Enemy at the (flood) gates

Bringing the EU back to social justice through the international protection of social rights. A legal perspective

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Contents

Introduction: a shortcut to "social justice"

As the title suggests, the present paper deals with the concept of "social justice". However, along the paper this concept is used in a rather peculiar fashion. Alas, this difference by no means implies an innovative way to look at "social justice". Instead, I will deploy a simplistic approach to such a concept, that is, a *positivist* approach. Hence, this paper builds on the assumption that "social justice", whatever fundamental definition of the concept one might accept, should *include* the respect of internationally agreed standards of protection of social rights. For all its simplicity, bordering on banality, this approach has three interesting perks for the present paper. First, the said simplicity allows the definition to avoid the inextricable conundrum of more normative and political debates surrounding the concept of "social justice". Second, the proposed definition is in itself *dynamic* as long as international texts setting the standards of

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protection of social rights are provided with supervisory/monitoring mechanism[2]. Third, in respect of the context of the European Union, the *level* of protection awarded to social rights by international instruments has often been considered as a minimum floor of protection. Implicitly or explicitly, the level of social protection reached by EU member states was considered as going beyond those minima[3]. However, during the recent years (2007 onwards) the *action of EU institutions* has brought several Member States to violate the standards of protection of social rights set in international documents, such as ILO Conventions and the European Social Charter. On the background of the previously identified understanding, this situation should provide the necessary *shock* to urge political and institutional actors to restore the respect of the said international standards.

The reference to "internationally agreed standards of protection of social rights" obviously requires the identification of those standards. In particular, it requires a choice in terms of which international instruments to consider as a useful source. In the context of this paper I will refer to the Conventions elaborated in the context of the International Labour Organisation (ILO) and to the European Social Charter (ESC[4]) as sources of standards of protection of social rights.

Both the ILO and the ESC are (relatively) well known, so that a specific introduction is not necessary at this point. However, a few elements are worth stressing in connection with the present research. First of all, the Constitution of the ILO[5], explicitly refers to the concept of "social justice" as the necessary basis for universal and lasting peace. The expression is repeated in the so-called Declaration of Philadelphia[6], annexed to the Constitution[7]. More recently (2008), the ILO adopted the *Declaration on Social Justice for a Fair Globalization*. As for the two previous occurrences however, the concept "social justice" is not defined by the document. Still, it is interesting in the context of this paper to note that the 2008 Declaration includes the concept as the fundamental yardstick on which to measure "all international economic and financial policies". On the contrary, the text of the ESC never refers to the wording "social justice".

[2] As it is the case for the set of instruments which will provide the bulk of arguments analysed in the present paper. See *infra*.
[3] See for example Vandamme, Les droits sociaux fondamentaux en Europe, 7 *Journal des Tribunaux – Droit Européen* 57, 49-56, 1999, p. 54: "Il est evident que le niveau social des Etats d'Europe de l'Ouest qui ont ratifié la Charte est assez élevé pour que les droits proclamés par elle soient déjà largement respectés sur leur territoire".
[4] The European Social Charter was adopted in 1961 and revised in 1996. In this paper however I will generally refer to it with the acronym ESC in lieu of RevESC. Hence, when not otherwise specified, ESC also refers to the revised version of the Charter.
[5] Contained in the Treaty of Versailles of 1919.
[6] "Declaration concerning the aims and purposes of the International Labour Organisation", adopted at the 26th meeting of the International Labour organisation in Philadelphia, 10th May 1944.
[7] "Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice".

Coming to the dynamic aspect one has to turn briefly to supervisory and monitoring bodies characterising the ILO and the ESC. Both systems feature a reporting system regarding the implementation of respective standards of protection of social rights. The ILO body examining the application of ratified Conventions is the Committee of Experts on the Application of Conventions and Recommendations (CEACR)[8]. On the ESC side, the monitoring is ensured by the European Committee of Social Rights (ECSR)[9]. Parallel to the monitoring procedure, the ILO has a number of "special procedures" and also provides for the possibility to lodge complaints[10]. More relevant for the present paper, the ECSR is characterised by a "collective complaint procedure"[11], which entitles a number of employers' and workers' associations, as well as NGOs to lodge complaints regarding the non-respect of the obligations stemming from the ESC.

1. EU close (and not so close) encounters with the ILO and the ESC

EU Treaties picture the EU itself as firmly committed to the respect of international law[12]. Articles 3(5)[13] and 21(1)[14] of the Treaty on European Union (TEU) are both a testament to this self-representation. Indeed, this commitment has been identified as one of the distinctive characteristics of EU action in the international relations[15]. Evidently, the picture is much more complicated than this black and white representation. Looking at the shades of grey, it has been pointed out that EU Member States consistently operated in the context of negotiations of international agreements in order to make these agreements compatible with the specific governance model of the EU[16]. Again, the importance of the European commitment to the respect and promotion

[8] Article 22 of the ILO Constitution. The CEACR is composed of 20 independent experts. See further http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--it/index.htm .

[9] Article 24 of the ESC. The ECSR is composed of 15 independent experts.

[10] Articles 26 to 34 of the ILO Constitution.

[11] Introduced by the Additional Protocol to the European Social Charter of 1998. See further De Schutter, The Two Lives of the European Social Charter, in De Schutter (ed.), *The European Social Charter: a Social Constitution for Europe*, Bruylant, Bruxelles, 11-37, 2010, pp. 22 and ff. .

[12] See De Burça, After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?, 20 *Maastricht Journal of European and Comparative Law*, 2, 2013, 168-184, p. 183.

[13] "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to *the strict observance and the development of international law*, including respect for the principles of the United Nations Charter" (emphasis added).

[14] "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and *respect for* the principles of the United Nations Charter and *international law*" (emphasis added).

[15] Bradford and Posner, Universal Exceptionalism in International Law, 52 *Harvard International Law Journal* 1, 1-51, 2011, p. 14.

[16] Ličková, European Exceptionalism in International Law, 19 *The European Journal of International Law Vol* 3, 463-490, 2008, pp. 475 and ff. .

of international law has been called into question as being essentially "cost free". This finding is based in particular on the analysis stemming from the field of international agreements regarding military activities, since EU countries "largely refrain from using military force and pursue peaceful means to solve international disputes"[17]. Moreover, the EU approach to international agreements predating the Treaty of Rome (1958) or the accession to the EU of a given Member State is even stricter. The first paragraph of Article 351 TFEU[18] seems to provide a "respectful" attitude towards these agreements, allowing Member States to justify the non-respect of EU law on the basis of the need to respect obligations stemming from them. However, the second paragraph clarifies that Member States having recourse to the exception of the first paragraph are then under the obligation to *solve* the conflict. Such an obligation means for the concerned Member State attempting to renegotiate the agreement and eventually, failing this avenue, to unilaterally *denounce* the instrument[19].

On this background one has to assess the relationship between the EU and the ILO. As it is well known, the EU is not part of the ILO[20], nor is it possible for the EU itself to ratify ILO Conventions. Still, along its history, the EU[21] has recognised an important role for the ILO in a number of occasions. Here I will refer to a few examples, following a chronological order. Thus, the first example comes straight from the founding years of the European Communities. Indeed, the so-called "Ohlin Report"[22], which would provide the theoretical basis for the social policy chapter of the Rome Treaty, was drafted by a group of experts of the ILO. The main finding of the Report was that the creation of the European Communities and of the common market did not require the harmonisation of labour standards[23]. The impact of this finding on the competences granted by the Treaty of Rome is evident[24]. Now, in our present context it is perhaps interesting to point out that such a conclusion was supported by the existence of *exchange rates* between countries which reflected their different productivity[25], but such an argument surely goes beyond the scope of this paper. The

[17] Bradford and Posner, *supra* note 16, p. 22.
[18] "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, *shall not be affected by the provisions of the Treaties*" (emphasis added).
[19] See Case C-10/61, *Commission v. Italian Republic*; Case C-84/98, *Commission v. Portuguese Republic*, para. 58: "Furthermore, although, in the context of Article 234 of the Treaty, the Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre Community convention and the EC Treaty. If a Member State encounters difficulties which make adjustment of an agreement impossible, *an obligation to denounce that agreement cannot therefore be excluded*" (emphasis added).
[20] The EU Commission has the status of non-voting observer.
[21] In the paper I will generally use the term "EU", though obviously, the history of the (now) European Union from 1958 to the present days encompasses different denominations.
[22] International Labour Organisation, Social Aspects of European Economic Co-operation. Report by a Group of Experts (summary), 74 *International Labour Review*, 99-123, 1956.
[23] *Ibidem*, pp. 120-121.
[24] See on this point Gijswijt, Informal governance and the Rome Treaties, in Christiansen and Neuhold (eds.), *International Handbook of Informal Governance*, Cheltenham, Edward Elgar, 2012, p. 421.
[25] *Ibidem*, p. 104 and 114: "If, in a country with rapidly rising productivity, money incomes do not rise more or less in step with productivity its export prices will also fall and other countries will have to adopt

second stop of this quick journey is the 2006 Communication on Decent Work[26]. In this Communication one can find an echo of the aforementioned idea that EU standards for social rights already go beyond the international standards[27]. The most interesting point for the analysis carried out in this paper comes from the passage of the Communication devoted to Enlargement[28]. Here the Commission stressed the importance for candidate countries to implement the decent work agenda, and in particular ILO core standards[29]. The reference to those standards was also included in the part dealing with trade policy[30]. The final step provides a more recent reference, although contained in a simple press release. Commenting the adoption by the EU Council of a Decision authorising Member States to ratify ILO Convention No 189 (concerning fair and decent work for domestic workers), the EU Commission stated that "[t]he EU promotes, in all its policies, the ratification and *effective implementation* of ILO Conventions on core labour standards"[31].

Turning to the European Social Charter, one can see that, as De Schutter puts it[32], this instrument never played an important role for the development of EU law in the social field, being seldom referred to. This notwithstanding the fact that the Treaties (now in Article 151 TFEU) explicitly mention the ESC in the chapter related to social policy[33]. As for the ILO, the EU is not part of the ESC. Though the Lisbon Treaty included the possibility/obligation for the EU to join the European Convention on

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a deflationary policy *or adjust their rates of exchange*".

