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Multi-level Disputes relating to Freedom of Association and the Right to Strike: Transnational Systems, Actors and Resources

Tonia Novitz

Abstract:

This article examines disputes regarding the connection between freedom of association and the right to strike, occurring at multiple levels, within international, regional and national legal orders. It focuses on the period from 2007 – 2019, when a challenge was made to norms long-established at the International Labour Organisations (ILO) that was subsequently continued in European and national court proceedings. These events raised the potential for normative fragmentation and conflict between legal systems. This article interrogates the roles played by two key actors in these processes: the International Organization of Employers (IOE) and the International Trade Union Confederation (ITUC). Drawing on sociological insights into collective action offered by Offe and Wiesenthal, transposed to the transnational level, an analysis is offered of the power dynamics that motivated IOE attempts to alter the content and influence of ILO norms, alongside the scope for ITUC resistance, given its resources.

Key words:
Freedom of association, right to strike, transnational, International Labour Organization (ILO), Council of Europe, European Union (EU), fragmentation, systems, communication, power

1 Professor of Labour Law, University of Bristol (tonia.novitz@bristol.ac.uk). I am very grateful to Michael Ford QC, Guy Mundlak and Jeffrey Vogt for their helpful comments on an earlier version of this paper; and also to participants at the workshop held at Bristol in October 2019. All opinions expressed here, as well as any errors or omissions, are my own.
I. INTRODUCTION

‘Freedom of association’ has been recognised as a national constitutional principle,² but also in international and regional human rights instruments relating to civil and political rights, such as the European Convention on Human Rights 1950 (ECHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR). The concrete protections associated with collective labour law, such as the right to strike, are set out in instruments addressing socio-economic entitlements, notably the European Social Charter 1961 and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). In this complex national, regional and international matrix, the International Labour Organization (ILO) has navigated a bridge between these categories of rights, for example linking freedom of association to the right to strike in the jurisprudence of its supervisory bodies, especially the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the tripartite Governing Body Committee on Freedom of Association (CFA). The CFA has repeatedly found that ‘the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests’.³ Both the CFA and the CEACR regard the right to strike also as ‘an intrinsic corollary to the right to organize protected by Convention No. 87’, ⁴ and have continued to pursue normative consistency.⁵

This article considers recent events during which that connection made by the ILO between freedom of association, the right to organise and the right to strike has been challenged, initially by an employers’ group ‘walk out’ at the ILO⁶ and subsequently. This

challenge has been manifested at various times and places, threatening fragmentation of norms. It is a complex journey to map.

In doing this mapping, this article draws on the idea of ‘transnational’ labour law, which considers how the creation and application of labour standards cross national borders. This entails attention to communications between public international law institutions, such as the ILO, European Union (EU) and Council of Europe, but also to the actors which navigate these systems. In particular, I investigate the roles played by the International Organization of Employers (IOE) and the International Trade Union Confederation (ITUC).

My suggestion is that a sociological perspective on collective action, transposed to a global level, sheds light on the role played by the IOE in challenging what previously seemed to be a stable linkage between the freedom of association and the right to strike, both at the ILO and beyond. The tension between two logics of collective action may also assist in understanding how the ITUC and its allies understood their options and resources when seeking to respond to this challenge in various settings.

II. THE INTER-SYSTEMIC ROLE OF TRANSNATIONAL REPRESENTATIVES OF EMPLOYERS AND WORKERS

Each international, regional and national legal institution has its own internal normative logic stemming from a distinctive constitutional base and functional objectives. They may be regarded also as separate systems which are operationally (or normatively) closed, but simultaneously cognitively open to learning. When systems interact, the disruption or

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8 See Adelle Blackett, Theorizing Emancipatory Transnational Futures of International Labor Law 113 AJIL Unbound 390 (2019); Adelle Blackett and Anne Trebilcock, Conceptualizing Transnational Labour Law ch. 1 (Adelle Blackett and Anne Trebilcock eds, 2015).


perturbations’ can prompt change, but these are filtered through their own internal normative framework, so the outcomes cannot be simply pre-determined. Proponents of reflexive labour law would argue accordingly that institutions like the ILO cannot simply ‘command and control’ other institutions, as this is not how systems inter-relate. What matters are the procedures through which systems communicate.

Notably, Simon Deakin has also observed that such communication has impact through the interaction of ‘agents’. This observation chimes with concern expressed by Harry Arthurs that a focus only on procedures could facilitate and obscure shifts in power, in particular between collective representatives of management and labour. This part begins by introducing the IOE and ITUC as two significant transnational actors that play a key role in disputes relating to freedom of association. They both have the capacity to contest and defend systemic norms, and also may seek to transport norms from one system (or even disputes raised there) into another. This part then goes on to consider how their global inter-systemic campaigns might be understood in sociological terms, with reference to the ‘two logics of collective action’ identified by Claude Offe and Helmut Wiesenthal.

