; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, *Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, Case C-341/05, 18 December 2007, par. 93.

Schmidberger⁹⁵⁹ and Omega⁹⁶⁰ provide valuable examples of the use of fundamental rights as “restrictions” to the exercise of economic freedoms.

Schmidberger, an international transport undertaking, brought an action before the Innsbruck Regional Court seeking damages against the Republic of Austria because some of its vehicles were unable to use the Brenner motorway blocked by a pacific demonstration. The demonstration was organised by an Austrian association to protect the biosphere in the Alpine region, it was duly notified to the Innsbruck provincial government as provided by Austrian law and made public to motorists, advising them to avoid that motorway during the period in question. The Austrian Court of Appeal referred to the Court for a preliminary ruling on the matter, asking, as first question, whether the principle of the free movement of goods requires a Member State to keep open major transit routes and whether that obligation «takes precedence over fundamental rights» such as the freedom of expression and the freedom of assembly guaranteed by Articles 10 and 11 ECHR⁹⁶¹.

The Court refuses to speak about precedence of fundamental rights over economic freedoms and amends the question in the following terms, thereby attracting the case in the sphere of free movement provisions: «first, the Court is asked to rule on whether the fact that the Brenner motorway was closed [...] amounts to a restriction of the free movement of goods and must therefore be regarded as a breach of Community law»⁹⁶².

For the Court the «protection of those [fundamental] rights is a legitimate interest»⁹⁶³ which, in principle, justifies a “restriction” of Treaty freedoms and in those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between fundamental rights and free movement provisions⁹⁶⁴.

In Omega, a German company had been operating an installation known as a “laserdrome”, a game that involved hitting fixed sensory tags installed in the firing corridors

⁹⁵⁹ Eugen Schmidberger, Internationale Transporte und Planzüge contro Republik Österreich, case C-112/00, 12 June 2003.

⁹⁶⁰ Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, case C-36/02, 14 October 2004.

⁹⁶¹ Eugen Schmidberger, Internationale Transporte und Planzüge contro Republik Österreich, case C-112/00, 12 June 2003, par. 20.

⁹⁶² Eugen Schmidberger, Internationale Transporte und Planzüge contro Republik Österreich, case C-112/00, 12 June 2003, par. 47.

⁹⁶³ Eugen Schmidberger, Internationale Transporte und Planzüge contro Republik Österreich, case C-112/00, 12 June 2003, par. 74.

⁹⁶⁴ C. Barnard, Derogations, Justification and the four freedoms: is state interest really protected? in C. Barnard - O. Odudu, The outer limits of European Law, Oxford, Hart Publishing, 2009, 285.

or to jackets worn by players. The German authorities argued the game involved a practice of “*play at killing*” people and it issued a prohibition order because the project constituted a danger to public order, since the acts of simulated homicide and the trivialisation of violence thereby engendered were an affront to human dignity, a concept established in the German Constitution.

Omega argued, in its appeal, that the order infringed Community law, particularly the freedom to provide services and the free movement of goods (since the “*laserdrome*” equipment and technology were supplied by a British company).

The German Court referred the following question to the ECJ for a preliminary ruling:

«Is it compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community for a particular commercial activity – in this case the operation of a so-called “laserdrome” involving simulated killing action – to be prohibited under national law because it offends against the values enshrined in the constitution?»⁹⁶⁵.

Differently than in Schmidberger, where the domestic Court directly asked if there was a prevalence of economic rights over fundamental rights, here the German Judge is concerned about the compatibility of the fundamental values of a nation with free movement provisions. The perspective is already the one of economic rights. The Court renders this idea more explicit and reformulates the question as the national judge was asking to what extent the “*restriction*” arising from the constitutional protection of fundamental values is capable of affecting the freedom to provide services and the free movement of goods.

Put in other words, it is the fundamental human value that represents a restriction to fundamental freedoms and not the opposite way round.

In favour of this construction of fundamental rights protection it might be said that the absence of primary European law justifying a human rights approach may have constituted an obstacle for the Luxembourg Court.

However, a different construction would have been possible along the line established in Wachauf⁹⁶⁶, where it was argued that it is the common organisation of a market that might constitute a restriction to the fundamental right and not the contrary:

⁹⁶⁵ Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, case C-36/02, 14 October 2004, par. 17.

⁹⁶⁶ Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, Case 5/88, 13 July 1989.

«The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights»⁹⁶⁷.

1.6.2. Changing paradigm: fundamental rights as primary law of the European Union

The first legal acknowledgement of fundamental rights in the European architecture can be traced back to the Preamble of the 1986 Single European Act. It provided for a light reference to the determination of the Member States to work together for the promotion of democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the European Social Charter.

In 1992, a stronger recognition of the case-law achievements in the field of fundamental rights was inserted in Article 2(F) of the Maastricht Treaty, that committed the Union to the respect of fundamental rights, as guaranteed by the European Convention on Human Rights and the constitutional traditions common to the Member States, as general principles of Community law.

After the denunciation of the feasibility of an accession to the European Convention on Human Rights by the Union⁹⁶⁸, the 1997 Amsterdam Treaty incorporated the respect for human rights as one of the founding principles of the Union in a new Article 6 par. 1 TEU. In addition, the Treaty of Amsterdam introduced a new article 7 TEU pursuant to which a Member State may be the recipient of recommendations from the Council or subject to the suspension of certain Treaty rights, including the voting rights in the Council, in the event, respectively, of *«risk of a serious breach»* or of *«existence of a serious and persistent breach»* of the values referred in Article 2 TEU, namely human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities⁹⁶⁹.

⁹⁶⁷ Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, Case 5/88, 13 July 1989, par. 18. See, also, Kjell Karlsson and Others, Case C-292/97, 13 April 2000, par. 45.

⁹⁶⁸ European Court of Justice, opinion pursuant to article 228 of the EC Treaty n. 2/94, 28 March 1996.

⁹⁶⁹ M Nowak, Human rights “conditionality” in relation to the entry to, and full participation in, the EU, in P. Alston, The EU and Human Rights, Oxford, Oxford University Press, 1999, 687 seq., exp. 690. However some authors doubt about the effectiveness of the article due to the procedural constraint for the activation of the

It is only with the Charter of Fundamental Rights of the European Union, solemnly proclaimed by European Parliament, the Council and the Commission at the meeting held in Nice in December 2000, and revised in Strasbourg on December 2007, that the Union has developed a far-reaching catalogue of fundamental rights⁹⁷⁰.

The “body” responsible for drafting the Charter of Fundamental Rights was composed not only by Member State governments, European institutions and national parliaments but also other bodies, social groups or experts were invited to give their views, so that a greater degree of popular legitimacy was secured⁹⁷¹.

The question of the Charter of Fundamental Rights force was left open for almost ten years⁹⁷², until the entry into force of the Treaty of Lisbon, that accorded it legally binding force⁹⁷³. Article 6 par. 1 TEU provides that the Charter is not incorporated in the Lisbon Treaty but has the same legal value as the Treaties:

«The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties».

procedure; see, A. C. L. Davies, Should the EU have the power to set minimum standards for collective labour rights in the Member States?, in P. Alston, Labour rights as human rights, Oxford, Oxford University Press, 2005, 177 seq., exp. 203.

⁹⁷⁰ G. De Burca, The drafting of the European Union Charter of fundamental rights, in European Law Review, 2001, 2, 126 seq.; M. Maduro, The double constitutional life of the Charter of fundamental rights of the European Union, in T. Hervey, J. Kenner, Economic and social rights under the EU Charter of Fundamental Rights of the European Union, Oxford, Hart Publishing, 2003, 269 seq.; S. Peers, A. Ward, The EU Charter of Fundamental Rights, Politics, Law and Policy, Oxford, Hart Publishing, 2004; M. Napoli, La carta di Nizza. I diritti fondamentali dell'Europa, Milano, 2004; B. Bercusson, European Labour Law and the EU Charter of Fundamental rights, Baden-Baden, 2006; J-C. Piris, Il Trattato di Lisbona, Milano, Giuffrè, 2013; R. Del Punta, I diritti sociali come diritti fondamentali: riflessioni sulla Carta di Nizza, Diritto delle Relazioni Industriali, 2001, 341; R. Bifulco, M. Cartabia, A. Celotto, L'Europa dei diritti: commento alla Carta dei diritti fondamentali dell'Unione Europea, Bologna, Il Mulino, 2001; B. Veneziani, Nel nome di Erasmo da Rotterdam. La faticosa marcia dei diritti sociali fondamentali nell'ordinamento comunitario, Rivista Giuridica del Lavoro, 2000, 414; G. Bronzini, La carta dei diritti fondamentali dell'Unione Europea, in Questione Giustizia, 2000, 937; E. Ales, Libertà e “uguaglianza solidale”: il nuovo paradigma del lavoro nella Carta dei diritti fondamentali, Argomenti di Diritto del Lavoro, 2001, 111; T. Treu, L'Europa sociale: problemi e prospettive, Diritto del Lavoro e delle Relazioni Industriali, 2001, 307; M. Roccella, La Carta dei diritti fondamentali: un passo avanti verso l'Unione politica, Lavoro e Diritto, 2001, 329.

⁹⁷¹ G. De Burca, The drafting of the European Union Charter of fundamental rights, European Law Review, 2001, 2, 126 seq.; S. Douglas Scott, The European Union and Human Rights after the Treaty of Lisbon, Human Rights Law Review, 2011, 4, 645.

⁹⁷² «The European Council would like to see the Charter disseminated as widely as possible amongst the Union's citizens. In accordance with the Cologne conclusions, the question of the Charter's force will be considered later», see, Conclusion of the Presidency, http://www.europarl.europa.eu/summits/nice1_en.htm.

⁹⁷³ United Kingdom and Poland negotiated designed to limit the application of the Charter; see, P. Craig, The Charter, the ECJ and National Court, in D. Ashiagbor, N. Countouris, I. Lianos, The European Union after the Treaty of Lisbon, Cambridge, Cambridge University Press, 2012, exp. 84 seq.

There is an expectation that Charter of Fundamental Rights will occupy a central position in the constitutional architecture of the European Union⁹⁷⁴ because of its capacity to enhance the fundamental rights discourse in the Community⁹⁷⁵. As it has being argued, in the longer term the Charter has the potential to contribute to a change in the culture of European labour law, from a defence against market fundamentalism into a pillar of social and labour rights⁹⁷⁶.

1.6.3. Articles 12 and 28 of the Charter of Fundamental Rights of the European Union

Notably, the Charter places solidarity as one of the founding values of the Union and provides a protection of collective social rights under article 12 and article 28.

Bercusson explains that initially “*freedom of association*” was designed to be placed together with a group of articles protecting collective labour rights. Subsequently, the attempt to insert it in the Chapter dealing with “*Solidarity*” failed and freedom of association remained in that part of the Charter headed “*Freedoms*”⁹⁷⁷.

Article 12 par. 1 protects freedom of assembly and association along the model of the European Convention on Human Rights⁹⁷⁸:

«everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests».

Article 28 safeguards the right to take collective action and strike⁹⁷⁹:

«workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts

⁹⁷⁴ S. Iglesias Sanchez, The Court and the Charter: the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights, *Common Market Law Review*, 2012, 5, 1565.

⁹⁷⁵ F. Hendrickx, Labour Law for the United States of Europe, Lecture delivered during the public acceptance of the appointment of Professor in European Labour Law at Tilburg University on 2 September 2011, 37.

⁹⁷⁶ B. Hepple, Fundamental social rights since the Lisbon Treaty, *European Labour Law Journal*, 2011, 2, 154.

⁹⁷⁷ B. Bercusson, *European labour law*, 2nd ed., Cambridge, Cambridge University Press, 2009, 322.

⁹⁷⁸ For a comprehensive analysis of the evolution of article 12 of the Charter, B. Bercusson, *European Labour Law and the EU Charter of Fundamental Rights*, Baden-Baden, Nomos, 2006, 135-169.

⁹⁷⁹ B. Veneziani, Right of collective bargaining and action (article 28) in B. Bercusson, *European Labour Law and the EU Charter of Fundamental Rights*, Baden-Baden, Nomos, 2006, 293 seq., exp. 321-335.

of interest, to take collective action to defend their interests, including strike action»⁹⁸⁰.

The explanations relating to the Charter of Fundamental Rights⁹⁸¹ clarify that the meaning of article 12 and article 28.

Article 12 par. 1 corresponds to article 11 of the ECHR - however with a wider scope, as it applies at all levels, including European level - and it is based on article 11 of the Community Charter of the Fundamental Social Rights of Workers. Since article 11 of the European Convention on Human Rights, protecting freedom of assembly and association, encompass the right to take collective action and strike⁹⁸², then it is appropriate to take article 12 par. 1 into consideration, even if it does not explicitly speak about industrial action.

Article 28 is based on article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). Additionally it is said that *«the right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR».*

Said rights are not absolute rights because they are subject to general and specific sources of limitations.

Article 12 of the Charter of Fundamental Rights is subject to the general limitation clause contained in article 52 par. 1:

«Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others».

Article 52 par. 1 should be read in conjunction with article 52 par. 3:

«In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid

⁹⁸⁰ According to Bercusson, the protection in article 28 of collective actions and strikes *«may led to a fundamental change in those national legal orders where this right is not given constitutional value or is not expressed at a constitutional level. It provides for a strong basis for courts to uphold the right to strike in those national legal orders where the law on strike and lock-outs is derived from general trade union rights (Germany and the Netherlands) and is almost completely judge-made»*; see, B. Bercusson, *European labour law*, 2nd ed., Cambridge, Cambridge University Press, 2009, 328.

⁹⁸¹ Explanations relating to the Charter of Fundamental Rights, 14 December 2007, 2007/C 303/02.

⁹⁸² See, Chapter Two.

down by the said Convention. This provision shall not prevent Union law providing more extensive protection».

The explanations on article 12 clarifies that:

«in accordance with Article 52(3) of the Charter, limitations on that right may not exceed those considered legitimate by virtue of Article 11(2) of the ECHR».

Therefore, limitations to article 12 of the Charter of Fundamental rights should be the same provided for by article 11 ECHR, save in case Union law provides more extensive protection.

Article 28 of the Charter of Fundamental Rights is subject to two sources of limitations: specific limitations deriving from the same article 28 and general limitations provided for under article 52 of the Charter of Fundamental Rights.

Under article 28 of the Charter of Fundamental Rights, the right to take collective action should be exercised *«in accordance with Union law and national laws and practices»*.

The explanations to article 28 state that:

«The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States».

The reference to Union law disappears in the explanations, and for this reason a clarification seems needed, in particular because article 52 par. 7 of the Charter of Fundamental Rights provides that the explanations are drawn up as a way of providing guidance in the interpretation of the Charter and shall be given due regard by the Courts of the Union and of the Member States. Nevertheless, it should also be noted that the same explanations *«do not as such have the status of law»*⁹⁸³, therefore the provisions of the Charter should theoretically prevail.

General limitations on the right to strike and the right to take collective action are permitted under article 52 par. 1 of the Charter of Fundamental Rights.

It is interesting to consider that in the formulation of article 52 par. 1 of the Charter, the perspective is that it is the *“limitation”* to a fundamental right that should be justified and not the *“exercise”* of the fundamental right itself. As a consequence, if a judicial analysis would be conducted in the perspective of the Charter, in case of a clash between the fundamental

⁹⁸³ Explanations relating to the Charter of Fundamental Rights, 14 December 2007, 2007/C 303/02.

right to strike and an economic freedom, there are legal grounds to consider the latter a limitation in the need for suitable justifications and not the opposite way round, with all the relevant consequences in terms of burden of proof⁹⁸⁴.

In *Commission v Germany*⁹⁸⁵ Advocate General Trstenjak stated that:

*«a restriction on a fundamental freedom is justified, where that restriction arose in the exercise of a fundamental right and was appropriate, necessary and reasonable for the attainment of interests protected by a fundamental right. As a mirror image thereof, a restriction on a fundamental right is justified when that restriction arose in the exercise of a fundamental freedom and was appropriate, necessary and reasonable for the interests protected by a fundamental freedom»*⁹⁸⁶.

The possible change in the judicial paradigm seems supported by the explanations on article 52. Indeed, they set the standard of interpretation by reference to the case-law of the Court of Justice that claimed for the recognition of fundamental rights as such and not as being, *per se*, restrictions to the exercise of economic freedoms⁹⁸⁷.

A judicial approach oriented to fundamental rights might reduce the risks of contradiction between the social dynamics of the Union and the ones of the Member States⁹⁸⁸ and contain the “*euro-sceptical*” tensions who determined some authors to affirm that the Union makes use of the economic freedoms as a Trojan horse⁹⁸⁹ to dismantle national industrial relations

⁹⁸⁴ B. Hepple, *The European Right to Strike revisited*, *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 2013, 4, 575, exp., 577-578. See, also, F. Hendrickx, *Completing economic and social integration: towards labour law for the United States of Europe*, in N. Countouris, M. Freedland, *Resocialising Europe in a time of crisis*, Cambridge, Cambridge University press, 2013, 75; P. Syrpis, *Reconciling Economic Freedoms and Social Rights - The Potential of Commission v Germany*, *Industrial Law Journal*, 2011, 2, 222; K.D. Ewing, J. Hendy, *The dramatic implications of Demir and Baykara*, *Industrial Law Journal*, 2010, 1, 2; P. Syrpis, *The Treaty of Lisbon: much ado ... but about what?*, in *Industrial Law Journal*, 2008, 3, 219. For the prevalence of fundamental rights recognised in the Charter vis-à-vis economic freedoms, J. Ziller, *I diritti fondamentali tra tradizioni costituzionali e “costituzionalizzazione” della Carta dei diritti fondamentali dell’Unione Europea*, in S. Civitarese Matteucci, F. Guarriello, P. Puoti, *Diritti fondamentali e politiche dell’Unione Europea dopo Lisbona*, Bologna, Maggioli Editore, 2013, 47 seq., exp. 51-52.

⁹⁸⁵ *European Commission v Federal Republic of Germany*, Case C-271/08, 15 July 2010.

⁹⁸⁶ See, *Opinion of Advocate General Trstenjak in European Commission v Federal Republic of Germany*, Case C-271/08, 15 July 2010, par. 199. See also the *Opinion of the same Advocate General in Idryma Typou AE v Ypourgos Typou kai Meson Mazikis Enimerosis*, case C-81/09, 21 October 2010, par. 86. However, perhaps undermining this approach somewhat, Advocate General Trstenjak proceeded to subject the social rights at issue in *Commission v Germany* to a proportionality test; see, S. Douglas Scott, *The European Union and Human Rights after the Treaty of Lisbon*, *Human Rights Law Review*, 2011, 4, 677.

⁹⁸⁷ *Kjell Karlsson and Others*, Case C-292/97, 13 April 2000, par. 45. In the same vein, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, Case 5/88, 13 July 1989, par. 18.

⁹⁸⁸ B. Bercusson, *Episodes on the path towards the European social model* in C. Barnard, S. Deakin, G.S. Morris, *The future of labour law. Liber Amicorum Sir Bob Hepple QC*, Oxford, Oxford University Press, 2004, 198.

⁹⁸⁹ B. Veneziani, *La Corte di Giustizia e il trauma del cavallo di Troia*, in *Rivista Giuridica del Lavoro*, 2008, 2, 295.

and social security systems. Moreover, the use of a canon of interpretation based on fundamental rights would mitigate the possible frictions between judgments delivered by the Court of Justice and decisions issued by the European Court of Human Rights⁹⁹⁰ on rights protected by both systems, which will be highly evident in particular when the Union itself will access the European Convention on Human Rights⁹⁹¹.

So far, the relationship between the European Union and the European Convention on Human Rights was governed by a presumption of equivalence.

In *Bosphorus*⁹⁹², the European Court of Human Rights stated as follows:

«State action taken in compliance with such legal obligations [namely, obligations arising from its membership of an international organisation to which it has transferred part of its sovereignty such as the European Union] is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...]. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation»⁹⁹³.

However, cases like *Viking*, *Laval* and *Enerji* show that certain core labour matters such as the right to strike and to take collective action may receive a different (and conflicting) protection according to the body responsible of the judgement; therefore, the adoption of a similar standard of review would contribute to mitigate possible future conflicts which would be detrimental to human rights protection⁹⁹⁴.

