INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-27/21
MAY 5, 2021
REQUESTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RIGHT TO FREEDOM OF ASSOCIATION, RIGHT TO COLLECTIVE BARGAINING AND RIGHT TO STRIKE, AND THEIR RELATION TO OTHER RIGHTS, WITH A GENDER PERSPECTIVE

(INTERPRETATION AND SCOPE OF ARTICLES 13, 15, 16, 24, 25 Y 26, IN CONJUNCTION WITH ARTICLES 1(1) AND 2 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS, ARTICLES 3, 6, 7 AND 8 OF THE PROTOCOL OF SAN SALVADOR, ARTICLES 2, 3, 4, 5 AND 6 OF THE CONVENTION OF BELEM DO PARA, ARTICLES 34, 44 AND 45 OF THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES, AND ARTICLES II, IV, XIV, XXI AND XXII OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN)

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court,") composed of the following judges:

Elizabeth Odio Benito, President;
L. Patricio Pazmiño Freire, Vice-President;
Eduardo Vio Grossi, Judge;
Humberto Antonio Sierra Porto, Judge;
Eduardo Ferrer Mac-Gregor Poisot, Judge;
Eugenio Raúl Zaffaroni, Judge, and
Ricardo Pérez Manrique, Judge;

also present,

Pablo Saavedra Alessandri, Registrar, and
Romina I. Sijniensky, Deputy Registrar,

pursuant to Article 64(1) of the American Convention on Human Rights (hereinafter "the American Convention or the Convention") and articles 70 to 75 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this Advisory Opinion structured as follows:

Contents

I.
SUBMISSION OF THE CONSULTATION

1. On July 31, 2019, the Inter-American Commission on Human Rights (hereinafter "the Commission"), invoking Article 64(1) of the American Convention on Human Rights and in keeping with the provisions of articles 70(1) and 70(2) of the Rules of Procedure, submitted a request for an advisory opinion on "the scope of State obligations under the Inter-American System with regard to the guarantee of trade union freedom, its relationship to other rights, and its application from a gender perspective" (hereinafter "the request " or "the consultation").

2. The Commission outlined the concerns that led to this consultation as follows:

> Trade union freedom or the rights of trade union are fundamental human rights that, together with the rights to collective bargaining, to organize and to strike, constitute the foundations for the protection and promotion of the right to work in just and favorable conditions […]. [I]n particular, they are vitally important for the guarantee and enjoyment of other human rights and the autonomous development of the individual. [D]evelopment of the content of the right to work is key to strengthening economic and social systems from a rights-based perspective. This includes the existence of a system ensuring that every worker has access to decent employment and is not deprived of this unjustly. The Court [has also made reference] to the content of the right to work as a right protected under Article 26 of the American Convention regarding which States have specific obligations
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> […] In October 2018, the [Commission] received information on restrictions to the exercise of trade union freedom, the rights to demonstrate and to strike, and the criminalization of protests in the Americas, involving Brazil, Colombia, Chile, Honduras, Argentina and Costa Rica. In addition, the Global Rights Index published by the International Trade Union Confederation mentions five countries of the continent as places where such rights are not guaranteed. This means that, although the law may include certain rights, workers lack real access to them and, therefore, are subject to abusive systems and unfair labor practices. Furthermore, it notes that, in eight countries of the Americas, such rights are systematically violated, which means that [they] are jeopardized or suppressed […]. That scenario has been made more complex by the expansion of new technologies and uncertainty about their impact on the Latin American labor market.
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> From the standpoint of equality, it should be considered that women account for around 51% of the total population and only receive 38% of the total monetary income created and earned by people, with the remaining 62% going to men. The [Commission held] that women suffer from different forms of discrimination both at law and in practice in relation to access to and control of financial resources, and the distribution and control of such resources both within the family and outside the home; moreover, they continue to face obstacles to acquiring the means to obtain these resources, a situation that is particularly acute in the labor area. The [Commission] also identified some issues of concern that affect women in this area, including the wage gap, unpaid work, harassment and occupational segregation.
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> Despite the foregoing, there are still no clear criteria on the specific State obligations in relation to trade union freedom, including the rights to collective bargaining and to strike, or their direct interdependence with fair and equitable working conditions. Moreover, no determination has been made of the specific guarantees that States should put in practice when acting as employers or when other actors, such as private enterprises, international agencies or non-governmental organizations, are acting in this capacity. Bearing in mind also that, historically and traditionally, trade union rights and labor rights have been understood from the perspective of a male workforce, the development of standards for State obligations to ensure the principle of non-discrimination and equality for women in the workplace is extremely relevant for the protection of women's labor rights.

> Consequently, [the Commission noted that] the purpose of this request is that the Court make a joint interpretation of several key inter-American norms relating to State obligations with regard to the exercise of trade union freedom, including the right to collective bargaining and to strike, as catalysts for the protection of labor rights, as well as an interpretation of these norms from a gender perspective. In the context of anti-union practices, unemployment, loss of the real value of wages, uncertainty of the labor market, gender-based violence and discrimination in the workplace and the impact on labor of the intensive use of new technologies in the Americas, it is pertinent and opportune that the Inter-American Court examine these issues and provide States with guidelines to ensure satisfactory compliance with their obligations […].

3. Based on these considerations, the Commission asked the Court the following specific questions:

a) Bearing in mind that Article 45(c) and (g) of the OAS Charter and the fundamental principles and rights at work recognize trade union freedom and the rights to collective bargaining and to strike as part of workers' rights in order to achieve a just social order, economic development and true peace: What is the scope of the State's obligations in relation to guarantees in the processes for the establishment of trade unions and in their election and internal governance procedures, on the one hand, and in the processes for collective bargaining and strike, on the other, in light of Articles 15, 16, 25 and 26 of the American Convention on Human Rights, 8 of the Protocol of San Salvador, and XXI and XXII of the American Declaration? And, what actions should States take to verify the realization of these rights in compliance with their obligation of progressivity? Within this legal framework, what procedures should States adopt to identify and eliminate the main risk factors that prevent the realization of these rights in the region, taking into account the nature and status of the employer: (a) public administration; (b) public enterprises; (c) private enterprises; (d) international agencies, and (e) non-profit organizations?

b) In light of Articles 16 and 26 of the American Convention on Human Rights, XXII of the American Declaration, and 8(1) of the Protocol of San Salvador: How is the relationship between freedom trade union [*sic*], collective bargaining and freedom of association expressed? Do any legal consequences result from this relationship as regards the content of the right to work and its fair and equitable conditions in light of Articles 26 of the American Convention, XIV of the American Declaration, 6 and 7 of the Protocol of San Salvador together with the fundamental principles and rights at work? In general, is it possible to allow the protections established by law to be derogated "in peius" by collective bargaining? What specific factors should be taken into account when women are exercising these rights?

c) In light of Articles 13, 15 and 26 of the American Convention on Human Rights, IV and XXI of the American Declaration, and 8(1) of the Protocol of San Salvador: How is the relationship between trade union freedom, freedom of expression, the right to strike, and the right of assembly expressed? Do any legal consequences result from this relationship as regards the content of the right to work and its fair and equitable conditions in light of Articles 26 of the American Convention, XIV of the American Declaration, 6 and 7 of the Protocol of San Salvador together with the fundamental principles and rights at work? What specific factors should be taken into account when women are exercising these rights?

d) How does the right of women to be free of all forms of discrimination and violence, in accordance with Articles 4(f) and 6(a) of the Convention of Belem do Pará, 1(1) and 24 of the American Convention, 3 of the Protocol of San Salvador, and II of the American Declaration, apply in the interpretation of the legal content of trade union freedom and the rights to collective bargaining and to strike? In this context: what is the scope of the State's obligations concerning the specific guarantees that derive from Articles 1(1), 2 and 26 of the American Convention, and Articles 2(b), 3 and 5 of the Convention of Belem do Pará in the face of gender-based discrimination or violence in the workplace that hinders the exercise of these rights by women?

e) What role should the State play to protect the autonomy and freedom to operate of trade unions under Articles 26 of the American Convention, XXII of the American Declaration and 8(1)(a) of the Protocol of San Salvador, and to ensure the effective participation of women as union members

and leaders in compliance with the principle of equality and non-discrimination? What are the characteristics of the division of family responsibilities between men and women in these contexts?

f) What is the scope of the State's obligations with regard to the specific guarantees derived from Articles 34(g) and 44(b),(c) and (g) of the OAS Charter, 1(1), 2 and 26 of the American Convention, and XIV and XXII of the American Declaration for the effective participation of workers, through the exercise of trade union freedom, collective bargaining and the right to strike, in the design, implementation and evaluation of work-related public policies and norms in the context of the changes in the workplace owing to the use of new technologies?

4. The Commission designated two delegates, Commissioner Margarette May Macaulay and Soledad García Muñoz, Special Rapporteur on Economic, Social, Cultural and Environmental Rights (hereinafter "REDESCA") and three legal advisors, Christian González Chacón, Luis Carlo Buob Concha, and Renan Bernardi Kalil.

II.
PROCEEDINGS BEFORE THE COURT

5. The Court Registrar (hereinafter "the Registrar"), in keeping with articles 73(1)[1] and 73(2)[2] of the Rules of Procedure of the Court (hereinafter "Rules of Procedure"), sent notes on October 14, 2019, conveying the consultation to all the Member States of the Organization of American States (hereinafter "OAS"), to the Secretary General of the OAS and to the Chair of the OAS Permanent Council, and informed them that the President of the Court, in consultation with the Court, had set January 15, 2020 as the deadline for submitting written comments to the request. The Registrar also sent notes on January 14, 2020, informing the same parties that the deadline had been extended to April 13, 2020.

6. The Registrar's notes sent on October 14, 2019, along with a notice posted on the Court's website on the same date, in compliance with the President's instructions and the requirements of article 73(3) of the Rules of Procedure,[3] invited a variety of international organizations, civil society entities, academic institutions in the region, and all interested persons to submit a written opinion on the point brought for consultation and informed them that the deadline set for the purpose was January 15, 2020. The Registrar also advised, in the January 14, 2020 notes and a posting on the Court's website, that the deadline had been extended to April 13, 2020.[4]

7. Upon expiration of the new deadline, the Secretariat had received the following written comments:[5]

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[1] Article 73(1) of the Rules of Procedure of the Court states: "Upon receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all of the Member States, the Commission, the Permanent Council through its Presidency, the Secretary General, and, if applicable, to the OAS organs whose sphere of competence is referred to in the request."

[2] Article 73(2) of the Rules of Procedure of the Court states: "The Presidency shall establish a time limit for the filing of written comments by the interested parties."

[3] Article 73(3) of the Rules of Procedure of the Court states: "The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the Presidency may do so after prior consultation with the Agent."

[4] In view of the high number of countries in the region that were affected by the disease known as COVID-19, defined by the World Health Organization as a worldwide health emergency, the Court signed agreements 1/20, dated March 17, 2020, and 2/20, dated April 16, 2020, suspending the calculation of all deadlines from March 17 through May 20, 2020, so that the final date for submission of written comments was extended to June 15, 2020.

[5] The request for an advisory opinion submitted by the Inter-American Commission on Human Rights, written and oral comments by the participating States and international and governmental organizations, international and national

a) *Written comments submitted by the states of the OAS:* (1) Republic of Argentina; 2) Plurinational State of Bolivia; (3) Republic of Costa Rica; (4) Republic of El Salvador; (5) Republic of Honduras; (6) Republic of Nicaragua, and (7) Republic of Panama.

b) *Written comments submitted by bodies of the OAS:* (1) Inter-American Commission on Human Rights; (2) Inter-American Commission of Women, and (3) Working Group on the Protocol of San Salvador (WGPSS).

c) *Written comments submitted by international organizations:* (1) United Nations High Commissioner for Human Rights, Geneva, and (2) International Labour Organisation (ILO).

d) *Written comments submitted by inter-governmental and governmental organizations, international and national associations, nongovernmental organizations. and academic institutions:* (1) Public Services International (PSI); (2) International Trade Union Confederation, Trade Union Confederation of the Americas and AFL-CIO Solidarity Center; (3) Confederación Latinoamericana y del Caribe de Trabajadores Estatales (CLATE); (4) Asociación Colombiana de Aviadores Civiles (ACDAC); (5) Asociación Nacional de Empleados Públicos y Privados (ANEP); (6) Asociación de Abogados Laboralistas (7) Cámara Colombiana de Comercio Electrónico; (8) Sindicato Nacional de Trabajadores de la Educación (SNTE); (9) Central Única dos Trabalhadores; (10) Confederación de Trabajadores de Venezuela; (11) Asociación de Profesores de Segunda Enseñanza; (12) Asociación Latinoamericana de Abogados Laboralistas (ALAL); (13) Unión Nacional de Empleados de la Caja y la Seguridad Social (UNDECA); (14) Agrupación Nacional de Empleados Fiscales; (15) Confederación Latinoamericana de Trabajadores del Poder Judicial (CLTPJ); (16) Ministério Público do Trabalho; (17) Comisión de Derechos Humanos de la Ciudad de México; (18) Centro de Estudios de Derecho e Investigaciones Parlamentarias de la Cámara de Diputados del Congreso de la Unión de los Estados Unidos Mexicanos; (19) Clínica de Derecho Laboral y Seguridad Social de la Facultad de Derecho de la Pontificia Universidad Católica del Peru; (20) Bonavero Institute of Human Rights, Faculty of Law, University of Oxford; (21) Inter-American Human Rights Academy; (22) Comisión Colombiana de Juristas (CCJ); (23) Observatorio del Sistema Interamericano de Derechos Humanos del Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de Mexico; (24) Red de Profesoras y del Programa Género y Derecho de la Facultad de Derecho de la Universidad de Buenos Aires; (25) Centro de Estudios en Derechos Humanos (CEDH), Facultad de Derecho, Universidad Nacional del Centro de la Provincia de Buenos Aires y el Observatorio de Derecho Internacional Humanitario de la Facultad de Derecho de la Universidad de Buenos Aires; (26) Centro de Investigación Científica Aplicada y Consultoría Integral (CICACI); (27) Clínica de Direitos Humanos e Direito Ambiental da Universidade do Estado do Amazonas and Grupo de Pesquisa Direitos Humanos na Amazonia; (28) Akahatá, Equipo de trabajo en sexualidades y géneros; (29) Asociación de Abogadas Feministas de Chile (ABOFEM); (30) Asociación de Mujeres Meretrices de Argentina (AMMAR); (31) Ciudadanos del Mundo por Derechos Humanos; (32) Corporación Centro de Interés Público y Justicia; (33) Bernard Duhaime, Senior Professor of International Public Law, Legal Sciences Department of the School of Political Science and Law of Université du Québec in Montréal; (34) Instituto Internacional de Responsabilidad Social y Derechos Humanos (IIRESODH); (35) Desarrollo Gradual Directo, Civil Association; (36) Cátedra de Derechos Humanos "A" de la Facultad de Derecho y Ciencias Sociales de la Universidad Nacional de Tucumán; (37) Instituto

associations, academic institutions, nongovernmental organizations. and civil society individuals are available for consultation on the Court's website: https://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=2093

Autónomo de Occidente; (38) Cátedra de Derechos Humanos y Garantías de la Facultad de Ciencias Jurídicas de la Universidad de Congreso; (39) Semillero de Litigio ante Sistemas Internacionales de Protección de Derechos Humano de la Facultad de Derecho de la Universidad de Antioquia; (40) Students and Faculty of the Centro Universitário Antônio Eufrásio de Toledo de Presidente Prudente; (41) Group "3C" of the Escuela Libre de Derecho, Mexico; (42) Students of Universidad EAFIT; and (43) Clínica Interamericana de Direitos Humanos de la Universidade Federal do Rio de Janeiro.

e) *Written comments submitted by civil society individuals:* (1) Héctor Pedro Recalde; (2) Joaquín Ignacio Mogaburu, Natalia Julieta Assalone and Siro de Martini; (3) Quetzalli Cruz Sosa; (4) Ángel Iván González Rodríguez; (5) Manuel Fernando García Barrios; (6) Daniel Valverde Mesén, and (7) Carlos Javier Spaventa Domenech.

8. Upon completion of the written stage of the proceeding, the President of the Court, in keeping with the provisions of article 73(4)[6] of the Rules of Procedure, issued an Order on July 3, 2020,[7] calling a public hearing to be held via virtual mode and invited the Inter-American Commission on Human Rights, the Member States of the OAS, the Secretary General of the OAS, the Chair of the OAS Permanent Council, the Chair of the Inter-American Juridical Committee, the members of a variety of international organizations, civil society organizations, academic institutions, and individuals who had submitted written observations, to present their oral comments on the consultation to the Court.

9. The public hearing took place in virtual format on July 27, 28 and 29, 2020, as part of the 135th regular session.[8]

10. The following persons appeared before the Court:

1) For the Inter-American Commission on Human Rights: Joel Hernández García, President, and Soledad García Muñoz, Special Rapporteur on Economic, Social, Cultural and Environmental Rights Rights (REDESCA).
2) For the Republic of Argentina: Elizabeth Gómez Alcorta, Minister for Women, Gender and Diversity, and Alberto Javier Salgado, Director of the Department on International Human Rights Litigation.
3) For the Republic of Costa Rica: Ricardo Marín Azofeifa, Deputy Minister of Labor and Social Security in the Labor Area, and Natalia Córdoba Ulate, Legal Director of the Ministry of Foreign Affairs and Worship.
4) For the Republic of Honduras: Rosa Seaman Sheran, Deputy Minister of Human Rights, and Nelson Gerardo Molina Flores, National Director of Human Rights and International Litigation of the Office of the Public Prosecutor, and Juan Miguel Ochoa, Advisor to the Office of the Prosecutor General.
5) For the Confederación Latinoamericana y del Caribe de Trabajadores Estatales (CLATE): Julio Fuentes and José Pérez Debelli.