A. The IOE and ITUC

The IOE and the ITUC are embedded in the ILO’s tripartite structure, even though they have, to different degrees, further influence in a range of international, regional and national fora. The IOE acts as the secretariat for the employers’ group at the ILO, but is institutionally

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16 Claus Offe and Helmut Wiesenthal, *Two Logics of Collective Action: Theoretical notes on social class and organizational form*, 1(1) Political Power and Social Theory 67 (1980).

separate from the Bureau for Employers’ Activities established within the ILO (ACTEMP).\textsuperscript{18} The ITUC provides parallel support for the ILO workers’ group, distinct from the Bureau for Workers’ Activities (ACTRAV).\textsuperscript{19}

The particular history of each organisation seems significant in demarcating its operational concerns. The IOE was founded in 1920 and given its present name in 1938. Known for specialising in ‘social matters’ at the ILO, the IOE has long been one of ‘two organisations representing the undertakings of the market economy countries’.\textsuperscript{20} The other is the International Chamber of Commerce (ICC), which is known to specialise in ‘economic matters’.\textsuperscript{21} In 1971, they reached agreement on their respective roles, but a study by Marieke Louis in 2016 found that they were in fact in ‘competition’, such that the IOE was ‘sidelined’ in various international economic settings.\textsuperscript{22} Her interviews with IOE representatives exposed their criticism of both the ICC and the World Economic Forum (WEF),\textsuperscript{23} indicating that representatives of business interests may not constitute ‘a collaborative and homogenous group’.\textsuperscript{24}

There are indications that the IOE is seeking to expand its representative role. The IOE has broadened its membership base, with a change of rules in 2019, to include also corporate organisations, previously represented only in the ICC.\textsuperscript{25} In 2020, the Vice-President of the IOE advocated an increased institutional role for ‘the global social partner organisations’ in other parts of the UN (beyond the ILO) and regional organisations.\textsuperscript{26} Moreover, in its current promotional literature, the IOE is described as ‘the sole

\textsuperscript{19} ‘ILO Bureau for Workers’ Activities (ACTRAV)’ (April 29, 2020), \url{https://www.ilo.org/actrav/lang--en/index.htm}.  
\textsuperscript{21} Ibid.  
\textsuperscript{23} Ibid.  
\textsuperscript{24} Ibid., 244.  
\textsuperscript{25} Ibid., 241. See IOE Statutes (2019), Article 2, \url{http://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=145587&token=c4497389ebb1597b105c949f69f11cb2a01a35&L=0}.  
representative of business’ at the ILO, but also as being recognised ‘across the UN, G20 and other emerging forums… for its unique expertise, advocacy and influence’.\textsuperscript{27}

The ITUC was created only in 2006, with the merger of two previously divided trade union confederations,\textsuperscript{28} the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL).\textsuperscript{29} At the time, the inaugural ITUC Secretary General, Guy Ryder, announced that: ‘Together, united, strong, the ITUC will play its part in building social justice, freedom, equality and peace …’\textsuperscript{30} This message of unification has been significant for ITUC relationships with regional and global trade union confederations.

The European Trade Union Confederation (ETUC) was created in 1973, leading to a decision by the ICFTU (one of the co-founders of the ITUC) to dis-establish its own European branch and instead work constructively with this new entity.\textsuperscript{31} The ETUC subsequently gained significant access to European-level social dialogue with European management alongside EU institutional funding. Rebecca Gumbrell-McCormick sees the ETUC as a forerunner of the unity accomplished in formation of the ITUC, insofar as the ETUC had admitted both ICFTU and WCL affiliates as its members.\textsuperscript{32} Since 2006, the ETUC has worked collaboratively with the ITUC. Their headquarters are in the same building and they organise various activities and campaigns together.

The ‘International Trade Secretariats’ established before the first World War changed their titles in 2002 to ‘Global Union Federations’ (GUFs) to reflect their engagement in


\textsuperscript{28} See Rebecca Gumbrell-McCormick, \textit{The International Labour Movement: Structure and Dynamics} (Peter Fairbrother, Christian Lévesque, Marc-Antoin Hennebert, eds., 2013); Rebecca Gumbrell-McCormick, \textit{The International Trade Union Confederation: From Two (or More?) Identities to One}, 51(2) BJIR 240 (2013b).

\textsuperscript{29} There was a decline in the funding and influence of more militant World Federation of Trade Unions (WFTU) after the demise of the Soviet Union but the WFTU continues to represent the communist-led trade union movement, having influence still in developing states. See ‘History’ (April 29, 2020), http://www.wftucentral.org/history/. Also, Gumbrell-McCormick (2013b) n.28 above, 247 and 253; and Louis n.22 above, 240.


\textsuperscript{31} Ibid., Part 4.

global sectoral union organising and bargaining. They have allied themselves to the ITUC. In addition, the ITUC works in tandem with the Trade Union Advisory Committee (TUAC) in the OECD, again sharing many affiliates. The ITUC has also sought a highly inclusive representative role in relation to precarious and what have been described as ‘non-standard’ workers.

Despite tensions between economic and social legal frameworks, the ITUC seems to have had access to representation in many global forums, with the cooperation of its wider allies. That success in unification of various facets of the trade union movement may also help to explain the unprecedented election of a highly successful global trade union official, Guy Ryder, to the position of ILO Director General in 2012, being a previous Secretary General of both the ICFTU (from 2002-2006) and the ITUC (from 2006-2010).

**B. A sociological analysis of collective action applied transnationally**

Louis mentioned very briefly, in her critique of IOE activities and influences, the potential relevance of a sociological analysis offered by two German commentators, Claus Offe and Helmut Wiesenthal. Their analysis was aimed at the operation of large and confederal employers’ and workers’ associations in a domestic setting, but may offer a useful frame for examination of the power relations which shape the activities of even larger transnational representatives of management and labour.

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33 Traud-Merz and Eckl n.30 above, Part 2.
38 Louis n.22 above, 240.
40 Louis n.22, 236.
41 Examined for e.g. in Michael Ford and Tonia Novitz, Error! Main Document Only. There is Power in a Union? Revisiting Trade Union Functions in 2019 ch. 14, 263 - 264 (Alan Bogg, Jacob Rowbottom and Alison Young, eds, 2020).
Offe and Wiesenthal considered how substantive inequality was institutionalized by ‘the liberal equation’, namely insistence on the equivalence of interests of capital and labour as if they were symmetrical and capable of being represented in the same ways. On this reading, the IOE and ITUC may both be interest groups treated with formal parity within the ILO, but may possess different sources of institutional power.