[26] COM(2006) 249, Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Promoting decent work for all - The EU contribution to the implementation of the decent work agenda in the world. On the relationship with ILO standards see further Casale, International labour standards and EU labour law, in Countouris and Freedland (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge University Press, Cambridge, 81-104, 2013, pp. 86 and ff. .

[27] *Ibidem*, p. 4: "The Community acquis in the fields of employment, social policy and equal opportunities in many respects *goes beyond the international standards* and measures which underpin the concept of decent work and incorporates the major principles of that concept" (emphasis added).

[28] *Ibidem*, p. 6.

[29] The reference here goes to those Conventions identified as fundamental by the 1998 ILO Declaration on Fundamental Principles and Rights at Work, *i.e.* Conventions covering (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

[30] COM(2006) 249, see *supra* note 27, p. 8. On this point see further Vandenberghe, On Carrots and Sticks: The Social Dimension of EU Trade Policy, 13 *European Foreign Affairs Review*, 561-581, 2008, pp. 567-568.

[31] European Commission, Working conditions: time for Member States to implement the ILO domestic workers convention, IP/14/82 28/01/2014, available at http://europa.eu/rapid/press-release_IP-14-82_en.htm (last accessed 20/06/2014)

[32] De Schutter, Le role de la Charte sociale européenne dans le dévelopement du droit de l'Union Européenne, in De Schutter (ed.), *The European Social Charter: a Social Constitution for Europe*, Bruylant, Bruxelles, 95-146 , 2010, p. 95.

[33] 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" (emphasis added).

Human Rights[34] (ECHR), the ESC did not enjoy similar attention. In fact, the first reference to the ESC in the context of primary EU law dates back to the Single European Act (1986)[35]. What is more, in the same location the document explicitly mentions "social justice" as one of the "fundamental rights" which it sought to promote. After that, the possibility of accession by the EU to the ESC was envisaged at the moment of the revision of the Charter, taking place between 1990 and 1994. Indeed, the 1994 draft of the Revised ESC included an Article (L) which paved the way for such accession[36]. However, the Article was dropped in the text which was ultimately adopted[37]. After this (missed) encounter, the drafting of the EU Charter of Fundamental Rights[38] (EUCFR) showed once again the distance between the EU and the ESC. Indeed, though the EUCFR makes explicit reference to the European Convention on Human Rights[39], the ESC is never mentioned along the text. This notwithstanding the fact that several disposition of the EUCFR itself were directly inspired by similar Articles of the ESC, as stated in the Explanations relating to the Charter of Fundamental Rights of the European Union[40] redacted by the Praesidium of the European Convention[41].

[34] Now in Article 6 TEU.

[35] "DETERMINED to work together to promote 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 the *European Social Charter*, notably freedom, equality and *social justice*" (emphasis added).

[36] "Article L - Accession by the European Community

1 After its entry into force, the Committee of Ministers of the Council of Europe may invite the European Community to accede to this Charter, by decision taken on the majority required by Article 20.*d* of the Council of Europe's Statute, and by a unanimous vote of the representatives of the Contracting States entitled to sit on the Committee. The specific modalities for the accession and the consequences for the functioning of the system of supervision shall be determined by the Committee of Ministers.

2 For the European Community, if it has acceded, this Charter shall enter into force on the first day of the month following the expiration of a period of one month after the date of the deposit of the instrument of accession with the Secretary General of the Council of Europe".

[37] See further on this point, De Schutter, L'adhésion de l'Union européenne à la Charte sociale européenne révisée, EUI Working Paper LAWNo. 2004/11, available at http://cadmus.eui.eu/bitstream/handle/1814/2826/law04-11.pdf?sequence=1 (last accessed 20/06/2014).

[38] Charter of Fundamental Rights of the European Union, solemnly proclaimed on December the 7th by the European Parliament, the European Council and the European Commission. The Treaty of Lisbon then clarified the legal status of the Charter, recognising to the rights, freedoms and principles contained therein the same legal value as the Treaties (Article 6 TEU).

[39] Article 52(2) EUCFR: " 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 down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

[40] Official Journal of the European Union (OJEU). 14.12.2007, No C 303. In particular Article 14 (Right to education), Article 15 (Freedom to choose an occupation and right to engage in work), Article 23 (Equality between women and men), Article 25 (the rights of the elderly), Article 26 (Integration of persons with disabilities), Article 27 (Workers' right to information and consultation within the undertaking), Article 28 (Right of collective bargaining and action), Article 29 (Right of access to placement services), Article 30 (Protection in the event of unjustified dismissal), Article 31 (Fair and just working conditions), Article 32 (Prohibition of child labour and protection of young people at work), Article 33 (Family and professional life), Article 34 (Social security and social assistance), Article 35 (Health care).

[41] "These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under

As it was just highlighted, the EU is not part of the ESC nor of (any Convention of) the ILO. However, the *effects* of its action do have an impact on the rights and values protected by the said legal orders. Hence, I will briefly look at the relationship the other way round, that is, from the "point of view" of the ESC and the ILO. The supervisory bodies of both systems have been confronted with the issue. They had to deliver their conclusions/decisions on a potential violation of the standard protected by the ESC or by ILO Conventions which was directly caused either by the application of EU law or by the action of EU institutions. On this background one can see that the supervisory bodies went on to scrutinise the situation in the Member State without awarding any special justification or presumption of conformity on the basis of the role of the EU in the issue[42]. In this sense the scrutiny was placed "downstream": the supervisory bodies did not scrutinise the EU law or the action of the EU *per se* but analysed instead the situation at the national level[43]. This analysis makes it evident that EU Member States find themselves between the proverbial rock and a hard place: on the one hand they must apply EU law[44], on the other they are bound to the respect of the obligations stemming from international agreements they have ratified.

All in all, the relationship emerging from this brief overview appears as a rather platonic one. Due to the impossibility of the EU to accede to these instruments, the legal orders of the ILO and the ESC are bound to *ignore* the role played by EU law and action when assessing the situation in the signatory countries. As for the EU, the

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the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter".

[42] European Committee of Social Rights, Decision on Admissibility and the Merits, 3 July 2013, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, para 74: "neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU with the European Social Charter". Cfr. the different stance of the European Court of Human Rights in this respect. European Court of Human Rights, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, no. 45036/98, para. 165-166: "the [European] Court [of Human Rights] finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent" […] to that of the Convention system […] In the Court's view, therefore, it cannot be said that the protection of the applicant company's Convention rights was manifestly deficient, with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted".

[43] International Labour Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations (The United Kingdom), 208-209, 209: "the Committee wishes to make clear 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, *but rather to examine whether the impact of these decisions at national level are such as to deny workers' freedom of association rights under Convention No. 87*" (emphasis added). Similarly in International Labour Conference, 102nd Session, 2013 Report of the Committee of Experts on the Application of Conventions and Recommendations (Sweden), 178-179, 178. European Committee of Social Rights, *supra* note 43, para 72: "It is ultimately for the Committee to assess compliance of a national situation with the Charter, *including when the transposition of a European Union directive into domestic law may affect the proper implementation of the Charter*" (emphasis added).

[44] Or comply with Memoranda of Understanding signed with the Troika which is in its turn composed for two third by EU institutions (the EU Commission and the European Central Bank), the last "third" being the International Monetary Fund.

possibility of a true commitment towards the ESC was ruled out by the preference for "self-sufficiency", *i.e.* for drafting its own instrument (the EUCFR). Though the relationship with the ILO is essentially as "platonic", the EU appears to recognise a higher "moral" role to ILO standards, in particular when it comes to its external relations.

2. "Austerity" and International Standards for Social Rights

During the years of the Great Recession the concept (or at least, the term) of "austerity" has become a familiar one. Austerity is in itself a package of policies presented as a *cure*. A cure, as Nobel laureate Paul Krugman puts it, akin to the bleeding inflicted by middle-age "doctors" to their patients, with the implication that, improvements failing to materialise, the patient would have to undergo... more bleeding[45]. In very brief, austerity policies are a mix of cuts in public spending, privatisation, labour market de-regulation and wage moderation (or outright reduction[46]). The aims of those policies, at the risk of oversimplifying, are the reduction of public debt to GDP ratio, the reduction of public deficit to GDP and the improvement of competitiveness through internal devaluation[47]. Leaving ideological reasons aside (though they probably played a major role[48]), the choice in favour of the austerity-cure was dictated by a diagnosis of the Euro-crisis which saw "fiscal profligacy" (public expenditure, public debts) in the "periphery" as the cause of the said crisis[49]. As it should be obvious, this paper does not aim to analyse those policies *per se* or their actual outcome. However, one should add for the sake of completeness, that much of the public debt was in fact the result of bank bailouts (especially in Spain and Ireland[50]),

[45] Krugman, Bleeding Europe, *The Conscience of a Liberal* (Blog), 11 December 2012, available at http://krugman.blogs.nytimes.com/2012/12/11/bleeding-europe (last accessed 20/06/2014): "it really is like medieval medicine, where you bled patients to treat their ailments, and when the bleeding made them sicker, you bled them even more".

[46] As for the public sector and general minimum wage in Greece. See Karakioulafis, Grèce: Les syndicats dans la ligne de mire de la troika, 143-144 *Chronique internationale de l'IRES*, 121–132, 2013.

[47] That is, lowering wages and labour costs in order for the "periphery" countries (in particular the so-called GIPSI countries: Greece, Italy, Portugal, Spain and Ireland) to restore their competitiveness and heal their economic woes by moving into surplus (*i.e.* becoming net exporters of goods and services). On the point see Pochet and Degryse, The Programmed Dismantling of the European Social Model, 47 *Intereconomics* 4, 200–217, 2012, p. 216; Roubini, Eurozone Crisis: Here Are the Options, Now Choose, *EconoMonitor* (Blog), 9 November 2011, available at http://www.economonitor.com/nouriel/2011/11/09/eurozone-crisis-well-at-least-we-have-options/ (last accessed 20/06/2014); Janssen, Internal Wage Devaluation - The IMF Admits It Does Not Work, *Social Europe* (Blog), 16 December 2013, available at http://www.social-europe.eu/2013/12/internal-wage-devaluation/ (last accessed (20/06/2014).