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[6] Article 73(4) of the Rules of Procedure of the Court states: "[a]t the conclusion of the written proceedings, the Court shall decide whether oral proceedings should take place and shall establish the date for a hearing, unless it delegates the latter task to the Presidency. Prior consultation with the Agent is required in cases governed by Article 64(2) of the Convention."

[7] *Cf. Request for an Advisory Opinion OC-27.* Notice of hearing. Order of the president of the Inter-American Court of Human Rights, July 3, 2020. Available at: https://www.corteidh.or.cr/docs/asuntos/solicitud_03_07_2020_eng.pdf

[8] Moreover, on August 24, 2020, during the 136th regular session, the Court held a virtual sitting with the Inter-American Commission of Women (ICW) to hear their oral comments on the request for an advisory opinion. Alejandra Mora Mora, Executive Secretary of the ICW and Luz Patricia Mejía Guerrero, Technical Secretary of the Follow-up Mechanism to the Belém Do Pará Convention, took part in the sitting.

6) For the Asociación Colombiana de Aviadores Civiles (ACDAC): Jaime Hernández Sierra and Carlos Roncancio Castillo.
7) For the Asociación de Abogados Laboralistas (AAL): Matías Cremonte and Rolando E. Gialdino.
8) For the Cámara Colombiana de Comercio Electrónico: María Fernanda Quiñones Zapata and Juan Sebastián Rozo Rengifo.
9) For the Sindicato Nacional de Trabajadores de la Educación (SNTE): Soralla Bañuelos.
10) For the Asociación de Profesores de Segunda Enseñanza: Manuel Hernández Venegas.
11) For the Asociación Latinoamericana de Abogados Laboralistas (ALAL): Luisa Fernanda Gómez Duque and César Landelino Franco López.
12) For the Unión Nacional de Empleados de la Caja y la Seguridad Social (UNDECA): Manuel Hernández Venegas.
13) For the Internacional de Servicios Públicos: Euan Gibb and Arturo Ruíz.
14) For the Confederación Latinoamericana de Trabajadores del Poder Judicial: Óscar Ariel Pringles Farabelli.
15) For the Confederación Sindical Internacional, la Confederación Sindical de los Trabajadores/as de las Américas and the Centro de Solidaridad: Rafael Freire and Sharan Burrow, respectively.
16) For the Comisión de Derechos Humanos de la Ciudad de México: Nashieli Ramírez Hernández and Nadia Sierra Campos.
17) For the Ministério Público do Trabalho de Brazil: Maurício Ferreira Britto and Renan Berdani Kalil.
18) For the Observatorio del Sistema Interamericano de Derechos Humanos del Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de Mexico: Magdalena Cervantes Alcayde and María Fernanda Téllez Girón García.
19) For the Clínica de Derecho Laboral y Seguridad Social de la Facultad de Derecho de la Pontificia Universidad Católica del Peru: Lucy Marmanillo Tárraga and Álvaro Eduardo Vidal Bermúdez.
20) For the Comisión Colombiana de Juristas: José Luciano Sanín Vásquez and Gustavo Gallón.
21) For the Red de Profesoras y del Programa de Género de la Facultad de Derecho de la Universidad de Buenos Aires: Victoria Flores Beltrán and Laura Pautassi.
22) For the Instituto Internacional de Responsabilidad Social y Derechos Humanos: Víctor Rodríguez Rescia and Roxanne Cabrera Baptista.
23) For Ciudadanos del Mundo por los Derechos Humanos: Gloria Perico de Galindo and Gloria Ríos.
24) For the Academia Interamericana de Derechos Humanos: Magda Yadira Robles Garza.
25) For the Asociación de Abogadas Feministas: Consuelo Navarro Pérez and Carol Alejandra Ortiz Romo.
26) For the Corporación Centro de Interés Público y Justicia: Alexander López Maya and Ana María Moya.
27) For the Clínica Interamericana de Direitos Humanos da Universidade Federal do Río de Janeiro: Siddharta Legale and Thainá Mamede.
28) For the Instituto Autónomo de Occidente, and the Centro de Derecho Corporativo, Derechos Humanos y Paz: José Benjamín González Mauricio.
29) For the Clínica de Direitos Humanos e Direito Ambiental da Universidade do Estado do Amazonas: Túlio Macedo Rosa e Silva, Gabriel Henrique Pinhero Andion, and Sílvia Maria da Silveira Loureiro.
30) For the Semillero de Litigio ante Sistemas Internacionales de Protección de Derechos Humanos de la Facultad de Derecho de la Universidad de Antioquia: Ángela Benavides Cerón and Alejandro Gómez Restrepo.
31) For the Asociación de Mujeres Meretrices de Argentina: Georgina Orellano and Jorge Alejandro Mamani.

32) For the Cátedra de Derechos Humanos "A" de la Facultad de Derecho y Ciencias Sociales de la Universidad Nacional de Tucumán: María Alicia Noli and Eleonora Inés Casa.
33) For the students of the Universidad EAFIT: Matías Aguirre Gómez and Amalia Cadavid Moll.
34) For the Centro Universitário Antônio Eufrásio de Toledo de Presidente Prudente: Fernando Batistuzo and Vinícius Franco.
35) Ángel Iván González Rodríguez.
36) Daniel Valverde Mesén.
37) Quetzalli Cruz Sosa.

11. The Court, in delivering its findings on this request for an advisory opinion, examined, considered and analyzed 61 briefs of written comments and 38 presentations at hearing and interventions by the states, bodies of the Organization of American States, international organizations, government agencies, non-governmental organizations, academic institutions, and individuals from civil society. The Court expresses its appreciation for these valuable contributions that helped enlighten its consideration of the different matters brought before it for issuing this advisory opinion.

12. The Court began deliberations on this advisory opinion on April 28, 2021 using virtual format.[9]

III.
JURISDICTION AND ADMISSIBILITY

13. Article 64(1) of the American Convention outlines one of the elements of the Inter-American Court's advisory role when it states:

> The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

14. The query that the Commission has brought before the Court falls within this Article 64(1) of the Convention. The Commission is a body of the OAS and therefore is entitled to ask the Inter-American Court for advisory opinions about interpretation of the Convention or other treaties addressing human rights protection in the Americas.[10]

15. The central purpose of the advisory role is for the Inter-American Court to deliver an opinion interpreting the American Convention or other treaties that address human rights protection in the American states, and this is defined within the scope of its jurisdiction. Accordingly, the Court has held that Article 64(1) of the Convention, making reference to the power of the Court to deliver an opinion on "other treaties concerning the protection of human rights in the American states," is broad and non-restrictive.[11]

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[9] Due to the exceptional circumstances brought about by the COVID-19 pandemic, this advisory opinion was deliberated on and approved during the 140th regular session, which was held using remote technology in keeping with the provisions of the Court's Rules of Procedure.

[10] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002*. Series A No. 17, par. 16.

[11] *Cf. "Other treaties" subject to the consultative jurisdiction of the Court* (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, operative point one, and *Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for state human rights obligations (interpretation and scope of articles 1, 2, 27, 29, 30, 31, 32, 33 a 65 and 78 of the American*

16. Consequently, Articles 70[12] and 71[13] of the Rules of Procedure set the formal requirements that must be met for a request to be considered by the Court. Essentially, the following requirements must be met by the requesting state or organization: (i) state the questions with precision; (ii) identify the provisions to be interpreted; (iii) state the considerations giving rise to the request, and (iv) provide the name and address of the agent. It has already been shown that requirements (iii) and (iv) were duly met (*supra* par. 2 and 4).

17. The proceedings on this request produced no comments challenging the competence of the Court to deliver this advisory opinion the admissibility and validity of the questions asked. The Court has decided nonetheless to offer a general discussion on the jurisdiction, admissibility and validity of replying to the questions asked by the Commission, and will do so in the following order: (a) the formal requirement to specify the provisions that need to be interpreted; (b) jurisdiction *ratione personae*; (c) jurisdiction over relevant regional instruments and other sources of international law; (d) the legal basis of this request for an advisory opinion; (e) the requirement to state the questions with precision and the Court's power to reformulate the questions asked.

A. The formal requirement to specify the provisions that need to be interpreted

18. The Court notes that the Commission's questions made reference to the following provisions to be interpreted: (a) on the first question, Articles 45, subparagraphs c and g of the Charter of the Organization of American States (hereinafter "OAS Charter"), 15, 16, 25 and 26 of the American Convention on Human Rights (hereinafter "American Convention" or "Convention"), 8 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (hereinafter "Protocol of San Salvador"), and XXI and XXII of the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration"); (b) on the second question, Articles 16 and 26 of the Convention, 6, 7 and 8(1) of the Protocol of San Salvador, and XIV of the American Declaration; c) on the third question, Articles 13, 15 and 26 of the American Convention, IV, XIV and XXI of the American Declaration, 6, 7 and 8(1) of the Protocol of San Salvador; (d) on the fourth question, Articles 2(b), 3, 4(f), 5 and 6(a) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém Do Pará" (hereinafter "Convention of Belém Do Pará"), 1(1), 3, 24 and 26 of the American Convention, 3 of the Protocol of San Salvador, and II of the American Declaration; (e) on the fifth question, Articles 26 of the Convention, XXII of the American Declaration, and 8(1)(a) of the Protocol of San Salvador, and (f) on the sixth question, Articles 34(g) and 44(b),(c) and (g) of the OAS Charter, 1(1), 2 and 26 of the American Convention, and XIV and XXII of the American Declaration.

19. For these reasons, the Court holds that the Commission has honored the duty to specify the provisions of the American Convention, the Protocol of San Salvador, the Convention of Belém Do Pará, the OAS Charter, and the American Declaration that need to be interpreted in response to the question submitted.

Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States). Advisory Opinion OC-26/20 of November 9, 2020. Series A No. 26, par. 14.

[12] Article 70 of the Rules of Procedure of the Court states: "Interpretation of the Convention. 1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates."

[13] Article 71 of the Rules of Procedure of the Court states: "Interpretation of Other Treaties. 1. If, as provided for in Article 64(1) of the Convention, the interpretation requested refers to other treaties concerning the protection of human rights in the American states, the request shall indicate the name of the treaty and parties thereto, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request."

B. Jurisdiction *ratione personae*

20. Ever since its first advisory opinion, the Court has held that, under Article 64 of the Convention, the organs of the OAS have standing to seek an advisory opinion "regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states," only within their spheres of competence. Thus, while the OAS Member States are fully qualified to seek advisory opinions, the right of the organs of the OAS is restricted to matters in which they have legitimate interest.[14]

21. The Inter-American Commission is one of the major bodies of the OAS, and its main function is "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters."[15] Moreover, the Statute of the Inter-American Commission recognizes the power "to consult the Court on the interpretation of the American Convention on Human Rights or of other treaties concerning the protection of human rights in the American states."[16] It is clear, therefore, that the Commission has a legitimate institutional interest in the consultation it has submitted, which concerns the interpretation of the scope of several human rights provisions in the Inter-American system for human rights protection (hereinafter "Inter-American system") contained in the American Convention, the Protocol of San Salvador, and Convention of Belém Do Pará, the OAS Charter, and the American Declaration.

C. Jurisdiction over relevant regional instruments and other sources of international law

22. The Court will now discuss its jurisdiction *ratione materiae* and emphasizes that the Commission requested an interpretation of several articles of the American Convention, the Protocol of San Salvador, the Convention of Belém Do Pará, the OAS Charter, and the American Declaration.

23. With respect to the American Convention, the Court has already established that its advisory function allows it to interpret any provision of that treaty, and that no part or aspect of this instrument shall be excluded. In this sense, it is clear that the Court, as the "final interpreter of the American Convention" is competent to issue, with full authority, interpretations of all the provisions of the Convention, including those of a procedural nature.[17]

24. The Court has also held that article 64(1) of the Convention, alluding to the Court's power to deliver an opinion on "other treaties concerning the protection of human rights in the American states," is broad and non-restrictive. The Court is accordingly qualified to exercise its advisory jurisdiction, in general, over any provision concerning the protection of human rights from any international treaty applicable in the American states, regardless of whether it is bilateral or multilateral, regardless of its primary purpose, and regardless of whether states outside the inter-American system are or could be parties to it.[18] The Court also has jurisdiction to interpret the Protocol of San Salvador and the Convention of Belém Do Pará.

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[14] *Cf. The effect of reservations on the entry into force of the American Convention on Human Rights* Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 1, par. 14.

[15] Charter of the Organization of American States, Article 106.

[16] Statute of the Inter-American Commission on Human Rights, Article 19 (d).

[17] *Cf. Article 55 of the American Convention on Human Rights.* Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20, par. 18, and Advisory Opinion OC-26/20, *supra*, par. 25.

[18] *Cf.* Advisory Opinion OC-1/82, *supra*, operative paragraph 1, and *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation*

25. At the same time, as stated in other precedent case law, the OAS Charter is a treaty on which the Court can exercise its advisory jurisdiction under the terms of Article 64(1) of the Convention.[19] Furthermore, Article 64(1) of the American Convention authorizes the Court to render advisory opinions on the interpretation of the American Declaration, in the context and within the limits of its jurisdiction set out in the OAS Charter and the Convention as well as other treaties concerning the protection of human rights in the Member States of the Americas.[20] The Court's handling of the instant opinion will therefore draw on the American Declaration when it interprets the obligations that arise from the OAS Charter in its discussion of the questions brought by the Commission.

26. In conclusion, the Court is empowered to render opinions in its advisory jurisdiction on the clauses of the American Convention on Human Rights, the Protocol of San Salvador, the Convention of Belém Do Pará, the OAS Charter, and the American Declaration, brought before it for consultation by the Inter-American Commission, in the terms indicated and insofar as they concern the protection of human rights in the American states, because they fall within the Court's sphere of competence.

D. The legal basis of this request for an advisory opinion

27. The Court notes that in its questions, the Commission made points about several specific situations involving the guarantees, procedures, and actions the states should adopt for the effective exercise of the rights addressed in the consultation, as well as a specific question about the possibility of allowing for rights protections set forth in domestic law to be abrogated by means of collective bargaining. In this regard, the Court notes that reference to certain examples serves the purpose of illustrating the potential significance of setting criteria and making interpretations of broad and general scope on the legal matter that is the subject of the consultation, without this implying that the Court is issuing a legal ruling on the specific situation raised in these examples. To the contrary, this allows the Court to show that its advisory opinion is not mere academic speculation, and is warranted by the benefit it might have for international protection of human rights, as it is a fundamental matter relevant to the overall inter-American system.[21]

28. In sum, the Court has understood that, while it should not lose sight of the fact that its advisory role essentially involves the exercise of its interpretative powers, consultations should serve a practical purpose and be predictable in their application. At the same time, the Court should not limit itself to an excessively precise factual premise that could make it difficult to disassociate the decision from a specific case, which would be detrimental to the general interest that could be served by a request for consultation. This ultimately requires delicate legal analysis to discern the substantive purpose of the request so that the matter may achieve the aims of widespread validity and relevance to all American states, beyond the reasons that may have originated the petition and beyond the particular facts that gave rise to it, so as to help OAS Member States and organs to fully and effectively discharge their international obligations.[22]

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to Article 1(1) of the American Convention on Human Rights). Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, par. 30.

[19] *Cf. Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights.* Advisory opinion OC-10/89 of July 14, 1989. Series A No. 10, par. 44, and Advisory Opinion OC-26/20, *supra*, par. 26.

[20] *Cf.* Advisory Opinion OC-10/89, *supra*, single operative paragraph one, and Advisory Opinion OC-26/20, *supra*, par. 26.

[21] *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16*,* par. 49, and Advisory Opinion OC-26/20, *supra*, par. 30.

[22] *Cf.* Advisory Opinion OC-16/99, *supra*, par. 49, and Advisory Opinion OC-26/20, *supra*, par. 31.

29. Consequently, it is proper to proceed with this request, given the widespread interest in having the Court render an opinion on a matter of legal significance in the region, that is, the scope of trade-union rights and the personal rights to collective bargaining and to strike, and how these rights relate to freedom of expression and association, freedom of assembly, and the right to work and to enjoy fair, equitable, satisfactory conditions, in the framework of state obligations to respect and guarantee human rights, with a gender perspective, for all persons under their jurisdiction. This will lead the Court to identify specific principles and duties the states should uphold regarding the rights of workers at a time of challenges involving economic and social disruptions caused by the COVID-19 pandemic, a fast-changing the labor market, economic, financial and structural adjustment programs, and new technologies.