⁹⁹⁰ S. Sciarra, Un confronto a distanza: il diritto di sciopero nell'ordinamento globale, in *Politica del Diritto*, 2012, 2, 217.

⁹⁹¹ P. Craig, *The Lisbon Treaty: law, politics and treaty reform*, Oxford, Oxford University Press, 2010, exp. 201 seq.; T. Lock, *Accession of the EU to the ECHR*, in D. Ashiagbor, N. Countouris, I. Lianos, *The European Union after the Treaty of Lisbon*, Cambridge, Cambridge University Press, 2012, 109 seq.; H.J. Blanke, *The Protection of Fundamental Rights in Europe*, in H.J. Blanke, S. Mangiameli, *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action*, Berlin, 2012, 159 seq. There European Court of Justice seems concerned to keep a specific autonomy on matters falling within the scope of European law; see, T. Lock, *Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order*, *Common Market Law Review*, 2011, 4, 1025.

⁹⁹² ECtHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Application n. 45036/98, 30 June 2005.

⁹⁹³ ECtHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Application n. 45036/98, 30 June 2005, par. 155-156.

⁹⁹⁴ G. de Burca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, New York University, School of Law, Public Law & Legal Theory Research Paper Series, Working Paper n. 13-51, September 2013, exp. 6.

Another issue pertains the recipients of the rights protected by the Charter of Fundamental Rights, namely if the document has only a vertical or also an horizontal applicability, on the model of some Treaty articles such as freedom of establishment and freedom to provide services⁹⁹⁵.

The hypothesis of the sole vertical impact of the Charter of Fundamental Rights emerges from a literal reading of article 51:

*«The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties».*

Nevertheless, some authors suggested that it would be possible to endorse a more “*radical reading*” of article 51, according to which an individual might rely on the Charter against another private individual on matters falling within the scope of European law⁹⁹⁶. Other seems to support the idea that sufficiently precise fundamental rights will become applicable in horizontal relationship⁹⁹⁷ in analogy with the direct applicability of fundamental rights when the European Union acts as an employer⁹⁹⁸.

⁹⁹⁵ International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007; Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007.

⁹⁹⁶ The choice embodied in the Charter would have been determined by the difficulties to find an agreement if its scope of application would have been vertical and horizontal. However, reasons of systematic coherence suggest that Charter rights should also have horizontal impact: *«There is an uneasy tension in normative terms between the solely vertical scope of the Charter rights, when compared to the vertical and horizontal scope of some Treaty articles. The very fact that comparable Treaty article is thought suited to a horizontal as well as a vertical application sits uneasily with the proposition that the analogous Charter right is limited to a vertical impact»*; P. Craig, *The Lisbon Treaty: law, politics and treaty reform*, Oxford, Oxford University Press, 2010, 209.

⁹⁹⁷ R. Nielsen, *Free movement and fundamental rights*, in *European Labour Law Journal*, 2010, 1, 19 seq.

⁹⁹⁸ Vivien Prais v Council of the European Communities, case C-130/75, 27 October 1976; Henri Maurissen v Court of Auditors of the European Communities, case C-417/85, 4 February 1987; Roderick Dunnett, Thomas Hackett and Mateo Turró Calvet v European Investment Bank, case T-192/99, 6 March 2001.

These positions find a support in the ECJ case-law that claimed for the horizontal applicability of the Charter, albeit limited to specific rights (such as the principle of non-discrimination) that already find a space within the Treaties⁹⁹⁹.

The same treatment is not reserved to certain social rights.

A recent case decided in January 2014 manifestly denies horizontal applicability to article 27 of the Charter of Fundamental Rights (Workers' right to information and consultation within the undertaking)¹⁰⁰⁰:

«Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive [...] is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision»¹⁰⁰¹.

According to the Court, Charter's rights might be invoked in proceedings before private parties only to the extent they can satisfy two conditions:

- (i) the situation has to be governed by European law¹⁰⁰²;
- (ii) the right in question should be sufficient in itself to confer on individuals an individual right which they may invoke as such¹⁰⁰³. Article 27 does not present this characteristic

⁹⁹⁹ Seda Küçükdeveci v Swedex GmbH & Co. KG, case C-555/07, 19 January 2010, par. 53- 56; DR and TV2 Danmark A/S v NCB - Nordisk Copyright Bureau, Case C-510/10, 26 April 2012; Sky Österreich GmbH v Österreichischer Rundfunk, Case C-283/11, 22 January 2013; Opinion of the Advocate General Trstenjak, Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, case C-282/10, 24 January 2012, par. 80 – 83. See, E. Spaventa, The horizontal application of fundamental rights as general principles of Union Law, in A. Arnall - C. Barnard - M. Dougan - E. Spaventa, A constitutional order of states: essays in honour of Alan Dashwood, 2011, Oxford, Hart Publishing, 199; M. De Mol, Küçükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law, in European Constitutional Law Review, 2010, 2, 293

¹⁰⁰⁰ Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), Case C-176/12, 15 January 2014.

¹⁰⁰¹ Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), Case C-176/12, 15 January 2014, par. 51.

¹⁰⁰² Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), Case C-176/12, 15 January 2014, par. 42.

¹⁰⁰³ Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), Case C-176/12, 15 January 2014, par. 47.

because, to be fully effective, it must be given more specific expression in European Union or national law¹⁰⁰⁴.

The decision of the Court totally departs from the Opinion of Advocate General Cruz Villalón¹⁰⁰⁵. He held that article 27 had to be considered an example of those rights «*which it would be more than imprudent to deny were relevant in relations governed by private law*»¹⁰⁰⁶. Indeed, “*the undertaking*” referred to in article 27 is involved in the safeguard of the effectiveness of that right because it has to ensure, on a day-to-day basis, that workers are guaranteed information and consultation at the appropriate levels¹⁰⁰⁷.

Bases on these assumptions he concluded that:

*«Article 27 may be relied on in a dispute between individuals. In other words, that possibility cannot be denied on the basis of the argument that the Charter, as a consequence of the provisions of Article 51(1), has no relevance in relations governed by private law»*¹⁰⁰⁸.

From the decision of the Court referred above it might be therefore argued that while some private actors (i.e. employers) are entitled to invoke the horizontal applicability not only of Treaty freedoms but also of Charter rights such as the freedom to conduct a business (article 16 of the Charter of Fundamental Rights)¹⁰⁰⁹, some others (i.e. workers and trade unions) may be deprived of the possibility to invoke the horizontal applicability of certain fundamental rights recognised in the Charter.

If the Court does not change its jurisprudence, there are grounds to maintain that the right to take collective action and strike in article 28 of the Charter will be denied of horizontal

¹⁰⁰⁴ Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), Case C-176/12, 15 January 2014, par. 45.

¹⁰⁰⁵ Opinion of Advocate General Cruz Villalón, Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), Case C-176/12, 18 July 2013.

¹⁰⁰⁶ Opinion of Advocate General Cruz Villalón, Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), Case C-176/12, 18 July 2013, par. 39.

¹⁰⁰⁷ Opinion of Advocate General Cruz Villalón, Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), Case C-176/12, 18 July 2013, par. 40.

¹⁰⁰⁸ Opinion of Advocate General Cruz Villalón, Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), Case C-176/12, 18 July 2013, par. 41.

¹⁰⁰⁹ See the conceptualization of D. Leczykiewicz, Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?, University of Oxford, Legal Research Paper Series n. 38/2013, April 2013.

applicability. As said, Charter's rights might be invoked in proceedings before private parties only to the extent the situation is governed by European law and the right in question is sufficient in itself to confer on individuals a right they may invoke as such, without the need to receive specific expression in European Union and national law.

On the assumption that it is possible to satisfy the first condition (for instance by applying the doctrine established in *Viking and Laval*), it would be difficult to fulfil the second condition. The rights protected by article 28 of the Charter are attributed *«in accordance with Union law and national law and practices»*, therefore there is already a presumption that the exercise of said rights should receive specific expression at the federal and at the domestic level. However, the presence of article 153 par. 5 TFEU represents an obstacle for a European strike law and in some Member States the right to strike does not even receive statutory recognition.

A mitigation of the risk to have different “classes” of recipients of the rights protected by the Charter may derive from article 53 of the Charter of Fundamental Rights, providing as follows:

«Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions».

The Parliamentary Assembly of the Council of Europe strongly desired the insertion of article 53 in order to settle possible divergences between different systems in the level of protection of fundamental rights¹⁰¹⁰.

On January 2000, it adopted Resolution n. 1210, drawing attention to the risks of having two sets of fundamental rights:

«The Assembly nonetheless considers that, in adopting a charter of fundamental rights, the achievements of the European Convention on Human Rights and the body of its case-law established over almost fifty years, which has had far-reaching effects on the law of the member states of the Council of Europe, and therefore of the European Union, cannot be disregarded. It further draws

¹⁰¹⁰ M. Cartabia, Article 53, in R. Bifulco, M. Cartabia, A. Celotto, *L'Europa dei diritti: commento alla Carta dei diritti fondamentali dell'Unione Europea*, Bologna, Il Mulino, 2001, 360 seq.

attention to the risks of having two sets of fundamental rights which would weaken the European Court of Human Rights»¹⁰¹¹.

On September of the same year it reiterated the appeal, demanding an application of the Charter of Fundamental Rights in a way reflecting the protection extended to every person within the jurisdiction of a Member State by the European Convention on Human Rights:

«The Assembly therefore reiterates its appeal to the European Union to do its utmost to safeguard the consistency of human rights protection in Europe. It thus invites the European Union and its member states [...] that both the text of the proposed charter and its ultimate application fully reflect and preserve the protection extended by the European Convention on Human Rights and the European Court of Human Rights to every person within the jurisdiction of European Union member states»¹⁰¹².

The Regional Office for Europe of the UN High Commissioner for Human Rights recommended that the EU ensures that its own internal human rights regime conforms to UN standards:

«universality is itself a principle that the EU promotes. Therefore, it seems all the more important that the EU ensures that its own internal human rights regime conforms to UN standards, to which all its Member States have committed themselves, and which it promotes abroad. Any disparity between internal and external approaches to human rights would only serve to undermine the role of the EU in the eyes of its international partners and other third States»¹⁰¹³.

Therefore, in the event the ECJ will be asked to solve cases of conflict between capital and labour entailing private parties, it is desirable it would, at least, set limitations to article 16 of the Charter of Fundamental Rights (freedom to conduct a business) in the light of the Council of Europe and international principles on collective actions.

¹⁰¹¹ Council of Europe, Parliamentary Assembly, Resolution 1210 (2000), 25 January 2000, <http://www.assembly.coe.int/Main.asp?link=http://www.assembly.coe.int/Documents/AdoptedText/ta00/eres1210.htm#1>.

¹⁰¹² Council of Europe, Parliamentary Assembly, Resolution 1228 (2000), 29 September 2000, <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/ERES1228.htm>.

¹⁰¹³ United Nations. OHCHR, Regional Office for Europe, The European Union and International Human Rights Law, 2011, http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf.

Otherwise, there is a risk that, again, the authority of the European Court of Justice will be challenged by supranational Court or supervisory bodies, as it recently happened with the European Committee of Social Rights¹⁰¹⁴.

SECTION II - The Case-Law

2.1. The European Court of Justice (ECJ)

The case-law of the European Court of Justice on the right to take collective action, including strike action, is quite limited and dates back to a period before the entry into force of the Treaty of Lisbon when collective social rights did not have recognition as primary law of the European Union. Nevertheless, it seems appropriate to take it into consideration in order to try to delineate the meaning of the rights in questions in the European Union context.

Particular reference should be made to two famous cases decided before the ECJ in 2007, *Viking* and *Laval*¹⁰¹⁵, because these are the only cases expressly dealing with the right to take collective action.

Both *Viking* and *Laval* involve a collective action and its capacity to obstacle an employer to exercise Treaty freedoms, namely freedom of establishment (*Viking*) or freedom to provide services (*Laval*). As said, economic freedoms have the capacity to negatively affect workers' rights, but trade unions have the function to secure advantages to workers, if necessary by taking industrial action according to national law and practices.

Viking, a Finnish ferry operator between Tallinn (Estonia) and Helsinki (Finland) wanted to sell one of its vessels, the *Rosella*, to its Estonian subsidiary and reflag it in order to enjoy Estonian lower wage costs for the crew. The Finnish Seaman's Union (FSU) opposed the project and, first, it asked the International Transport Workers Federation (ITF), which was running a flag of convenience (FOC) campaign¹⁰¹⁶, to inform with a circular all affiliated

¹⁰¹⁴ Collective complaint n. 85/2012, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, decision on the admissibility and the merits, 3 July 2013, par. 121-122.

¹⁰¹⁵ International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007.

¹⁰¹⁶ The FOC policy opposes flag of conveniences and requires that unions in the country of beneficial ownership have the right to conclude agreements covering vessels beneficially owned in their countries. See, S. Sciarra, *Viking and Laval: collective labour rights and market freedoms in the enlarged EU*, in Cambridge Yearbook of European Legal Studies, 2007-8, 10, 567; D. Fitzpatrick, *Transnational collective action. the FOC*

unions about the matter and to request them not to negotiate any collective agreement with Viking Line. Afterward, FSU threatened industrial action to push Viking to give up its reflagging plans or, in the event of reflagging, to have the crew employed under Finnish labour conditions. Viking Line sought injunctions before the London Commercial Court¹⁰¹⁷ claiming for the withdrawal of ITF circular and the issue of a judicial order to FSU obliging it not to interfere, *inter alia*, with Viking Line's right to freedom of establishment. The Commercial Court granted the requested injunctions upon an undertaking being given by Viking Line not to make any employees redundant as a result of the reflagging. ITF and FSU appealed the decision and the matter was referred to the ECJ.

In the Laval case, a company based and incorporated under Latvian law posted some workers to its subsidiary in Sweden, the Baltic, that won a tender for the construction of school premises in Vaxholm. Right after the arrival of the posted workers in Sweden, Byggettan (the Swedish building and public works trade union) started a negotiation with Baltic and Laval to have them sign the collective agreement for the building sector. The signature would have allowed negotiations on posted workers' wages amount with the local trade union (the Byggettan) and the mandatory beginning of a period of social peace (i.e. no possibility for Swedish trade unions to take collective actions). According to the Swedish system of industrial relations, while collective agreements regulate a number of labour matters (working time, annual leave, temporary unemployment and other pecuniary obligations specific for the building sector), wages should be negotiated on a case by case basis with the local trade unions¹⁰¹⁸. Laval entered into a Latvian collective agreements for the building sector and refused to sign the Swedish collective agreement since it was not possible for it to know in advance wages conditions. Hence, unions gave notice to Laval of a collective industrial action which, after the expiry of the notice period, consisted in a blockade of the construction site. Also the Swedish electricians' trade union (Elektrikerna) initiated sympathy action. In this framework, Laval commenced proceedings before the Labour Court in Sweden seeking a judicial order to cease industrial action and claiming compensation for damages. The Labour Court referred to the ECJ the question whether a collective action, such

campaign case study, in F. Dorsssement - T. Jasper, *Cross-Border collective actions in Europe: a legal challenge*, Antwerp, Intersentia, 2007, 85.

¹⁰¹⁷ London was ITF headquarters. The London Commercial Court had jurisdiction on the matter pursuant to 44/2001 Regulation.

¹⁰¹⁸ M. Ronnmar, *Free movement of services versus national labour law and industrial relations systems: understanding Viking and Laval from a Swedish and Nordic perspective*, in *Yearbook of European Legal Studies*, 2007 - 2008, 493.

as the one brought by Swedish trade unions, was compatible, among others, with freedom to provide services and 96/71 Directive.

2.1.1. The right to take collective action, including strike action, as a fundamental right

In its early case-law on staff cases, the Court recognised, under the “*general principles of labour law*”, first, the individual right to form and join an association and, secondly, the collective right to take action as “*one of the means*” available to unions to protect workers’ interests.

In *Union Syndicale, Massa and Kortner v Council of the European Communities*¹⁰¹⁹ the Court stated that:

*«Under the general principles of labour law, the freedom of trade union activity recognized under Article 24 a of the Staff Regulations means not only that officials and servants have the right without hindrance to form associations of their own choosing, but also that these associations are free to do anything lawful to protect the interests of their members as employees. The right of action is one of the means available for use by these associations»*¹⁰²⁰.

It is only with the opinion of the Advocate General Jacobs in *Albany* that these principles are applied outside the framework of staff-cases and are explicitly regarded as rights of a «*fundamental nature*»¹⁰²¹.

However, reference is made to the case-law on article 11 of the European Convention on Human Rights developed by the European Court of Human Rights as of 1999. Therefore it is said that freedom of association shall include the rights that are indispensable for the effective enjoyment of trade union freedom, and the right to strike is not included in the group, since the interests of the members can be furthered by other means¹⁰²².

On the contrary, in *Viking and Laval* the Court fully acknowledged the right to take collective action, including the right to strike, «*as a fundamental right which forms an*

¹⁰¹⁹ *Union syndicale - Amalgamated European Public Service Union - Brussels, Denise Massa and Roswitha Kortner v Council of the European Communities*, Case 175-73, 8 October 1974.

¹⁰²⁰ *Union syndicale - Amalgamated European Public Service Union - Brussels, Denise Massa and Roswitha Kortner v Council of the European Communities*, Case 175-73, 8 October 1974, par. 14-15; see, also *General Union of Personnel of European Organizations v Commission of the European Communities*, Case 18-74, 8 October 1974, par. 10-11.

¹⁰²¹ *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96, 21 September 1999, par. 139.

¹⁰²² *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96, 21 September 1999, par. 144-145.

*integral part of the general principles of Community law the observance of which the Court ensures»*¹⁰²³.

To classify the right to take collective action, including strike, as a fundamental right the Luxembourg Court relied on a number of international and European instruments such as the ILO Convention n. 87, the European Social Charter, the Community Charter of Fundamental Social Rights of Workers, and the Charter of Fundamental Rights of the European Union¹⁰²⁴.

2.1.2. The right to take collective action, including strike action, as a restriction to the exercise of economic freedoms

No “immunity” was granted to the right to take collective action and the right to strike from market principles¹⁰²⁵, a choice that was regarded by some scholars as an intrusion of the Court into the constitutional traditions of the Member States and an attempt to invade the space of autonomy left to the domestic legislator¹⁰²⁶.

Indeed, in Viking and Laval, trade unions suggested to follow the “Albany line” and grant an immunity to the right to strike by regarding it as falling outside EU competence¹⁰²⁷.

Albany concerned the compatibility with the Community competition rules of compulsory affiliation to a sectorial pension fund set up, in the context of a collective agreement, by organisations representing employers and workers in the relevant sector¹⁰²⁸.

¹⁰²³ International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 44; Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 91.

¹⁰²⁴ For Barnard, the statement was just a matter of “*sweeten the pill*”, see, C. Barnard, Social dumping or dumping socialism, in Cambridge Law Journal, 2008, 263.

¹⁰²⁵ Sciarra cautioned that granting the right to strike an immunity from the market principles would diminish the very origin of trade unions activity, that is deeply rooted into the market and oriented to impact on its rules, see, S. Sciarra, Diritti collettivi e interessi transnazionali dopo Laval, Viking, Ruffert, Lussemburgo, in A. Andreoni - B. Veneziani, Libertà economiche e diritti sociali nell’Unione Europea, Ediesse, Roma, 2009, exp. 33.

¹⁰²⁶ G. Orlandini, Trade unions rights and market freedoms: the European Court of Justice sets out the rule, in Comparative Labour Law and Policy Journal, 2007-2008, 599; U. Carabelli, Note critiche a margine della sentenza della Corte di Giustizia nei casi Laval e Viking, in Diritto del Lavoro e delle Relazioni Industriali, 2008, 1, 155.

¹⁰²⁷ The Albany line solution received the strong support of an assessment by Prof. Bercusson, assessment of the Opinions of the Advocates General in Laval and Viking and Laval, Six Alternative Solutions, Advice to the ETUC of 31 October 2007, at http://www.etuc.org/IMG/pdf_TTUR.Viking.Solutions.Oct._2007.ETUC.f.pdf.

¹⁰²⁸ Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, Case C-67/96, 21 September 1999, par. 46. According to Albany, the request for compulsory affiliation constituted an agreement between the undertakings operating in the sector concerned, contrary to Community competition rules. In short, the Court held that certain restrictions of competition are inherent in collective agreements. However, «*the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment*», par. 59.