[48] Fazi, It's Time To Stand Up To Troika Austerity (Part II), *Social Europe* (Blog), 19 June 2014, available at http://www.social-europe.eu/2014/06/time-stand-troika-austerity-part-ii/ (last accessed 20/06/2014).

[49] Degryse, Jepsen and Pochet, The Euro crisis and its impact on national and European social policies, 5 *ETUI Working Paper*, 1-44, 2013, p. 14, available at http://www.etui.org/Publications2/Working-Papers/The-Euro-crisis-and-its-impact-on-national-and-European-social-policies (last accessed 20/06/2014).

[50] See for example Varoufakis, The Global Minotaur: America, Europe and the Future of the Global Economy, London, Zed Books, 2013, p. 154; Degryse, "The new European economic governance", 14

that the growing *private* financial inflows which financed the "profligacy" of the periphery had provided the needed demand to absorb the external surpluses of the so-called "core" countries[51] and that many of the GIPSI countries had in fact entered the Great Recession with low deficits and comparatively low level of public debts[52]. Indeed, the said crisis-narrative has been turned upside down even by ECB vice-president Vitor Constancio in a relatively recent speak[53]. Still, austerity was the medicine of choice, and it is to its implementation in Greece that this section is devoted.

As it is well known, Greece occupies an unenviable first place in the sorry group of countries interested by austerity measures, and more precisely by Memoranda of Understanding (MoU). The MoU lay down the conditions for obtaining financial help in the form of loans from the so-called Troika, formed by the EU Commission, by the ECB and by the IMF. Thus, as often along this paper, I will only provide a brief account of the measures imposed to Greece during the Great Recession[54]. In particular, I will focus on the measures which gave rise to those violations of international standards of protection of social rights which represent the main object of this section.

Labour law regulations and social security represent two of the topics most interested by "austerity" measures. On the individual side, two measures can be pointed out. First, the reduction of compensation due to dismissal, introduced by Law

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ETUI Working Paper, 1-84, 2012, available at http://www.etui.org/Publications2/Working-Papers/The-new-European-economic-governance (last accessed 20/06/2014), p. 70: "before the crisis Ireland had had a budget surplus since 1997. The only Irish deficit year during this period was 2002, with a very modest -0.4 per cent of GDP. But in 2010 it reached -32.4 per cent of GDP because of the bailout of the financial sector".

[51] de Grauwe, Design failures in the Eurozone - can they be fixed?, 57 *European Economy. Economic Papers*, 2013, available at http://www.lse.ac.uk/europeaninstitute/leqs/leqspaper57.pdf (last accessed 20/06/2014), p. 7: "It is important to stress here that the booms in the South allowed the Northern European countries to accumulate large current account surpluses. These were financed by credit that the Northern European countries granted to the South. Thus in a way it can be said that Northern Europe behaved like the automobile salesman who sells cars to his customers by providing them with cheap credit. It is important to recognize this because in the North of Europe the irresponsibility of Southern countries to take on too much debt is often stressed. The truth is that for every foolish debtor there must be a foolish creditor".

[52] See Krugman, End This Depression Now!, New York. W. W. Norton & Company, 2013, pp. 165-166; Varoufakis, The Global Minotaur, *supra* note 51, p. 167: "While Greece was, indeed, running a large deficit, Ireland was a paragon of fiscal virtue. Spain was even running a surplus when the Crash of 2008 hit, and Portugal was no worse than Germany in its deficit and debt performance", but, continues Varoufakis, " who cares about the truth when lies are so much more fun, not to mention useful to those who are desperate to shift the spotlight from the real locus of the Crisis - the banking sector?".

[53] Vítor Constâncio, Speech at the Bank of Greece conference on "The crisis in the euro area", Athens, 23 May 2013, available at http://www.ecb.europa.eu/press/key/date/2013/html/sp130523_1.en.html (last accessed 20/06/2014): "I hope I have been clear about what I consider the prime drivers of the European crisis, namely the role of the financial sector and of the international financial crisis. Without the strain on public finances generated by the recession that ensued and by balance sheet losses of European banks, Euro area governments would not have been so vulnerable to stress in sovereign bond markets. In other words, without the banks' behaviour and the financial crisis, the sovereign debt crisis at least would not have been so severe".

[54] For a more thorough analysis see Achtsioglou, Greece 2010-2012: labour in the maelstrom of deregulation, 19 *Transfer: European Review of Labour and Research* 1, 125–127, 2013; Karakioulafis, Grèce: Les syndicats dans la ligne de mire de la troïka, *supra* note 47; Koukiadaki and Kretsos, Grèce/Greece, in: Escande Varniol et al (eds.), *Quel droit social dans une Europe en crise?*, Brussels, Larcier, 189–231, 2012.

3863/2010, and more specifically the provision of a "trial period" of 12 months. During such a period the employee has no right to compensation in case of dismissal. Second, the same law introduced the possibility to conclude "special apprenticeship contracts" of up to one year's duration with persons between 15 and 18 years. Those contracts are characterised by lower wages (70% of the minimum or daily wage), limited social security benefits and are excluded from the application of labour law provisions (except for health and safety provisions). This measure goes hand in hand with the general reduction of the minimum wage, which was more pronounced (32%) for young workers (under the age of 25). On the collective side, the whole Greek system of collective bargaining was deeply changed during the years of the Great Recession. Indeed, collective bargaining was directly affected by austerity measures from the very first Memorandum of Understanding [55] . Afterwards, Law 4024/2011 established a generalised priority for company level agreements, which would then prevail over a conflicting sectoral agreement, even if the latter is more favourable to the worker. The same law also suspended the possibility of extending *erga omnes* sectoral agreements, while also introducing the possibility to conclude company agreements with "association of workers" representing at least 3/5 of the workforce. The government also intervened *directly* upon the results of collective bargaining, for example by reducing the agreed minimum wage (of 22%) and by suspending clauses providing for wage increases relating to seniority for as long as unemployment is over 10%. Finally, turning to social security, the Greek government introduced several reductions to primary and auxiliary pensions[56]. In particular, those measures reduced holiday bonuses for pensioners (which were removed for pensions over 2500€ per month and for pensioners under 60 years); drastically cut pensions for pensioners being younger than 60; levied a "social security contribution" from pensions over 1400€ per month, the rate of the contribution varying on a slide scale between 3% and 14%.

2.1 Violations

Faced with this dire situation the Greek trade unions were particularly active in exploring the possibilities offered by international texts protecting social rights. It was this activism which set into motion the procedures which brought to the condemnations I will analyse in the next few paragraphs.

Already in September 2011 a High Level Mission of the ILO was sent to Greece in order to assess the respect of several Conventions following the adoption of austerity packages. The Report of the High Level Mission highlighted a number of issues in the areas of freedom of association and collective bargaining, wages, equality and non-discrimination, social security, labour inspection and labour administration, employment policies. For the first area, the Mission expressed its concerns in particular

[55] See Deakin and Koukiadaki. The sovereign debt crisis and the evolution of labour law in Europe, in Countouris and Freedland (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge, Cambridge University Press, 163–188, 2013, pp. 180-181.
[56] Act No. 3845 of 6 May 2010, Act No. 3847 of 11 May 2010, Act No. 3863 of 15 July 2010, Act No. 3865 of 21 July 2010, Act No. 3896 of 1 July 2011 and Act No. 4024 of 27 October 2011.

regarding the freeze in wage negotiations and the possibility for "association of workers" (as opposed to trade unions) to validly conclude collective agreements[57]. As regards wages, the most pressing critique was directed at the level of minimum wages which was falling dangerously close to the poverty line[58]. Finally, the High Level Mission openly criticised the fact that in the context of negotiations with the so-called Troika, employment objectives were rarely discussed[59]. The mission also noted that the impact of pension reforms (*i.e.* cuts) on poverty level had not been considered[60]. In 2012[61] the ILO Committee on Freedom of Association[62] (CFA) reviewed the Greek situation regarding Convention N° 87 (Freedom of Association and Protection of the Right to Organise) and 98 (Right to Organise and Collective Bargaining). The CFA further criticised the freeze on negotiations regarding wages, and more in general the "important and significant interventions in the voluntary nature of collective bargaining" going against the very principle of "inviolability of freely concluded collective agreements" [63] . The Committee moreover expressed its concerns regarding the possibility for "association of persons" to conclude collective agreements, noting in particular that those associations would not offer the same guarantees of independence than trade unions[64]. The concerns on this point are also expressed in the most recent Report of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)[65]. The CEACR based these concerns on statistics showing a staggering prevalence of company-level collective agreements concluded with said "association of persons", with a vast majority of those agreements providing for wage cuts[66].

[57] Report on the High Level Mission to Greece (Athens, 19-23 September 2011) by the ILO, para 304-307.
[58] *Ibidem*, para. 311-314.
[59] *Ibidem*, para. 330-332: "the mission has been struck by the reports that in discussions with the Troika employment objectives rarely figure".
[60] *Ibidem*, para. 323: "The High Level Mission was informed that questions such as the impact of the pension reform on poverty levels as well as the sustainability of the social security system in the light of he wage and employment policies pursued in parallel, have not been addressed in discussions with the Troika ".
[61] ILO Governing Body, 316th Session, Geneva, 1–16 November 2012, 365th Report of the Committee on Freedom of Association, para. 784-1003.
[62] The Committee (CFA) is composed of an independent chairperson and three representatives each of governments, employers, and workers, and was set up in 1951 in order examine complaints about violations of freedom of association. The CFA accepts Complaints against a member state introduced by employers' and workers' organizations.
[63] 365th Report of the Committee on Freedom of Association, *supra* note 62, para. 994-995.
[64] *Ibidem*, para. 998.
[65] International Labour Conference, 103rd Session, 2014, Report of the Committee of Experts on the Application of Conventions and Recommendations.
[66] *Ibidem*, p. 112: "The Committee now observes from the latest statistics provided by the Government that national occupational collective agreements have gone down from 43 in 2008 to seven in 2012 whereas firm-level collective agreements have increased from 215 in 2008 to 975 in 2012 (706 signed by associations of persons and 269 signed by trade unions). Moreover, 701 of those agreements signed by associations of persons and 76 signed with trade unions have provided for wage cuts. Similarly, 313 enterprise level collective agreements have been signed in 2013 of which 178 have been signed by associations of persons (156 providing for wage cuts) and 135 signed by trade unions (42 providing for wage cuts".