Offe and Wiesenthal observed that a trade union faces a considerable challenge in seeking to organise a heterogeneous workforce. They identified a trade-off for trade unions between size and power, recognised previously by Olson in relation to the free-rider problem. For Offe and Wiesenthal the difficulty is that, while trade unions may seek to increase their membership size in order to counteract an employer’s superior bargaining power, as they do so, they become less equipped to represent their diverse membership. Moreover, unions’ success ‘depends upon their sanctioning potential’, namely the ‘willingness to act’ on the part of members. If a union becomes too large and thereby bureaucratized, it no longer has that source of influence.

This is an inevitable problem for any large confederation of trade unions, whether national, regional (like the ETUC) or globally operating on a sectoral level (like the GUFs). It poses enormous difficulties for the very largest international trade union confederation, the ITUC, that allies these entities and hundreds of affiliates. Being large seems however an increasing imperative in a globally integrated trading system. Arguably, the best that the ITUC can hope for is to keep that capacity or willingness to act alive in the affiliates of its constituent national-level members. Arguably, this is precisely what the IOE challenge to the right to strike has sought to threaten.

By way of contrast, according to Offe and Wiesenthal, employers being ‘the powerful’ will be ‘fewer in number, … less likely to be divided among themselves, have a clearer view of what they want to defend, and have larger resources for organized action’. This is a view which has subsequently been applied to transnational employer interests,
which are not ‘unitary’, but can achieve ‘a unity of purpose and direction’. Ofle and Wiesenthal also assume that the interests as employers (as manifestations of business) lie in the status quo, which protects their privilege. As we shall see, these claims do not easily map onto the circumstances of the IOE, which illustrates the capacity for representation of business to be divided on the world stage, and also that employers may have an interest in changing the status quo (or at least that in the ILO).

Offe and Wiesenthal, in observing the standard imbalance of power between employer and worker associations, further identified five stages through which unions move towards reliance on ‘established and recognized channels of political action’. While these two commentators were concerned with the risks of such engagement at the national level, we might extrapolate from their analysis dangers also for the ITUC.

Stage one arises when a small sized union is formed around a particular ‘collective identity’ and ‘willingness to act’. Stage two takes place when the organisation is capable of gaining concessions through ‘its recognized potential of power’, not just because of a strike, but ‘in order to avoid a strike’. Stage three occurs as the organisation grows in size but also becomes more bureaucratic, limiting its ability to mobilise members to take collective action. The union then becomes more dependent on ‘external guarantees’ offered by the state (and employers) that it will be treated with respect:

It will try to become, with the help of its external supporters, incorporated into the formal decision-making process on economic and other policies. It will try to have as many as possible of its bargaining positions, which it had held formerly only because of the ‘willingness to act’ of the members, institutionalized and sanctioned by legal statutes.

This is also an observation that chimes with a power resource approach, as posited by Walter Korpi and others, such that where corporatist governance prevails, the incidence of strikes

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50 Ibid., 91.
51 Louis, n.22, 240.
52 Offe and Wiesenthal n.16 above, 104.
53 Ibid., 106.
54 Ibid.
55 Ibid., 107.
will decline, because there has been a shift from structural power in the labour market to reliance on political resources.\textsuperscript{56}

Offe and Wiesenthal noted that the trade-off for a trade union in exchange for inclusion in the political processes would be acceptance of those processes. They described this as ‘a perfectly rational strategy of transformation, which…’ may work well when ‘social democratic parties are strong political forces’ that can secure such guarantees.\textsuperscript{57} One can also arguably see parallels here with the ‘embedded liberalism’ resisting commodification of labour, which the ILO was designed to craft,\textsuperscript{58} and the attraction of tripartite governance for workers’ organisations globally.

The problem comes in \textit{stage four} when the trade union ‘no longer has any capacity to resist attempts to withdraw external support and the externally provided legal and institutional status’.\textsuperscript{59} Then the external guarantees will become open to threat. Where the structurally powerful position of employers remains intact, there will be a reversal of these political protections ‘as soon as political and/or economic conditions are favorable enough to attempt an attack’.\textsuperscript{60} Arguably, the employers’ group walk out at the ILO might be characterised in this way as an exercise of power which, contextually, the ITUC can do little to resist.

The \textit{fifth stage} identified by Offe and Wiesenthal is a ‘return to a type of collective action in which the members’ “willingness to act” is of predominant importance’. But \textit{stage five} will be different from \textit{stage one}, insofar as it will tend to ‘focus on a much broader range of political, legal, and institutional arrangements, which have played such an important and


\textsuperscript{57} Offe and Wiesenthal, n.16 above, 107.


\textsuperscript{59} Offe and Wiesenthal n.16 above, 108.

\textsuperscript{60} Ibid.
deceptive role in the prior stages’. Offe and Wiesenthal therefore saw political engagement to secure ‘external guarantees’ as ‘precarious’, ‘unstable’ and potentially ‘transitory’, threatening the survival of the union. This account invites us to consider how the ITUC is facing (and meeting) a fifth stage challenge. Offe and Wiesenthal consider that this can only be successfully done by a return to engagement with collective action, which is difficult to achieve, but to which the ITUC has sought to have some recourse. There might also be scope to utilise other sources of influence, such as mobilization through representations in other supervisory systems. Indeed, a contemporary power resources approach suggests that the ITUC can deploy institutional resources involving communications and coordination among its allies in litigation, and seek ‘societal power’ drawing on the messages coming from human rights and constitutional systems. There also may be other potential strategies available.