An interpretation of the Treaty provisions “*as a whole*” suggested that «*agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty*»¹⁰²⁹.

In Viking¹⁰³⁰, the Court rejected to apply Albany not only because free movement and competition provisions have different ambits of application¹⁰³¹ but also because «*it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree*»¹⁰³².

According to certain opinions, an analogy with Albany was possible and the conclusion would have been that collective actions fall outside Treaty provisions¹⁰³³. Other believes that the case cannot be qualified as a precedent for the restriction of actions by labour unions with regard to fundamental freedoms¹⁰³⁴. And even in case of application of the Albany principles, the unions might still have had to show that the action was pursuing a legitimate worker-protective purpose, like the pension fund in Albany itself¹⁰³⁵.

On the contrary the ECJ held that, albeit its nature of fundamental rights, the exercise of collective actions does not enjoy a special protection when it clashes against the exercise of economic freedoms and those actions «*may none the less be subject to certain restrictions*» -

¹⁰²⁹ Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, Case C-67/96, 21 September 1999, par. 60.

¹⁰³⁰ No reference to the Albany case is made in Laval.

¹⁰³¹ International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 55.

¹⁰³² International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 52.

¹⁰³³ B. Bercusson, The Trade Union Movement and the European Union: Judgment Day, European Law Journal, 2007, 3, 282; C. Joerges, F. Rödl, Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval, in European Law Journal, 2009, 1, 12; G. Conway, Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ, German Law Journal, 2010, 993. See, also, F. Dorssemont, The right to take collective action v. fundamental economic freedoms in the aftermath of Laval and Viking, in M. De Vos, European Union internal market and labour law: friends or foes?, Antwerp, Intersentia, 2009, 81. For the Author, the Albany avenue was rejected for a different reason, namely the refusal of the Court of an extrapolation *per analogiam*.

¹⁰³⁴ N. Reich, Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases before the European Court of Justice, German Law Journal, 2008, 129. See, also, A. Hinarejos, Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms, Human Rights Law Review, 2008, 721, who claims as follows: «*It should be borne in mind that Albany did not concern a clash between two rights, but rather a straightforward contradiction between a Treaty provision that sought to encourage a certain type of behaviour and another one that seemed to prohibit it. Furthermore, the prohibition in the Treaty that was at stake in Albany did not admit properly justified exceptions, whereas Articles 49 and 43 EC do. So the clash in Albany was total and would have resulted in the collective agreements being automatically void, without possible reconciliation-a reconciliation that is, however, possible in principle when a clash occurs between a fundamental right and one of the fundamental freedoms*».

¹⁰³⁵ A. Davies, One step forward, two steps back? The Viking and Laval cases in the ECJ, Industrial Law Journal, 2008, 2, 139.

as reaffirmed by article 28 of the Charter of Fundamental Rights of the European Union¹⁰³⁶ - flowing either from the national legislation¹⁰³⁷, or from Community law, such as free movement provisions¹⁰³⁸.

Notwithstanding this statement, the Court does not evaluate whether and when national or Union law is a permissible restriction to the right to take collective action but, in a reverse perspective, whether and when fundamental collective social rights are legitimate restrictions to the exercise of economic freedoms, compatible with Treaty provisions.

As a general rule, national law and practice is considered a restriction of Treaty provisions not only when it directly and currently affect the access to the market, but also when it has potential adverse repercussions on the economic attractiveness of pursuing certain occupations. Collective actions are subject to the same principle.

In Viking, the collective action had the effect of making less attractive, or even pointless, Viking's exercise of its right to freedom of establishment, *«inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State»*¹⁰³⁹.

In Laval the right of trade unions to take collective action *«by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector - certain terms of which [...] establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 [...] - is liable to make it less attractive, or more difficult, for such*

¹⁰³⁶ International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 44; Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 91. See on this point, T. Novitz, A human rights analysis of the Viking and Laval judgements, in Cambridge Yearbook of European Legal Studies, 2007 - 2008, 548. According to the author, article 28 *«does not so much allow scope for exceptional protection of the right to strike, but rather suggests that entitlements under national law can be struck down by the European Court of Justice to the extent that they are inconsistent with EC market freedoms»*.

¹⁰³⁷ International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 44; Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 92.

¹⁰³⁸ International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 45 -47; Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 93 - 95.

¹⁰³⁹ International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 72.

*undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services»*¹⁰⁴⁰.

Give the above, collective actions would not be a restriction of EU law only in the event:

- (i) they do not make less attractive or more difficult the exercise of economic freedoms;
- (ii) they permit the enjoyment of the same treatment of other economic operators in the place of establishment.

If these conditions are not satisfied, collective actions should pass the test of justification and proportionality¹⁰⁴¹. The application of the test, even if consistent with the established internal market case-law, raises some problems of compatibility with the position of private actors: trade unions are not granted with the broad margin of discretion accorded to States in defining their social objectives nor with the appropriate means to protect them¹⁰⁴². So, their power to bring defensive argument to justify, if needed, their conduct is impaired since the beginning, and the Court could easily make a selective and detrimental use of the proportionality test against trade unions. Moreover, as Bercusson cautioned, *«at what stage of this [negotiation] process and against what criteria is the test of proportionality to be applied?»*¹⁰⁴³.

¹⁰⁴⁰ Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 99.

¹⁰⁴¹ P. Syrpis - T. Novitz, Economic and social rights in conflict: Political and judicial approaches to their reconciliation, *European Law Review*, 2008, 3, 411; S. Sciarra, Notions of Solidarity in Times of Economic Uncertainty, *Industrial Law Journal*, 2010, 3, 223; N. Hos, The principle of proportionality in Viking and Laval: an appropriate standard of judicial review? *European Labour Law Journal*, 2010, 2, 236; R. Zimmer, Labour market politics through jurisprudence: the influence of the judgements of the European Court of Justice (Viking, Laval, Ruffert, Luxembourg) on labour market policies, *German Policy Studies*, 2011, 1, 211; C. Barnard, A Proportionate Response to Proportionality in the Field of Collective Action, *European Law review*, 2012, 2, 117.

¹⁰⁴² L. Azoulai, The court of justice and the social market economy: the emergence of an ideal and the conditions for its realization, *Common Market Law Review*, 2008, 5, 1350. See also, C. Kilpatrick, British Jobs for British Workers? UK Industrial Action and Free Movement of Service in EU Law, *Law Society and Economy Working Papers - London School of Economics and Political Science – Law Department*, 16/2009, 20; *contra*, K. Lenaerts - J. A. Guitierrez-Fons, The constitutional allocation of powers and general principles of EU law, *Common Market Law Review*, 2010, 6, 1666. According to the Authors, *«while it is in principle legitimate for trade unions to seek to protect workers from social dumping, it is equally true that trade unions are not entitled to shield local labour markets from competition coming from Member States with low average wages. For this reason, the ECJ may have felt that granting a margin of appreciation to trade unions in such a broad way, as if they were Member State authorities, was inappropriate»*. For States' margin of appreciation in the case-law, see, *United Pan-Europe Communications Belgium SA and Others v Belgian State*, case C-250/06, 13 december 2007, par. 39 - 42; *Dynamic Medien Vertriebs GmbH v Avides Media AG*, case C-244/06, 14 February 2008, par. 44 - 45; *Félix Palacios de la Villa v Cortefiel Servicios SA*, case C-411/05, 16 October 2007, par. 68. In the latter case the Court claimed that Member States and, where appropriate, the social partners at national level *«enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it»*.

¹⁰⁴³ B. Bercusson, The Trade Union Movement and the European Union: Judgment Day, *European Law Review*, 2007, 3, 304.

2.1.3. Different forms of “strikes” and permissible aims

The Court did not give a “*European definition*” of strikes and collective actions, but some indications on the point might be derived from the case-law so far.

An early suggestion results from staff-cases. In *Martine Browet and others v Commission of the European Communities* an abstention from work of European staff members to demonstrate against the delays which had affected the Council’s work on modifying Community salaries was qualified as “*strike*” and it was held that a deduction from pay for the day of abstention due to the participation in strike action was legitimate, along the established practice of the majority of the Member States¹⁰⁴⁴.

Other indications might be inferred from *Viking and Laval*¹⁰⁴⁵.

In *Viking*, the Court held that:

*«as regards the collective action taken by FSU, even if that action – aimed at protecting the jobs and conditions of employment of the members of that union liable to be adversely affected by the reflagging of the Rosella – could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat»*¹⁰⁴⁶.

Albeit in the case FSU did not realise any collective action but merely threatened one - by giving the employer due notice of the perspective activity¹⁰⁴⁷ - it might be generalised that, admittedly, a “*primary action*” aimed to protect workers of the host State against possible social dumping may constitute an overriding reason of public interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty¹⁰⁴⁸.

¹⁰⁴⁴ *Martine Browet and others v Commission of the European Communities*, Joined cases T-576/93 to T-582/93, 15 July 1994. See, also, *Marie-Louise Acton and others v Commission of the European Communities*, Joined Cases 44, 46 and 49/74, 18 March 1975.

¹⁰⁴⁵ For a comprehensive analysis, see, F. Dorsemont, *The right to take collective action v. fundamental economic freedoms in the aftermath of Laval and Viking*, in M. De Vos, *European Union internal market and labour law: friends or foes?*, Antwerp, Intersentia, 2009, 45 seq.

¹⁰⁴⁶ *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007, par. 81.

¹⁰⁴⁷ *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007, par. 16 and 19.

¹⁰⁴⁸ *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007, par. 77.

The same seems to hold true for “*solidarity actions*”. The case-law of the Court provides for a small catalogue of permitted solidarity actions: so far, circular, blockade and sympathy boycott actions.

In Viking, the Court stated that the “*circular*” issued by an international trade union federation to the affiliates asking them to refrain from entering into negotiations with a certain employer can be qualified as a “*collective action*” for solidarity purposes between trade unions¹⁰⁴⁹, and that it might also be justified by the need to protect workers’ interests, provided that the exercise of the economic freedom is liable to have a harmful effect on the work or conditions of employment of its employees¹⁰⁵⁰.

Authors pointed out that the qualification of the circular as a “*collective action*” is puzzling¹⁰⁵¹. First, the obligation to respect the campaign was inherent in the affiliation of the national unions to ITF, so that ITF itself could not have any recourse to collective action. The collective action, if any, would be operated by the affiliates unions¹⁰⁵². Second, the appeal to affiliated trade unions can be better qualified as the exercise of another right, namely, in Dorssemont’s opinion, freedom of expression¹⁰⁵³.

In Laval the Court had to deal with blockading and sympathy boycott actions and held that blockading actions by a trade union of the host Member State «*which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers*»¹⁰⁵⁴.

Blockading actions are defined by the Court as measures preventing the delivery of goods onto a working site, placing pickets and prohibiting workers and vehicles from entering the

¹⁰⁴⁹ International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 12, 73, 89.

¹⁰⁵⁰ International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 89.

¹⁰⁵¹ F. Dorssemont, The right to take collective action v. fundamental economic freedoms in the aftermath of Laval and Viking, in M. De Vos, European Union internal market and labour law: friends or foes?, Antwerp, Intersentia, 2009, 74.

¹⁰⁵² B. Bercusson, The Trade Union Movement and the European Union: Judgment Day, European Law Review, 2007, 3, 304-305.

¹⁰⁵³ F. Dorssemont, The right to take collective action v. fundamental economic freedoms in the aftermath of Laval and Viking, in M. De Vos, European Union internal market and labour law: friends or foes?, Antwerp, Intersentia, 2009, 72.

¹⁰⁵⁴ Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 107.

site¹⁰⁵⁵ while sympathy actions are considered the ones involving workers of trade unions belonging to different productive sectors and having the effect of boycotting the client (Laval) of their direct employer as expression of solidarity among workers¹⁰⁵⁶. Irrespective of their apparently different qualifications, these collective actions are in practice very similar¹⁰⁵⁷.

With regard to the permissible aims, it can be generally appreciated that the ECJ considered the protection of workers¹⁰⁵⁸, the prevention of social dumping or unfair competition¹⁰⁵⁹ and the protection of the labour market from disturbances¹⁰⁶⁰ acceptable social justifications for the restriction of market freedoms. From an analysis of the scarce case-law it might be said that, for the Luxembourg Court, strikes and collective actions could restrict economic freedoms if they pursue the following aims:

- (i) protect workers, in particular workers of the host State, from social dumping;
- (ii) ensure that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level.

Nevertheless, even if these objectives are legitimate social aims, they should pass the test of suitability, necessity and proportionality to be compatible with Treaty freedoms.

Other collective actions aimed to improve working conditions in a long run or to stimulate good practices in conducting business were, so far, not submitted to judicial scrutiny and it remains to see how they will be regarded by the Court¹⁰⁶¹, particularly in the aftermath of Lisbon.

Finally, it should be cited the different distinction proposed by Advocate General Poiares Maduro between collective actions exercised in case of companies' relocation:

¹⁰⁵⁵ Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 34.

¹⁰⁵⁶ Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 37-38.

¹⁰⁵⁷ F. Dorssemont, The right to take collective action v. fundamental economic freedoms in the aftermath of Laval and Viking, in M. De Vos, European Union internal market and labour law: friends or foes?, Antwerp, Intersentia, 2009, 72.

¹⁰⁵⁸ Alfred John Webb, case C-279/80, 17 December 1981; Rush Portuguesa Lda v Office national d'immigration, case C-113/89, 27 March 1990.

¹⁰⁵⁹ Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix, case C-60/03, 12 October 2004; Commission of the European Communities v Federal Republic of Germany, case C-244/04, 19 January 2006.

¹⁰⁶⁰ Commission of the European Communities v Grand Duchy of Luxembourg, case C-445/03, 21 October 2004.

¹⁰⁶¹ Indeed, collective actions aimed «to support policies which in a long run may improve the social well-being of their members or avoid social dumping by indirect means of action» are not considered legitimate restriction to Treaty freedoms by the Court. See, N. Reich, Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases before the European Court of Justice - Part II, German Law Journal, 2008, 159.

- (i) actions undertaken before the relocation, to be considered «*a legitimate way for workers to preserve their rights and corresponds to what would usually happen if relocation were taken place within a Member State*»¹⁰⁶²;
- (ii) actions undertaken after the relocation and aimed to prevent the company that has moved elsewhere to provide its services in the Member State in which it was previously established¹⁰⁶³, to be considered «*the type of trade barrier that the Court held to be incompatible with the Treaty*»¹⁰⁶⁴.

The distinction was not taken into consideration by the Court but, if applied, it would have created a differential treatment between relocations outside the European Union, against which strikes were always permissible, and relocations within the European Union, against which strikes were permissible only before the relocation¹⁰⁶⁵.

2.1.4. A suitable, necessary and proportionate right

The protection of workers from social dumping and the guarantee that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level are legitimate aims for collective actions.

Nevertheless, actions aimed to protect said interests should be suitable, necessary and proportionate and, to this extent, the following conditions should be satisfied:

- (i) the jobs or the conditions of employment at issue should be jeopardised or under serious threat¹⁰⁶⁶. In case of transnational solidarity action, each worker involved should suffer an immediate threat to its employment conditions¹⁰⁶⁷. Indeed, ITF campaign could not have justified a restriction to free movement provisions since it applied also «*where the vessel is registered in a State which guarantees workers a higher level of social*

¹⁰⁶² Opinion of Advocate General Poirares Maduro in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007, par. 67.

¹⁰⁶³ Opinion of Advocate General Poirares Maduro in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007, par. 67.

¹⁰⁶⁴ Opinion of Advocate General Poirares Maduro in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007, par. 67.

¹⁰⁶⁵ R. L. Zahn, *I casi Viking and Laval: tra problemi di allargamento e soluzioni poco fortunate*, in M. Cartabia, *Dieci casi sui diritti in azione*, Bologna, Il Mulino, 2011, 225 seq., exp. 230.

¹⁰⁶⁶ *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007, par. 81.

¹⁰⁶⁷ *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, 11 December 2007, par. 89.

*protection than they would enjoy in the first State»*¹⁰⁶⁸, hence in a situation of no social dumping, and where no immediate protection of the workers was required¹⁰⁶⁹.

Jobs or conditions of employment are not jeopardised or under serious threat in case there is an undertaking by a company as binding as the terms of a collective agreement and of such a nature as to provide a guarantee to the workers that the statutory provisions would be complied with and the terms of the collective agreement governing their working relationship maintained¹⁰⁷⁰;

- (ii) in the event the jobs or conditions of employment are in fact jeopardised or under serious threat, then the collective action should be suitable for ensuring the achievement of the objective pursued and should not go beyond what is necessary to attain it¹⁰⁷¹. These conditions are satisfied only in the event the collective action has been exercised as “*extrema ratio*”, once other available remedies established under national rules and practices were exhausted without success¹⁰⁷².
- (iii) in case of collective action aimed to enter into negotiations on pay, there must be transparency on the rules regulating pay at national level and it must be possible or not excessively difficult in practice for the undertaking to determine the obligations with which it is required to comply as regards minimum pay¹⁰⁷³. Moreover, the negotiation should take into consideration the content of collective agreements binding the foreign undertaking¹⁰⁷⁴.

SECTION III – What kind of standard?

The study of the legal sources and the case-law conducted above raises the question of what kind of right to take collective action, including strike action, is protected as a

¹⁰⁶⁸ International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 88.

¹⁰⁶⁹ T. Novitz, A Human Rights Analysis of the Viking and Laval Judgments, Cambridge Yearbook of European Legal Studies, 2007-2008, 1, 557.

¹⁰⁷⁰ International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 82.

¹⁰⁷¹ International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 84.

¹⁰⁷² International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 86-87.

¹⁰⁷³ Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 109-110.

¹⁰⁷⁴ Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, 18 December 2007, par. 116.

fundamental right by the Charter of Fundamental Rights. To this extent, it should be considered that the present European Union legal construction of the fundamental rights to freedom of association and to take collective action, including strike action, is based on three standards: points 11 to 14 of the Community Charter of the Fundamental Social Rights of Workers, article 11 of the European Convention on Human Rights and the relevant case-law, and article 6 of the European Social Charter. Moreover, both the ECJ doctrine and the international sources play a role in shaping the construction of collective social rights at European level.

3.1. The Community Charter of the Fundamental Social Rights of Workers

With regard to the 1989 Community Charter of the Fundamental Social Rights of Workers, it might be claimed that the Charter of Fundamental Rights represents an evolution of the principles established in the former document only in some aspects.

On the one hand, article 11 of the Community Charter of the Fundamental Social Rights of Workers circumscribed freedom of association to the purpose of defending economic and social interests of workers, along the model of article 8 of the International Covenant on Economic, Social and Cultural Rights, while in article 12 of the Charter of Fundamental Rights the reference to the sole economic and social interests is disappeared. On the other hand, the “*defensive*” recognition of freedom of association for the protection of one’s interests remains unaltered in article 12 of the Charter of Fundamental Rights, and there is no acknowledgement of the activity of “*promotion*” of said interests, contrary to international obligations binding the Member States¹⁰⁷⁵.

Article 28 of the Charter of Fundamental Rights, which deals more specifically with industrial actions, limits the exercise of the rights in question to the cases of “*conflict of interests*” in consonance with the Community Charter of the Fundamental Social Rights of Workers - and of the European Social Charter - but lacks any express reference to role of collective agreements in shaping strike activities, which was present in article 13 of the Community Charter of the Fundamental Social Rights of Workers.

¹⁰⁷⁵ For instance, article 8 of the International Covenant on Economic, Social and Cultural Rights encompasses the “*promotion*” and article 10 of the ILO Convention n. 87 extends to activities aimed at “*furthering*” the interests of workers or employers.

3.2. Different forms of “strikes”

The relationship with the Council of Europe construction of strikes appears more complex and it seems necessary to provide some comments on it in.

The case-law analysis conducted in the previous Chapter Two shows the willingness of both the European Court of Human Rights and the European Committee of Social Rights to include in the scope of the treaties a wide range of collective actions, irrespective of their definition and legal classification.