E. The requirement to state the questions with precision and the Court's power to reformulate the questions asked

30. In the exercise of its advisory role, the Court is called upon to unravel the meaning, purpose and reason for international human rights norms.[23] Thus, in exercising the powers inherent in the competence granted by Article 64 of the Convention, it may need to clarify or elucidate and, in certain cases, rephrase the questions posed to it, in order to clearly determine the substance of its interpretative task.[24]

31. The Court notes that the matters brought by the Commission in questions (a), (b), (c), (d) and (f) touch directly on the right to organize, the right to collective bargaining, and the right to strike, asking the Court to (i) give an opinion on the scope of state obligations for these rights; (ii) outline the legal consequences of their relation to other rights such as freedom of association, freedom of expression, the right to assembly, the right to work and to fair, equitable, satisfactory working conditions, and the right of women to be free from all forms of discrimination and violence; and (iii) respond to specific questions involving the legal consequences that derive from recognizing these rights and their interactions, such as the type of proceedings the states should undertake to eliminate risks to the effective exercise of trade-union rights, bearing in mind the nature of the employing organization, whether it is possible *in peius* for collective bargaining processes to abrogate protections established by labor laws, the specific obligations that arise in the face of practices of gender-based discrimination or violence in the workplace, or the scope of specific obligations for the effective participation by workers in the design, construction and evaluation of public policies. The Court also notes that question (e) focuses primarily on protecting the freedom of trade unions to operate and enjoy autonomy, while at the same time, guaranteeing the effective participation of women as union members and leaders.

32. The Court holds that, in order to respond clearly to the questions brought by the Commission, it first needs to elucidate the content of state obligations concerning the rights to organize, to collective bargaining and to strike, which cut across all the sections of this consultation, and subsequently to address their relation to the rights to assembly, freedom of association and expression, and the guarantee of right to work and do so under conditions that are fair, equitable and satisfactory. In the second place, based on this analysis, it can then consider specific questions about the material implications of fulfilling the obligations that arise from the recognition of these same rights. In the third place, the gender perspective holds a central position in the questions brought by the Commission, and it is therefore relevant to take a differentiated approach to upholding the right to equality and non-discrimination and the right of women to lead a life free of violence, and clarify the particulars of the state's obligations regarding the guarantee of labor and trade-union

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[23] *Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, par. 23, and Advisory Opinion OC-26//20 *supra,* par. 33.

[24] *Cf.* Advisory Opinion OC-25/18, *supra,* par. 55, and Advisory Opinion OC-26/20, *supra,* par. 33.

rights and their relation to other rights, with a gender perspective. Finally, the Court deems that the questions about trade-union autonomy, the participation of women in unions as members and leaders, and the participation of trade unions in the design, construction and evaluation of public policy is a particular type of question that, while related to the other two categories, must be examined separately.

33. In view of all this, for a more effective discharge of its advisory role, which is essentially to interpret and apply the American Convention or other treaties over which it has jurisdiction, the Court will reclassify the questions being submitted to its advisory jurisdiction into three general, over-arching questions, using applicable legal provisions as a basis, to wit:

> First, based on Articles 26, 13, 15, 16, 24, 25, 1(1) and 2 of the American Convention, 3, 6, 7 and 8 of the Protocol of San Salvador, 2, 3, 4, 5 and 6 of the Convention of Belém Do Pará, 34, 44, and 45 of the OAS Charter, and II, IV, XIV, XXI, and XXII of the American Declaration:
>
> (1) What is the scope of the right to organize, the right to collective bargaining, and the right to strike, and how do they relate to the rights to freedom of expression, freedom of association, the right of assembly and the right to work and do so under fair, equitable, satisfactory conditions?
> (2) What is the substance of the right of women to be free of all forms of discrimination and violence in the exercise of their right to freedom or association, to collective bargaining and to strike?
> (3) What is the scope of the state's duty to protect trade union autonomy and to guarantee the effective participation of women as trade union members and leaders? What is the scope of the state's obligations to guarantee the participation of trade unions in the design of regulations and public policies on work at a time when the use of new technologies is bringing changes in the labor market?

34. Based on this division, and considering the content of the questions asked by the Commission, the first section will address questions 1, 2 and 3 (*supra,* par. 3), the second will settle question 4 (*supra,* par. 3), and finally, the third will elucidate questions 5 and 6 (*supra,* par. 3). Each question discussed with a gender perspective as applicable.

35. The Court also recalls that its advisory role "enables the Court to perform a service for all of the members of the Inter-American system and is designed to assist them in fulfilling their international human rights obligations."[25] The Court would also reiterate what it has said before,[26] that the task of interpretation that it performs in the exercise of its advisory function not only seeks to clarify the meaning, purpose, and rationale of international human rights norms, but also, and above all, to assist the OAS Member States and organs to comply fully and effectively with their relevant international obligations, and to define and implement public policies to protect human rights. Thus, its interpretations aim to help strengthen the system for the protection of human rights.

36. Similarly, the Court finds it necessary to recall that, pursuant to international law, when a state is a party to an international treaty, such as the American Convention, such treaty is binding for all its organs, including the judiciary and the legislature, so that a violation by any of these organs

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[25] *Cf.* Advisory Opinion OC-1/82, *supra,* par. 39, and Advisory Opinion OC-25/18, *supra,* par. 54.

[26] *Cf.* Advisory Opinion OC-1/82, *supra*, par. 25, and *Cf. Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights).* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, par. 22.

gives rise to the international responsibility of the state. Accordingly, the Court considers that the different organs of the state must carry out the due judicial review on the Convention, based also on the considerations of the Court in exercise of its non-contentious or advisory jurisdiction, which undeniably shares with its contentious jurisdiction the goal of the inter-American human rights system, which is "the protection of the fundamental rights of human beings."[27]

37. In consideration whereof, the Court will now reply to the questions posed, in keeping with the mission entrusted to it within the inter-American system.

IV.
INTRODUCTION

38. This advisory opinion examines the scope of the right of freedom of association, the right to collective bargaining, and the right to strike, and their relation to other rights, with a gender perspective. The Court wishes to preface its analysis of the substantive issues brought for consultation by the Inter-American Commission with introductory words to stress that fighting poverty and inequality and guaranteeing human rights are an essential component for the full democratic development of nations. The Court recalls the OAS Charter, which states in this regard that one of the organization's purposes is to "eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere."[28] The Charter then asserts as one of its principles that "[t]he elimination of extreme poverty is an essential part of the promotion and consolidation of representative democracy and is the common and shared responsibility of the American States."[29]

39. In the inter-American system, the relationship between human rights and representative democracy has been set forth in several instruments and reaffirmed by the Court ever since its early decisions, when it found that "[t]he concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad."[30] To this effect, the Preamble of the American Convention asserts the determination of the states "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man[.]"[31] The Protocol of San Salvador, in turn, acknowledges how important it is for ESCERs to be "reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources[.]"[32]

40. Finally, the Inter-American Democratic Charter recognizes that "solidarity among and cooperation between American states require the political organization of those states based on the effective exercise of representative democracy, and that economic growth and social development

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[27] *Cf. Rights and guarantees of children in the context of migration and/or in need of international protection.* Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, *supra*, par. 31, and Advisory Opinion OC-25/18, *supra*, par. 58.

[28] OAS Charter, *supra*, article 2(g).

[29] OAS Charter, *supra*, article 3(f).

[30] *Cf. Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights).* Advisory opinion OC-8/87 of January 30, 1987. Series A No. 8, par. 26.

[31] American Convention on Human Rights, Preamble.

[32] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," Preamble.

based on justice and equity, and democracy are interdependent and mutually reinforcing[.]"[33] More specifically, Articles 1, 10 and 13 of this instrument state:

> Article 1
> The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. Democracy is essential for the social, political, and economic development of the peoples of the Americas.
>
> Article 10
> The promotion and strengthening of democracy requires the full and effective exercise of workers' rights and the application of core labor standards, as recognized in the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, and its Follow-up, adopted in 1998, as well as other related fundamental ILO conventions. Democracy is strengthened by improving standards in the workplace and enhancing the quality of life for workers in the Hemisphere.
>
> Article 13
> The promotion and observance of economic, social, and cultural rights are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy in the states of the Hemisphere.

41. The Inter-American Democratic Charter thus states that the people have a right to democracy, emphasizes that it is important for their social, political and economic development, and asserts that democracy is strengthened with the improvement of working conditions and quality of life for workers. The Court would likewise underscore that the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work and its Follow-up, which was recognized in Article 10 of the Democratic Charter as a source of obligations, sets forth that all the states belonging to the International Labour Organisation (hereinafter "ILO") must respect, promote and meet their obligations regarding: "(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."[34]

42. In this regard, the Court emphasizes that the protection of human rights has acquired particular importance due to the serious consequences of the global COVID-19 coronavirus pandemic and its impact on individuals and families. The Court reiterates that, "given the nature of the pandemic, economic, social, cultural and environmental rights must be guaranteed, without discrimination, to every person subject to the state's jurisdiction."[35] The pandemic has disproportionately affected groups in conditions of vulnerability, and in such cases, the states must adopt special measures of protection. This should be a factor to consider for all rights, that is, both civil and political rights and ESCERs, but the relevant concern for this advisory opinion is to emphasize that the states must make every effort at their disposal to ensure that sources of employment are safeguarded and that labor and trade-union rights are respected for all workers.[36] The obligation of the states to guarantee these rights will remain in effect even after the COVID-19 crisis eases or ends, and even in future cases of other phenomena that could bring about similar effects.

43. The final point in this introduction is to clarify from the very beginning, as was also shown by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of

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[33] Inter-American Democratic Charter, Preamble.

[34] *Cf.* International Labour Organisation. ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998, Article 2.

[35] *Cf.* Statement of the Inter-American Court of Human Rights 1/20, April 9, 2020, p.2.

[36] *Cf.* Statement of the Inter-American Court of Human Rights 1/20, April 9, 2020, p.2.

association: "[w]ithout assembly and association rights, workers have little leverage to change the conditions that entrench poverty, fuel inequality and limit democracy." This means the states must create an enabling environment for the full exercise these rights as a way to combat global inequality, poverty, violence and child and forced labor. Labor's traditional tools for asserting rights—trade unions, strikes, collective bargaining and so on—are essential to this task, and the states must safeguard the effective exercise of them all.[37] This Court also stresses that states engaged in any international financial contracting process must ensure that the commitments they assume entail no real or potential demands to relax or repeal provisions of the labor laws in detriment to workers' rights.

V.
RIGHT OF FREEDOM TO ORGANIZE, RIGHT TO COLLECTIVE BARGAINING AND RIGHT TO STRIKE, AND THEIR RELATION TO THE RIGHT TO FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION, RIGHT OF ASSEMBLY, AND RIGHT TO WORK, AND TO FAIR, EQUITABLE, SATISFACTORY WORKING CONDITIONS

A. Considerations

44. To deliver its opinion on the interpretation of the legal provisions brought before it, the Court will turn to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which set forth the customary general rule for interpretation of international treaties.[38] This calls for the simultaneous application of good faith, the ordinary meaning to be given to the terms of the treaty in their context, and the object and purpose of the instrument. Because the Court is addressing a human rights treaty, it must also turn to the standards of interpretation proper to the system. It finds that the American Convention expressly establishes specific standards of interpretation in Article 29, which includes the *pro persona* principle.[39] Moreover, the Court has repeatedly stated that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.[40]

45. The Court finds that the main legal problem brought before it requires an interpretation of the scope of the right to freedom to organize, right to collective bargaining, and right to strike, and their relation to the right to freedom of expression, freedom of association, right of assembly, and the right to work, and to fair, equitable, satisfactory working conditions, in the framework of protection established by the American Convention, the Protocol of San Salvador, the OAS Charter and the American Declaration. To answer this question, and given the very central role of the American Convention in the protection structure of the inter-American system, the Court will conduct its analysis based on Article 26 of the American Convention, in conjunction with Articles 45, subparagraphs (c) and (g) of the OAS Charter, Articles 1(1), 2, 13, 15, 16 and 25 of the American Convention, Articles 6, 7 and 8 of the Protocol of San Salvador, and Articles IV, XIV, XXI and XXII of the American Declaration, as well as relevant *corpus juris* on international labor law.

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37 *Cf.* United Nations. *Report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association,* A/71/385, September 14, 2016, par. 4, 9 and 11.

38 *Cf.* Advisory Opinion OC-21/14, *supra,* par. 52, and Advisory Opinion OC-26/20, *supra,* par. 41. *See* also, among others, International Court of Justice (ICJ), *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia).* Judgment of December 17, 2002, par. 37, and International Court of Justice, *Avena and Other Mexican Nationals (Mexico v. United States of America)*. Judgment of March 31, 2004, par. 83. The following member states of the OAS are parties to this treaty: Argentina, Barbados, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, Suriname and Uruguay.

39 *Cf.* Advisory Opinion OC-21/14, *supra,* par. 54, and Advisory Opinion OC-26/20, *supra,* par. 41.

40 *Cf.* Advisory Opinion OC-16/99, *supra,* par. 114, and Advisory Opinion OC-25/18, *supra,* par. 41.

46. Regarding the scope of Article 26 of the American Convention in conjunction with Articles 1(1) and 2 thereof, this Court has interpreted that the American Convention incorporated into its list of protected rights the so-called economic, social, cultural and environmental rights (ESCER), by derivation from the norms recognized in the OAS Charter, and also the rules of interpretation established in Article 29 of the Convention itself. This construct makes it possible to exclude or limit the enjoyment of the rights established in the American Declaration and even those recognized by domestic law. Furthermore, based on a systematic, teleological and evolutive interpretation, the Court has resorted to the national and international *corpus juris* on the matter to give specific content to the scope of the rights protected by the Convention, in order to derive the scope of the specific obligations relating to each right.[41]

47. To identify rights that could be derived through interpretation of Article 26 of the American Convention, it should be understood, for the purposes of this advisory opinion, that the article points directly to economic and social norms as well as provisions on education, science and culture contained in the OAS Charter as reformed by the Protocol of Buenos Aires. The Court finds, based on a reading of the Charter, that Article 45 contains foundational legal principles on the right to freedom of association, the right to collective bargaining, and the right to strike, under which the OAS Member States assume the obligation to devote their maximum efforts to the implementation of this right, "convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace."[42] The Court particularly points to subparagraphs (c) and (g) of the article, which read:

> (c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws;
>
> (g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business, neighborhood, and community associations to the life of the society and to the development process[.]

48. The Court accordingly deems that the reference is sufficiently specific regarding the rights to freedom of association, collective bargaining and to strike to infer that they are present and recognized in the OAS Charter. It therefore holds that these rights are protected under Article 26 of the Convention, whose scope should be defined in light of international *corpus juris*. The Court recalls that the obligations contained in Articles 1(1) and 2 of the American Convention constitute, ultimately, the basis for determining the international responsibility of a state for violations of the rights recognized in the Convention, including those recognized in light of Article 26.[43] Nevertheless, the Convention itself refers explicitly to the norms of international law for its interpretation and application, specifically in Article 29, which establishes the *pro persona* principle.[44] Thus, drawing on

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41 *Cf. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2017. Series C No. 340, par. 141 to 149, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 15, 1989. Series C No. 407, par. 153.

42 OAS Charter, *supra*, article 45(b).

43 *Cf. Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 22, 2019. Series C No. 395, par. 65, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, par. *156.*

44 C*f. Case of the Pacheco Tineo family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 25, 2013. Series C No. 272, par. 143, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, par. 157.

its recurring practice,[45] the Court can interpret obligations and rights contained in these articles in light of other applicable treaties and standards.[46]

49. Consequently, the Court will use the sources, principles and criteria of the international *corpus iuris* as special standards applicable to determine the content of the right to freedom of association, the right to collective bargaining, and the right to strike. The Court holds that the use of these standards to determine the rights in question will serve to supplement the provisions of the Convention, which is the point of departure for the analysis in this chapter. It assures that it is not assuming jurisdiction over treaties for which it holds none, nor is it placing the Convention over and above the provisions of other national or international instruments on ESCERs.[47] To the contrary, the Court will develop its interpretation in keeping with the provisions of Article 29 and the practice in its case law, and by this means will keep current the meaning of the rights derived from the OAS Charter that are recognized in Article 26 of the Convention.

50. In examining the right to freedom of association as regards trade unions, the right to collective bargaining, and the right to strike, it will also place particular emphasis on the American Declaration, because as this Court has previously held:

> […] the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.[48]

51. Similarly, this Court has indicated on other occasions that human rights treaties are living instruments, the interpretation of which must evolve with the times and current circumstances (*supra*, par. 44). This evolutionary interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention and in the Vienna Convention.[49] Moreover, paragraph three of Article 31 of the Vienna Convention authorizes the use of certain means of interpretation including agreements, practice, or relevant rules of international law that the states have asserted on the subject covered by the treaty; these are methods associated with an evolutionary vision of the treaty. Thus, in order to determine the scope of the right to freedom of association, the right to collective bargaining, and the right to strike, as can be derived from the economic and social norms and the rules on education, science and culture found in the OAS Charter and the Protocol of San Salvador, and in the interpretation being performed for this advisory opinion, the Court will draw on applicable instruments from international *corpus juris*.

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[45] *Cf. Case of Gelman v. Uruguay. Merits and Reparations.* Judgment of February 24, 2019. Series C No. 221, par. 78 and 121; *Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs.* Judgment of February 24, 2019. Series C No. 239, par. 83; *Case of the Pacheco Tineo family v. Bolivia, supra*, par. 129; *Case of I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 30, 2016. Series C No. 329, par. 168; *Case of Lagos del Campo v. Peru, supra*, par. 145; *Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs.* Judgment of March 8, 2018. Series C No. 349, par. 103; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2018. Series C No. 359, par. 100; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 21, 2019. Series C No. 394, par. 158, and *Case of Hernández v. Argentina, supra*, par. 65, *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, par. 157.