III. THE INTERPLAY OF EVENTS AND ACTORS BETWEEN 2007 – 2019

This part of the article traces a series of events, all of which concern the relationship between freedom of association and the right to strike, which took place between 2007 and 2019. In this twelve-year period, notable developments emerged relating to this controversy within the EU, the Council of Europe and the ILO. These, in turn have also had potential implications in national level litigation. They are navigated here by following the interplay between these systems, for it emerges that they are not insulated from each other. Key players in one site would seem to leverage disputes and transpose them to others. Indeed, the transnational institutional nature of both the IOE and ITUC enables them to seek to coordinate their engagement with jurisprudential developments across systems in a strategic manner. Their relative successes and the reasons for these are interrogated here with reference to the conceptual model offered by Offe and Wiesenthal.

A. The 2007 Viking and Laval litigation in the EU

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61 Ibid.
62 Ibid., 109.
63 See for discussion of the literature on mobilization, Claire Kilpatrick, Taking the Measure of Changing Labour Mobilization at the International Labour Organisation in the wake of the EU Sovereign Debt Crisis, 68(3) International & Comparative Law Quarterly 665, 691-692 and 695 (2019).
64 Schmalz et al, n.56, 118 – 124.
Two EU judgments, *Viking*\(^{65}\) and *Laval*,\(^{66}\) became notorious on the subject of freedom of association and the right to strike insofar as the Court of Justice deferred to ILO norms, but departed from their commonly understood implications. Previously, the limited legislative competence of the EU meant that little had been said in concrete social policy terms on freedom of association or the right to strike as entitlements of EU citizens.\(^{67}\) Instead, there had been declaratory recognition in Points 11 – 13 of the Community Charter of the Fundamental Social Rights of Workers (CCFSRW), while the right to strike received recognition in Article 28 of the EU Charter of Fundamental Rights (EUCFR) (although this was notionally separate to the guarantee of freedom of association in Article 12).

Both the *Viking* and *Laval* judgments made reference to the ‘various instruments which the Member States have signed or cooperated in, such as the European Social Charter… and Convention No 87 … ’ going on to refer also to the CCFSRW and the EUCFR.\(^{68}\) There was then, in systemic terms, arguably deference by the Court of Justice to ILO jurisprudence stating that Convention No. 87 provides a basis for a right to strike. Yet, there was also a clash of systems insofar as the Court prioritized the employer’s entitlements to free movement - of establishment (in *Viking*) and of services (in *Laval*).\(^{69}\) In both cases it was found that trade unions could be held financially liable for taking such action, due to their role in regulating industrial relations.\(^{70}\) These judgments have been aptly described as adopting the perspective of an EU internal market lawyer over that of an ‘international labour lawyer’.\(^{71}\)

Transnational collective representation of employers and workers became visible in this litigation and its aftermath. In the *Viking* case, the role of a GUF, the ITF, attracted attention. Notably, the ITF describes itself as allied to ITUC (since its creation in 2006, as

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65 Case C-438/05 *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line* [2007] ECR I-10779 (‘Viking’).

66 Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 (‘Laval’).

67 See Article 153(5) of the Treaty on the Functioning of the European Union (TFEU), a longstanding exclusion dating back to Article 2(6) of the ‘Agreement on Social Policy’ appended to the Maastricht Treaty on European Union.

68 Viking at para. 43; Laval at para. 90.

69 Albeit in different ways, see Viking, para. 75; Laval, para. 107 (and para. 103).


discussed previously). It was the ETUC (which as noted above also has its own close strategic relationship with the ITUC), that following the outcome in both Viking and Laval, actively campaigned for constitutional change in the EU. The ETUC was consistently opposed by what was the Union des Industries de la Communauté européenne (UNICE), since 2007 renamed ‘BusinessEurope’. BusinessEurope currently consists of 40 representatives currently from 35 countries, with a membership overlaps with that of the IOE. The intensity of engagement by the IOE and the ITUC on this issue was yet to come.

B. The Council of Europe case law 2008 – 2009

While the Court of Justice recognised but restricted exercise of the right to strike in the EU, the European Court of Human Rights (ECtHR) in the Council of Europe took a different tack. The Council of Europe’s two leading human rights instruments had seemed starkly divided, to the extent that Article 11 of the ECHR guaranteed freedom of association, including the right to form and join trade unions for the protection of one’s interests, while the European Social Charter (ESC) set out in Articles 5 and 6 obligations to protect collective bargaining and a right to strike. The ECtHR had previously used this division to defend its reticence to link collective bargaining or the right to strike to freedom of association.

The Viking judgment was, at least in part, premised on the view of the ECtHR that ‘collective action’ was merely one of the ways that a trade union could protect its interests under Article 11 of the ECHR, but was not essential. Two judgments delivered by the

77 See for a classic statement of this proposition, National Union of Belgian Police v Belgium 1 EHRR 578 (1979), para. 38.
78 Viking, para. 86, citing inter alia the Belgian Police n.77 above.
ECtHR placed that proposition in doubt. First, a right to collective bargaining was considered by a Grand Chamber of the ECtHR in *Demir & Baykara v Turkey* to have ‘become one of the essential elements’ of the Article 11 guarantee of freedom of association. That Turkey had not ratified and was not bound by Articles 5 and 6 of the ESC was deemed irrelevant; its ratifications of ILO Conventions Nos 98 and 151 were given more attention. Second, in *Enerji Yapi-Yol Sen v Turkey*, in a manner explicitly consistent with ILO CFA and CEACR recommendations, the ECtHR made the link between freedom of association and industrial action under Article 11. The Court found that exercise of the right to strike should not be restricted other than in narrowly defined circumstances which must be provided for by law, have a legitimate aim and be necessary in a democratic society. In subsequent cases, the ECtHR intervened to protect the interests of strikers, on the basis that their punitive treatment constituted a violation of freedom of association.