The European Committee of Social Rights claimed that different collective operations such as picketing (not only the ones at the worker's own place of work)¹⁰⁷⁶, ban on overtime¹⁰⁷⁷, work to rule¹⁰⁷⁸, go slows¹⁰⁷⁹, rotating strikes¹⁰⁸⁰, warning strikes¹⁰⁸¹ are protected by article 6 of the Charter. Similarly, the European Court of Human Rights chose not to speculate about the extent to which article 11 of the Convention grants the right to strike and what is the relevant definition (*«sans spéculer sur le point de savoir dans quelle mesure l'article 11 de la Convention octroie le droit à la grève et quelle est la définition de ce droit dans le cadre de cet article»*¹⁰⁸²).

If the meaning of collective social rights in the Charter of Fundamental Rights should be equated to the ones established in the Council of Europe framework, there is an expectation that the aforementioned forms of collective actions would receive appropriate protection.

Moreover, it should be mentioned that the EU human rights regime should conform to international standards pursuant to article 53 of the Charter of Fundamental Rights. Therefore, the level of protection accorded to collective actions should not fall below the one provided, for instance, by the supervisory bodies of the ILO, who considered expression of the right to freedom of association not only collective actions entailing a suspension of the working performance but also other forms of strikes such as tools-down¹⁰⁸³, go-slow¹⁰⁸⁴, working to rule¹⁰⁸⁵, sit-down strikes, picketing operations¹⁰⁸⁶, boycotts¹⁰⁸⁷ and so on.

¹⁰⁷⁶ Conclusions XII-1, United Kingdom, 88; Conclusions XIII-1, United Kingdom, 153-154.

¹⁰⁷⁷ Conclusions XV-1, vol. 1, Cyprus, 117.

¹⁰⁷⁸ Conclusions XV-1, vol. 1, Cyprus, 117.

¹⁰⁷⁹ Conclusions XV-1, vol. 1, Cyprus, 117. See, also, Conclusions XV-1, vol. 2, Spain, 520.

¹⁰⁸⁰ Conclusions XV-1, vol. 2, Spain, 520.

¹⁰⁸¹ European Social Charter (Revised), Conclusions 2002, Romania, 106.

¹⁰⁸² ECtHR, *Dilek and others v. Turkey*, Applications nos 74611/01, 26876/02 et 27628/02, 30 January 2008, par. 57.

¹⁰⁸³ International Labour Conference, Observation of the Committee on the Application of Standards, Pakistan, 1999, 86th session.

Likewise, also lock-outs should fall within the scope of article 28 of the Charter of Fundamental Rights even if not expressly mentioned, since article 6 par. 4 of the European Social Charter has been interpreted as encompassing also the right to lock-out¹⁰⁸⁸.

However, the European Committee of Social rights clarified that this «*does not necessarily imply that legislation and case-law should establish full legal equality between the right to strike [...] and the right to call a lock-out*», and a domestic legal system is in compliance with the European Social Charter even if there is no legislation expressly protecting the right to lock-out¹⁰⁸⁹.

However, it is confusing what kind of standard should be applied when there is disagreement within the same Council of Europe on certain forms of collective action or on the nature of the right to strike. Reference should be made to secondary actions, political strikes and on the possibility to reconnect the right to strike to freedom of association or to freedom of peaceful assembly, both contained in article 11 of the European Convention on Human Rights.

So far, the European Committee of Social Rights and the European Court of Human Rights took divergent views on secondary actions.

The European Committee of Social Rights held these are protected by the European Social Charter and that any legislation preventing employees from taking industrial action against the *de facto* employer or concerning a future employer and future terms and conditions of employment is in breach of said treaty¹⁰⁹⁰. The position is supported by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association. In the

¹⁰⁸⁴ International Labour Conference, Direct Request of the Committee of Experts, Switzerland, 1991, 78th session; International Labour Conference, Observation of the Committee of Experts, Bangladesh, 2011, 101st session.

¹⁰⁸⁵ Case n. 2815, Complaints presented by the Trade Federation for Metals, Electronics, Electrical and other Allied Industries – Federation of Free Workers (TF4FFW) against the Government of Philippines, Interim report of the Committee of Experts n. 362, 2011, par. 1370.

¹⁰⁸⁶ International Labour Conference, Observation of the Committee of Experts, Turkey, 2010, 99th session.

¹⁰⁸⁷ International Labour Conference, Observation of the Committee of Experts, United Kingdom, 1991, 78th session; for secondary boycotts, International Labour Conference, Observation of the Committee on the Application of Standards, Australia, 2006, 95th session.

¹⁰⁸⁸ Conclusions I, 38-39.

¹⁰⁸⁹ Conclusions II, Cyprus, 187; Conclusions XV-1, vol. 2, Italy, 366-367

¹⁰⁹⁰ Conclusions XII-1, United Kingdom, 88; Conclusions XIII-1, United Kingdom, 153-154; Conclusions XVI-1, vol.2, United Kingdom, 688-689.

Report drafted following the mission to United Kingdom and Northern Ireland¹⁰⁹¹ he emphasized that:

«the right to strike is a legitimate and integral part of the activities of a trade union” and that any restrictions have to meet the strict test set out in article 22 of the International Covenant on Civil and Political Rights. [...] he urges the visited country to take measures in order to “ensure that the law also protects the right to strike, including secondary strikes in conformity with international human rights law»¹⁰⁹².

By contrast, Strasbourg judges still have to rule explicitly on secondary actions¹⁰⁹³ but in the past they held that, in the event workers’ employment conditions are not *«at any real and immediate risk of detriment or of being left defenceless against future attempt to downgrade pay or conditions»¹⁰⁹⁴*, restrictions on strike actions are permissible.

The position of the ECJ is similar. Actions aimed to protect workers’ interests should be suitable, necessary and proportionate and, to this extent, the jobs or the conditions of employment at issue should be jeopardised or under serious threat¹⁰⁹⁵. In case of transnational solidarity action, each worker involved should suffer an immediate threat to its employment conditions¹⁰⁹⁶.

Similar uncertainties can be underlined with regard to political strikes.

Strikes taken for political ends do not fall within the scope of article 6 par. 4 of the European Social Charter¹⁰⁹⁷. However, along the model established under the ILO case-law, the term *“political strikes”* was interpreted by the European Committee of Social Rights in a restrictive way, so that strikes to express opposition to the government’s economic and social policy are lawful, while purely political strikes aimed at subverting the constitutional order are illegal¹⁰⁹⁸.

¹⁰⁹¹ A/HRC/23/39/Add.1, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai. Addendum. Mission to the United Kingdom of Great Britain and Northern Ireland.

¹⁰⁹² A/HRC/23/39/Add.1, 22.

¹⁰⁹³ It should be monitored how the Court will decide the pending case National Union of Rail, Maritime and Transport Workers (RMT) v. the United Kingdom, application n. 31045/10, lodged on 1 June 2010.

¹⁰⁹⁴ ECtHR, UNISON v. The United Kingdom, Application n. 53574/99, 10 January 2002.

¹⁰⁹⁵ International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 81.

¹⁰⁹⁶ International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, 11 December 2007, par. 89.

¹⁰⁹⁷ Conclusions II, p. 28. See, also, Conclusions XIII-4, Germany, 351.

¹⁰⁹⁸ Conclusions XV-1, vol. 2, Spain, 520.

On the contrary, in *Urcan and others v. Turkey*¹⁰⁹⁹ a strike action was depicted by the Court as “*political ideas which challenge the established order*” («*idées politiques qui contestent l'ordre établi*»¹¹⁰⁰). According to the Court, if these ideas are advocated by peaceful means, the State should offer a reasonable opportunity to express them through the exercise of freedom of assembly and by other legal means in order not to deprive article 11 of the European Convention on Human Rights of its content¹¹⁰¹.

Finally, the European Committee of Social Rights is unambiguous in considering the right to strike a corollary of the right to freedom of association, while the European Court of Human Rights subsumed strike actions under two different rights: in some cases, under the concept of freedom of association¹¹⁰² and in some others, under the concept of freedom of peaceful assembly¹¹⁰³. In the previous Chapter¹¹⁰⁴, it has been argued that the safeguard by the Strasbourg Court of the right to strike as the exercise of freedom of peaceful assembly under article 11 of the European Convention on Human Rights might lead to the protection of wildcat strikes, might determine the States' obligation to take reasonable and appropriate measures to enable demonstrations, and open-up the possibility to exercise the right to strike not only as an *extrema ratio*¹¹⁰⁵. The construction should have effect also at the European Union level, since the case-law of the Strasbourg Court is a source of reference to define the meaning of the rights contained in articles 12 and 28 of the Charter of Fundamental Rights.

3.3. Permissible aims

The picture is complicated by the position of the European Court of Justice.

¹⁰⁹⁹ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008. In the same vein, also, ECtHR, *Saime Ozcan v. Turkey*, Application n. 22943/04, 15 December 2009.

¹¹⁰⁰ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

¹¹⁰¹ ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008, par. 32.

¹¹⁰² ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009.

¹¹⁰³ ECtHR, *Karaçay v. Turkey*, Application n. 6615/03, 27 June 2007; ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008; ECtHR, *Trofimchuk v. Ukraine*, Application n. 4241/03, 28 January 2011.

¹¹⁰⁴ See, Chapter Two, Section II, par. 2.1.4.

¹¹⁰⁵ ECtHR, *UNISON v. The United Kingdom*, 10 January 2002, Application n. 53574/99.

The ECJ had the chance to deal only with certain forms of strikes and collective actions, in particular primary actions aimed to protect workers of the host State from possible social dumping or solidarity actions such as blockade and sympathy boycott actions.

These forms of action should allegedly be considered fundamental rights and fall within the scope of the Charter of Fundamental Rights, even if they do not receive any specific protection *per se*, but only in the event they pursue legitimate aims compatible with the European Treaties and their exercise is suitable, necessary and proportionate to reach said aims.

With regard to the permissible aims, these had been identified by the ECJ in the protection of worker from social dumping and in the guarantee that posted workers would have their terms and condition of employment fixed at a certain level.

This construction fails to take into consideration the position of the ILO who claimed that:

«the right to strike is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers»¹¹⁰⁶.

Moreover, the ECJ position does not reflect the protection accorded to the right to take collective action under article 6 par. 4 of the European Social Charter which includes strikes aimed not only at the conclusion of collective agreements but also directed, for instance, to oppose broad economic and social strategies.

3.4. A suitable, necessary and proportionate right

With regard to the characteristic of suitability, necessity and proportionality of the action, the ECJ hold that, basically, these conditions are satisfied if¹¹⁰⁷:

- (i) the jobs or the conditions of employment are jeopardised or under serious and immediate threat; and

¹¹⁰⁶ Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 1983, 62, par. 200; Case n. 1081, Complaints presented by the International Confederation of Free Trade Unions, the Federation of Peruvian Light and Power Workers and various other trade union organisations against the Government of Peru, Committee on Freedom of Association, 214th Report, 1982, 55 seq., par. 261.

¹¹⁰⁷ See, Section II, par. 2.1.4 of this Chapter.

(ii) the collective action has been exercised as “*extrema ratio*”, once other available remedies established under national rules and practices were exhausted without success.

The first condition (the existence of a serious and immediate threat) resembles the “*defensive*” recognition of the right to form and join trade unions for the protection of one’s interests under article 11 of the European Convention on Human Rights and certain case-law of the Strasbourg Court, claiming that restrictions on the exercise of the right to strike do not breach the European Convention on Human Rights in so far as the workers’ employment conditions are not «*at any real and immediate risk of detriment or of being left defenceless against future attempt to downgrade pay or conditions*»¹¹⁰⁸. However, the principle clashes with more recent decisions of the European Court of Human Rights, in which the Court did not deem necessary to have a real and immediate threat to the working conditions and considered falling within the scope of article 11 of the European Convention on Human Rights (notably, under freedom of peaceful assembly) an action aimed to protest against a labour legislation not yet entered into force but just under discussion in the Parliament¹¹⁰⁹.

The second condition (the exercise of the right to strike as a right of last resort) might find a correspondence in some early cases of the European Court of Human Rights. Those cases recognised the right to strike as one of the most important means to protect workers interests but denied any protection of same under the European Convention on Human Rights on the assumption that each State has great discretion to identify what are the means to promote trade unions action, and as far as these means are available, workers cannot be considered as deprived of their capacity to struggle for their interests¹¹¹⁰. This construction has been overruled by the subsequent case-law of the Strasbourg Court¹¹¹¹ even if it still have some echoes in the United Nations Committee on Economic, Social and Cultural Rights that, in a controversial way, pointed out that the right to strike should be exercised only as a right of last resort¹¹¹².

On the contrary, the European Committee of Social Rights refused to interpret the right to strike protected by article 6 par. 4 of the Economic and Social Charter as a right of last resort,

¹¹⁰⁸ ECtHR, *UNISON v. The United Kingdom*, Application n. 53574/99, 10 January 2002.

¹¹⁰⁹ ECtHR, *Kaya and Seyhan v. Turkey*, Application n. 30946/04, 15 December 2009.

¹¹¹⁰ ECtHR, *Schmidt and Dahlstrom v. Sweden*, Application n. 5589/72, 6 February 1976, par. 36. Similarly, ECtHR, *National Union of Belgian Police v. Belgium*, Application n. 4464/70, 27 October 1975; ECtHR, *Wilson, National Union of Journalists and others v. The United Kingdom*, Applications n. 30668/96, 30671/96 and 30678/96, 2 October 2002.

¹¹¹¹ ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009.

¹¹¹² CESCR, Session 37, Meeting 58, Tajikistan, 23 November 2006, Summary record E/C.12/2006/SR.39, E/C.12/2006/SR.40, E/C.12/2006/SR.41.

because it is a trade union's key prerogative to decide whether and when a strike is necessary. To this extent, the Netherlands was criticised for its misuse of the proportionality principle. In the country, a strike may only occur as a last resort and, as a consequence, a Dutch judge is entitled to decide on whether collective action is premature. For the Committee, this practice represents an illegitimate restriction on the right to strike contrary to the Charter because it materially allows the judge «*to exercise one of the trade unions' key prerogatives, that of deciding whether and when a strike is necessary*»¹¹¹³.

Above all, it is the same use of the proportionality principle that seems in contrast with the position of the European Committee of Social Rights and the international monitoring bodies.

The European Committee of Social Rights established that the use of the concept of abuse of right or the proportionality criterion to evaluate the appropriateness - and consequently the lawfulness - of strike actions may restricts the exercise of the right to strike beyond the limits set forth in article 31 of the European Social Charter, because it is not on the judge's side to evaluate the opportunity and the appropriateness of collective actions¹¹¹⁴. It also said that the principles of “*proportionality*” and “*fairness*” developed by the German jurisprudence¹¹¹⁵ is contrary to the Charter because it has the effect of supplanting the social partners in assessing the appropriateness of taking collective action in view of the circumstances and the interests at stake¹¹¹⁶.

At the international level, the ILO Committee of Experts maintained that, when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services¹¹¹⁷. The United Nations Committee on Economic, Social and Cultural Rights hold that the judicial interpretation may

¹¹¹³ Conclusions XVII-1, vol. 2, The Netherlands, 319.

¹¹¹⁴ Conclusions XVI-1, vol. 1, Belgium, 71.

¹¹¹⁵ According to which: «*a) the strike must be an adequate and necessary means to achieve lawful objectives in a dispute and bring about labour peace. Furthermore, the strike weapon must only be used as a last resort (ultima ratio); b) the strike must be carried out according to the rules of a fair dispute and must not aim at the elimination of the opponent, however, this does not mean that only the softest means must be used; c) upon termination of the strike, both parties to the collective agreement must contribute to re-establishing labour peace as quickly and as comprehensively as possible*»; see, Conclusions XVI-1, vol. 1, Germany, 248-249.

¹¹¹⁶ Conclusions XVI-1, vol. 1, Germany, 248-249; see, also, concurring opinion of Mr. Aliprantis, conclusions XVII-1 vol. 1, Germany, 225; conclusions XVI-1, vol.1, The Netherlands, 472-473.

¹¹¹⁷ Observation of the Committee of Experts to United Kingdom, International Labour Conference, 2010, 99th session; Observation of the Committee of Experts to Sweden, International Labour Conference, 2013, 102nd session. In comparable terms, European Committee of Social Rights, Collective complaint n. 85/2012, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, decision on the admissibility and the merits, 3 July 2013.

have the effect to curtail the exercise of the right to strike or deprive it of its effectiveness and asked the Swiss Government to provide information on the judicial use of the principle of “*reasonableness*” to evaluate the legitimacy of a strike action¹¹¹⁸.

3.5. Permissible restrictions

Turning to the permitted restrictions, it should be acknowledged that the right to take collective action, including strike action, is a fundamental right albeit not unlimited, and the international legal sources and the relevant case-law provides for guidance on the content and limits of the possible limitations. Within the framework of the Council of Europe, restrictions are normally tolerated, provided that they satisfy the requirements established by article 11 par. 2 ECHR or articles 31 ESC, G RESC or 6 par. 4 of the Charter¹¹¹⁹.

The same holds true for the European Union. The right to freedom of association protected by article 12 of the Charter of Fundamental Rights is subject to the limitations stemming from article 52 par. 1 that, in accordance with article 52 par. 3, «*may not exceed those considered legitimate by virtue of Article 11(2) of the ECHR*». Article 28 of the Charter of Fundamental Rights is subject to general limitations pursuant to article 52 par. 1 and specific limitations contained in the same article 28.

On the point, it should be drawn the attention to the discordance between the European Court of Human Rights and the European Committee of Social Rights about the State’s intervention to limit the collective conflict.

The European Committee of Social Rights held that States’ intervention at the very beginning of the strike, before its effect could be validly assessed¹¹²⁰, is not acceptable under the terms of the European Social Charter. The European Court of Human Rights took a different view and held that the State intervention at the beginning of the strike is justified in the event the unions the chance to exercise - for a certain, albeit short, period of time - their rights¹¹²¹. Differently than the Committee, the Court did not look at whether the intervention of the State was premature with regard to the concrete effect of the strike action, but limited

¹¹¹⁸ CESCR, Session 45, Meeting 55, Switzerland, 19 November 2010, E/C.12/CHE/CO/2-3, Summary record E/C.12/2010/SR.37, E/C.12/2010/SR.38 and E/C.12/2010/SR.39.

¹¹¹⁹ ECtHR, *Dilek and others v. Turkey*, Applications n. 74611/01, 26876/02 and 27628/02, 30 January 2008; ECtHR, *Enerji Yapi-Yol Sen v. Turkey*, Application n. 68959/01, 6 November 2009, par. 32; Conclusions I, 38; conclusions XII-1, Denmark, 84; conclusions 2004, Bulgaria, 44; conclusions 2010, vol. 1, Bulgaria, 186-187.

¹¹²⁰ Conclusions XII-1, Norway, 86-87.

¹¹²¹ ECtHR, *Federation of Offshore Workers’ Trade Unions and others v. Norway*, Application n. 38190/97, 27 June 2002.

its evaluation to the fact that workers got the possibility to strike, irrespective of the length of the action.

The case-law of the ECJ is not helpful to define the permissible restrictions on collective social rights under the Charter of Fundamental Rights. Indeed, in its jurisprudence the Luxembourg Court considered the same right to take collective action as a restriction to the exercise of economic freedoms in the need for suitable justification.

The Charter of Fundamental Rights, being primary law of the European Union, opened up the possibility to change the standard of interpretation and recognise the fundamental rights as such and not as being, *per se*, restrictions to the exercise of economic freedoms¹¹²².

Conclusions

An empirical study based on data collected through interviews with the Court of Justice's Judges and Advocates General shows a distinction between those who believe that a new era of integration based on human rights was inaugurated with Lisbon and those who reject the idea that the Union has entered in a new era of rights, arguing that the Court has recognised and protected rights for decades so that the Charter does only confer rights visibility to everybody in the continent¹¹²³.

The right to take collective action, including strike action, being the most manifest example of conflict between labour and capital, might constitute a good benchmark to test the tightness of the European Union economic and social aspirations after Lisbon. If the European Union protects the exercise of economic freedoms in a transnational contest, then the same must be true for the exercise of fundamental collective social rights.

The protection does not need to flow from "*federal*" legislative interventions, that would entail a common political will to modify the Treaties, but might be built upon the «*enormous transformative potential*»¹¹²⁴ offered by the new legal instruments at the disposal of the judicial.