[46] *Cf. Case of Muelle Flores v. Peru, supra*, par. 176, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, par. 157.

[47] *Mutatis mutandi, Cf. Case of the Pacheco Tineo family v. Bolivia, supra*, par. 143, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *supra*, par. 157.

[48] Advisory Opinion OC-10/89, *supra*, par. 43.

[49] *Cf*. Advisory Opinion OC-16/99, *supra*, par. 114, and *Case of Hernández v. Argentina, supra*, par. 67.

52. In the framework of this advisory opinion, the Court deems it useful to emphasize that, although its task is not to offer a direct interpretation of the various international instruments of labor law, there can be no question that the principles, rights and obligations contained therein contribute decisively to setting the scope of the American Convention. In addressing the matter brought for consultation, the Court will therefore consider additional sources of international law, most particularly, the conventions, recommendations, and other relevant instruments, as well as opinions and recommendations from the ILO Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations, to develop a harmonious interpretation of international obligations established under these conventions. The Court will also consider the applicable obligations and the case law and relevant decisions handed down by other bodies, as well as resolutions, pronouncements and declarations on the subject that have been adopted nationally or internationally.

53. Accordingly, then, in its reply to this consultation, the Court will stand as a human rights court guided by the standards that govern its advisory jurisdiction and proceed with a strictly legal analysis of the matters brought before it, abiding by international human rights law and taking into account the relevant sources of international law. It should be clarified in this regard that the *corpus juris* of international human rights law is made up, first, of a body of rules expressly set forth in international treaties or assembled through international customary law as evidence of a practice generally accepted as law, and second, of general principles of law and an array of provisions of a general nature, known as "soft law," that serve as a guide for interpreting the former, as they lend greater specificity to the minimum content set forth in conventions.[50] Naturally, the Court will base its decision on its own case law because, as should be expected, it is the "final arbiter of the American Convention."

54. Now, in view of these considerations, the Court will proceed to verify the following: (a) the content of the right to organize, the right to collective bargaining, and the right to strike; (b) the specific questions brought by the Inter-American Commission; (c) the relationship between these rights and the right to freedom of expression, right of assembly and freedom of association, as well as their consequences for the substance of the right to work and the right to fair, equitable, satisfactory conditions of work; and (d) the possibility that protections created under domestic law could be abrogated *in peius* through collective bargaining.

B. The right to freedom of association as regards trade unions

55. As noted above, Article 45, subparagraphs (c) and (g) of the OAS Charter expressly states that employers and workers may freely associate for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike. Moreover, Article XXII of the American Declaration recognizes every person's right to "associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature."[51] The right to freedom of association has also been recognized by a variety of regional instruments additional to the OAS Charter and the American Declaration. These instruments, adopted by the American states and as discussed below, understand freedom of association as a human right and highlight its importance to improve standards of living for workers.

56. The declaration of the social principles of the Americas, adopted in 1945 by the Inter-American Conference on the Problems of War and Peace, recommended to the states that they recognize the

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50 *Cf.* Advisory Opinion OC-24/17, *supra*, par. 60.

51 American Declaration *supra*, Article XXII.

workers' right of association, collective bargaining and the right to strike.[52] The Inter-American Charter of Social Guarantees, adopted at the Ninth International Conference of American States in 1948, set down the fundamental principles that must protect workers of all kinds and that constitute the minimum rights workers must enjoy in the American states, including the right to "associate freely for the defense of their particular interests, forming occupational associations and labor unions that, in turn, may join together in confederations. The same instrument recognizes the right of associations to hold legal status and be protected in the exercise of their rights. It provides for workers to have the right to strike and that the law shall recognize and regulate employment contracts and collective agreements."[53]

57. In the sphere of treaty law in the inter-American system, Article 8 of the Protocol of San Salvador addresses the system for protection of trade union rights as follows:

> **Article 8**
>
> **Trade Union Rights**
>
> 1. The States Parties shall ensure:
>
> a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;
>
> b. The right to strike.
>
> 2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.
>
> 3. No one may be compelled to belong to a trade union.

58. Likewise, freedom of association, as an inherent, inalienable right of all persons, has been recognized in both the universal system and the regional system as well as domestic jurisdictions of the states.

59. In the universal system, the Universal Declaration of Human Rights (hereinafter "Universal Declaration") recognizes in Article 23(4) that "Everyone has the right to form and to join trade unions for the protection of his interests."[54] The International Covenant on Civil and Political Rights (hereinafter also "ICCPR") recognizes in Article 22(1) that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."[55] Additionally, the International Covenant on Economic, Social and Cultural Rights

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[52] *Cf.* Declaración de Principios Sociales de América, adopted by the Inter-American Conference on the Problems of War and Peace, Mexico City, 1945, recommendation (g).

[53] *Cf. Inter-American Charter on Social Guarantees*, adopted at the Ninth International Conference of American States, Bogota, 1948, Articles 7, 26 and 27.

[54] United Nations. Universal Declaration of Human Rights, proclaimed by the United Nations on December 10, 1948, Article 23.

[55] United Nations. International Covenant on Civil and Political Rights, adopted on December 16, 1966, Article 22(1). The following member states of the OAS are parties to this treaty: Antigua and Barbuda, Argentina, Bahamas, Barbados,

(hereinafter also "ICESCR") goes into greater depth in Article 8 to outline trade union rights, as follows:[56]

> **Article 8**
>
> 1. The States Parties to the present Covenant undertake to ensure:
>
> (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
> (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
>
> (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
> (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
>
> 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
>
> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

60. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families follows similar lines in Article 26, establishing the obligation of the states to recognize the right of migrant workers and members of their families to "take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;" it also recognizes the right of workers and their families to "join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned."[57]

61. Moreover, the 1993 Vienna Declaration and Programme of Action declared support for all measures adopted by the United Nations and its relevant specialized agencies to ensure the effective promotion and protection of trade union rights, as stipulated in the ICESCR and other international

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Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, United States of America, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.

[56] United Nations. International Covenant on Economic, Social and Cultural Rights, adopted on December 16, 1966, Article 8. The following member states of the OAS are parties to this treaty: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.

[57] United Nations. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted on December 18, 1990, Article 26. The following member states of the OAS are parties to this treaty: Argentina, Belize, Bolivia, Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Paraguay, Peru, Saint Vincent and the Grenadines, Uruguay and Venezuela.

instruments. The Declaration then called on all states to abide fully by their obligations in this regard contained in international instruments.[58] The United Nations High Commissioner for Human Rights has stated, similarly, that trade union protection is a key factor in ensuring access to decent work and equality because unions can assist women workers, especially household, domestic or migrant workers, in claiming their labor rights. It added that there is an historic link between strong trade unionism and more equal societies.[59]

62. In the European regional system, the Court notes, for illustrative purposes, that Article 5 of the European Social Charter recognizes the "right to organize" for "ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations […]."[60] Also, Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "European Convention") enshrines every person's "right to freedom of assembly and association, including the right to form and to join trade unions for the protection of his interests;" it then sets forth the conditions under which the exercise of these rights may be regulated.[61] Along these lines, the European Court of Human Rights (hereinafter "the European Court") has held that significant delays in procedures for registering associations is a violation of freedom of association.[62]

63. The Court attaches particular significance to the content of the ILO Constitution that points to "recognition of the principle of freedom of association" as one of the means likely to improve the conditions of labor and guarantee universal and lasting peace.[63] ILO Convention No. 87 of 1948 reads as follows:[64]

> **Article 2**
>
> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.
>
> **Article 3**
>
> (1) Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

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58 *Cf.* Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, June 25, 2993, par. 77.

59 *Cf. Report of the Office of the United Nations High Commissioner for Human Rights. Realization of the right to work*, January 4, 2018, par. 53-56.

60 *Cf. Council of Europe*. European Social Charter, adopted October 18, 1961, Article 5.

61 *Cf.* Convention for the Protection of Human Rights and Fundamental Freedoms, adopted September 4, 1950, Article 11.

62 *Cf.* ECtHR, *Ismayilov v. Azerbaijan*, No. 4439/04, judgment of January 17, 2008, par. 48. The ESCR Committee agreed when it recommended that the state bring its legislation into line with Article 8 of the ICESCR and ILO Convention 87 by repealing provisions that do not allow "workers and workers' organizations to establish organizations of their own choosing, by eliminating the requirement of prior authorization by the Ministry of the Interior." *Cf.* Committee on Economic, Social and Cultural Rights. *Concluding observations on the third periodic report of Senegal*, November 13, 2019, par. 23.

63 Constitution of the International Labour Organisation, Preamble.

64 International Labour Organisation. ILO Convention 87, Freedom of Association and Protection of the Right to Organise adopted on July 9, 1948, Articles 2-5. The following member states of the OAS are parties to this treaty: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

(2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

64. ILO Convention 98 of 1949 regulates specific aspects of the right to organize and to collective bargaining, as follows:[65]

Article 1

(1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
(2) Such protection shall apply more particularly in respect of acts calculated to—
(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2

(1) Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
(2) In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article 5

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65 International Labour Organisation. Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949 (no. 98), Articles 1 and 2. The following member states of the OAS are parties to this treaty: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

> (1) The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
> (2) In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.
>
> **Article 6**
>
> This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

65. It is worth noting here that the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (*supra*, par. 41) recognizes that all members of the ILO, even if they have not ratified the conventions that the organization holds as fundamental, have an obligation to promote and to realize, in good faith, the essential principles which are the subject of those conventions, including "freedom of association and the effective recognition of the right to collective bargaining."[66]

66. The right to freedom of association not only enjoys broad recognition in the international *corpus juris*, but also has been enshrined in the constitutions and laws of OAS member states,[67] which was emphasized by those who submitted observations to this Court in the proceedings for this advisory opinion.[68] The Court would emphasize, as an illustration, the several states in this region that have set forth freedom of association in their constitutional order.

67. Article 14 of the Constitution of Argentina enshrines freedom of association in the following terms: "[a]ll inhabitants of the Nation enjoy the following rights in accordance with the laws regulating the exercise thereof: [t]o work and perform any lawful occupation; to petition the authorities; to enter, remain in, move through and depart from Argentine territory; to publish their ideas in the press free of prior censorship; to use and avail themselves of their property; to associate with others for useful purposes; to profess their faith freely; to teach and learn," and Article 14 bis states: "[w]ork in its different forms shall be protected by laws, which shall ensure workers […] free, democratic trade union organization, recognized via simple entry in a special registry. Trade unions are guaranteed the right to: enter into collective labor agreements; have recourse to reconciliation

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66 *Cf. ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, *supra*, Article 2.

67 *Cf. Constitución de la Nación Argentina,* Article 14 bis, and *Ley de Asociaciones Sindicales* No. 23551, Article 4; *Constitución Política del Estado Plurinacional de Bolivia,* Article 51, and *Ley General del Trabajo*, Article 99; *Constitución de la República Federativa del Brasil*, Article 8, *Código del Trabajo,* Article 511; *Constitución Política de la República de Chile,* Article 19, *Código del Trabajo*, Article 212; *Constitución Política de Colombia,* Article 39, and *Código Sustantivo del Trabajo,* Article 353; *Constitución Política de la República de Costa Rica*, Article 60 and *Código de Trabajo*, Article 341; *Constitución de la República de Ecuador,* Article 326.7 and *Código del Trabajo*, Article 440; *Constitución Política de El Salvador*, Article 47 and *Código de Trabajo*, Article 204; *Constitución Política de Guatemala*, Article 102 r; *Constitución de la República de Honduras*, Article 128, and *Código de Trabajo,* Articles 470 to 474; *Constitución Política de los Estados Unidos Mexicanos,* Article 123 A XVI and *Ley Federal del Trabajo*, Article 357; *Constitución Política de la República de Nicaragua*, Article 87 and *Código del Trabajo,* Articles 100 to 105; *Constitución Política de Panamá,* Article 68 and *Código del Trabajo*, Article 335; *Constitución de la República del Paraguay*, Article 96 and *Código del Trabajo*, Articles 64 and 67; *Constitución Política de Perú*, Article 28 and *Ley General del Trabajo*, Article 329; *Constitución Política de la República Dominicana,* articulo 62 and *Código del Trabajo de República Dominicana*, Article 318; *Constitución de la República Oriental del Uruguay*, Article 57, and *Ley 17.940*; *Canadian Charter of Rights and Freedoms,* Article 2, and *Dunmore v. Ontario (Attorney General)*, par. 37.

68 *Cf.* Argentine Republic (file of written observations, folios 2690 to 2756); Plurinational State of Bolivia (file of written observations, folios 2761 to 2783); Republic of Costa Rica (file of written observations, folios 1023 to 1082); State of El Salvador (file of written observations, folios 28 to 35); State of Honduras (file of written observations, folios 215 to 230); and State of Nicaragua (file of written observations, folios 1 to 26).

and arbitration; the right to strike. Union representatives shall enjoy the necessary guarantees to comply with their responsibilities for the trade union and for stability in their employment."[69]

68. Article 51 of the Constitution of the Plurinational State of Bolivia says, "[a]ll workers have the right to organize into unions in accordance with the law," and recognizes that the state "shall respect union principles of unity, trade union democracy, political pluralism, self-support, solidarity and internationalism;" it recognizes "union organization as a means for defense, representation, assistance, education and culture for workers in both rural and urban settings;" it provides that the state "shall respect the ideological and organizational independence of unions" [and that] "[t]rade unions shall have their own legal status by the mere fact of organizing and being recognized by their central bodies." It provides protection for the assets of union organizations and grants job protection for union leaders, who "may not be dismissed until one year following completion of their leadership positions, their social rights shall not be impinged upon, nor may they be subject to persecution or incarceration for actions performed as part of their union work;" it also recognizes the right of workers to organize to defend their interests.[70]

69. The Constitution of Costa Rica contains several provisions for protecting the freedom of association. Article 25 states, "[i]nhabitants of the Republic have the right to associate for lawful purposes. No one may be obliged to take part in any association;" Article 60 says, "[b]oth employers and workers may freely organize for the exclusive purpose of obtaining and preserving economic, social and occupational benefits […];" Article 61 "[r]ecognizes the employers' right of lockout and the workers' right to strike, except in public services, so long as participants are found to be acting in accordance with the law and in keeping with regulations established by law, which must disqualify any act of coercion or violence;" Article 62 says that "[c]ollective labor conventions are legally binding if, under the terms of the law, they were agreed to between employers or employer associations, and legally organized labor unions."[71]

70. All this points to the conclusion that freedom of association, in addition to being a right enshrined in the domestic law of the states and in a variety of international human rights instruments, is a general principle of international law.

71. The human right of freedom to organize has been understood by the Court in the framework of protection of the right to freedom of association in the labor arena, as a right with both collective and individual connotations.[72] In the collective dimension, freedom of association protects the ability to constitute trade union organizations, and to set into motion their internal structure, activities and action program, without any intervention by the public authorities that could limit or impair the

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69 Constitución de la Nación Argentina, Articles 14 and 14 bis.

70 *Cf.* Constitución Política del Estado Plurinacional de Bolivia, Article 51.

71 *Cf.* Constitución Política de la República de Costa Rica, Articles 25, 60, 61 and 62. The Constitutional Chamber of the Costa Rican Supreme Court has interpreted that "Article 60 of the Constitution, inseparable from clause 25 thereof, establishes the right of workers and employers to associate together to obtain economic and social benefits, whether through labor unions or through business chambers. This right of association is inseparable from the freedom of subjects to join or withdraw from the group to which they belong, all this for the purpose of protecting the fundamental principle of freedom. *Cf.* Observations by the Republic of Costa Rica (file of written observations, folio 1030).

72 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs.* Judgment of February 2, 2001. Series C No. 72, par. 153-159; *Case of Huilca Tecse v. Peru. Merits, Reparations and Costs.* Judgment of March 3, 2005. Series C No. 121, par. 69-77; *Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 10, 2007. Series C No. 167, par. 144-146; *Entitlement of legal entities to hold rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador).* Advisory opinion OC-22/16 of February 26, 2016. Series A No. 22**, par. 87; and** *Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2017. Series C No. 340, par. 156-157.

exercise of the respective right.[73] In the individual dimension, this freedom means that each individual may determine, without any coercion whatsoever, whether he or she wishes to form part of the organization.[74] Moreover, in the framework of the protection of this right, the Court has held that the state must guarantee that people can freely exercise their freedom of association without fear of being subjected to any violence; otherwise, the ability of groups to organize themselves to protect their interests could be impaired.[75] Thus, labor-related freedom of association is not exhausted by the theoretical recognition of the right to form trade unions, but also corresponds, inseparably, to the right to use any appropriate means to exercise this freedom.[76]

72. Indeed, the Court has held that unions and their representatives enjoy specific protection for the proper performance of their functions because, as the Court has established in its case law,[77] and as can be observed in different international instruments (*supra* par. 56 to 65), including Article 8 of the Protocol of San Salvador, freedom of association in union matters is extremely important to defend the legitimate interests of workers and is included in the human rights *corpus juris*. Moreover, the importance that states have attached to union rights is reflected in the fact that Article 19 of the Protocol of San Salvador gives the Court competence to rule on violations of the state obligation to allow labor unions, federations and confederations to function freely.[78]

73. This Court has also ruled that, when Article 8 of the Protocol of San Salvador declares that the states "shall permit" trade unions to function freely, this means they should make it possible for these collective organizations to develop their own charters and bylaws, elect their representatives or manage their finances. As a result, associating together and creating other collective organizations also means they are entitled to perform these actions. Being entitled to operate entails the existence of full legal status for trade unions, federations and confederations. This has led the Court to conclude that the use of the term "permit" presupposes that trade unions, federations and confederations exist as legal entities separate from their members and have their own separate capacity, other than that of their members, to contract obligations and acquire and exercise rights, such as freedom to operate. This Court has further held that trade union organizations should have the right to associate together and form national federations and confederations and international trade union organizations.[79] The states must therefore adopt whatever measures are necessary within the domestic legal system to guarantee the right to freedom of association as regards trade unions, which includes legislative or other kinds of measures that may be necessary for the effective exercise of these rights, as set forth in Articles 1 and 2 of the Protocol of San Salvador.