Turning to the European Social Charter, the complaint raised by the Greek trade union were aimed at the special apprenticeship contracts[67], the compensation-free dismissal during the trial period[68] and the pension reform[69]. In all these decisions, the European Committee of Social Rights (ECSR) ultimately found the austerity measures adopted by the Greek government to be in breach of one or more Articles of the European Social Charter. Thus, the "special apprenticeship contracts" violated Articles Article 4§1[70], 7§7[71], 10§2[72] and 12§3[73] of the ESC. The ECSR found that those contracts did not respect the right to a fair remuneration inasmuch as they provided for a wage *lower* than the *poverty line*[74], while they also violated the right of young persons to protection since they did not provide the minimum level of three weeks' annual paid leave[75]. Furthermore, the legal framework for these contracts did not mandate any form of training and was hence considered by the ECSR as violating the right to vocational training for boys and girls[76]. Finally, the apprenticeship contracts only included a very limited access to social security benefits, a situation which, in the words of the ECSR had "the practical effect of establishing a distinct category of workers who are effectively excluded from the general range of protection offered by the social security system at large"[77]. Thus, the measure was also found in breach of the right to social security. The second object of complaint was the possibility to dismiss a worker without notice and/or compensation (severance pay) during the first twelve months of an open-ended contract. The ECSR found this measure to be in breach of Article 4§4[78] of the

[67] European Committee of Social Rights, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011.
[68] European Committee of Social Rights, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 65/2011.
[69] European Committee of Social Rights, Pensioner's Union of the Agricultural Bank of Greece (ATE) vs. Greece, Complaint No. 80/2012; Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) vs. Greece, Complaint No. 79/2012; Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) vs. Greece, Complaint No. 78/2012; Panhellenic Federation of Public Service Pensioners vs. Greece, Complaint No. 77/2012; Federation of Employed Pensioners of Greece (IKA-ETAM) vs. Greece, Complaint No. 76/2012.
[70] "The right to a fair remuneration: All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families".
[71] "Right of children and young persons to protection: With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake […] to provide that employed persons of under 18 years of age shall be entitled to not less than three weeks' annual holiday with pay".
[72] "Right to vocational training: With a view to ensuring the effective exercise of the right to vocational training, the Contracting Parties undertake […] to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments".
[73] "The right to social security: With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake […] to endeavour to raise progressively the system of social security to higher level".
[74] General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, *supra* note 68, para. 60.
[75] *Ibidem*, para. 31.
[76] *Ibidem*, para. 38-40.
[77] *Ibidem*, para. 48
[78] "Right to a fair remuneration: With a view to ensuring the effective exercise of the right to a fair remuneration, the Contracting Parties undertake: […] to recognise the right of all workers to a reasonable period of notice for termination of employment".

ESC. The ECSR considered the absence of a period of notice *and* of a form of compensation to be in contrast with the ESC, where it provides for a right of *all* workers to a *reasonable* period of notice. In particular the ECSR stressed that the concept of "*all* workers" includes those on trial period, reinforcing its reasoning by noting *a contrario* that immediate dismissal could only be accepted in cases of serious misconduct[79]. Coming to pensions, the five complaints are essentially identical, having being brought against a series of measures adopted by the Greek government with the general aim, as I briefly described *supra*, of cutting pension benefits. In all these cases the ECSR considered the Greek measures as violating Article 12§3[80] of the ESC. However, it must be stressed that in these decisions the stance of the ECSR was more nuanced, opting for a rather *procedural* critique, *in lieu* of the more substantial one delivered in the previously presented ones. True enough, the ECSR found that the *cumulative* effect of the measures at stake was "bound to bring about a significant degradation of the standard of living and the living conditions of many of the pensioners concerned"[81]. However, it went on to criticise in particular the lack of research and analysis on the *impact* of these measures, the absence of discussion with the organisations concerned and the disregard for other possible measures which could have limited the said cumulative impact[82].

It is interesting to note that, in all those procures, both in the context of the ILO and of the ESC, the Greek government tried to defend itself "hiding" behind the obligations contained in the Memoranda. This line of defence was not particularly successful. Though the different bodies of the ILO and the ECSR recognised the difficult situation of the Greek government, they nonetheless considered the adopted measures to be in violation of the respective international standards. In the pensions' decisions the ECSR was particularly clear in this regard, affirming that "the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter"[83] since "when states parties agree on binding measures, which relate to matters within the remit of the Charter, they should -both when preparing the text in question and when implementing

[79] General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, *supra* note 69, para. 25-27.
[80] The right to social security, *supra* note 74.
[81] Pensioner's Union of the Agricultural Bank of Greece (ATE) vs. Greece; Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) vs. Greece; Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) vs. Greece,; Panhellenic Federation of Public Service Pensioners vs. Greece, *supra* note 70, all at para. 74; Federation of Employed Pensioners of Greece (IKA-ETAM) vs. Greece, para. 78.
[82] Pensioner's Union of the Agricultural Bank of Greece (ATE) vs. Greece; Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) vs. Greece; Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) vs. Greece,; Panhellenic Federation of Public Service Pensioners vs. Greece, *supra* note 70, all at para. 75-77; Federation of Employed Pensioners of Greece (IKA-ETAM) vs. Greece, para. 79-81.
[83] Pensioner's Union of the Agricultural Bank of Greece (ATE) vs. Greece; Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) vs. Greece; Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) vs. Greece,; Panhellenic Federation of Public Service Pensioners vs. Greece, *supra* note 70, all at para. 46-47; Federation of Employed Pensioners of Greece (IKA-ETAM) vs. Greece, para. 50-51.

it into national law- take full account of the commitments they have taken upon ratifying the European Social Charter"[84]. Furthermore, the ECSR added that "it is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the implementation of the parallel international obligations into domestic law may interfere with the proper implementation of those emanating from the Charter ambit of the Charter", confirming its "downstream" position when assessing national measures implementing other international obligations. What it is interesting in the Report of the ILO High Level Mission to Greece is the symmetric position of the representatives of the EU Commission. Indeed, in the wording of the Report we are told that "the policy choices were always made by the Greek Government"[85] and that the European Commission exerted no "pressure to violate ratified international labour Conventions"[86]. Now, though one may be relived to read this reassurance from the EU Commission, such a stance allows the Commission to "wash its hands" of the whole matter of respecting international standards of protections of social rights. At the same time, it provides the best justification for the approach of the ECSR and the CEACR to these issues, namely to examine the national implementation of measures agreed in the context of MoU or of EU acts without providing any presumption of conformity with the respective standards.

3. Social Rights, the EU Internal Market and the Court of Justice

The decisions delivered by the Court of Justice of the European Union (CJEU) in the *Viking*[87] and *Laval*[88] also need no particular introduction. Indeed, these "evil twins" have sparked a gargantuan debate among scholars[89]. Borrowing the words of the (relatively) recent Report "A New Strategy for the single Market" redacted by Mario Monti at the demand of President Barroso, these cases "revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level"[90]. As it happens, these decisions ended up also as (indirect) object of review from the CEACR[91] and the

[84] *Ibidem*.
[85] Report on the High Level Mission to Greece, *supra* note 58, para. 275.
[86] *Ibidem*.
[87] Case C-438/05, *Viking Line ABP v. The International Transport Workers' Federation and the Finnish Seaman's Union* (hereinafter *Viking*).
[88] Case C-341/05, *Laval un Partneri*, 18 December 2007 (hereinafter *Laval*).
[89] The European Trade Union Institute provides a comprehensive list of the "first wave" (2007-2009) of these commentaries at http://www.etui.org/Topics/Social-dialogue-collective-bargaining/Social-legislation/The-interpretation-by-the-European-Court-of-Justice/Reaction-to-the-judgements/Articles-in-academic-literature-on-the-judgements (last accessed 20/06/2014).
[90] "The revival of this divide", the Report continues "has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration". See A New Strategy for the single Market – at the Service of Europe's Economy and Society, Report to the President of the European Commission José Manuel Barroso by Mario Monti 9 May 2010, p. 68.
[91] International Labour Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations (The United Kingdom), 208, International Labour

ECSR[92]. Before passing to conclusions/decisions delivered by those bodies, I will however highlight a few fundamental points of *Viking* and *Laval* which are mandatory to fully understand the procedures in front of the said supervisory bodies.

The *Viking* and *Laval* cases concerned a conflict between one of the so-called "fundamental freedoms"[93] of the EU internal market[94] and the right to take collective action[95]. In both cases the Court was required to rule, leaving aside a good number of details, whether a *restriction* to a fundamental freedom resulting from a collective action initiated by trade unions against a private undertaking was permitted under EU (primary) law. Although the right to take collective action was for the first time recognised as a fundamental one in these cases[96], the CJEU analysed its exercise from a formal point of view as a (mere) *restriction* to a fundamental freedom of the internal market. Having decided for this approach, the Court of Justice applied a rather "standardised" reasoning, considering whether it was possible to *justify* such a restriction. In very brief, the said collective action should a) pursue a *legitimate aim* compatible with the Treaty and b) be justified by *overriding reasons in the public interest*, c) on condition that the action is carried out in a way *suitable* for securing the attainment of the objective pursued and *does not go beyond what is necessary* in order to attain it[97]. The actual outcome of the cases is not particularly important for the present paper. In *Viking* the CJEU found that the collective action passed steps (a) and (b) of the test, sending the case back to the national court, although with a rather clear guidance, for the assessment of point (c) (the so-called proportionality test *stricto sensu*). The dispute was ultimately settled privately, the content of the settlement itself remaining confidential. In *Laval* the collective action was found wanting under point (b) of the test. The issues however lie in the very approach concocted by the CJEU to tackle the conflict between the (fundamental) right to take collective action and the fundamental freedoms of the internal market. To consider just two critiques to this approach, the stance was criticised because, by considering the right to take collective action through the restriction/justification scheme, it suggested a hierarchical relation between fundamental social rights and fundamental freedoms of the internal market, with the latter enjoying a higher ground than the former[98]. Secondly, the principle of proportionality (embodied by the third step of the test outlined before) was criticised as

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Conference, 102nd Session, 2013 Report of the Committee of Experts on the Application of Conventions and Recommendations (Sweden), 178.