¹¹²² See the reference made in the explanations to the Charter of Fundamental Rights to certain case-law of the Court of Justice that admitted the judicial overturn; Kjell Karlsson and Others, Case C-292/97, 13 April 2000, par. 45. In the same vein, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, Case 5/88, 13 July 1989, par. 18.

¹¹²³ S. Morano-Foadi - S. Andreadakis, Reflections on the Architecture of the EU after the Treaty of Lisbon: the European Judicial Approach to Fundamental Rights, *European Law Journal*, 2011, 5, 595.

¹¹²⁴ N. Countouris, M. Freedland, *Resocialising Europe - looking back and thinking forward*, in N. Countouris, M. Freedland, *Resocialising Europe in a time of crisis*, Cambridge, Cambridge University press, 2013, 496.

Nevertheless, there should be an agreement upon the content of the rights protected by the Charter of Fundamental Rights. Collective social rights are construed around the meaning that those rights have within international systems of human rights safeguard and their level of protection should not fall below the standards established by those systems.

This construction suggests, first, that it is necessary to look at European fundamental rights from a human rights perspective, that is the same perspective of the international systems of human rights protection who determine the meaning of European collective social rights. Therefore, fundamental rights should be justified *per se*, even if it is possible to provide some limitations on their exercise, as long as these limitations would not deprive them of their effectiveness.

Secondly, the international machinery of fundamental rights protection should move in a coherent direction, in order to give collective social rights an unambiguous meaning. And to reach the aim, there should be a commitment of supranational courts and monitoring bodies to look at each other decisions, and to take into consideration the most protective standard internationally established.

BIBLIOGRAPHY

LIST OF AUTHORS

- Ahlberg K., Laval case brings new Swedish law, *Nordic Labour Journal*, April 2010.
- Ales E., Libert  e “uguaglianza solidale”: il nuovo paradigma del lavoro nella Carta dei diritti fondamentali, *Argomenti di Diritto del Lavoro*, 2001, 1.
- Alfredsson G., Eide A., *The Universal declaration of Human Rights. A common standard of achievement*, The Hague, Martinus Nijhoff, 1999.
- Alston P., *Labour rights as human rights*, Oxford, Oxford University Press, 2005.
- Alston P., *The EU and Human Rights*, Oxford, Oxford University Press, 1999.
- Andenas M., Roth W., *Services and Free Movement in EU Law*, Oxford, Oxford University Press, 2001.
- Andreoni A., Sciopero, contratto collettivo e diritti dell’economia: la svolta politica della Corte di Giustizia, in Andreoni A., Veneziani B., *Libert  economiche e diritti sociali nell’Unione Europea. Dopo le sentenze Laval, Viking, Ruffert e Lussemburgo*, Roma, Ediesse, 2009.
- Andreoni A., Veneziani B., *Libert  economiche e diritti sociali nell’Unione Europea. Dopo le sentenze Laval, Viking, Ruffert e Lussemburgo*, Roma, Ediesse, 2009.
- Anonymous, *The European Social Charter and International Labour Standards: I*, *International Labour Review*, 1961, 5.
- Anonymous, *The European Social Charter and International Labour Standards: II*, *International Labour Review*, 1961, 6.
- Apps K., *Damage claims against trade unions after Viking and Laval*, *European Law Review*, 2009, 1.
- Arnold A., Barnard C., Dougan M., Spaventa E., *A constitutional order of states: essays in honour of Alan Dashwood*, Oxford, Hart Publishing, 2011.
- Arthurs H., *Labour law after labour*, in Davidov G., Langille B., *The Idea of Labour Law*, Oxford, Oxford University Press, 2011.
- Ashiagbor D., Countouris N., Lianos I., *The European Union after the Treaty of Lisbon*, Cambridge, Cambridge University Press, 2012.
- Azoulai L., *The court of justice and the social market economy: the emergence of an ideal and the conditions for its realization*, *Common Market Law Review*, 2008, 5.
- Ballestrero M. V., *Europa dei mercati e promozione dei diritti*, in WP C.S.D.L.E. “Massimo D’Antona”, 55/2007.
- Barnard C., ‘British Jobs for British Workers’: The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market, *Industrial Law Journal*, 2009, 3.

- Barnard C., A Proportionate Response to Proportionality in the Field of Collective Action, *European Law Review*, 2012, 2.
- Barnard C., Deakin S., *European Labour Law after Laval*, in Moreau M., *Before and after the economic crisis. What implications for the 'European Social Model'?*, Cheltenham, Edward Elgar Publishing, 2011.
- Barnard C., Deakin S., In search of coherence: social policy, the single market and fundamental rights, *Industrial Relations Journal*, 2000, 4.
- Barnard C., Deakin S., Morris G.S., *The future of labour law. Liber Amicorum Sir Bob Hepple QC*, Oxford, Oxford University Press, 2004.
- Barnard C., Derogations, Justification and the four freedoms: is state interest really protected? in Barnard C., Odudu O., *The outer limits of European Law*, Oxford, Hart Publishing, 2009.
- Barnard C., *EC Employment law*, Oxford, Oxford University Press, 2000.
- Barnard C., *EU Employment law*, 4th ed., Oxford, Oxford University Press, 2012.
- Barnard C., Fitting the remaining pieces into the goods and persons jigsaw?, *European Law Review*, 2001, 1.
- Barnard C., Internal Market v. Labour Market: a Brief History, in De Vos M., *European Union Internal Market and Labour Law: Friends or Foes?*, Antwerp, Intersentia, 2009.
- Barnard C., Restricting restrictions: lessons for the EU from the US?, *Comparative Law Journal*, 2009, 3.
- Barnard C., Social dumping or dumping socialism? *Cambridge Law Journal*, 2008, 2.
- Barnard C., *The substantive law of the EU*, 3rd ed., Oxford, Oxford University Press, 2010.
- Barnard C., Viking and Laval: An Introduction, *Cambridge Yearbook of European Legal Studies*, 2007-2008, 1.
- Barnard C., Odudu O., *The outer limits of European Law*, Oxford, Hart Publishing, 2009.
- Barnard C., Scott J., *The Law of the Single European Market: Unpacking the Premises*, Oxford, Hart Publishing, 2002.
- Bartole S., De Sena P., Zagrebelsky V., *Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, Milano, Cedam, 2012.
- Bartolomei De La Cruz H. G., International Labour Law: Renewal or Decline?, *International Journal of Comparative Labour Law and Industrial Relations*, 1994, 3.
- Bates E., The birth of the European Convention on Human Rights, in Christoffersen J., Madsen M., *The European Court of Human Rights between law and politics*, Oxford, Oxford University Press, 2011.
- Bates E., *The Evolution of the European Convention on Human Rights From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010.
- Bellace J. R., *Deciding the Meaning of Human Rights at Work*, draft for the courtesy of the Author, forthcoming.
- Bellace J. R., The ILO and the right to strike, *International Labour Review*, 2014, 1, forthcoming.

- Bellace J. R., *The ILO Declaration of Fundamental Principles and Rights at Work*, *International Journal of Comparative Labour Law and Industrial Relations*, 2001, 3.
- Ben-Israel R., *International Labour Standards: the case of freedom to strike*, Deventer, Kluwer law and taxation publishing, 1988.
- Ben-Israel R., *Strikes, Lock-outs and other kinds of hostile actions*, *International Encyclopaedia of Comparative Law*, Vol. XV, 1994.
- Bercusson B., *Assessment of the Opinions of the Advocates General in Laval and Viking and Laval, Six Alternative Solutions*, Advice to the ETUC, 31 October 2007.
- Bercusson B., *Episodes on the path towards the European social model in Barnard C., Deakin S., Morris G.S., The future of labour law. Liber Amicorum Sir Bob Hepple QC*, Oxford, Oxford University Press, 2004.
- Bercusson B., *European Labour Law and the EU Charter of Fundamental Rights*, Baden-Baden, Nomos, 2006.
- Bercusson B., *European labour law*, 2nd ed., Cambridge, Cambridge University Press, 2009.
- Bercusson B., *The Trade Union Movement and the European Union: Judgment Day*, *European Law Journal*, 2007, 3.
- Bernard N., *Discrimination and Free Movement in EC Law*, *International and Comparative Law Quarterly*, 1996, 1.
- Bestagno F., *I diritti economici, sociali e culturali – promozione e tutela nella comunità internazionale*, Vita & Pensiero, Milano, 2009.
- Betten L., *The EU Charter of Fundamental Rights: a Trojan Horse or a Mouse?*, *International Journal of Comparative Labour Law and Industrial Relations*, 2001, 17.
- Bifulco R., Cartabia M., Celotto A., *L'Europa dei diritti: commento alla Carta dei diritti fondamentali dell'Unione Europea*, Bologna, Il Mulino, 2001.
- Birk R., *The Historical Development of the European Social Charter*, in Blanpain R., Colucci M., *International Encyclopaedia for Labour Law and Industrial Relations*, The Hague, Kluwer Law International, 2007.
- Blackburn R., Polakiewicz J., *Fundamental rights in Europe: the European Convention on Human Rights and its member States, 1950-2000*, Oxford, Oxford University Press, 2001.
- Blanke H.J., Mangiameli S., *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action*, Berlin, Springer, 2012.
- Blanke H.J., *The Protection of Fundamental Rights in Europe*, in Blanke H.J., Mangiameli S., *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action*, Berlin, Springer, 2012.
- Blanpain R., Colucci M., Hendrickx F., *Legal analysis of certain aspects of collective labour law: strike*, European Social Fund, 2011.
- Blanpain R., Colucci M., *International Encyclopaedia for Labour Law and Industrial Relations*, The Hague, Kluwer Law International, 2007.
- Blanpain R., *Comparative labour law and industrial relations in industrialized market economies*, The Hague, Kluwer Law International, 2010.

- Blanpain R., *Comparative labour law and industrial relations in industrialised market economies*, The Hague, Kluwer Law International, 2007.
- Blanpain R., *European Labour Law*, The Hague, Kluwer Law International, 2010.
- Blanpain R., *Labour law, human rights and social justice. Liber amicorum in honour of Ruth Ben-Israel*, The Hague, Kluwer Law International, 2001.
- Bloed A., De Jonge W., *Legal aspects of a new European legal infrastructure*, Utrecht, Nederlands Helsinki Komitè, 1992.
- Bond M., *The Council of Europe and human rights: an introduction to the European Convention on Human Rights*, Strasbourg, Council of Europe, 2010.
- Borelli S., Guazzarotti A., Lorenzon S., *I diritti dei lavoratori nelle carte europee dei diritti fondamentali*, Jovene, Napoli, 2012.
- Bossuyt M.J., *Guide to the “travaux préparatoires” of the International Covenant on Civil and Political Rights*, Dordrecht, Martinus Nijhoff Publisher, 1987.
- Bossuyt M.J., *La distinction juridique entre les droits civil et politiques et le droits économiques, sociaux et cultureles*, *Revue de droit de l’homme*, 1975, 8.
- Briggs C., *Lockout Law in a Comparative Perspective: Corporatism, Pluralism and Neo-Liberalism*, *International Journal of Comparative Labour Law and Industrial Relations*, 2005, 3.
- Bronzini G., *Diritto alla contrattazione collettiva e diritto di sciopero entrano nell’alveo protettivo della CEDU: una nuova frontiera per il garantismo sociale in Europa?*, *Rivista Italiana di Diritto del Lavoro*, 2009, 2.
- Bronzini G., *La carta dei diritti fondamentali dell’Unione Europea*, in *Questione Giustizia*, 2000.
- Bruun N., Jonsson C. M., *Country report - Nordic countries*, in Bücken A., Warneck W., *Viking – Laval – Ruffert: Consequences and policy perspectives*, Bruxelles, ETUI, 2010.
- Bücken A., Warneck W., *Viking – Laval – Ruffert: Consequences and policy perspectives*, Bruxelles, ETUI, 2010.
- Buergenthal T., Shelton D., Stewart D. P., *International Human Rights in a Nutshell*, 3rd ed., Minnesota, West Publishing Company, 2002.
- Buergenthal T., *The Evolving International Human Rights System*, *The American Journal of International Law*, 2006, 4.
- Bultrini A., *La Conferenza di Brighton sul futuro della Convenzione europea dei diritti dell'uomo*, *Quaderni Costituzionali*, 2012, 3.
- Caflich L., *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, *Human Rights Law Review*, 2006, 2.
- Cançado Trindade A.A., *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011.
- Carabelli U., *Il contrasto tra le libertà economiche fondamentali e i diritti di sciopero e di contrattazione collettiva nella recente giurisprudenza della Corte di giustizia: il sostrato*

ideologico e le implicazioni giuridiche del principio di equivalenza gerarchica, Studi sull'integrazione europea, 2011, 2.

Carabelli U., Note critiche a margine della sentenza della Corte di Giustizia nei casi Laval e Viking, Diritto del Lavoro e delle Relazioni Industriali, 2008, 1.

Carabelli U., Unione Europea e libertà economiche "sociofaghe" (ovvero, quando le libertà di circolazione dei servizi e di stabilimento si alimentano del dumping sociale), in Foglia R., Cosio R., Il diritto del lavoro nell'Unione europea, Milano, 2011.

Cartabia M., Article 53, in Bifulco R., Cartabia M., Celotto A., L'Europa dei diritti: commento alla Carta dei diritti fondamentali dell'Unione Europea, Bologna, Il Mulino, 2001.

Cartabia M., Dieci casi sui diritti in azione, Bologna, Il Mulino, 2011.

Cartabia M., I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti Europee, Bologna, Il Mulino, 2007.

Cartabia M., L'ora dei diritti fondamentali nell'Unione Europea, in Cartabia M., I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti Europee, Bologna, Il Mulino, 2007.

Christoffersen J., Madsen M., The European Court of Human Rights between law and politics, Oxford, Oxford University Press, 2011.

Civitarese Matteucci S., Guarriello F., Puoti P., Diritti fondamentali e politiche dell'Unione Europea dopo Lisbona, Bologna, Maggioli Editore, 2013.

Clauwaert S., European Framework Agreements: "nomina nuda tenemus" or what's in a name? Experiences of the European Social Dialogue, in Schomann I., Jagodzinski R., Boni G., Clauwaert S., Glassner V., Jasper T., Transnational collective bargaining at company level. A new component of European Industrial relations?, Brussels, ETUI, 2012.

Conway G., Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ, German Law Journal, 2010, 11.

Coppel J., O'Neill A., The European Court of Justice: Taking Rights Seriously?, Common Market Law Review, 1992, 4.

Corazza L., Il nuovo conflitto collettivo. Clausole di tregua, conciliazione e arbitrato nel declino dello sciopero, Milano, Franco Angeli, 2012.

Cosio R., Foglia R., Il diritto europeo nel dialogo delle Corti, Milano, Giuffrè, 2013.

Cosio R., I diritti fondamentali nell'Unione Europea, in Cosio R., Foglia R., Il diritto europeo nel dialogo delle Corti, Milano, Giuffrè, 2013.

Countouris N., Freedland M., Injunctions, cyanamid and the corrosion of the right to strike in the UK, European Labour Law Journal, 2010, 4.

Countouris N., Freedland M., Resocialising Europe - looking back and thinking forward, in Countouris N., Freedland M., Resocialising Europe in a time of crisis, Cambridge, Cambridge University Press, 2013.

Countouris N., Freedland M., Resocialising Europe in a time of crisis, Cambridge, Cambridge University Press, 2013.

Craig P., De Burca G., The evolution of EU Law, Oxford, Oxford University Press, 2011.

Craig P., *The Charter, the ECJ and National Court*, in Ashiagbor D., Countouris N., Lianos I., *The European Union after the Treaty of Lisbon*, Cambridge, Cambridge University Press, 2012.

Craig P., *The Lisbon Treaty: law, politics and treaty reform*, Oxford, Oxford University Press, 2010.

Craven M. C. R., *The International Covenant on Economic, Social and Cultural Rights*, Oxford, Clarendon Press, 1995.

Creighton B., *Freedom of association*, in Blanpain R., *Comparative labour law and industrial relations in industrialized market economies*, The Hague, Kluwer Law International, 2010.

Creighton B., *The ILO and protection of Freedom of Association in the United Kingdom*, in Ewing K.D., Gearty C.A., and Hepple B., *Human rights and labour law. Essays for Paul O'Higgins*, London, Mansell Publishing Limited, 1994.

Curcuruto F., *L'integrazione europea tra Bundesverfassungsgericht e Corte di Giustizia*, in Cosio R., Foglia R., *Il diritto europeo nel dialogo delle Corti*, Milano, Giuffrè, 2013.

Dani M., *I diritti dei lavoratori tra costituzionalismo statale e diritto del mercato unico Europeo*, in Borelli S., Guazzarotti A., Lorenzon S., *I diritti dei lavoratori nelle carte europee dei diritti fondamentali*, Jovene, Napoli, 2012.

Daniele L., *Non-discriminatory restrictions to free movement of persons*, *European Law Review*, 1997, 3.

Dashwood A., *The limits of European Community powers*, *European Law Review*, 1996, 2.

Dashwood A., *Viking and Laval: issues of horizontal direct effect*, *Cambridge Law Journal*, 2007 – 2008.

Davidov G., Langille B., *The Idea of Labour Law*, Oxford, Oxford University Press, 2011.

Davies A. C. L., *Right to Strike versus Freedom of Establishment in EC Law: The Battle Commences*, *Industrial Law Journal*, 2006, 1.

Davies A. C. L., *Should the EU have the power to set minimum standards for collective labour rights in the Member States?*, in Alston P., *Labour rights as human rights*, Oxford, Oxford University Press, 2005.

Davies A., *One step forward, two steps back? The Viking and Laval cases in the ECJ*, *Industrial Law Journal*, 2008, 2.

Davies P., Lyon-Caen A., Sciarra S., Simitis S., *European Community Labour Law: principles and perspectives*, Oxford, Clarendon Press, 1996.

Davies P., *Posted Workers: Single Market Or Protection of National Labour Law Systems?*, *Common Market Law Review*, 1997, 3.

De Albuquerque C., *Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights-The Missing Piece of the International Bill of Human Rights*, *Human Rights Quarterly*, 2010, 32.

De Burca G., *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, New York University, School of Law, Public Law & Legal Theory Research Paper Series, Working Paper n. 13-51, September 2013.

- De Burca G., De Witte B., *Social Rights in Europe*, Oxford, Oxford University Press, 2005.
- De Burca G., *The drafting of the European Union Charter of fundamental rights*, *European Law Review*, 2001, 2.
- De Burca G., *The principle of proportionality and its application in EC Law*, *Yearbook of European Law*, 1993.
- De Burca G., *Unpacking the concept of discrimination in EC and International trade law*, in Barnard C., Scott J., *The Law of the Single European Market: Unpacking the Premises*, Oxford, Hart Publishing, 2002.
- De Mol M., *Küçükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law*, *European Constitutional Law Review*, 2010, 2.
- De Salvia A., *La proposta di Regolamento Monti II in materia di sciopero*, *Rivista Italiana di Diritto del Lavoro*, 2012, 3.
- De Salvia A., *Le conseguenze del caso Laval sul sistema svedese di relazioni industriali*, in *Sociologia del Diritto*, 2011, 3.
- De Salvia M., *La Convenzione europea dei diritti dell'uomo*, 3rd ed., Napoli, Editoriale scientifica, 2001.
- De Schutter O., *The European Social Charter*, in Krause C., Scheinin M., *International Protection of Human Rights: a textbook*, Turku, Abo Akademi University, 2012.
- De Schutter O., *The European Social Charter: a social constitution for Europe*, Bruxelles, Bruylant, 2011.
- De Schutter O., *The Status of Human Rights in International law*, in Krause C., Scheinin M., *International Protection of Human Rights: a textbook*, Turku, Abo Akademi University, 2012.
- De Vos M., *European Union Internal Market and Labour Law: Friends or Foes?*, Antwerp, Intersentia, 2009.
- Deakin S., *Labour Law as market regulation: the economic foundation of the European social policy*, in Davies P., Lyon-Caen A., Sciarra S., Simitis S., *European Community Labour Law: principles and perspectives*, Oxford, Clarendon Press, 1996.
- Deakin S., *Legal Diversity and Regulatory Competition: Which Model for Europe?*, *European Law Journal*, 2006, 4.
- Deakin S., *Regulatory competition in Europe after Laval*, Centre for Business Research, University of Cambridge, Working Paper n. 364, June 2008.
- Del Punta R., *I diritti sociali come diritti fondamentali: riflessioni sulla Carta di Nizza*, *Diritto delle Relazioni Industriali*, 2001.
- Dinan D., *Europe Recast. A history of the European Union*, Houndmills, Palgrave Macmillan, 2004.
- Dorssemont F., *A judicial pathway to overcome Laval and Viking*, OSE Research Paper n. 5, September 2011.
- Dorssemont F., *How the European Court of Human Rights gave us Enerji to cope with Viking and Laval*, Moreau M-A., *Before and After the Economic Crisis. What implications for the European Social Model?*, Cheltenham, Edward Elgar Publishing, 2011.