This series of judgments from 2008 – 2009 is significant, in that the ILO appears to have effectively communicated norms to the Council of Europe ECHR system, which were applied systematically, leading to a correction which reduced fragmentation. This emergent process has been identified by Virginia Mantouvalou as an ‘integrated’ approach to human rights protection. This ECtHR jurisprudence also arguably placed pressure on the EU market system, fuelling ETUC claims for constitutional and regulatory reform. This move towards consistency was certainly heralded with considerable approval from the workers’ side and their advocates, such as Keith Ewing and John Hendy (leading exponents of workers’ human rights within the UK Institute of Employment Rights).

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79 Appn 34503/97 *Demir and Baykara v Turkey* Appn 34503/9, 12 November 2008, para. 154.
81 Appn 67336/01 *Danilenkov v Russia*, 30 July 2009, para. 123 and Appn 22943/04 *Saime Özcan v Turkey*, 15 September 2009; and Appn 30946/04 *Kaya and Seyhan v Turkey*, 15 September 2009. Although not in all cases, such as Appn 4241/03 *Trofimchuk v Ukraine* Appn 4241/03, 28 January 2011.
C. Reaction in the ILO to the EU and to the Council of Europe

The ILO CEACR responded critically to Court of Justice treatment of the right to strike in the EU. That reaction seems to have been one of a number of factors which, together with the influence which ILO treatment of collective bargaining and the right to strike now seemed to wield in the Council of Europe, led to the dramatic walkout staged by the employers’ group in 2012. It was at this stage that the significance of the role played by the IOE became visible.

1. Responding to EU developments

ILO supervisory jurisprudence developed by the CFA and CEACR has stated that the right to strike is not unlimited, but that only certain kinds of limitation are permissible.\(^\text{85}\) The right to strike may be restricted in respect of: ‘public servants exercising authority in the name of the state’; in essential services ‘the interruption of which would endanger the life, personal safety or health of the whole or part of the population’; and in the event of ‘an acute national emergency and for a limited period of time’.\(^\text{86}\) Free movement of establishment and services by employers within a European market system was not regarded as sufficient reason to prevent access to industrial action. ‘By linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded.’\(^\text{87}\) Accordingly, in the British Airlines Pilots Association (BALPA) case,\(^\text{88}\) the CEACR expressed ‘serious concern’ regarding ‘the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the Viking and Laval judgements’.\(^\text{89}\) Also, the CEACR 2012 General Survey ‘Giving Globalisation a Human Face’ again asserted the relationship between ILO Conventions Nos 87 and 98 and the right to strike.\(^\text{90}\)

\(^{85}\) Jeffrey Vogt et al, The Right to Strike in International Law (Hart 2020), 44.
\(^{87}\) ILO Digest of Decisions of the CFA, 5\(^{\text{th}}\) ed. (2006), para. 592.
\(^{88}\) See Katherine Apps, Damages Claims Against Trade Unions After Viking and Laval, 34 European Law Review 141 (2009).
These findings can be regarded as a simple defence by the CEACR of the normative coherence of the ILO’s supervisory system against a significant threat from an external market-based system. As such, they did not prompt any action by the ITUC. Rather, it was the IOE, contrary to Offe and Wiesenthal’s assumptions, which was seeking to disrupt the status quo.\(^{91}\) The CEACR had already been criticised by the employers’ group in the ILO Conference Committee on the Application of Standards (the CAS) on the basis that it was interpreting Conventions Nos 87 and 98, neither of which expressly mentioned the right to strike, and had in that way exceeded its constitutional powers.\(^{92}\) Such accusations became more heated as the response to EU case law by the CEACR was articulated. Notably, the employers’ group was led by Chris Syder, a representation of the Confederation of British Industry (CBI) from the UK, where the Viking case had first been heard and the BALPA case arose. What followed was a rebellion led by the IOE culminating in a walkout by the employers’ group from the CAS, aimed at preventing consideration of supervisory findings made by the CEACR on the right to strike.\(^{93}\)

2. Other factors?

The employers’ rebellion can also be attributed to other factors. One such factor may have been that the socialist threat of revolution was no longer likely or viable. While the IOE had advocated exercise of right to strike as a facet of freedom of association in communist regimes, such as Poland, IOE enthusiasm had waned at the end of the Cold War.\(^{94}\) From 1990 onwards, the employers’ group had requested repeatedly that ‘dispute settlement’ be placed on the ILO International Labour Conference agenda, their hope seeming to be that the new balance of power would work in the employers’ favour so as to restrict access to industrial action. Aware of the potential for dilution of the right to strike, the workers’ group resisted that proposal.\(^{95}\) Arguably, this imbalance of bargaining power had been exacerbated by the

\(^{91}\) See n.50 above.

\(^{92}\) See, for example, Record of Proceedings (Geneva: ILO, 2009), ILC, 98th Session, Ethiopia, vol. 16, Part II(Rev.)/37; and Panama, vol. 16, Part II(Rev.)/56.

\(^{93}\) Ibid. See also Bellace and La Hovary, n.6 above.