[92] Decision on Admissibility and the Merits, 3 July 2013, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012.

[93] See in general Barnard, The Substantive Law of the EU: The Four Freedoms, Oxford, Oxford University Press, 2013.

[94] Respectively, the freedom of establishment and the freedom to provide services.

[95] Whose most common manifestation is the right to strike, though the concept of collective action encompasses other different practices of industrial conflict. In fact neither in *Viking* nor in *Laval* the collective action took the form of a strike.

[96] *Laval*, para. 90-93; *Viking*, para. 43-46.

[97] *Laval*, para. 101; *Viking*, para. 75.

[98] See the Opinion of AG Trstenjak in Case C-271/08, *Commission v Germany*, para. 183; see also Joerges and Rödl, Informal Politics, Formalised Law and the Social Deficit of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval, 15 *European Law Journal* 1, 1-19, 2009, p. 19.

being essentially illogic, provided that the more a collective action is successful, the more it will infringe on the economic freedoms of an employer, the less likely it would be for the action to pass the proportionality test[99]. It is worth mentioning these critiques, among the host which has been flung at the twin decisions, inasmuch as they will be confirmed by the decisions/conclusions of the CEACR and the ECSR which will soon be presented.

Beyond the approach delivered by the CJEU, it is relevant in the context of this paper to look at the sources referred to in order to affirm the fundamental nature of the right to take collective action. Indeed, in both decisions the Court of Justice cites a number of international texts[100], including the European Social Charter and Convention No 87 of the ILO. Now, along the decisions, and in particular when assessing the possible limitations to the newly found fundamental right, the CJEU never refers to the body of decisions elaborated by the respective monitoring bodies. However, the same Court of Justice is definitely *aware* of the existence and of the importance of this (*sui generis*) "case law"[101], since, as it is well known, the text of ILO Convention No 87 *never* mentions the right to take collective action, or the right to strike for what it matters. In fact the right to take collective action has been considered as *included* under the protection of the freedom of association by... the ILO supervisory bodies[102]. Still, the CJEU did not feel the need to mention this contribution. More in general, the Court of Justice appears particularly recalcitrant when it comes to referring to other sources of human or fundamental rights law and "jurisprudence"[103].

3.1 Violations

The *impact* of the decisions of the CJEU in *Viking* and *Laval* came under the scrutiny of both the CEACR and ECSR. In fact, the CEACR analysed these impacts

[99] Novitz,A human rights analysis of the Viking and Laval judgments, 10 *Cambridge yearbook of European legal studies*, 541–561, 2008, p. 560; Barnard, The Protection of Fundamental Social Rights in Europe after Lisbon: a Question of Conflicts of Interests, in de Vries, Bernitz and Weatherill (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, 37–57, Oxford, Hart Publishing, 2013, p. 50.

[100] *Laval*, para. 90; *Viking*, para. 43.

[101] Dorssemont, The right to take collective action versus fundamental economic freedoms in the aftermath of Laval and Viking. Foes are Forever". In De Vos (ed.), *European Union Internal Market and Labour Law: Friends or Foes?*, 45–104, Antwerp, Intersentia, 2009, p. 89.

[102] The Committee on Freedom of Association first recognized this in 1952, the CEACR in 1959. See Gernigon, Odero, and Guido, ILO Principles concerning the right to strike, ILO, Geneva, 2000, available at http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_087987/lang--en/index.htm (last accessed 20/06/2014). Further on this point see the unsurpassed analysis of Tonia Novitz in International and European Protection of the Right to Strike, Oxford, Oxford University Press, 2003.

[103] See Barnard, Barnard, The Protection of Fundamental Social Rights in Europe after Lisbon: a Question of Conflicts of Interest, *supra* note 100, pp. 43-44; De Burça, After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?, 20 *Maastricht Journal of European and Comparative Law* 168, 168-184, 2013, p. 173: "What is evident from the analysis described in more detail below is that there has been a remarkable lack of reference on the part of the Court of Justice to other relevant sources of human rights law and jurisprudence"; Flauss, Les interactions normatives entre les instruments européens relatifs à la protection des droits sociaux, in Flauss (ed.), *Droits sociaux et droit européen. Bilan et prospective de la protection normative*, Nemesis, Bruxelles, 89-114, 2002, p. 109: "en effet, si la Cour de Luxembourg, s'est à l'occasion référée à la Charte sociale européenne, elle l'a fait avec mesure et discrétion, et en toute hypothèse à dose homéopathique".

twice, the first time because of a collective dispute[104] (the so-called BALPA case) and the second because of a national reform aimed at "implementing" the decision of *Laval*[105]. The ECSR only analysed the latter impact[106].

In all these occasions the approach developed by the CJEU and summarised before was openly criticised. As I explained in Section 1, this was done through the critique of the national situation. Still, the critique of the role of EU law and of the CJEU is as explicit as possible provided the context.

The BALPA dispute[107] arose in the context of negotiations between British Airways and the British Air Line Pilots' Association (BALPA). British Airways was planning to launch a wholly owned subsidiary airline that would operate between Paris and (among others) the US. Along with this operation, the process of collective bargaining started: the thorny issue revolved around the working conditions to apply to the workers of the subsidiary. In very brief, negotiations failed and no agreement was reached. BALPA then called for strike action, holding a ballot which turned out in favour of collective action. The company held that any strike action would be unlawful because of the doctrine developed by the CJEU in the *Viking* case, since the action would violate its freedom of establishment. The main threat revolved around a claim for unlimited damages, estimated by the company at £100 million *per day*. Such a "life-threatening" amount forced the trade union to cancel the collective action. At this point BALPA lodged a complaint before the CEACR, being joined by the International Transport Federation (ITF). The CEACR delivered its conclusions on the dispute in the occasion of the 2010 Report. Also in this occasion, the defence of "hiding behind the EU" was deployed[108] (*in casu* by the UK government). To this the CEACR responded with the stance outlined before, that is, by placing its scrutiny "downstream". In the words of the conclusions: "the Committee wishes to make clear 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, but rather to examine whether *the impact of these decisions at national level* are such as to deny workers' freedom of association rights under Convention No. 87"[109]. Still, notwithstanding this rather careful approach, the CEACR clearly concluded *against* the application of the principle of proportionality to

[104] International Labour Conference, 99th Session, 2010, *supra* note 91.
[105] International Labour Conference, 102th Session, 2013, *supra* note 91.
[106] Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, *supra* note 92.
[107] See further Ewing and Jones, Introduction, in Ewing and Hendy (eds), *The New Spectre Haunting Europe, The ECJ, Trade Union Rights and the British Government*, London, Institute of Emplyment Rights, 1–5, 2009.
[108] International Labour Conference, 99th Session, 2010, *supra* note 91, pp. 208-209: " The Committee notes the Government's indication in its reply that BALPA's application is misdirected and misconceived because *any adverse impact of* Viking *and* Laval *would be a consequence of the European Union law*, to which the United Kingdom is obliged to give effect, rather than of any unilateral action by the United Kingdom itself".
[109] *Ibidem*, p. 209 (emphasis added).

the right[110] to take collective action[111]. Indeed, one cannot but observe that the critique to the case law of the CJEU was not so careful, since the CEACR concluded that "the doctrine that is being articulated in these ECJ[112] judgements 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"[113].

The same critiques were repeated almost verbatim in the conclusions related to the so-called *Lex Laval*[114]. The *Lex Laval* being the nickname for a package of amendments[115] introduced by the Swedish government enacted in order to bring the Swedish system in line with the *Laval* decision. These amendments try to "integrate" the points raised by the CJEU decision into the Swedish system, while keeping intact the fundamental characteristics of the system. The whole issue is strictly connected with the distinct topic of posting of workers, which goes well beyond the scope of the present paper. Fortunately, the statements delivered by the CEACR and by the ECSR when assessing the *Lex Laval* can be analysed without entering the minefield of posting. Of the critiques raised by the CEACR I have already said. These are essentially a repetition of the ones regarding the BALPA dispute. The substance of the decision delivered by the ECSR[116] is also similar. Repetitive it may be, it is also worth stressing that the "hiding behind the EU" argument was once again put forward by the defendant government (Sweden)[117]. And, once again, was dismissed, this time by the ECSR, on the ground that it is the conformity of the resulting national law with the ESC that has to be assessed by the Committee[118]. In this context the ECSR also refused to award EU a "special treatment", in the form of a presumption of conformity with the ESC[119]. As for

[110] Or freedom, provided that the dispute is situated in the UK context.
[111] [111] International Labour Conference, 99th Session, 2010, *supra* note 91, p. 209: "The Committee observes 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 services".
[112] Which is another acronym for the European Court of Justice.
[113] *Ibidem*.
[114] International Labour Conference, 102th Session, 2013, *supra* note 91.
[115] See further See Bruun and Malmberg, *Lex Laval*: Collective Actions and Posted Workers in Sweden, in Blanpain and Hendrickx (eds.), *Labour Law Between Change and Tradition, Liber Amicorum Antoine Jacobs*, Alphen aan den Rijn, Kluwer, 21-33, 2011.
[116] Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, *supra* note 92. I had the occasion to analyse this decision in greater detail; see Rocca, A Clash of Kings – The European Committee on Social Rights on the '*Lex Laval*'… and on the EU Framework for Posting of Workers, 3 *European Journal of Social Law*, 217-232, 2013.
[117] Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Document No. 2, Submissions of the Government on Admissibility and Merits, p. 3: "the Swedish government would like to stress that the legislative changes were considered necessary in order for the Swedish legislation to comply with EU law on freedom to provide services and non-discrimination, as interpreted by the ECJ in the Laval case".
[118] Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, *supra* note 92, para. 72-74: "It is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the transposition of a European Union directive into domestic law may affect the proper implementation of the Charter".
[119] *Ibidem*, para. 74: "the Committee considers that neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU".
with the European Social Charter".

the more substantial points, the ECSR completely reverses the logic of the approach delivered by the CJEU, by affirming that the restrictions *to* the right to collective action should be proportionate[120], since these restrictions have to be assessed from the point of view of Article G of the ESC[121]. Finally, the ECSR seems to agree with the critiques aimed the hierarchy between fundamental freedoms and fundamental social rights *de facto* created by the decisions of the CJEU. Hence, the Committee feels appropriate to remind that "consequently, the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – 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"[122].