Dorssemont F., Jasper T., *Cross-Border collective actions in Europe: a legal challenge*, Antwerp, Intersentia, 2007.

Dorssemont F., The right to form and to join trade unions for the protection of his interests under article 11 of the ECHR. An attempt “to Digest” the case-law (1975-2009) of the European Court on Human Rights, *European Labour Law Journal*, 2010, 1.

Dorssemont F., The right to take collective action v. fundamental economic freedoms in the aftermath of Laval and Viking, in M. De Vos, *European Union internal market and labour law: friends or foes?*, Antwerp, Intersentia, 2009.

Douglas Scott S., The European Union and Human Rights after the Treaty of Lisbon, *Human Rights Law Review*, 2011, 4.

Drzewicki K., European systems for the promotion and protection of human rights, in Krause C., Scheinin M., *International Protection of Human Rights: a textbook*, Turku, Abo Akademi University, 2012.

Drzewicki K., Future relations between Eastern Europe and the Council of Europe, in Bloed A., De Jonge W., *Legal aspects of a new European legal infrastructure*, Utrecht, Nederlands Helsinki Komitè, 1992.

Dunning H., The origins of Convention n. 87 on freedom of association and the right to organise, *International Labour Review*, 1998, 2.

Ebert F. C., Oelz M., Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts, Geneva, International Labour Organization, International Institute for Labour Studies, Discussion paper 212/2012.

Ellis E., *The principle of proportionality in the laws of Europe*, Oxford, Hart publishing, 1999.

Enchelmaier S., Always at your service (within limits): the ECJ’s case law on article 56 TFEU (2006-11), *European Law Review*, 2011, 2.

Evju S., The right to collective action under the European Social Charter, in *European Labour Law Journal*, 2011, 2.

Ewing K.D., *Decisions of the European Court of Justice: Implications for UK labour law*, Institute of employment rights, 2009.

Ewing K.D., Gearty C.A., Hepple B., *Human rights and labour law. Essays for Paul O’Higgins*, London, Mansell Publishing Limited, 1994.

Ewing K.D., Hendy J., The Dramatic Implications of Demir and Baykara, *Industrial Law Journal*, 2010, 1.

Ewing K.D., Myth and reality of the right to strike as a ‘Fundamental labour right’, *International Journal of comparative labour law and industrial relations*, 2013, 2.

Fabbrini F., Granat K., «Yellow Card, But No Foul»: The Commission Proposal for an EU Regulation on the Right to Strike and the Reaction of the National Parliaments under the Subsidiarity Protocol, *Common Market Law Review*, 2013, 1.

Fenwick C., Novitz T., *Human Rights at work*, Oxford, Hart Publishing, 2010.

- Fitzpatrick D., Transnational collective action. the FOC campaign case study, in Dorssemont F., Jasper T., Cross-Border collective actions in Europe: a legal challenge, Antwerp, Intersentia, 2007.
- Foglia R., Cosio R., Il diritto del lavoro nell'Unione europea, Milano, 2011.
- Fontana G., Libertà sindacale in Italia e in Europa. Dai principi ai conflitti, in WP C.S.D.L.E. "Massimo D'Antona", 78/2010.
- Fredman S., Human Rights Transformed: Positive Rights and Positive Duties, Oxford, Oxford University Press, 2008.
- Gernigon B., Odero de Dios A., Guido O., ILO principles concerning the right to strike, Geneva, International Labour Office, 2000.
- Giubboni S., I diritti sociali fondamentali nell'ordinamento comunitario. Una rilettura alla luce della carta di Nizza, Diritto dell'Unione Europea, 2003, 2-3.
- Glendon M. A., The forgotten crucible: the Latin American influence on the Universal Human Rights idea, Harvard Human Rights Journal, 2003, 16.
- Gomien D., Short guide to the European Convention on human rights, 3rd ed., Strasbourg, Council of Europe, 2005.
- Gori G., Il Comitato europeo dei Diritti sociali: il ruolo e l'azione dell'organo di controllo della Carta sociale europea, in Bestagno F., I diritti economici, sociali e culturali – promozione e tutela nella comunità internazionale, Vita & Pensiero, Milano, 2009.
- Gravel E., Duplessis I., Gernigon B., The Committee on Freedom of Association. Its impact over 50 years Geneva, International Labour Organisation, 2001.
- Greer S., The European convention on human rights: achievements, problems and prospects, Cambridge, Cambridge University Press, 2006.
- Greer S., The margin of appreciation: interpretation and discretion under the European Convention on Human Rights, Strasbourg, Council of Europe, 2000.
- Greer S., Wildhaber L., Revisiting the Debate about 'constitutionalising' the European Court of Human Rights, Human Rights Law Review, 2012, 4.
- Guzman A. T., Rethinking International Law as Law, Proceedings of the Annual Meeting, American Society of International Law, 25-28 March, 2009.
- Harbo T., The Function of the Proportionality Principle in EU Law, European Law Journal, 2010, 2.
- Harris D., Darcy J., The European Social Charter, 2nd ed., New York, Ardsley, 2001.
- Harris D., O'Boyle M., Warbrick C., Law of the European convention on human rights, 2nd ed., Oxford, Oxford University Press, 2009.
- Harris D., The European Social Charter, International and Comparative Law Quarterly, 1964, 13.
- Hendrickx F., Beyond Viking and Laval: The Evolving European Context, Comparative Labour Law and Policy Journal, 2010 – 2011.

Hendrickx F., Completing economic and social integration: towards labour law for the United States of Europe, in Countouris N., Freedland M., *Resocialising Europe in a time of crisis*, Cambridge, Cambridge University press, 2013.

Hendrickx F., *Labour Law for the United States of Europe*, Lecture delivered during the public acceptance of the appointment of Professor in European Labour Law at Tilburg University on 2 September 2011.

Hepple B., Fundamental social rights since the Lisbon Treaty, *European Labour Law Journal*, 2011, 2.

Hepple B., *Labour Laws and Global Trade*, Oxford, Hart Publishing, 2005.

Hepple B., The European Right to Strike revisited, *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 2013, 4.

Hepple B., *The making of labour law in Europe. A comparative study of nine countries up to 1945*, Oxford, Hart Publishing, 2010.

Hervey T., Kenner J., *Economic and social rights under the EU Charter of Fundamental Rights of the European Union*, Oxford, Hart Publishing, 2003.

Hilf M., The protection of fundamental rights in the Community, in Jacobs F. G., *European law and the individual*, Amsterdam, North Holland Publishing, 1976.

Hilson C., Discrimination in Community free movement law, *European Law Review*, 1999, 24.

Hinarejos A., Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms, *Human Rights Law Review*, 2008, 4.

Hodges-Aeberhard J., Odero de Dios A., Principles of the Committee on Freedom of Association concerning strikes, *International Labour Review*, 1987, 5.

Hos N., The principle of proportionality in Viking and Laval: an appropriate standard of judicial review? *European Labour Law Journal*, 2010, 2.

Hudson M. O., Integrity of International Instruments, *The American Journal of International Law*, 1948, 1.

Iglesias Sanchez S., The Court and the Charter: the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights, *Common Market Law Review*, 2012, 5.

International Labour Office, *Social Aspects of European Economic Co-operation*, *International Labour Review*, 1956.

International Labour Office, *Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations*, 1959.

International Labour Office, *Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations*, 1973.

International Labour Office, *Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations*, 1983.

International Labour Office, Freedom of Association and Collective Bargaining: General Survey, Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st session, 1994.

International Labour Office, Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed., Geneva, 2006.

International Labour Office, International Labour Conference, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Freedom of association in practice: Lessons learned, 97th session, 2008.

International Labour Office, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, 101st session, 2012.

International Labour Office, Handbook of procedures relating to international labour Conventions and Recommendations, Geneva, International Labour Standards Department, 2012.

International Labour Office, General Survey concerning labour relations and collective bargaining in the public service, Report of the Committee of Experts on the Application of Conventions and Recommendations, 102nd session, 2013.

IOE – ACT/EMP - Toolkit for employers on international labour standards. Freedom of association and protection of the right to organize convention, 1948 (no. 87), http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/international_labour_standards/EN/_2013-11-15__IOE_ACT_EMP_ILS_TOOLKIT_C87.pdf.

Jacobs A. T. M., The law of strikes and lock-outs, in Blanpain R., Comparative labour law and industrial relations in industrialised market economies, The Hague, Kluwer Law International, 2007.

Jacobs A., Collective self-regulation, in Hepple B., The making of labour law in Europe. A comparative study of nine countries up to 1945, Oxford, Hart Publishing, 2010.

Jacobs A., Towards Community action on strike law, Common Market Law Review, 1978.

Jacobs F. G., European law and the individual, Amsterdam, North Holland Publishing, 1976.

Janis M.W., Kay R. S., Bradley A. W., European Human Rights Law, Oxford, Clarendon Press, 1995.

Jessup P. G., A modern law of Nations, New York, The Macmillan Company, 1948.

Joerges C., Rödl F., Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval, in European Law Journal, 2009, 1.

Johnson E., O’Keeffe D., From discrimination to obstacles to free movement: recent developments concerning the free movement of workers 1989-1994, in Common Market Law Review, 1994, 6.

Joseph S., UN Covenants and Labour Rights, in Fenwick C., Novitz T., Human Rights at work, Oxford, Hart Publishing, 2010.

- Kai C., Legitimacy and the Legal Regulation of Strikes in China: A Case Study of the Nanhai Honda Strike, *International Journal of Comparative Labour Law and Industrial Relations*, 2013, 2.
- Keller H., Stone Sweet A., *A Europe of rights. The impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2008.
- Keller H., Ulfstein G., *UN human Rights Treaty Bodies. Law and Legitimacy*, Cambridge, Cambridge University Press, 2012.
- Kelsen H., *Principles of International law [1952]*, New Jersey, The Lawbook Exchange Ltd., 2003.
- Kenner J., *EU Employment law. From Rome to Amsterdam and beyond*, Oxford, Hart Publishing, 2003.
- Kilpatrick C., *British Jobs for British Workers? UK Industrial Action and Free Movement of Service in EU Law*, Law Society and Economy Working Papers - London School of Economics and Political Science – Law Department, 16/2009.
- Kovacs E., *The right to strike in the European Social Charter*, *Comparative Labour Law and Policy Journal*, 2005, 26.
- Krause C., Scheinin M., *International Protection of Human Rights: a textbook*, Turku, Abo Akademi University, 2012.
- Krenn C., *A Missing Piece in the Horizontal Effect Jigsaw: Horizontal Direct Effect and the Free Movement of Goods*, *Common Market Law Review*, 2012, 1.
- Kvesko I., *Is there Anything Left Outside the Reach of the European Court of Justice?*, *Legal Issues of Economic Integration*, 2006, 4.
- La Hovary C., *Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike*, *Industrial Law Journal*, 2013, 4.
- Langille B., *Labour law's theory of justice*, in Davidov G., Langille B., *The idea of labour law*, Oxford, Oxford University Press, 2011.
- Lauren P.G., «To Preserve and Build on its Achievements and to Redress its Shortcomings»: *The Journey from the Commission on Human Rights to the Human Rights Council*, *Human Rights Quarterly*, 2007, 2.
- Lauterpacht H., *International Law and Human Rights*, London, Stevens & Sons Ltd., 1950.
- Leader S., *Can you derive a right to strike from the right to freedom of association?* *Canadian Labour and Employment Law Journal*, 2010, 2.
- Leader S., *Freedom of Association: A Study in Labor Law and Political Theory*, New Haven, London, Yale University Press, 1992.
- Leczykiewicz D., *Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?*, University of Oxford, Legal Research Paper Series n. 38/2013, April 2013.
- Lemmens P., Vandenhole W., *Protocol n. 14 and the reform of the European Court of Human Rights*, Antwerp, Intersentia, 2005.

- Lenaert K., Guitierrez-Fons J. A., The constitutional allocation of powers and general principles of EU law, *Common Market Law Review*, 2010, 6.
- Letsas G., *A theory of interpretation of the European convention on human rights*, Oxford, Oxford University Press, 2007.
- Leuprecht P., Innovation in the European system of human rights protection: is enlargement compatible with reinforcement?, *Transnational law and contemporary problems*, 1998, 8.
- Lo Faro A., *La contrattazione collettiva nei paesi newcomers e il modello sociale europeo*, *Diritti Lavori e Mercati*, 2009, 2.
- Lock T., Accession of the EU to the ECHR, in Ashiagbor D., Countouris N., Lianos I., *The European Union after the Treaty of Lisbon*, Cambridge, Cambridge University Press, 2012.
- Lock T., Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review*, 2011, 4.
- Lopez J., Chacartegui C., Canton C. G., From conflict to regulation: the transformative function of labour law, in Davidov G., Langille B., *The idea of labour law*, Oxford, Oxford University Press, 2011.
- Lord Wedderburn, *Labour law and freedom: further essays in labour law*, Lawrence and Wishart, London, 1995.
- Lord Wedderburn, Multi-national Enterprise and National Labour Law, *Industrial Law Journal*, 1972.
- Macdonald R. St. J., Matscher F., Petzold H., *The European System for the Protection of Human Rights*, Dordrecht, Martinus Nijhoff Publishers, 1993.
- Malmberg J., Bruun N., Sanctions for 'EU-unlawful' Collective Action, *FORMULA Working Paper*, 37/2012.
- Malmberg J., Sigeman T., Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice, *Common Market Law Review*, 2008, 4.
- Malmberg J., Trade Union Liability for EU-Unlawful Collective Action, *European Labour Law Journal*, 2012, 1.
- Mancini F., The making of a constitution for Europe, *Common Market Law Review*, 1989, 4.
- Mantouvalou V., Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation, *Human Rights Law Review*, 2013, 3.
- McAllister R., *European Union. An historical and political survey*, 2nd ed., London, Routledge, 2010.
- McDougal M.S., Bebr G., Human Rights in the United Nations, *The American Journal of International Law*, 1964, 3.
- Mertus J.A., *The United Nations and Human Rights. A guide for a new era*, 2nd ed., London, Routledge, 2009.

- Morano-Foadi S., Andreadakis S., Reflections on the Architecture of the EU after the Treaty of Lisbon: the European Judicial Approach to Fundamental Rights, *European Law Journal*, 2011, 5.
- Moreau M-A., Before and After the Economic Crisis. What implications for the European Social Model?, Cheltenham, Edward Elgar Publishing, 2011.
- Napoli M., La carta di Nizza. I diritti fondamentali dell'Europa, Milano, 2004.
- Nielsen R., Free movement and fundamental rights, in *European Labour Law Journal*, 2010, 1.
- Novak M., UN Covenant on Civil and Political Rights, CCPR Commentary, Kehl am Rhein, Engel Publisher, 2005.
- Nowak M., Human rights “conditionality” in relation to the entry to, and full participation in, the EU, in Alston P., *The EU and Human Rights*, Oxford, Oxford University Press, 1999.
- Novitz T., A Human Rights Analysis of the Viking and Laval Judgments, *Cambridge Yearbook of European Legal Studies*, 2007-2008, 1.
- Novitz T., International and European protection of the right to strike, Oxford, Oxford University Press, 2003.
- Novitz T., The European Union and international labour standards: the dynamics of dialogue between EU and the ILO, in Alston P., *Labour rights as human rights*, Oxford, Oxford University Press, 2005.
- Nystrom B., Final decision in the Laval case, *European Labour Law Journal*, 2010, 1.
- O’Cinneide C., Social rights and the European Social Charter - New challenges and fresh opportunities, in De Schutter O., *The European Social Charter: a social constitution for Europe*, Bruxelles, Bruylant, 2010.
- O'Donoghue R., Carr B., Dealing with Viking and Laval: From Theory to Practice, *Cambridge Yearbook of European Legal Studies*, 2008 – 2009.
- Orlandini G., Autonomia collettiva e libertà economiche: alla ricerca dell’equilibrio perduto in un mercato aperto e in libera concorrenza, in WP C.S.D.L.E. “Massimo D’Antona” 66/2008.
- Orlandini G., Gli effetti della sentenza Viking ovvero l’insostenibile incertezza delle regole, in Andreoni A., Veneziani B., *Libertà economiche e diritti sociali nell’Unione Europea. Dopo le sentenze Laval, Viking, Ruffert e Lussemburgo*, Ediesse, Roma, 2009.
- Orlandini G., The free movement of goods as possible ‘Community’ limitation on industrial conflict, *European Law Journal*, 2000, 4.
- Orlandini G., Trade unions rights and market freedoms: the European Court of Justice sets out the rule, *Comparative Labour Law and Policy Journal*, 2007-2008.
- Partsch K.J., Art. 55, in Simma B., *The Charter of the United Nations. A commentary*, Oxford, Oxford University Press, 1995.
- Peers S., Ward A., *The EU Charter of Fundamental Rights, Politics, Law and Policy*, Oxford, Hart Publishing, 2004.

- Perinetti P. A., Viking and Laval: an Italian perspective. A case of no impact, in *European Labour Law Journal*, 2012, 4, special issue.
- Perulli A., Globalizzazione e social dumping: quali rimedi? in *Lavoro e Diritto*, 2011, 1.
- Piris J-C., *Il Trattato di Lisbona*, Milano, Giuffrè, 2013.
- Poiars Maduro M., Harmony and Dissonance in Free Movement, in Andenas M., Roth W., *Services and Free Movement in EU Law*, Oxford, Oxford University Press, 2001.
- Poiars Maduro M., Reforming the market or the State? Article 30 and the European Economic Constitution: Economic freedom and Political process, *European Law Journal*, 1997, 3.
- Poiars Maduro M., The double constitutional life of the Charter of fundamental rights of the European Union, in Hervey T., Kenner J., *Economic and social rights under the EU Charter of Fundamental Rights of the European Union*, Oxford, Hart Publishing, 2003.
- Poiars Maduro M., *We, the Court. The European Court of Justice and the European Economic Constitution*, Oxford, Hart Publishing, 1998.
- Prassi J., To Strike, to Serve? Industrial Action at British Airways. *British Airways plc v Unite the Union (Nos 1 and 2)*, *Industrial Law Journal*, 3, 2011.
- Radaelli C. M., The Puzzle of Regulatory Competition, *Journal of Public Policy*, 2004, 1.
- Raimondi L., *Il Consiglio d'Europa e la Convenzione europea dei diritti dell'uomo*, 2nd ed., Napoli, Editoriale scientifica, 2008.
- Rapport de Chefs de Delegation aux Ministres des affaires Etrangères, 21 April 1956.
- Reich N., Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases before the European Court of Justice, *German Law Journal*, 2008.
- Reinisch A., *Essentials of EU Law*, 2nd ed., Cambridge, Cambridge University Press, 2012.
- Riesenhuber K., *European employment law*, Antwerp, Intersentia, 2012.
- Riley A., The Vaxholm Case of Swedish 'Social Dumping', *Centre for European Policy Studies*, 2008.
- Ritter C., Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234, *European Law Review*, 2006, 5.
- Rocca M., Proposal for a (so-called) Monti II Regulation on the Exercise of the Right to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services: Changing without Reversing, Regulating without Affecting, *European Labour Law Journal*, 2012, 1.
- Rocella M., *La Carta dei diritti fondamentali: un passo avanti verso l'Unione politica*, *Lavoro e Diritto*, 2001, 4.
- Rogers N., Scannel R., Walsh J., *Free movement of persons in the enlarged European Union*, London, Sweet and Maxwell, 2012.
- Ronmar M., Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the Laval Case from a Swedish and Nordic Perspective; *Cambridge Yearbook of European Legal Studies*, 2007-2008.