\(^{95}\) See Novitz n.76 at 120 – 123.
recent global financial crisis and the decline of trade union protections and access to the right to strike in times of austerity; Europe being no exception.96

Recent ECHR jurisprudence may also have added fuel. At the time of the walkout, the employers’ group expressed concern that CEACR reports were being referred to in other supervisory proceedings, and arguably guiding State conduct.97 In other words, their findings 'were being viewed by the outside world as a form of soft law labour standards jurisprudence'.98 As Henner Gött has observed:

The employers did not call the ECtHR by name. However, it can hardly be overlooked that the Court’s reversed stance on the right to strike was the proverbial elephant in the room, as it opened an avenue for workers to bring other contentious aspects of the right to strike before the ECtHR.99

A further factor may have been the appointment of Guy Ryder to ILO Director-General in May 2012. Although he did not take office until October 2012, the IOE may have wanted to be seen to resist the ILO becoming overly deferential to trade union interests. The recent unification of a divided movement under the ITUC, and under Ryder’s leadership, could certainly have seemed threatening. Moreover, if the IOE was competing with other business representatives for recognition on the international stage,100 this demonstration of its power may have been attractive. In this way, the employers’ action chimes with the fourth of Offe and Wiesenthal’s stages of political engagement, namely the withdrawal of ‘external guarantees’ prompted by employers when the surrounding circumstances look fortuitous.101

By way of contrast, the ITUC, having in Offe and Wiesenthal’s terms conceded to the legitimacy of ILO political processes, would not take such retaliatory action in response. A walkout might be a political possibility for the employers’ group (despite its irony while protesting against a right to strike); but this was not an option for the workers’ group which was dependent on recognition of the legitimacy of ILO processes (and the external guarantees

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98 Ibid., Part I/19.
101 Offe and Wiesenthal n.16 above, 108.
it offered). The ITUC was however forced to face what Offe and Wiesenthal termed a fifth stage challenge to its previous commitment to political engagement.102

Undaunted, the CEACR continued with its criticism of EU legal constraints on the right to strike, as manifested in BALPA.103 Similarly, in response to concerns raised concerning implementation of the Laval case in Sweden, the CEACR recalled ‘that imposing sanctions on unions for leading a legitimate strike is a grave violation of the principles of freedom of association’. An assessment of proportionality ‘bearing in mind a notion of freedom of establishment or freedom to provide services’ also did not comply with established ILO standards.104 Meanwhile, on the advice of the IOE as their secretariat, the employers’ group continued to block any approval of CEAR findings in the CAS, so that a ‘special paragraph’, the ultimate sanction of the Conference for breach of labour standards could not be issued in respect of the right to strike.105

The ITUC at this stage began to mobilize, launching a lengthy legal opinion of 122 pages on The Right to Strike and the ILO, published on its website in March 2014, authored by the ITUC legal adviser, Jeffrey Vogt, joined by a number of academic scholars in support (myself included, alongside Ewing and Hendy).106 The ITUC expressed confidence that the CEACR position would be upheld were the matter placed before the International Court of Justice (ICJ) for an advisory opinion, since if the CEACR was not competent to interpret Conventions, the ICJ could do so under Article 31 of the ILO Constitution. The IOE in a thinner briefing (of 13 pages) posted on its website in October 2014, rejected the authority of the CEACR to interpret Convention No. 87 to include a right to strike,107 but also resisted

102 Ibid., 109.
104 Ibid., 176-180.
Arguably, the confidence of the IOE of its relative power in this battle was indicated by this much briefer document and contradictory response. The stalemate situation at the ILO was then used by the IOE to seek to influence litigation on freedom of association and the right to strike in other regional and national fora.

D. Using the ILO employers’ group walkout in other fora from 2013 – 2015

Three key attempts were made by the IOE to use the employers’ group walkout to undermine the authority of previous CEACR jurisprudence on the right to strike. The first was made in a complaint relating to breach of Article 6 of the ESC before the European Committee of Social Rights (ECSR) in LO and TCO v Sweden. The second consisted of an intervention in the RMT case brought against the UK heard by the ECtHR. The last was in Canadian constitutional litigation culminating in the Saskatchewan judgment. In this way, the IOE sought cross-fertilisation of normative change between legal systems, seeking to unify them in a manner which reflected its rejection of CEACR jurisprudence. Yet, in no single instance was the IOE wholly successful. While Offe and Wiesenthal suggest that a union confederation might be particularly vulnerable at the point when external guarantees are withdrawn, such as the international recognition of the right to strike as a protected ILO standard, instead, the ETUC and ITUC were energised into presenting a strong litigious response. In so doing, these actors protected (and even arguably enhanced) the entitlement to take collective action in other regional and national systems.

In the LO case, the Swedish trade unions successfully pursued their complaint with the assistance of the ETUC. The ECSR refused to view the right to strike as a mere exception to economic freedoms, concluding that it was unduly restricted by the Swedish legislation implementing the Laval decision. The IOE and BusinessEurope had offered ‘Observations’, referring to the walkout by the ILO employers’ group, asking that ‘[g]iven the importance of this debate at international level’, the ECSR ‘take into account the current

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109 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden, Complaint No. 85/2012, Decision on admissibility and on the merits, 3 July 2013, (‘LO and TCO v Sweden’), para. 9.
110 Appn 31045/10 The National Union of Rail, Maritime and Transport Workers (RMT) v UK, 8 April 2014.
111 Saskatchewan Federation of Labour v Saskatchewan 2015 SCC 4 (‘Saskatchewan’).
112 Ibid., paras 121 – 125.
discussion taking place among the ILO tripartite constituents’. The ETUC offered its own ‘Observations’, pointing to CEACR criticism of the Laval legislation in 2013, making reference also to the BALPA case. It did not mention the ILO employers’ group walkout and neither ultimately did the ECSR. The ECSR decision made an implicit statement by simply ignoring that context, while offering an extensive review of relevant ILO standards, including mention of ILO Conventions 87 and 98 and CEACR findings.