74. In view of all this, and in light of Article 45, subparagraphs (c) and (g) of the OAS Charter and its relation to Article 26 of the Convention, and furthermore, in consideration of Article 29 of the Convention and Article 8 of the Protocol of San Salvador, this Court will now develop the following additional considerations regarding the content of the right to freedom of association as regards trade unions.

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[73] *Cf. Case of Baena Ricardo et al. v. Panama, supra,* par. 156, and *Case of Lagos del Campo v. Peru, supra*, par. 156.

[74] *Cf. Case of Baena Ricardo et al. v. Panama, supra*, par. 158, and *Case of Lagos del Campo v. Peru, supra*, par. 156-157.

[75] *Cf. Case of Huilca Tecse v. Peru, supra,* par. 77, and *Case of Lagos del Campo v. Perú, supra*, par. 156.

[76] *Cf. Case of Huilca Tecse v. Peru, supra,* par. 70., and *Case of Lagos del Campo v. Peru, supra*, par. 156.

[77] *Cf. Case of Baena Ricardo et al. v. Panama, supra*, par. 156, and *Case of Lagos del Campo v. Peru, supra*, par. 157.

[78] *Cf.* Protocol of San Salvador, *supra*, Article 19(6); Advisory Opinion OC-22/16, *supra*, par. 87, and *Case of Lagos del Campo v. Peru*, *supra*, par. 157.

[79] *Cf.* Protocol of San Salvador, *supra*, Articles 19(6); Advisory Opinion OC-22/16, *supra*, par. 91.

75. In the first place, the Court believes that the right of persons "to associate themselves freely for the defense and promotion of their interests," in the terms of Article 45(c) of the OAS Charter, includes the right to form trade unions, which in turn, includes the freedom to associate together to form a trade union, the right to join a trade union that has already been created, and the right to leave a trade union without discrimination. The right to form trade unions therefore must be guaranteed to workers in both the public and private sectors, including those who work in state-owned commercial enterprises. The Court reiterates, along these lines, that the principles of equality and freedom from discrimination in matters regarding trade unions are fully applicable for public-sector workers, because as the ILO Committee on Freedom of Association (hereinafter "Committee on Freedom of Association") has asserted, "It [is] indeed considered inequitable to draw any distinction in trade union matters between workers in the private sector and public servants, since workers in both categories should have the right to organize for the defence of their interests."[80] Accordingly, the states are under obligation to guarantee that worker associations in the public sector enjoy the same advantages and privileges as those of the private sector.[81]

76. Likewise, with respect to unionization rights in the armed forces, the Court agrees with the Committee on Freedom of Association that "the members of the armed forces who can be excluded should be defined in a restrictive manner[;...] workers should be considered as civilians in case of doubt."[82] The Court therefore cautions that, because the category of "members of the armed forces" should be given a restrictive interpretation, civilian employees of the armed forces, as well as those who work in military manufacturing establishments, the army bank, or civilians employed by the army, must have the right to form trade unions. In the event of uncertainty, workers should be considered civilians.[83]

77. Moreover, this Court cannot ignore the fact that members of the armed forces discharge duties entirely different from those of police personnel, given that the former must, above all, ensure national defense, while the latter safeguard public safety, which includes preventing crime and investigating or assisting in the investigation of crime. It must therefore be recognized that the police perform essentially civilian duties, although within certain necessary constraints inherent to their work, particularly regarding the right to strike, which must be limited because this is a particular class of workers who provide essential public services. In any case, the states must guarantee that police workers enjoy the right to organize to discuss together the conditions of their work, petition their supervisors and the authorities, and express themselves publicly using peaceful means, all of which is essential for them to develop their professional identity.

78. In the second place, regarding the objective scope of the right to freedom of association, the Court holds that this right compels the state to guarantee that no advance administrative authorization be required, as this would invalidate the exercise of the right of workers to create whatever trade unions they judge appropriate. Thus, the states must refrain from requiring permits

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[80] International Labour Organisation. Compilation of decisions of the Committee on Freedom of Association, Sixth Edition, 2018, par. 334. *Cf.* Committee on Freedom of Association, 348th report, case number 2516, paragraph 675; 362nd report, case number 2723, paragraph 840; and 370th report, case number 2926, paragraph 385 and case number 2961, paragraph 488.

[81] *Cf.* Compilation of decisions of the Committee on Freedom of Association, Sixth Edition, 2018, par. 339. *Cf.* Committee on Freedom of Association, 355th report, case number 2680, paragraph 887; 360th report, case number 2680, paragraph 59; 363rd report, case number 2680, paragraph 154; and 367th report, case number 2680, paragraph 65.

[82] Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 347.

[83] Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 348-350. *Cf.* Committee on Freedom of Association, 343rd report, case number 2432, par. 1027; 348th report, case number 2520, par. 1032; 349th report, case number 2520, par. 206; 353rd report, case number 2520, par. 188; 355th report, case number 2520, par. 111; case number 2273, par. 147, case number 2454, par. 1065; and 371st report, case number 2988, par. 841.

or authorizations concerning the content of bylaws for creating worker organizations.[84] Within these limits, states may still enact domestic legislation requiring certain simple formalities that may be necessary for founding and operating worker organizations, but such laws should not create conditions that make it difficult or impossible for the organizations to be founded freely, or require certain mandatory content for their charters or bylaws that may contradict the principles of freedom of association.[85] Along the same lines, any restrictions as may be introduced must serve the sole objective of "protecting the interests of members and guaranteeing the democratic functioning of organizations."[86] This Court also deems that the states should ensure that formal requirements for founding worker organizations may not be so detailed as to deter workers from setting up organizations, or require such a high number of members as to hinder their establishment.[87]

79. In the third place, the Court recalls that freedom of association includes the right of workers to create organizations of their own choosing, and to join these organizations and set up their internal structure. Therefore, workers must enjoy the right to create and join organizations of their own choosing, independent of those that may already exist in certain sectors.[88] Furthermore, the state must not prohibit the creation of more than one union in any occupational or economic sector, or in a single establishment, as this would entail a violation of the right to freedom of association.[89]

80. In the fourth place, the Court reiterates that freedom of association, in its individual dimension, presupposes that every person can determine without pressure whether or not to be part of the organization (*supra,* par. 71). The protection of this right requires the states to guarantee that workers and their representatives enjoy sufficient job protection against any act of coercion or discrimination, direct or indirect, that could undermine the exercise of their freedom of association. This protection against acts of anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment, in particular, transfers, suspensions, downgrades and other acts prejudicial to the worker.[90] This implies that workers must be able to

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[84] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 419. *Cf.* Committee on Freedom of Association, 357th report, case number 2701, paragraph 137; 367th report, case number 2944, paragraph 138; case number 2952, par. 876; and 370th report, case number 2961, paragraph 489.

[85] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 427-434. *Cf.* Committee on Freedom of Association, 340th report, case number 2439, paragraph 360, case number 2431, paragraph 923; 342nd report, case number 2441, paragraph 624; 354th report, case number 2672, paragraph 1137; 356th report, case number 2672, paragraph 1275; 357th report, case number 2701, paragraph 137; 359th report, case number 2751, paragraph 1043; 360th report, case number 2777, paragraph 779; 363rd report, case number 1865, paragraph 125; 365th report, case number 2840, paragraph 1057; 367th report, case number 2944, paragraph 138; 375th report, case number 2777, paragraph 39; and 376th report, case number 3042, paragraph 535.

[86] Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 563. *Cf.* Committee on Freedom of Association, 342nd report, case number 2453, paragraph 716; 358th report, case number 2740, paragraph 658; and 363rd report, case number 2740, paragraph 703.

[87] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 435. *Cf.* Committee on Freedom of Association, 376th report, case number 3042, par. 540.

[88] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 477. *Cf.* Committee on Freedom of Association, 365th report, case number 2516, paragraph 685; and 378th report, case number 2952, paragraph 68.

[89] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 478. *Cf.* Committee on Freedom of Association, 346th report, case number 2523, paragraph 350. Specifically, the Committee on Freedom of Association has stated that the "principle of trade union pluralism is grounded in the right of workers to come together and form organizations of their own choosing, independently and with structures which permit their members to elect their own officers, draw up and adopt their by-laws, organize their administration and activities and formulate their programmes without interference from the public authorities and in the defence of workers' interests." Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 483. *Cf.* Committee on Freedom of Association, 359th report, case number 2807, paragraph 701; 360th report, case number 2508, paragraph 803; case number 2747, paragraph 838; and 363rd report, case number 2807, paragraph 720.

[90] Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1087. *Cf.* Committee on Freedom of Association, 349th report, case number 2580, paragraph 870, case number 2546, paragraph 1217; 351st report, case number 2566, paragraph 986; 353rd report, case number 2546, paragraph 242; 354th report, case number 2633, paragraph

avail themselves of their right, such that they are protected from all acts calculated to cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the employer's consent, during working hours.[91]

81. The Court therefore holds that the right of workers to belong to a union, by logical extension, entails the right to conduct union activities. The array of actions included in the right is broad in content and should be regulated in the bylaws of the union organizations, which should be developed by the members. Such activities may include, for example, attendance at union meetings, the right to express opinions, the right to receive or distribute information, the right to take part in decisions made at union meetings or assemblies, the right to elect union representatives, or the right to be elected as union representative. The state is also bound to safeguard the proper exercise of workers' union activities, preventing any action by authorities that could place constraints on the exercise of these rights, and adopting measures necessary for workers and their representatives to take an effective part in union activities in the establishments or agencies where they work.

82. The Court would also draw attention to ILO Convention 135, which recognizes that worker's representatives should be free to perform their task of representation effectively.[92] Article 2 of the same Convention provides, "[s]uch facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently." ILO Recommendation 143 provides for workers' representatives to be afforded facilities for them to carry out their functions, including sufficient time to conduct representation activities without fear of reprisal, and the ability to attend meetings or training courses; the possibility of access to all workplaces in the undertaking when necessary and to maintain communication with the management of the undertaking and with management representatives; and be authorized to collect trade union dues regularly and conduct other actions of communication and dissemination of union activities.[93]

83. In the fifth place, the Court holds that freedom of association recognizes the right of workers' organizations to regulate their union, the right to representation, the right to organize their own internal administration, and the right not to be dissolved by administrative measures. In this regard, the Court recalls that Article 3 of ILO Convention 87 states, "[w]orkers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes." It goes on to say, "public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."[94] Thus, member workers themselves are the ones who, through

719; 356th report, case number 2681, paragraph 1034; 362nd report, case number 2825, paragraph 1258; 372nd report, case number 3025, paragraph 154; 374th report, case number 2811, paragraph 367; and 376th report, case number 2892, paragraph 145.

91 Compilation of decisions of the Committee on Freedom of Association, supra, par. 1086; *Cf.* Committee on Freedom of Association, 355th report, Case number 2648, paragraph 960.

92 International Labour Organisation. Workers' Representatives Convention, 1971 (No. 135), Article 1. The article provides as follows: "[w]orkers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements." The following member states of the OAS are parties to this treaty: Argentina, Barbados, Belize, Brazil, Chile, Colombia, Costa Rica, Dominica, El Salvador, Guyana, Mexico, Nicaragua, Suriname and Uruguay.

93 *Cf.* International Labour Organisation. Workers' Representatives Recommendation, 1971 (No. 143), Articles 5-17.

94 ILO Convention No. 87, *supra*, Article 3.

internal mechanisms created for this purpose, should develop the regulations governing the administration and activities of trade unions[95]

84. With respect to the right to representation, the Court deems that trade union organizations should enjoy the right to elect their representatives in full freedom.[96] This right is a cornerstone for freedom of association, because it is through their representatives that organizations can perform independently and effectively to defend the workers. States must therefore avoid actions that would constrain or hinder workers from the exercise of this right, whether via legislative provisions or through actions by authorities. The workers themselves must be in charge of determining conditions of eligibility of leaders, including processes for reelection or the holding of elections per se, in compliance with regulatory and constitutional provisions. This is why, for example, as the Committee on Freedom of Association has asserted, laws that meticulously detail regulation of the trade union electoral process, fix the days on which meetings will take place, set the date for the general assembly or determine the date on which the mandates of trade union officers shall expire are incompatible with the right to freedom of association.[97]

85. The Court deems it necessary to recall that the Committee on Freedom of Association has made the following statements about admissible privileges for most representative organizations:

> The Committee has pointed out on several occasions, and particularly during discussion on the draft of the Right to Organize and Collective Bargaining Convention, that the International Labour Conference referred to the question of the representative character of trade unions, and, to a certain extent, it agreed to the distinction that is sometimes made between the various unions concerned according to how representative they are. Article 3, paragraph 5, of the Constitution of the ILO includes the concept of "most representative" organizations. Accordingly, the Committee felt that the mere fact that the law of a country draws a distinction between the most representative trade union organizations and other trade union organizations is not in itself a matter for criticism. Such a distinction, however, should not result in the most representative organizations being granted privileges extending beyond that of priority in representation, on the ground of their having the largest membership, for such purposes as collective bargaining or consultation by governments, or for the purpose of nominating delegates to international bodies. In other words, this distinction should not have the effect of depriving trade union organizations that are not recognized as being among the most representative of the essential means for defending the occupational interests of their

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[95] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 669. *Cf.* Committee on Freedom of Association, 359th report, case number 2753, paragraph 408; and 363rd report, case number 2753, paragraph 484. (1) The Committee also established the following standard on restrictions to this principle: "Legislative provisions which regulate in detail the internal functioning of workers' and employers' organizations pose a serious risk of interference by the public authorities. Where such provisions are deemed necessary by the public authorities, they should simply establish an overall framework in which the greatest possible autonomy is left to the organizations in their functioning and administration. Restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body so as to avoid any risk of excessive or arbitrary interference in the free functioning of organizations." Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 566. Committee on Freedom of Association, case number 2453, paragraph 716; 358th report, case number 2740, paragraph 658; and 363rd report, case number 2740, paragraph 703.

[96] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 585; *Cf.* Committee on Freedom of Association, 350th report, case number 2621, paragraph 1238; 355th report, case number 2642, paragraph 1162; 367th report, case number 2952, paragraph 876; 370th report, case number 2971, paragraph 225; and 374th report, case number 3034, paragraph 284.

[97] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, paragraph 594-595; Committee on Freedom of Association, 340th report, case number 2411, paragraph 1391; and 342nd report, case number 2422, paragraph 1036.

members, for organizing their administration and activities and formulating their programmes, as provided for in Convention No. 87.[98]

86. The Court also cautions that trade union organizations should enjoy the right to administer their own internal affairs without undue hindrance by the state and in line with the principles of freedom of association and democracy.[99] The guarantee of this right presupposes financial independence for these organizations, which implies that public authorities not enjoy discretionary powers over them;[100] that they be free to use their funds according to decisions by their authorities for the conduct of their normal activities;[101] that they be able to administer and invest their funds as they see fit, for normal and lawful trade union purposes; [102] and that they be able to decide whether they shall receive external funding for legitimate activities to promote and defend human rights of their workers.[103] The Court would add, on the matter of union dues, that if the right to freedom of association is to be fully effective, questions concerning the financing of trade union organizations, including the collection and distribution of dues among the various union structures, must be governed by union charters and bylaws. The state must therefore refrain from regulating such matters by constitutional or legal provisions.[104]

87. The Court further holds that the right to freedom of association protects trade union organizations from administrative dissolution such that they can only be dissolved voluntarily or through judicial channels.[105] Therefore, measures for suspension or dissolution by administrative authorities may constitute a violation of freedom of association, as would measures resulting in cancellation or removal of an organization from the register.[106] Moreover, no trade union may be suspended or dissolved on the premise that certain members, even in the framework of their union activities, may have committed illegal acts.[107] The Court agrees that dissolution of a trade union is a measure which should occur only in extremely serious cases, can profoundly prejudice freedom of association, and should happen only following a judicial decision so that workers' rights of due process and judicial protection may be fully guaranteed.[108]

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98 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 525; *Cf.* Committee on Freedom of Association, 343rd report, case number 2438, paragraph 226; 358th report, case number 2759, paragraph 520; 362nd report, case number 2843, paragraph 1487; 364th report, case number 2898, paragraph 910; 367th report, case number 2940, paragraph 257; 372nd report, case number 3007, paragraph 224; and 378th report, case number 3169, paragraph 349.

99 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 668. *Cf.* Committee on Freedom of Association, 376th report, case number 3113, par. 986.

100 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 680.

101 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 683.

102 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 706. *Cf.* Committee on Freedom of Association, 342nd report, case number 2453, paragraph 713; and 358th report, case number 2740, paragraph 654.

103 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 715.