- Ronnmar M., *Labour law, fundamental rights and social Europe*, Oxford, Hart Publishing, 2011.
- Ronnmar M., *Laval Returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms*, *Industrial Law Journal*, 2010, 3.
- Rood M., *New developments within the ILO supervisory system*, Blanpain R., *Labour law, human rights and social justice. Liber amicorum in honour of Ruth Ben-Israel*, The Hague, Kluwer Law International, 2001.
- Rosas A., Armati L., *EU Constitutional law. An introduction*, 2nd ed., Oxford, Hart Publishing, 2012.
- Rozakis C.L., *The European Judge as a Comparatist*, *Tulane Law Review*, 2005.
- Ryan B., *Pay, trade union rights and European Community law*, *International Journal of Comparative Labour Law and Industrial Relations*, 1997, 13.
- Ryan B., *The Charter and collective labour law*, in Hervey T., Kenner J., *Economic and social rights under the EU charter of fundamental rights: a legal perspective*, Oxford, Hart Publishing, 2003.
- Saccà E., *Nuovi scenari nazionali del caso Laval. L'ordinamento svedese tra responsabilità per danno "da sciopero" e innovazioni legislative (indotte)*, in WP C.S.D.L.E. "Massimo D'Antona", 86/2010.
- Samuel L., *Fundamental social rights. Case law of the European Social Charter*, 2nd ed., Strasbourg, Council of Europe, 2002.
- Schabas W.A., *The Universal Declaration of Human Rights. The travaux preparatoires*, Vol. 1, October 1946 to November 1947, lxxvi, Cambridge, Cambridge University Press, 2013.
- Scharpf F. W., *The asymmetry of European integration, or why the EU cannot be a 'social market economy'*, *Socioeconomic Review*, 2010, 2.
- Scharpf F., *The European social model: coping with the challenges of diversity*, *Journal of Common Market Studies*, 2002, 4.
- Schmidt S. K., *Who cares about nationality? The path-dependence case law of the ECJ from goods to citizens*, *Journal of European Public Policy*, Special Issue, 2012, 1.
- Schomann I., Jagodzinski R., Boni G., Clauwaert S., Glassner V., Jasper T., *Transnational collective bargaining at company level. A new component of European Industrial relations?*, Brussels, ETUI, 2012.
- Schwelb E., *The International Court of Justice and the Human Rights Clauses of the Charter*, *The American Journal of International Law*, 1972, 2.
- Schwimmer W., *The European Dream*, London, Continuum Publishing, 2004.
- Sciarra S., *Collective agreements in the hierarchy of European Community sources*, in Davies P., Lyon-Caen A., Sciarra S., Simitis S., *European Community labour law: principles and perspectives*, Liber amicorum Lord Wedderburn of Charlton, Oxford, Clarendon Press, 1996.
- Sciarra S., *Diritti collettivi e interessi transnazionali dopo Laval*, Viking, Ruffert, Lussemburgo, in Andreoni A., Veneziani B., *Libertà economiche e diritti sociali nell'Unione Europea*, Ediesse, Roma, 2009.

- Sciarra S., Notions of Solidarity in Times of Economic Uncertainty, in *Industrial Law Journal*, 2010, 3, 223;
- Sciarra S., Un confronto a distanza: il diritto di sciopero nell'ordinamento globale, *Political del Diritto*, 2012, 2-3.
- Sciarra S., Viking and Laval: collective labour rights and market freedoms in the enlarged EU, *Cambridge Yearbook of European Legal Studies*, 2007-2008, 10.
- Sengenberger W., *Globalization and social progress: the role and impact of international labour standards*, 2nd ed., Bonn, Friedrich-Ebert-Stiftung, 2005.
- Servais J-M., ILO law and the right to strike, *Canadian Labour Law and employment Journal*, 2009, 15.
- Servais J-M., *International Labour Law*, The Hague, Kluwer Law International, 2011.
- Shanks M., Introductory article: the social policy of the European Communities, *Common Market Law Review*, 1977, 4.
- Shuibhne N., Free Movement of Persons and the Wholly Internal Rule: Time to Move On?, *Common Market Law Review*, 2002, 4.
- Shulman M. R., The four freedoms: good neighbors make good law and good policy in a time of insecurity, *Fordham Law Review*, 2008, 77.
- Simitis S., Leon-Caen A., Community labour law: a critical introduction to its history, in Davies P., Lyon-Caen A., Sciarra S., Simitis S., *European Community Labour Law: principles and perspectives*, Oxford, Clarendon Press, 1996.
- Simma B., Alston P., The sources of human rights law. Custom, jus cogens and general principles, *Australian yearbook of International law*, 1988-1989, 12.
- Simma B., Khan D., Nolte G., Paulus A., Wessendorf N., *The Charter of the United Nations. A commentary*, Oxford, Oxford University Press, 2012.
- Skouris V., Fundamental rights and fundamental freedoms: the challenge of striking a delicate balance, *European Business Law Review*, 2006, 2.
- Snell J., The notion of market access: a concept or a slogan?, *Common Market Law Review*, 2010, 47.
- Sohn L., Buergenthal T., *International protection of human rights*, Indianapolis, Bobbs-Merrill, 1973.
- Sohn L., The new international law: protection of the rights of individuals rather than States, *American University International Law Review*, 1982, 9.
- Spaventa E., From Gebhard to Carpenter: towards a (non) economic European constitution, *Common Market Law Review*, 2004, 3.
- Spaventa E., The horizontal application of fundamental rights as general principles of Union Law, in Arnulf A., Barnard C., Dougan M., Spaventa E., *A constitutional order of states: essays in honour of Alan Dashwood*, Oxford, Hart Publishing, 2011.
- Spielmann D., Tsirli M., Voyatzis P., *La Convention europeenne des droits de l'homme, un instrument vivant: melanges en l'honneur de Christos L. Rozakis*, Bruxelles, Bruylant, 2011.

Stone J., *International Guarantees of Minority Rights: Procedure of the Council of the League of Nations in Theory and Practice*, London, 1932.

Sun J., Pelkmans J., *Regulatory competition in the single market*, *Journal of Common Market Studies*, 1995, 1.

Swepton L., *Crisis in the ILO supervisory system: dispute over the right to strike*, *International Journal of Comparative Labour Law and Industrial Relations*, 2013, 2.

Swepton L., *Human rights law and freedom of association: development through ILO supervision*, *International Labour Law Review*, 1998, 2.

Swepton L., *International Labour Law*, in Blanpain R., *Comparative labour law and industrial relations in industrialized market economies*, The Hague, Kluwer Law International, 2010.

Swiatkowski A. M., *Charter of Social Rights of the Council of Europe*, The Hague, Kluwer Law International, 2007.

Swiatkowski A., *Resocialising Europe through a European right to strike modelled on the Social Charter?*, in Countouris N., Freedland M., *Resocialising Europe in a time of crisis*, Cambridge, Cambridge University Press, 2013.

Sypris P., *The judiciary, the legislature and the EU internal market*, Cambridge, Cambridge University Press, 2012.

Syrpis P., Novitz T., *Economic and social rights in conflict: Political and judicial approaches to their reconciliation*, *European Law Review*, 2008, 3.

Syrpis P., *Reconciling Economic Freedoms and Social Rights - The Potential of Commission v Germany*, *Industrial Law Journal*, 2011, 2.

Syrpis P., *The Treaty of Lisbon: much ado ... but about what?*, *Industrial Law Journal*, 2008, 3.

Syrpis P., *Theorising the relationship between the judiciary and the legislature in the EU internal market*, in Sypris P., *The judiciary, the legislature and the EU internal market*, Cambridge, Cambridge University Press, 2012.

Tomuschat C., *Freedom of Association*, in Macdonald R. St. J., Matscher F., Petzold H., *The European System for the Protection of Human Rights*, Dordrecht, Martinus Nijhoff Publishers, 1993.

Treu T., *L'Europa sociale: problemi e prospettive*, *Diritto del Lavoro e delle Relazioni Industriali*, 2001.

Tridimas T., *Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction*, *International journal of constitutional law*, 2011, 3.

Tridimas T., *The general principles of EU law*, 2nd ed., Oxford, Oxford University Press, 2006.

Tryfonidou A., *In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?*, *Common Market Law Review*, 2009, 5.

Tryfonidou A., *The Free Movement of Goods, the Overseas Countries and Territories, and the EU's Outermost Regions: Some Problematic Aspects*, *Legal Issues of Economic Integration*, 2010, 4.

Uladzislau B., The case of Laval in the Context of the Post-Enlargement EC Law Development, *German Law Journal*, 2008.

United Nations, Global Corporate Sustainability Report, September 2013, http://www.unglobalcompact.org/docs/about_the_gc/Global_Corporate_Sustainability_Report2013.pdf.

United Nations, Global Compact, <http://www.unglobalcompact.org>.

Valticos N., International labour standards and human rights: approaching the year 2000, *International Labour Review*, 1998, 2.

Valticos N., La Charte Social Européenne: sa structure, son contenu, le controle del son application, *Droit Social*, 1963, 8.

Valticos N., Les methodes de la protection internationale de la liberte syndicale, *Recueil des cours*, 1975, 1.

Valticos N., The future prospects for international labour standards, *International Labour Review*, 1979, 6.

Valticos N., Von Potobsky G., *International labour law*, 2nd ed., Deventer, Kluwer, 1995

Van Dij P., Yutaka A., *Theory and practice of the European convention on human rights*, 4th ed., Antwerpen, Intersentia, 2006.

Vandamme F., The Revision of the European Social Charter, *International Labour Review*, 1994, 5-6.

Vandenbogaerde A., Vandenhole W., The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: an Ex Ante Assessment of its Effectiveness in Light of the Drafting Process, *Human Rights Law Review*, 2010, 2.

Veneziani B., La Corte di Giustizia e il trauma del cavallo di Troia, *Rivista Giuridica del Lavoro*, 2008, 2.

Veneziani B., Right of collective bargaining and action (article 28) in Bercusson B., *European Labour Law and the EU Charter of Fundamental Rights*, Baden-Baden, Nomos, 2006.

Veneziani B., Nel nome di Erasmo da Rotterdam. La faticosa marcia dei diritti sociali fondamentali nell'ordinamento comunitario, *Rivista Giuridica del Lavoro*, 2000, 4.

Villani U., *Istituzioni di diritto dell'Unione Europea*, 3rd ed., Bari, Cacucci, 2013.

Weatherill S., After Keck: some thoughts on how to clarify the clarification, *Common Market Law Review*, 1996, 33.

Weiler J., Lockhart N. J.S., 'Taking rights seriously' seriously: The European Court and its fundamental rights jurisprudence, *Common Market Law Review*, 1995, 1 and 2.

Weiler J., *The constitution of Europe : Do the new clothes have an emperor? and other essays on European integration*, Cambridge, Cambridge University press, 1999.

Weiss M., International labour standards: a complex public-private policy mix, *International Journal of Comparative Labour Law and Industrial Relations*, 2013, 1.

White R., C. Ovey, Jacobs, White & Ovey: *The European Convention on Human Rights*, 5th ed., Oxford, Oxford University Press, 2010.

Wiebringhaus H., *La Charte Sociale Européenne*, in *Annuaire français de droit international*, 1963, 9.

Wilsher D., *Does Keck discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market*, *European Law Review*, 2008, 1.

Wisskirchen A., *The standard setting and monitoring activity of the ILO: legal questions and practical experience*, *International Labour Review*, 2005, 3.

World Peace Foundation Pamphlet Series, *Labor in the Treaty of Peace, 1917-1919*.

Wright Q., *Human rights and the world order*, *International Conciliation*, 1942-1943, 21.

Young A.L., *The Charter, Constitution and Human Rights: is this the Beginning or the End for Human Rights Protections by Community law?*, *European Public Law*, 2005, 11.

Zahn R. L., *I casi Viking and Laval: tra problemi di allargamento e soluzioni poco fortunate*, in Cartabia M., *Dieci casi sui diritti in azione*, Bologna, Il Mulino, 2011.

Ziller J., *I diritti fondamentali tra tradizioni costituzionali e “costituzionalizzazione” della Carta dei diritti fondamentali dell’Unione Europea*, in Civitarese Matteucci S., Guarriello F., Puoti P., *Diritti fondamentali e politiche dell’Unione Europea dopo Lisbona*, Bologna, Maggioli Editore, 2013.

Zimmer R., *Labour market politics through jurisprudence: the influence of the judgements of the European Court of Justice (Viking, Laval, Ruffert, Luxembourg) on labour market policies*, *German policy studies*, 2011, 7.

TABLE OF CASES

A. International Labour Organisation

Case n. 5, *Complaints presented by the Hind Mazdoor Sabha and the World Federation of Trade Unions against the Government of India*, *Seventh Report of the International Labour Organisation to the United Nations*, Appendix V, 1953.

Case n. 11, *Complaints presented by the World Federation of Trade Unions against the Government of Brazil*, *Seventh Report of the International Labour Organisation to the United Nations*, Appendix V, 1953.

Case n. 28, *Complaint presented by the World Federation of Trade Unions against the Government of the United Kingdom (Jamaica)*, *Sixth Report of the International Labour Organisation to the United Nations*, Appendix V, 1952.

Case n. 60, *Complaints presented by the World Federation of Trade Unions and by the General Council of Trade Unions of Japan against the Government of Japan*, *8th Report of the International Labour Organisation*, 1954.

Case n. 834 (Greece), *Committee on Freedom of Association*, *Definitive Report n. 160*, 1977.

Case n. 86 (Italy), *8th Report of the International Labour Organisation to the United Nations*, 1954.

Case n. 1067, Complaint presented by the International Confederation of Free Trade Unions and the World Confederation of Labour against the Government of Argentina, 214th Report of the Committee on Freedom of Association, 1982.

Case n. 1081, Complaints presented by the International Confederation of Free Trade Unions, the Federation of Peruvian Light and Power Workers and various other trade union organisations against the Government of Peru, Committee on Freedom of Association, 214th Report, 1982.

Case n. 1458, Complaint presented by the Icelandic Federation of Labour against the Government of Iceland, Committee on Freedom of Association, Definitive Report n. 262, 1989.

Case n. 1971, Representation for the non-observance by the Government of Denmark presented by the Association of Salaried Employees in the Air Transport Sector and the Association of Cabin Crew at Maersk, Committee on Freedom of Association, Definitive Report n. 317, 1999.

Case n. 2815, Complaints presented by the Trade Federation for Metals, Electronics, Electrical and other Allied Industries – Federation of Free Workers (TF4FFW) against the Government of Philippines, Interim report of the Committee of Experts n. 362, 2011.

International Labour Conference, Direct Request of the Committee of Experts, Switzerland, 78th session, 1991.

International Labour Conference, Observation of the Committee of Experts, United Kingdom, 78th session, 1991.

International Labour Conference, Observation of the Committee on the Application of Standards, Pakistan, 86th session, 1998.

International Labour Conference, Observation of the Committee on the Application of Standards, Australia, 95th session, 2006.

International Labour Conference, Observation of the Committee on the Application of Standards, Romania, 96th session, 2007.

International Labour Conference, Observation of the Committee of Experts, Colombia, 98th session, 2009.

International Labour Conference, Observation of the Committee of Experts, Turkey, 99th session, 2010.

International Labour Conference, Observation of the Committee of Experts, United Kingdom, 99th session, 2010.

International Labour Conference, Observation of the Committee of Experts, Jersey, 100th session, 2011.

International Labour Conference, Observation of the Committee of Experts, Bangladesh, 101st session, 2012.

International Labour Conference, Direct Request of the Committee of Experts, Rwanda, 102nd session, 2013.

International Labour Conference, Observation of the Committee of Experts, Kiribati, International Labour Conference, 102nd session, 2013.

International Labour Conference, Observation of the Committee of Experts, Sweden, 102nd session, 2013.

B. Human Rights Committee

HRC, Session 48, Meeting 1259, Ireland, 28 July 1993, CCPR/C/79/Add.21, Summary record 1235; 1236; 1239.

HRC, Session 50, Meeting 1315, 6 April 1994, CCPR/C/79/Add.32, Summary record 1302; 1303; 1304; 1305.

HRC, Session 65, Meeting 1740, Chile, 30 March 1999, CCPR/C/79/Add.104, Summary record 1733; 1734.

HRC, Session 89, Meeting 2445, Chile, 26 March 2007, CCPR/C/CHL/CO/5, Summary record CCPR/C/SR.2429, CCPR/C/SR.2430.

HRC, Session 99, Meeting 2736, Estonia, 27 July 2010, CCPR/C/EST/CO/3, Summary record CCPR/C/SR. 2736.

J.B. et al. v. Canada, inadmissibility decision of 18 July 1986, communication n. 118/1982, CCPR/C/OP/2, 34-39, doc. A/41/40, 1986, Annex IX, section B, 151-163.

C. Committee on Economic, Social and Cultural Rights

CESCR, Session 9, Meeting 49, Senegal, 10 December 1993, E/C.12/1993/18, Summary record 37; 38.

CESCR, Session 10, Meeting 23, Mauritius, 18 May 1994, E/C.12/1994/8, Summary record 22; 23.

CESCR, Session 10, Meeting 26, Morocco, 19 May 1994, E/C.12/1994/5, Summary record 8; 9; 10.

CESCR, Session 10, Meeting 27, Belgium, 20 May 1994, E/C.12/1994/7, Summary record 15; 16; 17.

CESCR, Session 12, Meeting 27, Republic of Korea, 18 May 1995, E/C.12/1995/3, Summary record 3; 4; 6.

CESCR, Session 13, Meeting 55, Norway, 6 December 1995, E/C.12/1995/13, Summary record 34; 36; 37.

CESCR, Session 14, Meeting 22, Guinea, 5 May 1996, E/C.12/1/Add.5, Summary record 17; 22.

CESCR, Session 15, Meeting 54, Portugal, Macau, 6 December 1996, E/C.12/1/Add.9, Summary record 31; 32; 33.

CESCR, Session 16, Meeting 26, Libyan Arab Jamahiriya, 16 May 1997, E/C.12/1/Add.15, Summary record 20; 21.

CESCR, Session 17, Meeting 52, Iraq, 4 December 1997, E/C.12/1/Add.17, Summary record 33; 34; 35.

CESCR, Session 17, Meeting 53, United Kingdom and Northern Ireland, 4 December 1997, E/C.12/1/Add.19, Summary record 36; 37; 38.

CESCR, Session 18, Nigeria, E/C.12/1/Add.23, Summary record 6; 7; 8; 9.

CESCR, Session 19, Meeting 54, Germany, 2 December 1998, E/C.12/1/Add.29, Summary record 40; 41; 42.

CESCR, Session 19, Meeting 55, Cyprus, 3 December 1998, E/C.12/1/Add.28.

CESCR, Session 19, Meeting 55, Switzerland, 3 December 1998, E/C.12/1/Add.30, Summary record 37; 38; 39.

CESCR, Session 20, Meeting 26, Denmark, 12 May 1999, E/C.12/1/Add.34, Summary record 11; 12; 13.

CESCR, Session 20, Meeting 27, Tunisia, 14 May 1999, E/C.12/1/Add.36, Summary record 17; 18; 19.

CESCR, Session 21, Meeting 50, 51, Bulgaria, 30 November 1999, E/C.12/1/Add.37, Summary record 30; 31; 32.

CESCR, Session 22, Meeting 26, Egypt, 12 May 2000, E/C.12/1/Add.44, Summary record 12; 13; 14.

CESCR, Session 23, Meeting 51, Kyrgyzstan, 29 August 2000, E/C.12/1/Add.49, Summary record 42, 43, 44.

CESCR, Session 25, Meeting 26, Republic of Korea, 9 May 2001, E/C.12/1/Add.59, Summary record 12, 13, 14.

CESCR, Session 25, Meeting 28, Bolivia, 10 May 2001, E/C.12/1/Add.60, Summary record 15, 16, 17.

CESCR, Session 26, Meeting 58, Germany, 31 August 2001, E/C.12/1/Add.68, Summary record E/C.12/2001/SR.48 and 49.

CESCR, Session 28, Meeting 24, Benin, 15 May 2002, E/C.12/1/Add.78, Summary record E/C.12/2002/SR.8, 9, and 10.

CESCR, Session 28, Meeting 25, United Kingdom and Northern Ireland, 16 May 2002, E/C.12/1/Add.79, Summary record E/C.12/2002/SR.11, 12, 13.