To conclude this gallery of violations, it seems useful to add yet another potential clash, though this ultimately failed to materialise. Following the critiques against *Viking* and *Laval*, a legislative solution was proposed in 2012 by the EU Commission. The solution, in itself a proposal for a new EU Regulation[123], was never adopted, following the impossibility to find the necessary support among Member States[124]. This premature death notwithstanding, two strictly intertwined points are worth mentioning in the context of the present Section. First, in the Explanatory Memorandum accompanying the Proposal, the aforementioned Conclusions delivered by the CEACR in the BALPA case are explicitly referred to. This shows at the very least the awareness on the EU Commission's side of the *violation* of ILO standards

[120] *Ibidem*, para. 121: "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".

[121] Which establishes the conditions for restricting the rights protected by the ESC: "The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as 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".

[122] Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, *supra* note 92, para. 122.

[123] 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. See on the proposal Bruun, Bücker and Dorssemont, Balancing Fundamental Social Rights and Economic Freedoms: Can the Monti II Initiative Solve the EU Dilemma?, 28 *International Journal of Comparative Labour Law and Industrial Relations*, 279-306, 2012; Orlandini, The Monti II proposal for the regulation and the right to strike in post-Lisbon Europe, 4 *European Journal of Social Law*, 224-240, 2012; M. Rocca, 'The 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', 1 *European Labour Law Journal*, 19-34, 2012.

[124] See the letter of the Commission accompanying the withdrawal of the proposal, Brussels 12 September 2012, Ares(2012)1058907.

caused by the application of *Viking* and *Laval*[125]. However, coming to the second element, the Proposal itself refers to the *principle of proportionality*, as the tool to reconcile the exercise the right (or freedom) to take collective action and the freedom of establishment and to provide services[126]. Going beyond the mere reference, the actual stance of the CEACR about this very principle seems somewhat lost on the Commission.

4. Scenario 1: Beyond Fair-weather Friendship?

As it should be evident, the violations outlined highlights first and foremost a *political* problem. To this however I will only devote a few comments in the closing Section of the paper. Here I will stick to the legal approach, in order to analyse "the road not taken". In this sense I will look to those instruments *already* present in EU law which could have allowed (and could still allow, at the low price of a change of mind) a more clear commitment to the respect of the international standards described before. This choice (*de jure condito*) must be considered as opposed to a more "creative" one, which would consist in proposing legal changes (*de jure condendo*), *e.g.* the accession of the EU to the ESC. In this sense, I will analyse the possibilities offered by the EU Charter of Fundamental Rights (EUCFR) and by Article 351 TFEU.

This approach is not without drawbacks. The major one is related to the issues analysed in Section 2. This is due to the legal nature of MoU, which are considered as simple declarations. As it was stressed before, the EU Commission considers the Greek state to be the sole responsible for the political choices implementing the various MoU, and the violation of the conditions would "only" cause the interruption of the loan. In fact, an attempt to pierce this veil was made by the *Tribunal do Trabalho* of Porto (Portugal). The Tribunal sent a request for a preliminary ruling to the CJEU, asking whether the principles of equality and non-discrimination[127] and of fair and just working conditions[128] recognised by the EUCFR were being violated by the decision of the Portuguese Govrnment to cut wages in the public sector[129]. The CJEU simply affirmed its lack of jurisdiction on the matter[130]. Thus, it remains extremely unclear whether the EUCFR is applicable to MoU. However, and this is why the present discussion remains interesting also for the issues highlighted in Section 2, it can be argued that the EUCFR

[125] Explanatory Memorandum of COM(2012) 130 final, *supra* note 124, pp. 8-9: " The importance of this problem has been highlighted in the 2010 Report of the ILO Committee of Experts on the Application of Conventions and Recommendations which expressed 'serious concern' about the practical limitations on the effective exercise of the right to strike imposed by the CJEU rulings. The right to strike is enshrined in ILO Convention No. 87, which is signed by all EU Member States".
[126] *Ibidem*, Recital 11: "
[127] Article 21 EUCFR.
[128] Article 31 EUCFR.
[129] Reference for a preliminary ruling from the Tribunal do Trabalho do Porto (Portugal) lodged on 8 March 2012 - Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios, SA, Case C-128/12.
[130] Order of the Court (Sixth Chamber) of 7 March 2013 in case C-128/12.

still binds EU Institutions even when acting in their role of "Troika members"[131]. This is nothing but reinforced by the fact that EU Institutions compose two thirds of the said Troika.

The first "window" allowing EU Institutions to fully (and legally) commit to the respect of international standards set by ILO Conventions and by the ESC is Article 53 EUCFR. The window however is definitely a narrow one. Article 53 EUCFR states that the Charter *itself* shall not 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, the Community or all the Member States are party". Hence, it could be argued, in situation in which the EUCFR does apply, it should be interpreted in a way which is compatible with "international agreements to which the Union, the Community or *all the Member States* are party". As for example, all Member States have ratified ILO Convention No 87, which was at stake both in the Greek context (regarding the reform of the system of collective bargaining) and in the CJEU decisions in *Viking* and *Laval*. The situation is less clear for the ESC. This is due to the peculiar nature of the instrument, first signed in 1961 and then revised in 1996. Some Member States have only ratified the first version of the ESC, some have ratified both and another group of states only has ratified the revised version. The situation is summarised by the Table below.

Instrument	Member States
Only ESC (1961)	Austria, Croatia, Czech Republic, Denmark, Germany, Greece, Hungary, Latvia, Luxembourg, Poland, Slovakia, Spain, United Kingdom
Only RevESC (1996)	Bulgaria, Estonia, Lithuania, Romania, Slovenia
Both	Belgium, Cyprus, Finland, France, Ireland, Italy, Malta, the Netherlands, Portugal, Sweden

In a recent contribution, a member of the ECSR has argued in favour of the interpretation of the ESC as falling into the category of treaties signed by all Member States and hence covered by Article 53 EUCFR[132]. Still, as it was stressed before, the possibility to look through this "window" presupposes a legal dispute where the EUCFR is applied.

The second window is quite wider. The problem in this case is what lies outside. Article 351 TFEU explicitly provides the tools to solve a conflict between EU law and

[131] As argued by the study of Fischer-Lescano, Human Rights in Times of Austerity Policy - The EU institutions and the conclusion of Memorandaof Understanding, Legal opinion commissioned by the Chamber of Labour, Vienna, 17 February 2014.

[132] Schlachter, The European Social Charter: could it contribute to a more Social Europe?, in Contouris and Freedland (eds.), *Resocialising Europe in a Time of Crisis*. Cambridge, Cambridge University Press, 105–117, 2013, p. 116.

international treaties concluded *before the accession to the EU*[133]. Hence, the question would be one of chronological order. Each ILO Convention has obviously a different date of adoption and (for each Member State) ratification, so that it would be hard to provide an easy answer. Looking at the aforementioned ILO Convention 87, one can see that all Member States save Italy and Luxembourg [134] have ratified it before the accession to the EU.

For the ESC the picture is more complicated, due to the said "dual" nature of the instrument, with the Revised ESC being ratified at a much later date. It has been argued[135] that, in the case of a Member State having ratified both instruments, the ratification date of the Revised ESC would be the one to take into account, hence "resetting" the clock in respect of Article 351 TFEU. However, the contrary stance was maintained by the ETUC in its submission to the ECSR in the *Lex Laval* case [136], arguing in favour of a "continuity" of the two instruments. Once again, the situation can be summarised with a Table. Hence, a fairly large group of Member States could invoke the first paragraph of Article 351 TFEU in order to protect the rights and obligations covered by the ESC and by (certain) ILO Conventions from the effects of EU law. This is particularly interesting in respect of the issues identified in Section 3. As for Section 2 and the MoU, the rather disturbing impression is that an eventual successful invocation of international instruments protecting social rights would simply force the given government to "cut" elsewhere. Or it would stop the payment of the loan linked to the application of the MoU in question.

	Before EU Accession	**After EU Accession**
Only ESC (1961)	Austria, Croatia, Czech Republic, Denmark, Greece, Hungary, Latvia, Poland, Slovakia, Spain, United Kingdom	Germany, Luxembourg
Only RevESC (1996)	Bulgaria, Estonia, Lithuania, Romania, Slovenia	
Both (reset)	Cyprus	Belgium, Finland, France, Ireland, Italy, Malta, Netherlands, Portugal, Sweden
Both (continuity)	Cyprus, Finland, Ireland, Malta, Sweden	Belgium, France, Italy, Netherlands, Portugal

[133] Article 351(1): "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties".
[134] Which have ratified Convention No 87 a few *months* after the creation of the European Communities, respectively on 13 March 1958 and 3 March 1958.
[135] De Schutter. L'adhésion de l'Union européenne à la Charte sociale européenne revise, 11 *EUI Working Papers*, 1–44, 2004, pp. 8-9, on the basis of the precedent of Case C-466/98, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.
[136] Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, Document No. 4, Observations by the European Trade Union Confederation (ETUC), para. 52.

Another problem arises when one looks further than the first paragraph of Article 351. In order to keep up the suspense, I will come back to this issue in Section 5.

4.1 A Short Deviation to Strasbourg

In developing this paper I have decided to look to the legal systems of the ILO and the ESC. This choice was based on their "specialisation" in the field of social rights and of their correlation with the concept of social justice. In this sense, the role of the European Court of Human Rights (ECtHR) and of the European Convention on Human Rights (ECHR) remains outside the scope of the present analysis. However, the ECtHR may have a role to play *also* in lending its superior "strength" to the more specialised bodies supervising the application of the ESC and of ILO Conventions.

The first and most evident basis for this strength stems from the obligation of the EU to accede to the ECHR contained in the Lisbon Treaty and now in Article 6 TEU[137]. The eventual accession will in fact shape the relationship between the two apical European Courts. Before that, it remains to both systems, through the case law of the respective Courts, to define their relationship[138]. However, four years have passed since the commitment to such accession was included in the Treaties. A draft of the accession protocol was published[139], but then the negotiations faced a sudden stop, due to the afterthoughts of some Member States. Two years after, an agreement was reached over the draft accession instrument[140], which is now awaiting the opinion of the Court of Justice.