The UK Government in the RMT v UK case sought to resist a claim that protection of freedom of association under Article 11 of the ECHR entailed protection of secondary action (which is prohibited under British legislation). While the UK accepted that ‘the right afforded under Article 11 to join a trade union normally implied the ability to strike’, it was argued that this could not be derived from ILO jurisprudence, as ‘the question of a right to strike was currently the cause of sharp controversy within the ILO, as part of which the status of the ILO Committee of Experts [the CEACR] had been called into question’. The IOE seemingly had no need to seek notice as a ‘third party’, since its views were represented by the UK Government. The ETUC did however intervene, alongside the British Trades Union Congress (TUC) which is an ITUC affiliate, arguing that ILO (and ESC) jurisprudence on the right to strike and condemnation of the UK was authoritative. The ECtHR’s majority opinion did make explicit reference to the dispute at the ILO, but ostensibly denied its relevance, saying that the disagreements had ‘originated with and were confined to the employer group’ while government representatives continued to endorse established ILO jurisprudence. Nevertheless, that judgment found that ‘negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter’ did not, in this instance, have sufficient ‘persuasive weight’ to find that the UK’s legal treatment of secondary action constituted a violation of Article 11. The ECtHR also declined ‘to determine whether the taking of industrial action should now be accorded the status of an essential element of the Article 11 guarantee’, even though it is regarded as a necessary aspect of freedom of

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113 LO v TCO v Sweden, Observations by the IOE and BusinessEurope, 7 May 2013, para. 167.
114 LO v TCO v Sweden, Observations by the ETUC, 13 May 2013.
115 LO v TCO v Sweden, Decision reviewed at paras 54 – 63; with relevant comment at para. 110 and arguably paras 120 – 121.
116 RMT v UK, para. 62.
117 Ibid, para. 69.
118 Ibid., para. 71.
119 Ibid., para. 97.
120 Ibid., para. 98.
association and the right to organise in ILO supervisory findings. In his separate ‘Concurring Opinion’, Judge Wojtyczek relied more directly on the actions of the employer group as a reason to resist application of ILO principles regarding a right to strike, reaching the same conclusion as the majority.

By 2013, the IOE was already seeking to intervene in Canadian proceedings, offering affidavit support of the contention that the right to strike was not enshrined in the ILO’s international labour standards, and in doing so was countered energetically by the ITUC. The dispute at the ILO was again cited in submissions before the Canadian Supreme Court in the Saskatchewan case. In response, a minority judgment delivered by Judges Rothstein and Wagner cited ‘trouble at the ILO’ as a reason to disregard CEACR and CFA jurisprudence. Nevertheless, a majority of the Court in the compelling judgment delivered by Abella J found that a total strike ban on those unilaterally designated ‘essential service employees’ (without any alternative arbitration as contemplated in the ILO supervisory jurisprudence) violated the principle of freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms. In so doing, Abella J’s judgment was more supportive of the right to strike than the ECtHR in RMT, confirming that: “The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right.”

The Saskatchewan judgment was delivered on 30 January 2015. On 18 February 2015, the ITUC organized a ‘global day of action on the right to strike’ which led to widespread protests by affiliate unions around the world. This can be viewed as an attempt to demonstrate workers’ willingness to act, as Offe and Wiesenthal might have anticipated, but the ITUC’s litigious mobilization may have had in fact more influence. In doing so, the

123 See Affidavit of Brent Wilton (IOE Secretary-General), Canadian Union of Postal Workers v AG of Canada, Ontario Superior Court of Justice, 18 March 2013.
124 Affidavit of Sharan Burrow (ITUC Secretary-General), Canadian Union of Postal Workers v AG of Canada, Ontario Superior Court of Justice, 1 June 2013.
125 Saskatchewan per Rothstein and Wagner JJ, paras 151–153.
126 Saskatchewan per Abella J, paras 67–68.
127 Ibid., para. 3. For comment, see Fudge, n.2.
ITUC drew on extensive institutional and societal resources, its assets including the message of unity, expressed by engagement with affiliate unions and other allies like the ETUC.

Ultimately, on 23 February 2015, a compromise agreement was reached in the form of a ‘Joint Statement of Workers’ and Employers’ Groups’ at the ILO.\textsuperscript{130} The Joint Statement recognised ‘the mandate of the CEACR’ as defined in the CEACR’s own report of 2015, while also acknowledging that: ‘The right to take industrial action by workers and employers in support of their legitimate industrial interests is recognised by the constituents of the International Labour Organisation.’ However, while the ‘Government Group Statement’ expressly stated ‘that the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO’ and that ‘the complex body of recommendations and observations developed in the past 65 years of application of Convention 87 by the various components of the ILO supervisory system constitutes a valuable resource’,\textsuperscript{131} those acknowledgements are missing from the Joint Statement and were never the subject of IOE commitments.

\textbf{E. The swing back (but not too far) 2016 – 2019}

There does seems to have been a swing back towards protection of protection of the right to strike as a facet of freedom of association and the right to organise, with the determined advocacy of both the ETUC and ITUC, but it has not gone too far. For example, in 2017 a European Pillar of Social Rights was adopted by the EU,\textsuperscript{132} which makes specific reference to collective bargaining and the right to take collective action in principle 8. However, the Commission Communication issued in January 2020 for ‘A Strong Social Europe for Just Transitions’\textsuperscript{133} mentioned only social dialogue and collective bargaining, not collective action or a right to strike.


\textsuperscript{131} Ibid., Annex II, paras 4 and 6.