104 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 687-689. *Cf.* Committee on Freedom of Association, 360th report, case number 2777, paragraph 778, and 372nd report, case number 2954, paragraph 96.

105 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 979; *Cf.* Committee on Freedom of Association, 363rd report, case number 2684, paragraph 564.

106 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 988. *Cf.* Committee on Freedom of Association, 348th report, case number 2520, paragraph 1031.

107 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 995. *Cf.* Committee on Freedom of Association, 344th report, case number 2169, paragraph 139.

108 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1002. *Cf.* Committee on Freedom of Association, 348th report, case number 2520, paragraph 1031, and 376th report, case number 3113, paragraph 990.

C. The right to collective bargaining

88. The 1944 Declaration of Philadelphia, concerning the aims and purposes of the International Labour Organisation, stated that one of its obligations was to achieve "the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures."[109] Under treaty law, in addition to the content outlined above (*supra* par. 47 and 48), the right to collective bargaining for worker organizations has been recognized in general terms in ILO Conventions 98 and 154,[110] and more specifically for public sector worker organizations, in ILO Convention No. 151.[111] Moreover, the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association has stated that freedom of association includes participation in collective bargaining and strikes as vehicles for workers to defend and promote their interests.[112]

89. ILO Convention 98 provides in Article 4 that the states shall take "measures appropriate to national conditions[...], where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."[113] ILO Convention 154, in turn, defines collective bargaining as "all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other," when the purpose is for "(a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations."[114]

90. ILO Convention 154 goes on, framing the obligation to adopt appropriate measures that will promote collective bargaining with the following aims: "(a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention; (b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention," which refers to working conditions and terms of employment, relations between employers and workers, and relations between employers or their organizations and one or more worker organizations; "(c) the establishment of rules of procedure agreed between employers' and workers' organisations should be encouraged; (d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules; (e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining."[115]

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109 Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), adopted on May 10, 1944, Article III(e).

110 *Cf.* ILO Convention No. 98, *supra*, Article 4, and International Labour Organisation. Convention concerning the Promotion of Collective Bargaining, 1981 (no. 154). The following member states of the OAS are parties to this treaty: Antigua and Barbuda, Argentina, Belize, Brazil, Colombia, Guatemala, Saint Lucia, Suriname and Uruguay.

111 *Cf.* International Labor Organization. Labour Relations (Public Service) Convention, 1978 (no. 151). The following member states of the OAS are parties to this treaty: Antigua and Barbuda, Argentina, Belize, Brazil, Chile, Colombia, El Salvador, Guyana, Peru, Suriname and Uruguay.

112 *Cf.* UN. Report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, *supra*, par. 95-98.

113 ILO Convention No. 98, *supra*, Article 4.

114 ILO Convention No. 154, *supra*, Article 2.

115 ILO Convention No. 154, *supra*, Articles 4 and 5.

91. The Court holds that the right to collective bargaining is an essential component of the freedom of association, as it addresses the means by which workers can be in a position to defend and promote their interests. Thus, in view of the provisions of ILO Conventions 98 and 154, the states should refrain from engaging in behaviors that would restrict trade unions from exercising their right to negotiate and seek to improve the living and working conditions for those they represent, which means that the authorities must refrain from intervening in negotiating processes. As the Committee on Freedom of Association has asserted, intervention by the state to limit collective bargaining violates the right of the organizations to manage their activities and formulate their programs.[116] Nonetheless, states should adopt measures to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.[117] Clearly, any provisions that prohibit trade unions from undertaking collective bargaining frustrate the purpose and contradict the content of the right to collective bargaining.[118]

92. This Court holds that systems of collective bargaining that extend exclusive rights to the most representative trade union, as well as those that allow multiple collective agreements to be concluded by a number of trade unions within a company, are both compatible with the principles of freedom of association.[119] Thus, legislation cannot be seen as contrary to freedom of association when it grants exclusive authorization to representative trade unions to sign collective agreements, sit on joint committees and participate in international events,[120] although in such cases, minority trade unions that have been denied the right to negotiate collectively should be permitted to conduct their activities and at least to speak on behalf of their members and represent them in the case of an individual claim.[121] Along these lines, the Committee on Freedom of Association has stated: "[...] where the law of a country draws a distinction between the most representative trade union and other trade unions, such a system should not have the effect of preventing minority unions from functioning and at least having the right to make representations on behalf of their members and to represent them in cases of individual grievances;"[122] and, "[s]ystems based on a sole bargaining

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116 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1431. *Cf.* Committee on Freedom of Association, 342nd report, case number 2447, paragraph 751; 444th report, case number 2502, paragraph 1020; and 365th report, case number 2820, paragraph 995.

117 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1231. *Cf.* Committee on Freedom of Association, case number 2460, paragraph 993; 349th report, case number 2481, paragraph 78; 350th report, case number 2602, paragraph 676; 356th report, case number 2611, paragraph 174; 358th report, case number 2704, paragraph 357; 362nd report, case number 2826, paragraph 1298; 363rd report, case number 2819, paragraph 538; 364th report, case number 2848, paragraph 426; 370th report, case number 2900, paragraph 627; and 371st report, case number 3010, paragraph 668.

118 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1249. *Cf.* Committee on Freedom of Association, 344th report, case number 2460, paragraph 989, and case number 2437, paragraph 1320.

119 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1351. *Cf.* Committee on Freedom of Association, 344th report, case number 2437, paragraph 1315; 356th report, case number 2691, paragraph 258; 358th report, case number 2729, paragraph 887; 362nd report, case number 2750, paragraph 933; 363rd report, case number 1865, paragraph 115; 364th report, case number 2881, paragraph 229; 367th report, case number 2952, paragraph 878; 370th report, case number 2971, paragraph 220; and 372nd report, case number 3024, paragraph 421.

120 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 526. *Cf.* Committee on Freedom of Association, 362nd report, case number 2843, paragraph 1487.

121 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 545. *Cf.* Committee on Freedom of Association, 340th report, case number 2351, paragraph 1347; 348th report, case number 2153, paragraph 23; 362nd report, case number 2805, paragraph 201, case number 2750, paragraph 933; 363rd report, case number 1865, paragraph 115; and 372nd report, case number 3007, paragraph 224.

122 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1387. *Cf.* Committee on Freedom of Association, 356th report, case number 2691, paragraph 258.

agent (the most representative) and those which include all organizations or the most representative organizations in accordance with clear pre-established criteria for the determination of the organizations entitled to bargain are both compatible with Convention No. 98."[123]

93. The Court also holds that public service workers should enjoy effective protection from all acts of discrimination against trade unions in connection with their employment, such that the state should give priority to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service.[124] This means that workers and their representatives must be able to participate fully and meaningfully in negotiation processes, and for this purpose, the state must provide workers with access to the information they need to familiarize themselves with the material necessary to conduct negotiations. This is particularly critical in wage negotiations, as in the context of economic stabilization, the states should give priority to collective bargaining as a means of determining the employment conditions of public servants, rather than adopting legislation to restrain wages in the public sector.[125] The Court also deems that no action is permissible if it entails requiring workers to belong to any particular organization of public service workers in order to keep their jobs, or firing them for taking part in union activities.

94. In view of all this, the Court would add as a corollary that the right to collective bargaining, an essential part of the freedom to organize, consists of various components, including at least the following: (a) the principle of freedom from discrimination for workers who are involved in union activities, as the guarantee of equality is a prior condition for negotiations between employers and workers; (b) freedom from direct or indirect interference by employers during the creation, operation and administration of workers' labor unions, as this could produce an imbalance in negotiations that would undermine the workers' objective of improving their living and working conditions through collective bargaining or other lawful means; and (c) progressively encouraging processes of voluntary negotiation between employers and workers aimed at improving working conditions through collective bargaining agreements.

D. The right to strike

95. The right to strike is one of the fundamental human rights of workers, and they can avail themselves of it even outside of their organizations. This is stated in Articles 45(c) of the OAS Charter (workers' right to strike) and 27 of the Inter-American Charter of Social Guarantees (workers have the right to strike); it is also stated, and deliberately placed separately from the rights of union organizations, in Articles 8(b) of the Protocol of San Salvador and 8(1)(d) of the ICESCR[126] (*supra,* par. 47 and 48, and 56 to 60). Otherwise, the negative dimension of freedom of association in the individual sense could be breached. It is also one of the leading rights of union organizations in general.

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123 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1360. *Cf.* Committee on Freedom of Association, 368th report, case number 2919, paragraph 651.

124 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1241. *Cf.* Committee on Freedom of Association, 343rd report, case number 2430, paragraph 361, and case number 2292, paragraph 794; 344th report, case number 2364, paragraph 91; 376th report, case number 3042, paragraph 560; 377th report, case number 3118, paragraph 177; and 378th report, case number 3135, paragraph 418.

125 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1492. *Cf.* Committee on Freedom of Association, 368th report, case number 2918, paragraph 362.

126 The placement of a provision can be a factor of considerable importance for interpretation purposes. *Cf. Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights). Advisory Opinion OC-7/86 of August 29, 1986.* Series A No. 7, par. 25, and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985.* Series A No. 5, par. 47.

96. The Court cautions that, although the right to strike is not expressly recognized in the ILO conventions, nonetheless, Article 3 of Convention 87 does recognize the right of worker organizations "in full freedom, to organise their administration and activities and to formulate their programmes" (*supra* par. 63). The Committee on Freedom of Association has accordingly recognized the importance of the right to strike as "an intrinsic corollary to the right to organize protected by Convention No. 87."[127] In both cases, the strike is a legitimate means for defending economic, social and occupational interests. It is a resource that workers use to apply pressure on their employers for correcting an injustice or for seeking solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.

97. The Court also notes that, in addition to being broadly recognized in international *corpus juris,* the right to strike has also been recognized in the national constitutions and laws of OAS member states.[128] It can thus be considered a general principle of international law.

98. The Committee on Freedom of Association, in general terms, understands a strike as "a temporary work stoppage (or slowdown) willfully effected by one or more groups of workers with a view to enforcing or resisting demands or expressing grievances, or supporting other workers in their demands or grievances."[129] The Court concurs with this definition and deems the right to strike to be one of the fundamental rights of workers and their organizations, as it is a legitimate means to defend their economic, social and occupational interests. It is a resource that workers use as a means to apply pressure on their employers for correcting an injustice or for seeking solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.[130] The European Court has ranked strikes as the "most powerful" instrument to protect labor rights.[131]

99. This Court holds that there are three categories of purposes or demands that can be expressed through strike and that are subject to protection: labor issues intended to improve working or living conditions for workers; trade union issues putting forward the collective demands of union organizations; and strikes seeking to challenge public policies.[132]

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127 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 754. *Cf.* Committee on Freedom of Association, 344th report, case number 2471, paragraph 891; 346th report, case number 2506, paragraph 1076, case number 2473, paragraph 1532; 349th report, case number 2552, paragraph 419; 354th report, case number 2581, paragraph 1114; and 362nd report, case number 2838, paragraph 1077.

128 *Cf. Constitución de la Nación Argentina,* Article 14 bis; *Constitución Política del Estado Plurinacional de Bolivia,* Article 53; *Constitución Política de Brasil*, Article 9; *Constitución Política de la República de Chile,* Article 16; *Constitución Política de Colombia,* Article 56; *Constitución Política de la República de Costa Rica*, Article 61; *Constitución de la República de Ecuador,* Article 35.10; *Constitución Política de El Salvador*, Article 48; *Constitución Política de Guatemala*, Article 104; *Constitución de la República de Honduras*, Article 128; *Constitución Política de los Estados Unidos Mexicanos,* Article 123 A XVIII; *Constitución Política de la República de Nicaragua*, Article 83, *Constitución Política de Panamá,* Article 69; *Constitución de la República del Paraguay*, Article 98; *Constitución Política de Perú*, Article 28; *Constitución Política de la República Dominicana,* Article 62.6, and *Constitución de la República Oriental del Uruguay*, Article 57, *Canadian Charter of Rights and Freedoms,* assented to in 1982, Article 2(b), and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, par.3.

129 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 783; *Cf.* Committee on Freedom of Association, 358th report, case number 2716, paragraph 862.

130 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 758; *Cf.* Committee on Freedom of Association, 344th report, case number 2496, paragraph 407; 353rd report, case number 2619, paragraph 573; 355th report, case number 2602, paragraph 668; 357th report, case number 2698, paragraph 224; 371st report, case number 2963, paragraph 236, case number 2988, paragraph 852; and 378th report, case number 3111, paragraph 712.

131 ECtHR, *Hrvatski Liječnički sindikat v. Croatia*, No. 36701/09, judgment of November 27, 2014, par. 59.

132 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 758 and 763. *Cf.* Committee on Freedom of Association, 344th report, case number 2509, paragraph 1247; 348th report, case number 2530, paragraph 1190; 351st report, case number 2616, paragraph 1012; 353rd report, case number 2619, paragraph 573; 355th report,

100. The Court also upholds the standard of legality as a key factor to determine whether the right to strike can be exercised. The Court deems, in this sense, that the states should adopt measures of domestic law as necessary to bring their legislation into line with the content of this right. In doing so, the states should consider that, even allowing for certain exceptions under international law, the legislation should protect the exercise of the right to strike for all workers. Thus, the preconditions and prior requirements allowed by law for a strike to be considered legal should not be so complicated as to render a legal strike impossible in practice. The obligation to give the employer advance notice before calling a strike is admissible, so long as the notice is reasonable.[133] The same is not true of the requirement to set a limit on the duration of a strike which, due to its nature as a last resort for the defense of workers' interests, cannot be predetermined.[134]

101. The Court also emphasizes that the power to declare a strike illegal should not lie with an administrative body; instead, it pertains to the judicial authority to make the determination, applying mandatory grounds stipulated in advance by the law, in keeping with the rights to judicial guarantees called for in Article 8 of the American Convention.[135] The Court also holds that the state must refrain from applying sanctions to workers who take part in a legal strike, which is a legitimate union activity and the exercise of a human right, and it must guarantee that no such sanctions be applied by private companies.

102. The Court deems, furthermore, that the exercise of the right to strike can be restricted or prohibited only in the case of: (a) public servants who serve as arms of public power and exercise authority on behalf of the state, and (b) workers in essential services.[136]

103. Workers who provide essential services should be so defined according to the strict sense of the term, that is, providing services whose interruption entails a clear and imminent threat to the life, safety, health or freedom of the whole or part of the population (for example, workers in the hospital sector, electricity services, or water supply services).[137] The Court also upholds the need for appropriate compensatory guarantees to be in place for those services considered essential and for

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case number 2602, paragraph 668; 360th report, case number 2747, paragraph 841; and 372nd report, case number 3011, paragraph 646.

133 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 799; *Cf.* Committee on Freedom of Association, 340th report, case number 2415, paragraph 1257; 344th report, case number 2509, paragraph 1246; 346th report, case number 2473, paragraph 1542; and 376th report, case number 2994, paragraph 1002.

134 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 815. *Cf.* Committee on Freedom of Association, 376th report, case number 2994, par. 1002.

135 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 910. *Cf.* Committee on Freedom of Association, 343rd report, case number 2355, paragraph 471; 348th report, case number 2355, paragraph 309, and case number 2356, paragraph 368.

136 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 830. *Cf.* Committee on Freedom of Association, 340th report, case number 1865, paragraph 751; 344th report, case number 2467, paragraph 578; 346th report, case number 2500, paragraph 324; 348th report, case number 2433, paragraph 48, case number 2519, paragraph 1141; 349th report, case number 2552, paragraph 421; 351st report, case number 2355, paragraph 361, case number 2581, paragraph 1336; 353rd report, case number 2631, paragraph 1357; 354th report, case number 2649, paragraph 395; 356th report, case number 2654, paragraph 370; 357th report, case number 2698, paragraph 224; 362nd report, case number 2741, paragraph 767, case number 2723, paragraph 842; 365th report, case number 2723, paragraph 778; 367th report, case number 2894, paragraph 335, case number 2885, paragraph 384, case number 2929, paragraph 637, case number 2860, paragraph 1182; 370th report, case number 2956, paragraph 142; 371st report, case number 3001, paragraph 211, case number 2988, paragraph 851; 372nd report, case number 3022, paragraph 614; 374th report, case number 3057, paragraph 213; 377th report, case number 3107, paragraph 240; and 378th report, case number 3111, paragraph 715.

137 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 836 and 840. *Cf.* Committee on Freedom of Association, 343rd report, case number 2355, paragraph 469; 346th report, case number case number 2488, paragraph 1328; 348th report, case number 2519, paragraph 1141; 349th report, case number 2552, paragraph 421; and 364th report, case number 2907, paragraph 670.

public services, as the restriction on the right to strike must be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.[138]

104. Also with regard to essential services, the Court would stress that the states must seek possible alternatives for cases where a minimum service could be an appropriate solution to avoid total prohibition of the strike while still guaranteeing users' basic needs or the safe operation of facilities providing a service considered "essential."[139] It would emphasize that such minimum services should be limited to operations necessary to meet the population's basic needs or minimum service requirements, with the guarantee that the scope of minimum services not be so expansive as to render the strike impossible. Negotiations on minimum services must take place before a labor conflict arises, so that all stakeholders (public authorities, worker organizations, and employer organizations) can remain as objective and clear-headed as possible.