The second basis justifying the assumption of a major "strength" on the ECtHR side lies in the EUCFR. Indeed, the EU Charter of Fundamental Rights explicitly refers to the ECHR in Article 52§3[141]. In the words of the Explanations provided by the Praesidium[142], this Article is meant "to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR". The Explanations make it clear that this reference includes the case-law of the European Court of Human Rights. Explanations have no binding legal value, though

[137] "The Union *shall* accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties" (emphasis added).
[138] See Dorssemont, A judicial pathway to overcome Laval and Viking, 5 *OSE Reasearch Paper*, 1-22, 2011.
[139] Draft legal instruments on the accession of the EU to the European Convention on Human Rights, 19 July 2011, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/CDDH-UE_2011_16_final_en.pdf (last accessed 20 June 2014).
[140] Council of Europe, press release, "Milestone reached in negotiations on accession of EU to the European Convention on Human Rights", 05 April 2013, https://wcd.coe.int/ViewDoc.jsp?Ref=DC-PR041 (last accessed 20 June 2014).
[141] "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 down by the said Convention. This provision shall not prevent Union law providing more extensive protection".
[142] *Supra* notes 40-41.

they are "a valuable tool of interpretation intended to clarify the provisions of the Charter". Following this "valuable tool" it would seem that the rights recognized by the EUCFR should be interpreted as providing *at least* the same level of protection granted by the case law of the ECtHR.

It remains to see how this "strength" can be used in support of the supervisory bodies mentioned before. The tool lies in the *Demir and Baykara*[143] decision where the ECtHR opened an important channel to the corpus of decisions of the ECSR[144] and of other supervisory bodies, as the CEACR[145]. The ECtHR referred to the interpretation provided by those bodies of their respective international agreements (ILO Conventions and the European Social Charter), in order to assess the emerging consensus (and the "continuous evolution") regarding the rights protected by the ECHR[146]. *In casu* such emerging consensus brought the ECtHR to consider the right to bargain collectively as an "essential element" of the right to form and join trade unions[147], protected by Article 11 ECHR[148].

The obstacle on this deviation through Strasbourg is represented by a certain deference which the ECtHR shows when dealing with EU law. This approach is epitomised by the *Bosphorus*[149] case, where the ECtHR considered that EU law enjoyed a "presumption of conformity" with respect to the ECHR[150]. Still, the possible complementary role of the ECtHR in completing the protection of fundamental social rights was probably suggested implicitly by the ECSR in its decisions in the Greek pensions' cases which were described in Section 2, where it affirmed that "the Committee considers that *other mechanisms* are more suited to address complaints relating to the effects of the contested legislation on *individual* pensioners' *right to property*"[151].

[143] European Court of Human Rights, 12 November 2008, *Demir and Baykara v. Turkey*, no. 34503/97.
[144] *Ibidem*, para 50 and 149.
[145] *Ibidem*, para. 38, 43, 101, 122, 147 and 166.
[146] *Ibidem*, para. 85-86. On the point see Lörcher, The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara Judgment, its Methodology and Follow-up, in Dorssemont, Schömann and Lörcher, *The European Convention on Human Rights and the Employment Relation*, Oxford: Hart Publishing, 3–46, 2013; M. Schlachter, The European Social Charter: could it contribute to a more Social Europe?, *supra* note 133, p. 115.
[147] *Demir and Baykara v. Turkey*, para. 154.
[148] "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".
[149] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, *supra* note 42.
[150] *Ibidem*, para. 165-166.
[151] Pensioner's Union of the Agricultural Bank of Greece (ATE) vs. Greece; Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) vs. Greece; Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) vs. Greece,; Panhellenic Federation of Public Service Pensioners vs. Greece, *supra* note 70, all at para. 78; Federation of Employed Pensioners of Greece (IKA-ETAM) vs. Greece, para. 82.

5. Scenario 2: a different EU Exceptionalism?

The interest for this second scenario has been triggered by the reactions of EU institutions to the condemnations and concerns described so far. For the issues examined in Section 2 (austerity in Greece), these "reactions" amounts to... nothing. Neither the EU Commission nor the ECB have so much as commented on the number of concerns raised by the ILO High Level Mission. Even more problematic, the same silence met the direct condemnations which have been delivered by the ECSR, the CFA and the CEACR. This is in fact coherent with the logic one can observe in the statement of the EU Commission in the context of the ILO High Level Mission[152], which basically reads as: we never told Greece to violate any international standard of protection for social rights. The same approach has been clarified in the second MoU with Greece, were it is reaffirmed that "the ownership of the programme and all executive responsibilities in the programme implementation remain with the Greek Government"[153]. One might say that this approach conflicts with the self-representation delivered by the EU Commission *during* the application of the MoU in Greece, based on the idea that "[t]he EU promotes, *in all its policies*, the ratification and *effective implementation* of ILO Conventions on core labour standards"[154]. However, from a legal point of view this is not a particularly strong argument. As regards the issues analysed in Section 3, the follow-up from the EU Commission was in its turn even more puzzling, even though the different topic is not as shocking and far reaching as the question of austerity policies. As it was highlighted before, the legislative proposal which should have solved the problems created by *Viking* and *Laval* relied on a legal approach extremely similar to the one explicitly criticised (at the time of the proposal) by the CEACR, and later also by the ECSR. In front of the condemnations and concerns presented in this paper, the EU Commission (in particular) and the ECB remained rather relaxed, and any change of approach was implicit (and difficult to discern at that) at best, nonexistent at worst.

This is why looking at the possibilities offered by Article 351 TFEU is ultimately disturbing. The first paragraph was described in the previous Section. As I said, a Member State having ratified the ESC or a given ILO Convention before the accession to the EU could theoretically invoke Article 351 TFEU in order to immunise certain rights from the effects of EU law. However, in such an hypothesis, the ultimate outcome could go in the very contrary direction than the one envisaged before, *i.e.* reaffirming the commitment of the EU to the respect of international standards of protection of social rights. This possibility stems from the second paragraph of Article

[152] See *supra* notes 85-86.
[153] Memorandum of Understanding on Specific Economic Policy Conditionality, March 2012, in Economic and Financial Affairs, *The Second Economic Adjustment Programme for Greece*, 94 Occasional Papers, March 2012, p. 123, available at http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf (last accessed 20 June 2014).
[154] European Commission, Working conditions: time for Member States to implement the ILO domestic workers convention, *supra* note 31 (emphasis added).

351 TFEU, which states that, in our hypothesis "the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established". This process may take three different directions: a) a change in the policies of the given Member State; b) a change on the side of EU law and action; c) a change on the side of the ESC or the ILO. Now, the first possibility is only available for the issues regarding austerity policies in Greece, since the tensions caused by the case law of the CJEU stem from the interpretation by an independent judge of EU primary law –both elements which are beyond the reach of a single Member State (or a small group of Member States for what it matters[155]). As regards austerity policies, outcome (a) is in a way the most likely. The respect of international standards of protection of social rights would just add the umpteenth constraint to the action of the Greek Government, which could in its turn find other measures to appease the Troika. Solutions (b) and (c) are evidently much more difficult to achieve. In the case of the CJEU decisions, outcome (b) would require nothing less than a change of the Treaties. In the case of Greek austerity, it would require for the EU institutions which are part of the Troika to take into account the critiques and/or condemnations outlined before and modify the MoU accordingly. Their stance so far suggests that this possibility is indeed remote. Outcome (c) requires a very broad international consensus in order to intervene on the agreements in question, so that it appears even more remote.

However, the three possibilities just highlighted may all end up as dead ends. In such a situation the case law of the CJEU has already clarified that the given Member State(s) would have to *denounce* the international agreement conflicting with EU law[156]. For the ESC this could be achieved more easily, since the Charter allows for the "selective" ratification of its Articles[157]. ILO Convention No 87 would put up a fiercer fight in this regard. Indeed, its inclusion in the 1998 Declaration on Fundamental Principles and Rights at Work[158] makes its respect an obligation directly stemming from the membership of the ILO itself. It seems safe to affirm that the eventuality of EU Member States being forced to leave en masse the ILO is almost unthinkable, though the years of the Great Recession, characterised by a sort of continuous "EU state of emergency"[159], somewhat changed our perception of what is "unthinkable" in Europe[160].

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[155] What Falkner calls the "court decision trap". See Falkner, Introduction: The EU's Decision Traps and their Exits - A Concept for Comparative Analysis, in Falkner (ed.), *The EU's Decision Traps: Comparing Policies*, Oxford, Oxford University Press, 1-17, 2011, pp. 10-11.

[156] Case C-10/61, *Commission v. Italian Republic*; Case C-84/98, *Commission v. Portuguese Republic*, *supra* note 19. See further Ličková, European Exceptionalism in International Law, *supra* note 16, pp. 472-473.

[157] States which are members of the ESC can decide to accept only certain Articles of Part II of the Charter, as long as they accept (among other conditions) at least 16 Article out of 31. See further, De Schutter, The Two Lives of the European Social Charter, pp. 16-17, *supra* note 11.

[158] ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 29.

[159] See Ruffert, The European Debt Crisis and European Union Law, 48 *Common Market Law Review*, 1777–1806. 2011, p. 1804.

[160] *E.g.*: "drastic reductions to municipality budgets have led to a scaling back of several activities (eg, mosquito spraying programmes), which, in combination with other factors, has allowed the re-emergence of locally transmitted malaria for the first time in 40 years"; see Kentikelenis et al., Greece's health crisis: from austerity to denialism, 748–753, 383 *The Lancet*, 2014, p. 748. Or, "calls on the services of Caritas

The "European exceptionalism" (in fact, the EU exceptionalism) mentioned in the title of this Section has generally been affirmed from a different point of view. In particular, several authors have highlighted the exceptionalism of the EU with respect of the tension between the regional economic integration and the participation in international agreements and bodies devoted to international trade[161] (GATT, WTO). It may sound quite ironic in light of the analysis carried out so far, but the European exceptionalism has also been identified in the tendency to neglect "international law obligations" in order to maintain a high level of social protection[162]. Here one is confronted with the very opposite, as the EU neglects international commitments to social rights in order to pursue a closer economic integration *via* the internal market (the CJEU decisions) or to manage the crisis of a given Member State (austerity in Greece).