\textsuperscript{133} COM(2020)14 final. See also on consultation regarding regulation of a minimum wage challenging the exclusion in Article 153(5) TFEU (April 29, 2020), \url{https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_20}. 
Following the *RMT* judgment, ECtHR case law has been inconsistent. The judgment in *Association of Academics v Iceland*[^134] made no mention of ILO standards, but repeated the finding in *RMT* that a right to strike may be protected under Article 11 but is not an essential element of freedom of association.[^135] By way of contrast, the majority judgment[^136] in *Ognewenko v Russia*[^137] is notable for its assertion that the right to strike is ‘one of the most important means’ by which trade unions and their members could defend their interests under Article 11.[^138] That judgment referred extensively to both CEACR and CFA findings.[^139] Notably, these were both public sector cases in which the IOE was not directly interested.

At the ILO, despite opposition from the IOE, a new edition of CFA findings was issued as a ‘Compilation’ of Decisions in 2018. There was however a change in title from the past ‘Digest’ of Decisions, although the format remains largely the same.[^140] The IOE continue to insist that the right to strike has never been ‘regulated at the supranational or global level’, including by ILO Conventions Nos 87 and 98.[^141] While the employers’ group constitute a minority in the ILC and ILO Governing Body, their adamant opposition on this issue has been curiously persuasive in extracting concessions. The ILO International Labour Conference in the 2019 Centenary Declaration[^142] and even the International Labour Office report on Sustainable Development Goal 8[^143] are notably silent on the subject of a right to strike. By way of comparison, the ITUC offers no countervailing threat and perhaps would not want to undermine the leadership of the current Director-General. This dynamic seems to

[^136]: The Russian Judge Dedov provided the sole Dissenting Opinion (in his country’s own cause).
[^138]: *Ognewenko v Russia*, paras 56 – 57.
[^139]: Ibid., para. 22.
[^140]: Vogt n.85, 63 and 188.
[^141]: Hornung-Draus n.26, 5 (2020).
continue in the re-examination of ILO standards and supervisory mechanisms through the ‘Standards Review Mechanism’.  

Greater support for a right to strike has been forthcoming instead from the UN human rights system, due to the 2018 report of the UN Special Rapporteur on Freedom of Assembly and Freedom of Association and the Joint Statement of the UN Human Rights Committee and Committee on Economic, Social and Cultural Rights. The latter says that the right to strike is ‘corollary to the effective exercise of the right to form and join trade unions’. The ITUC has won the argument in that sphere, even if tripartism makes a palpable victory less likely at the ILO.

**IV. CONCLUSION**

The tale told in this article might just seem like a clash of systems or another story of fragmentation. ILO norms have been put to use differently in different systems (the EU being separate from the Council of Europe). An autopoietic analysis would prompt us to identify the communicative processes by which cross-fertilisation or disruption has been achieved and perhaps suggest procedural solutions. This ‘neutral’ approach may however be deceptive. It has been argued in this article that important roles are played in these settings by transnational representatives of employers and workers, especially the IOE and ITUC, and that the relative power of these agents may be significant.

Some of the ways in which the IOE and ITUC have sought to exercise political influence are reminiscent of observations once offered by Offe and Wiesenthal regarding the dynamics of interactions between national employer and worker associations. Rejection by the IOE of established ILO norms and pursuit of litigation in a variety of other spheres citing that rejection, accords with predictions made by Offe and Wiesenthal that employers

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147 Offe and Wiesenthal, n.16 above, 71 and 94.

148 See text accompanying ns 42 - 62 above.
associations, when they have the opportunity, are likely to disrupt the expectations of workers’ associations which have become overly dependent on external guarantees given by political institutions.¹⁴⁹ Their model assumed that this challenge by employers would come from a place of strength, and that analysis accords with the increase in employer power at the end of the Cold War and in a time of austerity. Another reading, less consistent with their hypothesis is that the IOE was acting out a sense of vulnerability and a need to utilise its ILO influence to persuade business of its relevance and viability, perceiving itself in competition with other forms of business representation on the global scale and alarmed that the ILO might be vulnerable to increasing ITUC influence. Indeed, the IOE’s difficulties may be continuing, since the Confederation of British Industry, whose representative Chris Syder was the chief proponent of the 2012 employers’ group walkout, is no longer a member of the IOE.¹⁵⁰

Whether acting out of strength or vulnerability, the IOE placed the ITUC in a position where had to respond, namely in a fifth stage of crisis in political engagement that Offe and Wiesenthal had anticipated. The ITUC did, as they suggested it should, seek to demonstrate its members’ willingness to act through a rare global day of action in 2015. However, this was a one-off event and it seems to have been the ITUC’s ongoing response to the litigious claims of the IOE, by fully deploying its institutional and societal resources in alliances (unity) with the ETUC, GUFs and its national union members, that was its most effective form of collective mobilization. Moreover, it seems that the ITUC appreciates the need for external guarantees beyond the ILO, where they are forthcoming in other systems, such as the UN and Council of Europe human rights systems and even within the EU.

Arguably, the challenge the IOE faces has also highlighted the need to strengthen its membership bases and alliances so as to be able to mobilise effectively. A restrictive approach to freedom of association only for narrowly defined workers,¹⁵¹ would limit the ITUC’s ability to act and thereby exercise future influence. In this respect, the ITUC campaign for an extended ‘Universal Labour Guarantee’ as a facet of decent work and

¹⁴⁹ See Offe and Wiesenthal, n.16 above, 108.
sustainable development is likely to be important for its strategic aims. The ITUC may also need to assert its interests in a wider range of issues which also overlap with that of other UN agencies, such as the World Health Organization, in the context of the impact of the coronavirus crisis on worker health. In these ways, an awakening to the potential limitations of ILO processes may not lead to the fragility anticipated by Offe and Wiesenthal, even if the ITUC cannot readily demonstrate the willingness to act of the workers who are the members of its affiliates. Rather, in contemporary global politics, the ITUC may yet utilise other resources to greater effect.

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