CESCR, Session 29, Meeting 56, 29 November 2002, E/C.12/1/Add.85, Summary record E/C.12/2002/SR.41-43.

CESCR, Session 29, Meeting 56, Slovakia, 29 November 2002, E/C.12/1/Add.81, Summary record E/C.12/2002/SR.30-32.

CESCR, Session 31, Meeting 56, Russian Federation, 28 November 2003, E/C.12/1/Add.94, Summary record E/C.12/2003/SR.41, 42 and 43.

CESCR, Session 33, Meeting 56, Azerbaijan, 26 November 2004, E/C.12/1/Add.104, Summary record E/C.12/2004/SR.41, E/C.12/2004/SR.42, E/C.12/2004/SR.43.

CESCR, Session 33, Meeting 56, Malta, 26 November 2004, E/C.12/1/Add.101, Summary record E/C.12/2004/SR.32, E/C.12/2004/SR.33.

CESCR, Session 34, Meeting 27, Serbia and Montenegro, 13 May 2005, Summary record E/C.12/2005/SR.11, E/C.12/2005/SR.12, E/C.12/2005/SR.13.

CESCR, Session 34, Meeting 27, Serbia and Montenegro, 13 May 2005, E/C.12/1/Add.108, Summary record E/C.12/2005/SR.11, E/C.12/2005/SR.12, E/C.12/2005/SR.13.

CESCR, Session 34, Meeting 27, Zambia, 3 May 2005, E/C.12/1/Add.106, Summary record E/C.12/2005/SR.3, E/C.12/2005/SR.4, E/C.12/2005/SR.5.

CESCR, Session 35, Meeting 58, Libyan Arab Jamahiriya, 25 November 2005, E/C.12/LYB/CO/2, Summary record E/C.12/2005/SR.44, E/C.12/2005/SR.45, E/C.12/2005/SR.46.

CESCR, Session 35, Meeting 58, Slovenia, 25 November 2005, E/C.12/SVN/CO/1, Summary record E/C.12/2005/SR.30, E/C.12/2005/SR.31, E/C.12/2005/SR.32.

CESCR, Session 35, Meeting 58, Uzbekistan, 25 November 2005, E/C.12/UZB/CO/1, Summary record E/C.12/2005/SR.38, E/C.12/2005/SR.39, E/C.12/2005/SR.40.

CESCR, Session 36, Meeting 29, Canada, 19 May 2006, E/C.12/CAN/CO/4-5, Summary record E/C.12/2006/SR.9, E/C.12/2006/SR.10, E/C.12/2006/SR.11, E/C.12/2006/SR.12.

CESCR, Session 36, Meeting 29, Liechtenstein, 19 May 2006, E/C.12/CO/LIE/1, Summary record E/C.12/2006/SR.6, E/C.12/2006/SR.7.

CESCR, Session 37, Meeting 53, El Salvador, 21 November 2006, E/C.12/SLV/CO/2, Summary record E/C.12/2006/SR.36, E/C.12/2006/SR.37.

CESCR, Session 37, Meeting 55, Albania, 22 November 2006, E/C.12/ALB/CO/1, Summary record E/C.12/2006/SR.45, E/C.12/2006/SR.46, E/C.12/2006/SR.47.

CESCR, Session 37, Meeting 56, The former Yugoslav Republic of Macedonia, 22 November 2006, E/C.12/MKD/CO/1, Summary record E/C.12/2006/SR.42, E/C.12/2006/SR.43, E/C.12/2006/SR.44.

CESCR, Session 37, Meeting 58, Tajikistan, 23 November 2006, Summary record E/C.12/2006/SR.39, E/C.12/2006/SR.40, E/C.12/2006/SR.41.

CESCR, Session 39, Meeting 55, Belgium, 21 November 2007, E/C.12/BEL/CO/3, Summary record E/C.12/2007/SR.41, E/C.12/2007/SR.41.

CESCR, Session 40, Meeting 25, India, 16 May 2008, E/C.12/IND/CO/5, Summary record E/C.12/2008/SR.14, E/C.12/2008/SR.15, E/C.12/2008/SR.16.

CESCR, Session 42, Meeting 26, Australia, 20 May 2009, E/C.12/AUS/CO/4, Summary record E/C.12/2009/3, E/C.12/2009/4, E/C.12/2009/5.

CESCR, Session 43, Meeting 55, Republic of Korea, 19 November 2009, E/C.12/KOR/CO/3, Summary record E/C.12/2009/SR.42, E/C.12/2009/SR.43, E/C.12/2009/SR.44.

CESCR, Session 44, Meeting 19, Mauritius, 17 May 2010, E/C.12/MUS/CO/4, Summary record E/C.12/2010/SR.9, E/C.12/2010/SR.10, E/C.12/2010/SR.11.

CESCR, Session 44, Meeting 25, Kazakhstan, 20 May 2010, E/C.12/KAZ/CO/1, Summary record E/C.12/2010/SR.12, E/C.12/2010/SR.13, E/C.12/2010/SR.14.

CESCR, Session 45, Meeting 55, Netherlands, 19 November 2010, E/C.12/NDL/CO/4-5, Summary record E/C.12/2010/SR.43, E/C.12/2010/SR.44 and E/C.12/2010/SR.45.

CESCR, Session 45, Meeting 55, Sri Lanka, 19 November 2010, E/C.12/LKA/CO/2-4, Summary record E/C.12/2010/SR.40, E/C.12/2010/SR.41 and E/C.12/2010/SR.42.

CESCR, Session 45, Meeting 55, Switzerland, 19 November 2010, E/C.12/CHE/CO/2-3, Summary record E/C.12/2010/SR. 37, E/C.12/2010/SR.38 and E/C.12/2010/SR.39.

CESCR, Session 46, Meeting 29, Russian Federation, 20 May 2011, E/C.12/RUS/CO/5, Summary record E/C.12/2011/SR.15, E/C.12/2011/SR.16, E/C.12/2011/SR.17.

CESCR, Session 48, Meeting 28, Slovakia, 18 May 2012, E/C.12/SVK/CO/2, Summary record E/C.12/2012/SR.3, E/C.12/2012/SR.4, E/C.12/2012/SR.5.

D. European Court of Human Rights and European Commission of Human Rights

Decision of the Commission, Ahmet Imam and others v. Greece, Application n. 29764/96, 20 October 1997.

Decision of the Commission, Mehmet Agko v. Greece, Application n. 31117/96, 20 October 1997.

Decision of the Commission, S. v. the Federal Republic of Germany, Application n. 10365/83, 5 July 1984.

Decision of the Commission, The National association of teachers in further and higher education v. the United Kingdom, Application n. 28910/95, 16 April 1998.

Decision of the Commission, X. v. the Federal Republic of Germany, Application n. 4984/71, 5 October 1972.

ECtHR, AB Kurt Kellerman v. Sweden, Application n. 41579/98, 26 January 2005.

ECtHR, Airey v. Ireland, Application no. 6289/73, 9 October 1979.

ECtHR, Alekseyev v. Russia, Applications ns. 4916/07, 25924/08 and 14599/09, 11 April 2011.

ECtHR, Anton Jazvinsky v. the Slovak Republic, partial decision, Application n. 33088/96, 52236/99, 52451/99 - 52453/99, 52455/99, 52457/99 - 52459/99, 7 September 2000.

ECtHR, Barraco v. France, Application n. 31684/05, 5 June 2009.

ECtHR, Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland, Application n. 45036/98, 30 June 2005.

ECtHR, D. v. The United Kingdom, Application n. 30240/96, 2 May 1997.

ECtHR, Danilenkov and others v. Russia, Application n. 67336/01, 10 December 2009.

ECtHR, Demir and Baykara v. Turkey, Application n. 34503/97, 12 November 2008.

ECtHR, Deumeland v. Germany, Application no. 9384/81, 29 May 1986.

ECtHR, Dilek and others v. Turkey, Applications n. 74611/01, 26876/02 and 27628/02, 30 January 2008.

ECtHR, Enerji Yapi-Yol Sen v. Turkey, Application n. 68959/01, 6 November 2009.

ECtHR, Federation of Offshore Workers' Trade Unions and others v. Norway, Application n. 38190/97, 27 June 2002.

- ECtHR, *Feldbrugge v. the Netherlands*, Application n. 8562/79, 29 May 1986.
- ECtHR, *Gillow v. The United Kingdom*, Application n. 9063/80, 24 November 1986.
- ECtHR, *Gustaffson v. Sweden*, Application n. 15573/89, 25 April 1996.
- ECtHR, *Kalashnikov v. Russia*, Application n. 47095/99, 15 October 2002.
- ECtHR, *Karaçay v. Turkey*, Application n. 6615/03, 27 June 2007.
- ECtHR, *Kaya and Seyhan v. Turkey*, Application n. 30946/04, 15 December 2009.
- ECtHR, *Konig v. Germany*, Application n. 6232/73, 28 June 1978.
- ECtHR, *Kudla v. Poland*, Application n. 30210/96, 26 October 2000.
- ECtHR, *Lopez Ostra v. Spain*, Application n. 16798/90, 9 December 1994.
- ECtHR, *National Union of Belgian Police v. Belgium*, Application n. 4464/70, 27 October 1975.
- ECtHR, *National Union of Rail, Maritime and Transport Workers (RMT) v. the United Kingdom*, application n. 31045/10, lodged on 1 June 2010.
- ECtHR, *Pertti Kajanan and Pekka Tuomaala v. Finland*, Application n. 36401/97, 19 October 2000.
- ECtHR, *Platform "Ärtze für das Leben" v. Austria*, Application n. 10126/82, 21 June 1988.
- ECtHR, *Poltoratskiy v. Ukraine*, Application n. 38812/97, 29 April 2003.
- ECtHR, *Powell and Rayner v. The United Kingdom*, Application n. 9310/81, 21 February 1990.
- ECtHR, *Saime Ozcan v. Turkey*, Application n. 22943/04, 15 December 2009.
- ECtHR, *Schmidt and Dahlstrom v. Sweden*, Application n. 5589/72, 6 February 1976.
- ECtHR, *Schuler-Zgraggen v. Switzerland*, Application n. 14518/89, 24 June 1993.
- ECtHR, *Sergey Kuznetsov v. Russia*, Application n. 10877/04, 23 January 2009.
- ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Applications n. 29221/95 and 29225/95, 2 January 2002.
- ECtHR, *STEC and Others v. the United Kingdom*, Applications n. 65731/01 and 65900/01, 5 September 2005.
- ECtHR, *Swedish transport workers' union v. Sweden*, Application n. 53507/99, 30 November 2004.
- ECtHR, *Trofimchuk v. Ukraine*, Application n. 4241/03, 28 January 2011.
- ECtHR, *UNISON v. The United Kingdom*, 10 January 2002, Application n. 53574/99.
- ECtHR, *Urcan and others v. Turkey*, Application n. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 October 2008.
- ECtHR, *William and Anita POWELL v. The United Kingdom*, Application n. 45305/99, 4 May 2000.

ECtHR, Wilson, National Union of Journalists and others v. The United Kingdom, Applications n. 30668/96, 30671/96 and 30678/96, 2 October 2002.

ECtHR, Zehnalova and Zehnal v. The Czech Republic, Application n. 38621/97, 14 May 2002.

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 European Social Charter (Revised), Conclusions 2002, France.
 European Social Charter (Revised), Conclusions 2002, Romania.
 European Social Charter (Revised), Conclusions 2002, Sweden.
 European Social Charter (Revised), Conclusions 2004, Bulgaria.
 European Social Charter (Revised), Conclusions 2004, Cyprus.
 European Social Charter (Revised), Conclusions 2004, Ireland.
 European Social Charter (Revised), Conclusions 2004, Lithuania.
 European Social Charter (Revised), Conclusions 2004, Norway.

European Social Charter (Revised), Conclusions 2005, Statement of Interpretation on Article 11.

European Social Charter (Revised), Conclusions 2006, Finland.

European Social Charter (Revised), Conclusions 2006, Norway.

European Social Charter (Revised), Conclusions 2010, Azerbaijan.

European Social Charter (Revised), Conclusions, 2010, Bulgaria.

European Social Charter (Revised), Conclusions 2010, Norway.

European Social Charter (Revised), Conclusions 2010, Ukraine.

Collective complaint n. 12/2002, Confederation of Swedish Enterprises v. Sweden, decision on the merits, 15 May 2003.

Collective complaint n. 14/2003, International Federation of Human Rights Leagues (FIDH) v. France, decision on the merits, 8 September 2004.

Collective complaint n. 30/2005, Marangopoulos Foundation for Human Rights (MFHR) v. Greece, decision on the merits, 6 December 2006.

Collective complaint n. 32/2005, Confederation of Independent Trade Unions in Bulgaria, Confederation of Labour "Podkrepa" and European Trade Union Confederation v. Bulgaria, decision on the merits, 16 October 2006.

Collective complaint n. 59/2009, European Trade Union Confederation (ETUC)/Centrale générale des syndicats libéraux de Belgique (CGSLB)/Confédération des syndicats chrétiens de Belgique (CSC)/Fédération générale du travail de Belgique (FGTB) v. Belgium.

Collective complaint n. 72/2011, International Federation for Human Rights (FIDH) v. Greece, decision on the merits, 23 January 2013.

Collective complaint n. 77/2012, Panhellenic Federation of Public Service Pensioners (POPS) v. Greece, decision on the merits, 7 December 2012.

Collective complaint n. 82/2012, European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France, decision on admissibility and the merits, 19 March 2013.

Collective complaint n. 85/2012, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, decision on the admissibility and the merits, 3 July 2013.

F. European Court of Justice

Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, case C-67/96, 21 September 1999.

Alfred John Webb, case 279/80, 17 December 1981.

Alpine Investments BV v Minister van Financiën, case C-384/93, 10 May 1995.

Arblade and Others, joined cases C-369/96 and C-376/96, 23 November 1999.

ASBL v Willy van Wesemael and others, joined cases 110-111/78, 18 January 1979.

Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT), case C-176/12, 15 January 2014.

B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo, case 36/74, 12 December 1974.

CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie, case C-442/02, 5 October 2004.

Centros Ltd v Erhvervs - og Selskabsstyrelsen, case C-212/97, 9 March 1999.

Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo, joined cases C-51/96 and C-191/97, 11 April 2000.

Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue Belge de judo ASBL, Union européenne de judo and François Pacquée, joined cases C-51/96 and C-191/97, 11 April 2000.

Cinéthèque SA and others v Fédération nationale des cinémas français, joined cases 60 and 61/84, 11 July 1985.

Commission of the European Communities v Federal Republic of Germany, case C-244/04, 19 January 2006.

Commission of the European Communities v French Republic, case 167/73, 4 April 1974.

Commission of the European Communities v Grand Duchy of Luxembourg, case C-111/91, 10 March 1993.

Commission of the European Communities v Grand Duchy of Luxembourg, case C-445/03, 21 October 2004.

Commission v Kingdom of Denmark, case C-464/02, 15 September 2005.

Commission v Republic of Italy, case C-518/06, 28 April 2009.

Dieter Kraus v Land Baden-Württemberg, case C-19/92, 31 March 1993.

DR and TV2 Danmark A/S v NCB - Nordisk Copyright Bureau, Case C-510/10, 26 April 2012.

Dynamic Medien Vertriebs GmbH v Avides Media AG, case C-244/06, 14 February 2008.

Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, Case C-260/89, 18 June 1991.

Erich Stauder v City of Ulm – Sozialamt, case 29-69, 12 November 1969.

Eugen Schmidberger, Internationale Transporte und Planzüge contro Republik Österreich, case C-112/00, 12 June 2003.

European Commission v Federal Republic of Germany, case C-271/08, 15 July 2010.

Félix Palacios de la Villa v Cortefiel Servicios SA, case C-411/05, 16 October 2007.

Finalarte Sociedade de Construção Civil Lda and Others v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft and Others, joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, 25 October 2001.

Flaminio Costa v E.N.E.L., case 6-64, 15 July 1964.

Freskot AE v Elliniko Dimosio, case C-355/00, 22 May 2003.

Henri Maurissen v Court of Auditors of the European Communities, case C-417/85, 4 February 1987.

Hoefner and Elser v Macroton Gesellschaft fuer Datenfassungssysteme mit beschraenken Haftung, case C-41/90, 23 April 1991.

Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, case 5/88, 13 July 1989.

Idryma Typou AE v Ypourgos Typou kai Meson Mazikis Enimerosis, case C-81/09, 21 October 2010.

Impact v Minister for Agriculture and Food and Others, case C-268/06, 15 April 2008.

International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, case C-438/05, 11 December 2007.

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11-70, 17 December 1970.

J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, interveners: Raad van de Balies van de Europese Gemeenschap, case C-309/99, 19 February 2000.

J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, case 4-73, 14 May 1974.

Jacques Pistre, joined cases C-321/94, C-322/94, C-323/94 and C-324/94, 7 May 1997.

Kjell Karlsson and Others, case C-292/97, 13 April 2000.

Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP), case C-405/98, 8 March 2001.

Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, case C-341/05, 18 December 2007.

Lotti and Matteucci, Joined cases C-395/08, C-396/08, 10 June 2010.

Lynne Watson e Alessandro Belmann, case 118/75, 7 July 1976.

Manfred Säger v Dennemeyer & Co. Ltd., case C-76/90, 25 July 1991.

Marie-Louise Acton and others v Commission of the European Communities, Joined cases 44, 46 and 49/74, 18 March 1975.

Martine Browet and others v Commission of the European Communities, Joined cases T-576/93 to T-582/93, 15 July 1994.

Mazzoleni and Inter Surveillance Assistance SARL, case C-165/98, 15 March 2001.

Mervett Khalil (C-95/99), Issa Chaaban (C-96/99) and Hassan Osseili (C-97/99) v Bundesanstalt für Arbeit and Mohamad Nasser (C-98/99) v Landeshauptstadt Stuttgart and

Meriem Addou (C-180/99) v Land Nordrhein-Westfalen, Joined cases C-95/99 to C-98/99 and C-180/99, 11 October 2001.

Meryem Demirel v Stadt Schwäbisch Gmünd, case 12/86, 30 September 1987.

Morson and Jhanjan v State of the Netherlands, joined cases 35-36/82, 27 October 1982.

NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26-62, 5 February 1963.

Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, case C-36/02, 14 October 2004.

Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, case C-36/02, 14 October 2004.

Orkem v Commission of the European Communities, case 374/87, 18 October 1989.

Piera Scaramuzza v Commission of the European Communities, case C-76/93 P, 20 October 1994.

Portugaia Construções Lda, case C-164/99, 24 January 2002.

Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community, joined cases 36, 37, 38-59 and 40-59, 15 July 1960.

Regina v Saunders, case 155/78, 10 June 1980.

Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, case C-55/94, 30 November 1995.

Roderick Dunnett, Thomas Hackett and Mateo Turró Calvet v European Investment Bank, case T-192/99, 6 March 2001.

Roland Rutili v Ministre de l'intérieur, case 36-75, 28 October 1975.

Roman Angonese v Cassa di Risparmio di Bolzano SpA, case C-281/98, 6 June 2000.

Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities, case C-94/00, 22 October 2002.

Rush Portuguesa Ld^a v Office national d'immigration, case C-113/89, 27 March 1990.

Seda Küçükdeveci v Swedex GmbH & Co. KG, case C-555/07, 19 January 2010.

Sky Österreich GmbH v Österreichischer Rundfunk, case C-283/11, 22 January 2013.

Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA, case C-412/93, 9 February 1995.

Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman, case C-415/93, 15 December 1995.

Union syndicale - Amalgamated European Public Service Union - Brussels, Denise Massa and Roswitha Kortner v Council of the European Communities, case 175-73, 8 October 1974.

United Pan-Europe Communications Belgium SA and Others v Belgian State, case C-250/06, 13 December 2007.

Vivien Prais v Council of the European Communities, case C-130/75, 27 October 1976.

Volker Graf v Filzmoser Maschinenbau GmbH, case C-190/98, 27 January 2000.

Volker Steen v Deutsche Bundespost, case C-132/93, 16 June 1994.

Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix, case C-60/03, 12 October 2004.

Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud, case C-307/05, 13 September 2007.

G. National Courts

Stockholm Labour Court, judgment n. 89/09, case n. A 268/04, 2 December 2009.