The seminal contributions which have described the "American exceptionalism" have identified a number of manifestations of this approach to public international law[163]. The most extreme of these manifestations, in the hierarchy developed by Koh, is the one called "double standards", which characterises the situation in which a country (*in casu* the US) advocates the application of different rules to other countries than to itself. In this sense it could be argued that the apparent disregard of EU institutions for the rights and obligations stemming from ILO Conventions falls in this category. Indeed, the EU considers the same ILO Conventions as a fundamental element both in its trade policy and in evaluating a candidate country for accession[164]. Hence the *double*

Spain have increased by some 170% since the start of the crisis. They point to the adverse impact of austerity measures on people dependent on social services and an increase in people lacking food and money to pay utility bills", reported by Caritas Europa, The Impact of the European Crisis – A study on the impact of the crisis and austerity on people, with a special focus on Greece, Ireland, Italy, Portugal and Spain, Crisis Monitoring Report 2013, available at http://www.caritas.eu/sites/default/files/caritascrisisreport_web.pdf (last accessed 20 June 2014).

[161] See Ličková, European Exceptionalism in International Law, *supra* note 16, pp. 475 and ff.; Safrin, The Un-Exceptionalism of U.S. Exceptionalism, 41 *Vanderbilt Journal of Transnational Law*, 1307-1354, 2008, pp. 1325 and ff.; Bradford and Posner, Universal Exceptionalism in International Law, *supra* note 15, pp. 16 and ff. .

[162] Bradford and Posner, Universal Exceptionalism in International Law, *supra* note 15, p. 16.

[163] Koh, On American Exceptionalism, 1 *Yale Law School Legal Scholarship Repository*, 1479-1527, 2003, who identifies four manifestations: distinctive rights (*i.e.* a particular attention for some distinctive rights, as the freedom of speech), different label to describe the same rights and obligations, flying buttress mentality, or compliance without ratification, double standards (*i.e.* the application to other countries of obligations which are in turn considered as not applying to the US); M Ignatieff , Introduction, in Ignatieff (ed.), *American Exceptionalism and Human Rights*, Princeton University Press, Princeton , 1-26, 2005, who identifies three manifestations: human-rights narcissism, judicial exceptionalism, exemptionalism (*i.e.* the attitude of not joining international agreements, or joining without reservations, or joining without complying).

[164] See *supra* Section 1, pp. 5-6. Indeed, it is interesting to note that the EU places great emphasis in this regard on ILO Conventions regarding "promoting trade union freedom and collective bargaining in order to enhance the capacity of the parties concerned to engage in autonomous social dialogue". This clearly includes Convention No 87, which was at stake both in the violations caused by the decisions of the CJEU and in the concerns and violations regarding austerity in Greece.

standard could be identified in the tension between internal and external commitment to international labour standards[165].

One could also focus on the discrepancy between the self-representation of the EU, which was highlighted in Section 1, and the lack of reaction to the violations highlighted so far. Clearly, this should not be qualified as "exceptionalism", representing more a political embarrassment than an exceptionalist approach to international commitments[166].

6. Perspectives

The *boring* positivistic definition of social justice proposed in the Introduction has evidently been construed *ad hoc*. Even worse, it was identified *ex post*, meaning that it was meant to be breached. Hence, I claim no particular value from this finding. Indeed, in the age of austerity, the EU appears rather unconcerned by its failure to pursue social justice thus defined. What makes this finding more interesting is exactly the very minimalist nature of the aforementioned definition. International standards of protection of social rights should be considered as representing a minimum level. Hence it may not be completely unfounded to consider the respect of this level as a necessary stepping stone towards social justice. This is why Section 4 represents the road not taken, by showing that legal instruments to take into account these standards in a more convincing way are *already* in place.

Now, in the previous Section I outlined four possible outcomes when a conflict between EU law and action and an international agreement breaks out under Article 351 TFEU. These possibilities were a) a change in the policies of the given Member State; b) a change on the side of EU law and action; c) a change on the side of the ESC or the ILO. To this however one should add another possibility, which would sound like "d) ignore the conflict with international standards of protection for social rights". This possibility is in fact the first which comes to the mind looking at the issue with a realist mindset. International standards of protection of social rights! How many divisions have they got? And the pragmatic answer, taking into account the sheer disproportion in the arsenal of sanctions between the ILO, the ESC[167] and the CJEU or, even worse, the loan facility dependent upon the respect of the MoU, would be: not many.

However, in concluding this rather bleak picture, it should be added that one can find some reaction of at least one EU institution. On the 13th of March2014 two reports were adopted by the European Parliaments, one on "Employment and social aspects of

[165] A similar critique, though in the broader context of human rights, has been formulated by De Burça, The Road not Taken: the European Union as Global Human Rights Actor, 105 *American Journal of International Law*, 649-693, 2011, p. 682.
[166] Or what Nolte and Aust call "a weak form of 'double standards', i.e., one in which the mere discrepancy between rhetoric and practice would form the building block of the claim to exceptionality". See Nolte and Aust, European exceptionalism?, 2 *Global Constitutionalism* 3, 407-436, 2013, 432-433.
[167] Which are essentially characterised by a system of voluntary compliance and peer pressure.

the role and operations of the Troika"[168] and the other on "Role and operations of the Troika with regard to the euro area programme countries"[169]. Both Reports mention the ESC, and both do so by affirming that, on the basis of Article 151 TFEU, "action taken by the EU and its Member States must be consistent with the fundamental social rights laid down in the 1961 European Social Charter". What is more, the Report on Employment and social aspects of the role and operations of the Troika mentions the condemnations highlighted in Section 2[170] and refers to the necessity to restore the respect of international obligations stemming from ILO Conventions and from the ESC[171]. Still, the Report "Role and operations of the Troika with regard to the euro area programme countries" confirmed the idea that MoU are situated outside the scope of EU law, by regretting "that the programmes are not bound by the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and the European Social Charter, due to the fact that they are not based on Union primary law". In this sense, the concerns and condemnations delivered by the ILO supervisory bodies as well as by the ECSR seem to have contributed in providing the political legitimacy to condemn (or at least criticise) those very same policies they could not overturn through legal means. On the contrary, the condemnations described in Section 3 were less successful in shaping the solution to the *Viking* and *Laval* decisions, as showed by the brief account of the short-lived Monti II proposal[172]. Thus framed, the question leaves its legal aspects in the background to become one of legitimacy. Hence, the *de minimis* "social justice" definition plays a different role in highlighting the problem of legitimacy in the "output"[173] of the EU action, which is not be able to respect the standards set by the ILO and by the ESC. In this light, one can also stress an interesting correlation between these shortcomings in output legitimacy and the recent advancement on the *input* one. That is, in reducing the democratic deficit of the EU. The ultimate choice of the EU Council in favour of Mr. Juncker, one of the *Spitzencandidaten* of the recent European elections goes in this sense. The same can be

[168] European Parliament resolution of 13 March 2014 on Employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries (2014/2007(INI)), available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0240&language=EN (last accessed 20 June 2014).

[169] European Parliament resolution of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277(INI)) available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0239&language=EN&ring=A7-2014-0149 (last accessed 20 June 2014).

[170] "the Council of Europe has already condemned the cuts in the Greek public pension system, considering them to be a violation of Article 12 of the 1961 European Social Charter and of Article 4 of the Protocol thereto, stating that 'the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter"; "notes that the ILO Expert Committee has requested that the social dialogue be re-established".

[171] " Calls on the Troika and the Member States concerned to end the programmes as soon as possible and to put in place crisis management mechanisms enabling all EU institutions, including Parliament, to achieve the social goals and policies – also those relating to the individual and collective rights of those at greatest risk of social exclusion – set out in the Treaties, in European social partner agreements and in other international obligations (ILO Conventions, the European Social Charter and the European Convention of Human Rights)".

[172] See *supra* Section 3, pp. 20-21.

[173] See in general Scharpf, Legitimacy in the multilevel European polity, 09 *MPIfG working paper* 1, 1-33, 2009.

said for the recommendations of the EP Report "Role and operations of the Troika with regard to the euro area programme countries", which raises a milder critique to the *output* of the Troika programmes focusing instead on the need to further involve the European Parliament in adjustment programmes by bringing MoU under the umbrella of EU law and community method[174].

Alas, closing this paper with a legal point of view brings about a rather depressing note. As I just described, there are calls to improve the input legitimacy of EU action by bringing MoU under the rule of EU law. In both EP Reports, this move was identified as able to guarantee the application, among others, of ILO Conventions and of the ESC. However, such an application can only be foreseen, leaving aside *de jure condendo* solutions[175], on the basis of a radical change of approach of the CJEU to these sources. Rather than merely referring to the texts of these instruments, the Court of Justice should then take into account the *corpus* of decision delivered by the supervisory bodies of ILO Conventions and of the ESC. At the peak of the Euro-crisis, an un-elected EU institution stepped up in order to (try to) avoid the collapse of the Eurzone. It would be now for the CJEU to do "whatever it takes" in order to preserve the possibility for this small measure of social justice. To keep up with the promise of a depressing ending I will just add that, in light of the decisions in *Viking* and *Laval*, this scenario appears unlikely at best.

[174] "Calls for the memoranda to be placed within the framework of Community legislation so as to promote a credible and sustainable consolidation strategy, thus also serving the objectives of the Union's growth strategy and the declared social cohesion and employment objectives; recommends that for assistance programmes to be vested with appropriate democratic legitimacy, the negotiation mandates should be submitted to a vote in the European Parliament, and that Parliament should be consulted on the resulting MoUs"; "Reiterates its call for decisions related to the strengthening of the EMU to be taken on the basis of the Treaty on European Union; takes the view that departure from the Community method with increased use of intergovernmental agreements (such as contractual agreements) divides, weakens and challenges the credibility of the Union, including the euro area; is aware that full respect of the Community method in further reforms of the Union assistance mechanism might require treaty change, and stresses that any such changes must fully involve the EP and be subject to a convention".

[175] The usual example, the accession of the EU to the ESC.