105. Finally, this Court finds it allowable for states to set forth certain prior conditions that need to be met, as defined through the process of collective bargaining, before a decision is made to activate the mechanism of a strike to defend workers. Such conditions, however, should be reasonable and in no event should undercut the essential content of the right to strike or the autonomy of trade union organizations.[140]

E. On the specific questions raised by the Inter-American Commission

106. This Court reiterates that freedom of association, collective bargaining, and the right to strike are rights incorporated into Article 26 of the Convention, as they derive from Article 45, subparagraphs (c) and (g) of the OAS Charter (*supra,* par. 48). Although each one is a right on its own merits, this Court would stress that they are interdependent and indivisible.[141] As such, they are subject to the general obligations established in Articles 1(1) and 2 of the Convention, which set forth duties to respect and guarantee the rights recognized therein without discrimination, and to adopt measures under domestic law to give effect to those rights and freedoms.

107. The Court has repeatedly held, since its earliest judgments, that the first obligation assumed by the states parties under Article 1(1) is "to respect the rights and freedoms" recognized by the Convention. The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the state. The protection of human rights, particularly the civil and political rights set forth in the Convention,

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138 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 856. *Cf.* Committee on Freedom of Association, 340th report, case number 2415, paragraph 1256; 344th report, case number 2484, paragraph 1095; 349th report, case number 2552, paragraph 421; 350th report, case number 2543, paragraph 726; 353rd report, case number 2631, paragraph 1357; 356th report, case number 2654, paragraph 376; 359th report, case number 2383, paragraph 182; 367th report, case number 2885, paragraph 384, case number 2929, paragraph 637; 370th report, case number 2956, paragraph 142; and 371st report, case number 2203, paragraph 534.

139 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 867. *Cf.* Committee on Freedom of Association, 344th report, case number 2461, paragraph 313, case number 2484, paragraph 1094; 348th report, case number 2433, paragraph 48; 349th report, case number 2545, paragraph 1153; 350th report, case number 2543, paragraph 727; 354th report, case number 2581, paragraph 1114; 356th report, case number 2654, paragraph 371; 362nd report, case number 2741, paragraph 768, case number 2841, paragraph 1041; 371st report, case number 2988, paragraph 851; 372nd report, case number 3022, paragraph 614; and 377th report, case number 3107, paragraph 240.

140 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 789-790. *Cf.* Committee on Freedom of Association, 343rd report, case number 2432, paragraph 1026; 346th report, case number 2488, paragraph 1331; 357th report, case number 2698, paragraph 225; 359th report, case number 2203, paragraph 524; 371st report, case number 2988, paragraph 850; and 375th report, case number 2871, paragraph 231.

141 *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2009 Series C No. 198, par. 101, and *Case of Lagos del Campo v. Peru*, *supra,* par. 141.

is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. There are individual domains that are beyond the reach of the state or to which the state has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power.[142]

108. The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of states parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the states must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation. The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation—it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights. [143]

109. The Court has also held that Article 2 of the Convention establishes the general duty of the states parties to adapt their domestic legislation to the Convention's provisions, and thus to guarantee the rights enshrined therein. This implies the adoption of measures of two kinds. The first is to eliminate any norms or practices that in any way violate the guarantees provided under the Convention. The second is to promulgate norms and develop practices conducive to effective observance of those guarantees.[144] More specifically regarding the adoption of such measures, the Court has recognized that all authorities of a state party to the Convention have an obligation to perform a review against the Convention to ensure that the interpretation and application of national law is consistent with the state's international human rights obligations.[145]

110. Thus, with regard to the above discussion (*supra* par. 55 to 87), and in consideration of the questions raised by the Commission (*supra* par. 3), the Court cautions that the general obligations point to the conclusion that the states must adopt all necessary measures to respect and guarantee the full, effective exercise of the right to freedom of association in both the individual and collective dimensions. In the individual sphere, both workers and employers, without any distinction and without prior authorization, should enjoy the right to organize unions and join the one of their choosing to conduct any lawful union activity to defend and promote their interests, and to implement their internal structure, activities and programs of action, free of intervention by public authorities that could limit the exercise of the right, so long as they abide by the organization's own bylaws. In the exercise of this right, the state is under obligation to guarantee sufficient protection from acts of violence and anti-union discrimination for workers and their representatives, who must be able to enjoy the conditions necessary for the effective exercise of their trade union freedoms. Accordingly,

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142 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, par. 165, and C*ase of the Massacres of El Mozote and nearby places v. El Salvador. Merits, Reparations and Costs.* Judgment of October 25, 2012. Series C No. 252, par. 13.

143 *Cf. Case of Velásquez Rodríguez v. Honduras*, *supra*, par. 166 and 167, and *Case of Hermanos Landaeta Mejías et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 27, 2014. Series C No. 281, par. 214.

144 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs.* Judgment of May 30, 1999. Series C No. 52*,* par. 207, *and Case of Gorigoitía v. Argentina. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 02, 2019.* Series C No. 382, par. 55.

145 *Cf. Case of Radilla Pacheco v. México. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2009. Series C No. 209, par. 340, and Case of *Petro Urrego v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 8, 2020. Series C No. 406, par. 103.

any legal norms regulating the operation of unions must facilitate union autonomy and, to this end, be the fewest necessary to guarantee democratic operation of the union and to safeguard the interests of union members.

111. With respect to the right to strike (*supra* par. 95 to 105), the Court cautions that the states must respect and guarantee the possibility for this right to be exercised effectively by all workers without discrimination. They must therefore adopt any measures necessary to ensure that preconditions and advance requirements for calling a strike not become obstacles to the action. The state must also guarantee that workers be able to exercise their right to strike free of any sanctions by the particular employer or by the state itself. This means that states should repeal those criminal provisions that could be used to prosecute the exercise of the right to strike. In the case of workers lending essential services or whose duties entail exercising authority on behalf of the state, the list of essential services exempt from the exercise of the right to strike must be clearly defined in domestic legislation and conform to the provisions established by the ILO. Workers who perform these essential duties must also have mechanisms for mediation and arbitrage that provide them a means to obtain answers to their demands.

112. The Court also recalls that the obligation to guarantee sets the states specific duties to prevent, investigate and punish any violation of the rights recognized by the Convention and, if possible, restore the right violated and provide compensation as warranted for damages resulting from the violation (*supra* par. 108). With respect to freedom of association, the states must adopt all necessary political, administrative and cultural measures, with a gender perspective, to promote the safeguarding of freedom of association for trade unions, foster the strengthening of union organizations and the effectiveness of collective action, and ensure that if any violations should occur, they would be duly investigated in accordance with domestic legislation and in keeping with the seriousness of the incidents (*infra*, par. 168). As for actions by private parties to breach these rights, the state must adopt measures that will facilitate proper regulation, supervision and oversight of private companies. Along the same lines, this Court has held that, in compliance with their obligation to protect, the states must enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps.[146]

113. This is essential in the case of acts of violence committed against union leaders, especially threats to their life and personal safety. The Court has held that the right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. This is why states have the obligation to guarantee the creation of the conditions required for violations of this basic right not to occur and, in particular, the duty to prevent its agents from violating it.[147] The states have the obligation to adopt special measures for protecting the lives of union leaders, especially when they are engaged in their duties of representing workers in a context of violence, and thus allow them and the workers they represent to exercise their right to freedom of association. This Court has asserted that the execution of a trade union leader restricts not only the freedom of association of an individual, but also the freedom of a group to associate freely.[148] Similarly, the Committee on Freedom of Association has established that "freedom of association can only be

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[146] *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, par. 149 and 150, and Human Rights Council. Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, June 16, 2011, Principle No. 3.

[147] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, par. 144, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, par. 116.

[148] *Cf. Case of Huilca Tecse v. Peru. supra*, par. 69.

exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed."[149]

114. The Court emphasizes that the exercise of the right to freedom of association, the right to collective bargaining and the right to strike may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order for protecting public health or morals or the rights and freedoms of others. Any such restrictions set on the exercise of these rights, however, must be interpreted restrictively, applying the *pro persona* principle, and must never be stripped of their essential contents or reduced such as to deprive them of any practical value. It is essential to stress that, in the protection framework of the inter-American system, military or police personnel and public officers exercising duties of authority on behalf of the state or working in essential public services may be subject to special restrictions by the states in the exercise of their rights, under the terms established above (*supra* par. 76 and 102 and 103). In any case, restrictions, if they are to be consistent with the Convention, must pursue legitimate aims and be appropriate, and any measures invoked must be necessary and proportional.

115. The Court would likewise recall that Article 25(1) of the Convention mandates the states parties to guarantee that all persons under their jurisdiction must have effective recourse against acts that violate their fundamental rights,[150] including the rights to freedom of association, collective bargaining and the right to strike. If a remedy is to be effective, it must not only exist formally, but must also produce results or responses to violations of rights fixed in the Convention, in the national constitution, or in the laws.[151] This means that the remedy must fit the violation and must be applied effectively by the competent authority.[152] The Court has similarly held effectiveness of the remedy to mean that the analysis by the competent authority of a judicial recourse cannot be reduced to a mere formality; instead it must examine the reasons invoked by the claimant and make express statements regarding the same.[153] This does not suggest that the effectiveness of a remedy can be judged by whether it produces a result favorable to the petitioner.[154]

116. Furthermore, the Court has seen that some of the OAS member states have created a specialized jurisdiction to settle conflicts regarding the labor rights of workers, both individual and

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[149] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 82. *Cf.* Committee on Freedom of Association, 342nd report, case number 2203, paragraph 509; 343rd report, case number 2445, paragraph 896; 346th report, case number 2489, paragraph 461, case number 2528, paragraph 1437; 348th report, case number 2540, paragraph 813, case number 2254, paragraph 1323; 350th report, case number 2570, paragraph 269; 351st report, case number 2540, paragraph 894; 355th report, case number 2609, paragraph 863; 356th report, case number 2727, paragraph 1646; 358th report, case number 2727, paragraph 975; 359th report, case number 2540, paragraph 61, case number 2609, paragraph 630; 360th report, case number 2745, paragraph 1070; 363rd report, case number 2761, paragraph 427; 364th report, case number 2859, paragraph 551; 368th report, case number 2609, paragraph 484; 371st report, case number 2982, paragraph 700; 372nd report, case number 2254, paragraph 733; 374th report, case number 2254, paragraph 908; 375th report, case number 3070, paragraph 113; and 378th report, case number 2254, paragraph 843.

[150] *Cf. Case of Velásquez Rodríguez v. Honduras, Preliminary Objections.* Judgment of June 26, 1987. Series C No. 1, par. 91, and *Case of Romero Feris v. Argentina. Merits, Reparations and Costs.* Judgment of October 15, 2019. Series C No. 391, par. 134.

[151] *Cf. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, par. 24, and *Case of Rico v. Argentina. Preliminary objections and Merits.* Judgment of September 02, 2019. Series C No. 383, par. 88.

[152] *Cf.* Advisory Opinion OC-9/87, *supra*, par. 24, and *Case of Rico v. Argentina, supra*, par. 88.

[153] *Cf. Case of López Álvarez v. Honduras. Merits, Reparations and Costs.* Judgment of February 1, 2006. Series C No. 141, par. 96, and *Case of Amrhein et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs.* Judgment of April 25, 2018. Series C No. 354, par. 267.

[154] *Cf. Case of Velásquez Rodríguez v. Honduras, supra*, par. 67, and *Case of Romero Feris v. Argentina*, *supra*, par. 135.

collective.[155] In this particular regard, the Court emphasizes that access to labor justice requires a justice system bearing the following characteristics: (1) the right of workers to apply to competent judicial authorities to settle labor conflicts of any kind is inalienable, except in cases for which other means of conflict resolution have been provided by law; (2) a specialized jurisdiction to hear labor issues exclusively, based on the number of labor-related cases and petitions; (3) application of the gender perspective in settling labor disputes; (4) provision of a specialized procedure to address the specificities of labor issues; (5) features such as distribution of the burden of proof, weighing of evidence, and grounds for judicial decisions, based on principles that offset the inequalities proper to the world of work, such as the *in dubio pro operario* principle and the principle of favorability; (6) a labor justice system that is available free of charge; and (7) a guaranteed right to specialized defense.

117. The Court also emphasizes that two types of obligations deriving from recognition of the ESCERs are protected under Article 26 of the Convention: those that are enforceable immediately, and those that are realized progressively. Regarding the latter, that is, progressive realization of obligations, the Court reiterates what can already be found in its case law, that flexibility in the timetables and means whereby the state complies with its obligations of progressive realization according to Article 26 means, essentially although not exclusively, an obligation to act, that is, to adopt judicial decisions and lend the means and tools necessary to respond to demands for the effective exercise of the rights involved, to the degree that available economic and financial resources allow for compliance with this international commitment it has acquired.[156] Thus, the state may be asked to give an accounting of the progressive implementation of these measures, and if necessary, compliance with the commitment undertaken by the state can be demanded before the bodies called to judge human rights violations.

118. For the purposes of this advisory opinion, which addresses the exercise of a comprehensive freedom (freedom of association), two components—the right to negotiate freely with employers concerning working conditions, and the right to strike—are essential, and their exercise is not subject to any resource constraints the state may be facing; in other words, freedom of association, the right to collective bargaining and the right to strike are rights subject to immediate enforcement, while any expansion of these rights or measures to conform them to higher-order standards is progressive. All that is really needed from state authorities is to respect them and to refrain from any interference. This Court affirms that the principles of freedom of association allow domestic legislation on union negotiations to grant exclusive rights for the most representative labor union in the sector to enter into collective bargaining agreements, so long as this does not interfere with the operation of minority unions or deprive them of the right to raise their own demands on behalf of their members and represent them in instances of individual conflicts (*supra* par. 92).

119. Finally, the Court recalls that the Inter-American Commission submitted questions about the procedures that states should adopt to identify and remove the main risk factors that interfere with trade union rights, taking into account the nature and status of the employer.

120. The Court cautions, in this regard, that these rights should be guaranteed without distinction or prior authorization by the employer or any authority, whether the workers are in the private sector or the public sector (*supra* par. 75). ILO Convention 87 is clear when it states, "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the

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155 *Cf. Constitución Política de la República de Costa Rica*, Article 70, and *Código del Trabajo de Costa Rica,* Article 420; *Ley General del Trabajo*, Article 329; *Nueva Ley Procesal del Trabajo* (Peru), Ley No. 29497, Article II; *Código del Trabajo* (Guatemala), Article 283; *Código Procesal del Trabajo and la Seguridad Social* (Colombia), Decreto Ley 2158, Article 1; *Código del Trabajo* (Dominican Republic), Principio XIII; *Código Procesal del Trabajo* (Paraguay), Article 10.

156 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, par. 104, and *Case of de the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil , supra*, par. 172.

rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."[157] In the specific case of public sector employees, it is equally relevant to recall the content of ILO Convention No. 151 concerning working relations in the public service, stating, "[p]ublic employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment," as well as any acts of interference by a public authority in their establishment, functioning or administration.[158]

F. Relationships among freedom of association, right of assembly, freedom of expression, freedom to organize, and collective bargaining, and the consequences for the content of the right to work and to just, equitable, satisfactory conditions

121. Article 16(1) of the American Convention recognizes the right of all persons to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. This Court has held that the right of association means that individuals are able to create or take part in entities or organizations in order to act collectively to achieve very diverse purposes, provided they are legitimate.[159]. The Court has viewed that all those who are under the jurisdiction of the states parties have the right to associate freely with others, and that public authorities may not intervene to restrain or impede the exercise of this right; at issue is the right to gather together in the shared pursuit of a lawful purpose, and the state's corresponding negative obligation not to pressure or interfere in such manner as to alter or corrupt that purpose.[160] The Court has also observed that other positive obligations derive from freedom of association, preventing attacks against this freedom, protecting those who exercise it, and investigating violations of it; these positive obligations should be adopted even in the sphere of relations between individuals, should the case merit it.[161]

122. The Court recalls, along these lines, that the United Nations Guiding Principles on Business and Human Rights states, "[i]n meeting their duty to protect, states should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;[…]".[162] The Court went on to explain, in the *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, that states have the obligation to guarantee the rights recognized in the American Convention, which entails regulation, supervision, and oversight of working conditions, and the adoption of measures for implementing a systematic policy of regular inspections to verify that occupational health and safety conditions are in place.[163]

123. Therefore, and in view of the material cited above, this Court understands that the relationship between freedom of association and freedom to organize is both general and particular. The general sense recognizes the right of persons to create organizations and take collective action in pursuit of lawful ends, based on Article 16 of the American Convention, while the particular sense should be understood in terms of the specificity of the activity and the importance of purposes sought through

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157 *Cf.* ILO Convention No. 87, *supra*, Article 2.

158 *Cf.* ILO Convention No. 151, *supra*, Article 4.

159 *Cf. Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 6, 2009. Series C No. 200, par. 169, and *Case of Lagos del Campo, supra*, par. 155.

160 *Cf. Case of Baena Ricardo et al. v. Panama, supra,* par. 156, and *Case of Lagos del Campo*, *supra*, par. 155.

161 *Cf*. *Case of Huilca Tecse v. Peru, supra*, par. 76, and *Case of Lagos del Campo*, *supra*, par. 155.

162 *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, par. 172, and Human Rights Council. Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, June 16, 2011, Principle No. 3.

163 *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil, supra*, par. 287.

union activities, such as the specific protection derived from Article 26 of the Convention and Article 8 of the Protocol of San Salvador.

124. It should be noted, accordingly, that trade unions arise when workers need to take collective action to defend their interests, and they are thus a means to offset the power imbalance between workers and employers. The protective provisions for workers emerge specifically from the unequal relationship between the two parties and therefore protect workers, as the more vulnerable group.[164] The protection of freedom to organize plays an important social role because the work of trade unions and other worker and employer organizations provides a means to preserve or improve working and living conditions for workers, and the protection of this freedom therefore makes it possible to ensure the effective exercise of other human rights as well. Likewise, protection of the right to collective bargaining and the right to strike, as essential tools for the freedom of association and freedom to organize, is essential to provide for effective defense of workers' rights. So these rights are related to the right to work and the right to just, equitable, satisfactory conditions, serving as "a means to level the unequal relationship between workers and employers, thereby helping workers correct abuses and gain access to fair wages, safe working conditions and a collective voice."[165]

125. The Court warns, in the same vein, that multiple instruments addressing the right to work and the right to just, equitable, satisfactory working conditions constitute a broad conception of work, as the possibility for people to practice their vocation and be assured of a standard of living for themselves and their families. This conception is expressed in the Universal Declaration of Human Rights, which says, "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."[166] The American Declaration follows suit, saying, "[e]very person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit," and "[e]very person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family."[167] This provision is useful for defining the scope of Article 26 of the Convention, because "to this extent the American Declaration is for these states a source of international obligations related to the Charter of the Organization."[168]

126. Furthermore, Article 45(b) of the OAS Charter holds that work is "a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working"[169].

127. The Court also emphasizes that, as the ILO explained in the 1999 Report of the Director-General, "decent work" consists of the convergence of four strategic employment objectives: the promotion of rights at work; employment; social protection; and social dialogue.[170] It is also worth recalling that one of the Sustainable Development Goals adopted by the United Nations General Assembly in the resolution "Transforming Our World: The 2030 Agenda for Sustainable Development" is *promote sustained, inclusive and sustainable economic growth, full and productive employment*

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164 *Cf. Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 149.

165 *Cf.* UN. Special Rapporteur on the rights to freedom of peaceful assembly and of association, *supra*, par. 16.

166 Universal Declaration of Human Rights, *supra*, Article 23.

167 American Declaration of the Rights and Duties of Man, Article XIV.

168 *Cf.* Advisory Opinion *OC-10/89*, supra, par. 45

169 OAS Charter, *supra*, article 45(b).

170 *Cf.* International Labour Conference, Report of the Director-General: Decent Work. ILO, 1999.

and decent work for all (goal 8), and among its aims are "[b]y 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value," and "[p]rotect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment."[171]

128. The right to work encompasses a wide array of other rights recognized in various international Instruments. Of particular note in the inter-American system are those contained in Articles 6 and 7 of the Protocol of San Salvador, which read as follows:

> **Article 6**
> **Right to work**
> (1) Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.
> (2) The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.
>
> **Article 7**
> **Just, Equitable, and Satisfactory Conditions of Work**
> The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to:
> (a) Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction;
> (b) The right of every worker to follow his vocation and to devote himself to the activity that best fulfils his expectations and to change employment in accordance with the pertinent national regulations;
> (c) The right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority;
> (d) Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;
> (e) Safety and hygiene at work;
> (f) The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety, or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received;
> (g) A reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or of night work;
> (h) Rest, leisure and paid vacations as well as remuneration for national holidays.

129. The Court has given its view on various facets of the right to work, including the right to labor stability and the right to working conditions that safeguard worker safety, health and hygiene. Its findings on the right to labor stability in the private sector can be translated in principle into the following duties: (a) to adopt suitable measures for appropriate regulation and oversight of this right; (b) to protect workers and, through the competent bodies available for this purpose, to deter any denigrating conduct by employers, leading to unjustified dismissal; (c) in case of unjustified

[171] United Nations. Resolution 70/01. Transforming Our World: The 2030 Agenda for Sustainable Development, adopted by the General Assembly on 25 September 2015, Goal 8.

dismissal, to rectify the situation (whether by reinstatement or, if applicable, through compensation and other benefits provided for by domestic legislation, according to the worker's preference). Therefore, (d) the state should have effective grievance mechanisms for situations of unjustified dismissal, to guarantee access to justice and effective judicial protection of these rights. The Court has further noted that labor stability does not mean permanent, unrestricted job tenure. Instead, it means that this right is to be respected by, among other things, granting due guarantees of worker protection. Dismissal can occur for justified grounds, which implies that employers must demonstrate sufficient cause to adopt such a sanction with all due guarantees, and in such a case, the worker should be able to challenge the decision before domestic authorities empowered to verify whether the stated grounds are arbitrary or unlawful.[172]

130. The Court also found, in the *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil,* that the right to equitable and satisfactory conditions that ensure workplace safety, health and hygiene is a right protected by Article 26 of the Convention, given that Article XIV of the American Declaration points to the right to equitable, satisfactory working conditions when it says that all persons have "the right to work under proper conditions."[173] The Court found in this case that such rights must be guaranteed if workers are to perform their duties in adequate conditions of safety, hygiene and health that safeguard against occupational accidents, and this is especially relevant in the case of activities that involve significant risk to the life and integrity of workers. Also with particular reference to the case cited, the Court, in light of applicable legislation in Brazil, held that this right involves the adoption of measures to prevent or reduce work-related risks and occupational accidents; the obligation to provide adequate protection equipment for work-related hazards; the classification by the labor authorities of unhealthy and unsafe workplaces, and the obligation to oversee such conditions, also under the responsibility of the labor authorities.[174]

131. The Court reiterates that the right of freedom to organize, understood as an autonomous right and as a specific class of the right to freedom of association, is a right that empowers workers to defend their interests from employers and the state, and denying the exercise of this right jeopardizes the effective exercise of a broad array of recognized labor rights. Indeed, a guarantee of the right to freedom of association, with its component rights to collective bargaining and to strike, is the instrument by which workers are able to aspire to better working and living conditions. The Committee on Freedom of Association, addressing this subject, has stated that statutory limitations on collective bargaining dare not consistent with the principles of freedom of association, and in the long term, could only prove harmful and destabilize labor relations, as it deprives workers of a fundamental right and means of furthering and defending their economic and social interests.[175] In the same vein, the Special Rapporteur on the rights to freedom of peaceful assembly and of association has warned about the social and economic effects of an impaired right to association for workers, which "exacerbates global inequality, poverty, violence and child and forced labour, and directly contributes to problems such as human trafficking and slavery."[176]

132. The Court emphasizes the close connection among the freedom of expression, the right of assembly, and the rights to organize, to collective bargaining and to strike.

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172 *Cf. Case of Lagos del Campo*, *supra*, par. 149-150, and *Case of Dismissed Employees of Petroperú et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2017. Series C No. 344, par. 192.

173 *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil, supra*, par. 155 and 160.

174 *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil, supra*, par. 174.

175 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1422-1423. *Cf.* Committee on Freedom of Association, 372nd report, case numbers 2177 and 2183, paragraph 373; and 378th report, case numbers 2177 and 2183, paragraph 465.

176 UN. Special Rapporteur on the rights to freedom of peaceful assembly and of association, *supra*, par. 40.

133. Its case law has adopted a broad interpretation of the right to freedom of thought and expression as enshrined in Article 13 of the Convention. The Court has held that the article protects the right to seek, receive and impart information and ideas of all kinds, as well as to know and receive information and ideas disseminated by others.[177] In addition, it has indicated that freedom of expression has both an individual dimension and a social dimension and thus has concluded that a series of rights are protected under this article.[178] This Court has said that both dimensions are of equal importance and should be guaranteed simultaneously in order to give total effect to the right to freedom of expression in the terms of Article 13 of the Convention.[179] For the ordinary citizen, the right to know about other opinions and the information that others have is as important as the right to impart their own.[180] Consequently, in light of the two dimensions, freedom of expression requires, on the one hand, that no one may be arbitrarily hindered or prevented from expressing his or her own opinion and, thus, represents a right of each individual; while, on the other hand, it also signifies a collective right to receive any kind of information and learn about the opinions of others.[181]

134. The Court has held that the American Convention guarantees the right of freedom of expression to every individual, irrespective of any other consideration, so such guarantee should not be limited to a given occupation or group of individuals.[182] Thus, freedom of expression is indispensable for public opinion to develop in a democratic society. The Court has found that it is a *conditio sine qua non* in the workplace if trade unions, and generally, anyone who wishes to influence the collective, are to develop fully.[183] Similarly, freedom of expression is a necessary condition for worker organizations, including trade unions, to function and so to protect their labor rights and improve their conditions and legitimate interests, as without this right, such organizations would become ineffective and have no reason to exist.[184] The Court has also held that the obligation to guarantee Convention-based rights entails positive obligations for the state to protect rights, even in the private sphere.[185]

135. This is why the Court has clearly stated that the issuing of information about the workplace environment is generally a matter of public interest and therefore is protected by freedom of expression.[186] Opinions or information can be seen as holding public interest if they involve matters about which society has a legitimate interest to be informed, in order to be aware of anything that bears on the performance of the state or impacts on general interests or rights, or of anything having

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177 *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29, American Convention on Human Rights). Advisory Opinion OC-5/85, November 13, 1985.* Series C No. 5, par. 30, and Case of Lagos del Campo, supra, par. 89.

178 *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, OC-5/85, supra*, par. 31 and 32, and *Case of Lagos del Campo*, *supra*, par. 89.

179 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al) v. Chile. Merits, Reparations and Costs.* Judgment of February 5, 2001. Series C No. 73, par. 67, and Case of Lagos del Campo, supra, par. 89.

180 *Cf. Case of "The Last Temptation of Christ" v. Chile, supra,* par. 66, and *Case of Lagos del Campo*, *supra*, par. 89.

181 *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, OC-5/85, supra*, par. 30, and *Case of Lagos del Campo*, *supra*, par. 89.

182 *Cf. Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs.* Judgment of January 27, 2009. Series C No. 193, par. 114, and *Case of Lagos del Campo*, *supra*, par. 90.

183 *Cf.* Advisory Opinion OC-5/85*, supra*, par. 70, and *Case of Lagos del Campo*, *supra*, par. 90.

184 *Cf. Case of Lagos del Campo*, *supra*, par. 91, and ECtHR, *Case of Vereinigung Demokratischer Soldaten Osterreichs and Gubi v. Austria*, No. 15153/89. Judgment of December 19, 1994, and ECtHR, *Case of Palomo Sánchez et al. v. Spain, [GS]* No. 28955/06, 28957/06, 28959/06 and 28964/06. Judgment of September 12, 2011, par. 56.

185 *Cf. Case of Velásquez Rodríguez v. Honduras.* Merits, *supra,* par. 166, and *Case of Lagos del Campo*, *supra*, par. 92.

186 *Cf. Case of Lagos del Campo*, *supra*, par. 111.

significant consequences.[187] This is why the general arena of protecting the right to freedom of thought and expression is particularly applicable in workplace contexts, where the state must not only respect this right, but also guarantee it, so that workers or their representatives can exercise it. If a particular case holds special general or public interest, therefore, protection of the freedom of expression needs to be even stronger, especially for those who hold positions of representing workers.[188]

136. The Court also recalls that, in keeping with Article 13 of the Convention, the right to freedom of expression protects people's right of access to information. The right of everyone to obtain information is supplemented by a correlative positive obligation of the state to provide this information, so that the individual may have access to receive and assess it.[189] Similarly, the Court warns that workers must have access to all the public information they may need to exercise their trade union rights, including the right to collective bargaining. The right of access to information thus becomes instrumental, a means to obtain satisfaction of other human rights, and for the purposes of this advisory opinion, the right to collective bargaining. The Court also agrees with the Committee on Freedom of Association that freedom of opinion and expression constitutes one of the basic civil liberties essential for the normal expression of trade union rights.[190] The freedoms of opinion and expression, in the words of the Human Rights Committee, "form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association […]."[191]

137. In the view of this Court, the existence of a free flow of information, ideas and opinions is fundamentally important for the exercise of trade union rights and the right to collective bargaining, and therefore, the authorities' threatening to press criminal charges in response to legitimate opinions of trade union representatives may have an intimidating and detrimental effect on workers and employers alike.[192]. It is therefore arbitrary to use detention or incarceration as punishment for the legitimate exercise of the right to freedom of opinion and expression, the right of assembly and the right to freedom of association. The Court also deems that in the framework of this relationship among rights, trade union organizations must enjoy the right to choose their own identifying materials (such as an insignia, flags, bulletin boards or leaflets), as well as the means by which they are displayed and distributed.[193] Accordingly, the publication and distribution of news and information of interest to trade unions are encompassed in the right to freedom of expression, such that the application of measures designed to control union publications and means of information may involve serious interference by administrative authorities.[194]

138. Similarly, the European Court has held, "members of a trade union must be able to express to their employer the demands by which they seek to improve the situation of workers in their

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187 *Cf. Case of Tristán Donoso v. Panama*, supra, par. 51, and *Case of Lagos del Campo*, *supra*, par. 110.

188 *Cf. Case of Lagos del Campo*, *supra*, par. 96.

189 *Cf. Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs.* Judgment of September 19, 2006. Series C No. 151, par. 77, and *I.V. v. Bolivia*, *supra*, par. 156.

190 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 233. *Cf.* Committee on Freedom of Association, 349th report, case number 2546, paragraph 1215.

191 Human Rights Committee. *General Comment No. 34. Article 19. Freedoms of opinion and expression,* September 12, 2011, par. 4.

192 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 237; *Cf.* Committee on Freedom of Association, 373rd report, case number 3002, paragraph 73.

193 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 254. *Cf.* Committee on Freedom of Association, 374th report, case number 2946, par. 244.

194 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 260; *Cf.* Committee on Freedom of Association, 351st report, case number 2566, paragraph 987.

company," such that a "trade union that does not have the possibility of expressing its ideas freely in this connection would indeed be deprived of an essential means of action."[195] Trade union expression, it added, based on Recommendation No. 143 on worker representatives (ILO, 1971), "may take the form of news sheets, pamphlets, publications and other documents of the trade union whose distribution by workers' representatives acting on behalf of a trade union must therefore be authorised by the management" of the company.[196] As the Court has held in the past, the sphere of protection of the right to freedom of thought and expression is particularly applicable to workplace contexts, and thus requires a higher degree of protection for freedom of expression for worker representatives.[197]

139. This Court would recall that the American Convention also addresses the right of assembly, stating in Article 15, "[t]he right of peaceful assembly, without arms, is recognized." The Court has held this right to cover both private assemblies and assemblies in public spaces, whether they are held in one place or include marches. The possibility of demonstrating publicly and peacefully is one of the most accessible ways of exercising the right to freedom of expression, through which the protection of other rights can be demanded. Therefore, the right of assembly is a fundamental right in a democratic society and should not be interpreted restrictively.[198] The Human Rights Committee has held that the right of peaceful assembly has an intrinsic value and is, "moreover, often exercised with the aim of advancing the implementation of other human rights,"[199] among which, this Court would particularly point to freedom of association, the right to collective bargaining, and the right to strike. Thus, "the duty to respect and ensure the right of peaceful assembly derives its legal justification also from the importance of the broader range of other rights, norms and principles whose implementation it advances."[200] The Court has also stated that the right to protest or to demonstrate discontent with a state action or decision is protected by the right of assembly.[201]

140. In this same regard, the Court notes that the right of assembly, as a right that protects people's ability to gather together, is essential to the exercise of freedom of association and freedom to organize and a crucial factor for trade unions to be able to conduct their activities. In the words of the Committee on Freedom of Association, "[f]reedom of assembly and freedom of opinion and expression are a sine qua non for the exercise of freedom of association."[202] The Court holds, similarly, that trade unions must enjoy the right to hold their meetings without the need to communicate the agenda to the authorities, as this would run counter to the principle of freedom of association.[203] Unions should have the right to hold meetings in their premises to discuss occupational questions, without interference by the authorities, unless public order is disturbed thereby or its

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195 *Case of Palomo Sánchez et al. v. Spain,* ECtHR, *supra*, par. 56.

196 *Case of Palomo Sánchez et al. v. Spain*, ECtHR, *supra*, par. 56.

197 *Cf. Case of Lagos del Campo*, *supra*, par. 96, and ECtHR, Case of Csánics v. Hungary, No. 12188/06. Judgment of January 20, par. 44.

198 *Cf. Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs.* Judgment of October 5, 2015. Series C No. 302, par. 167, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 28, 2018. Series C No. 371, par. 171. *Cf.* ECtHR, *Case of Ezelin v. France,* No. 11800/85. Judgment of April 26, 1991, par. 53.

199 Human Rights Committee. *General Comment Nº. 37. Right of peaceful assembly (article 21),* September 17, 2020, par. 102.

200 Human Rights Committee. *General Comment Nº. 37. Right of peaceful assembly (article 21), supra,* par. 102.

201 *Cf. Case of Women Victims of Sexual Torture in Atenco v. Mexico*, *supra*, par. 171.

202 Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 205. *Cf.* Committee on Freedom of Association, 362nd report, case number 2723, paragraph 839.

203 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 202. *Cf.* Committee on Freedom of Association, 344th report, case number 2456, paragraph 278; 348th report, case number 2516, paragraph 678; and 374th report, case number 3032, paragraph 418.

maintenance seriously and imminently endangered.[204] The states must therefore refrain from adopting any provisions concerning the presence of agents of the state as a condition for holding union meetings.[205]

141. This Court cautions that the rights to freedom of expression, freedom of assembly and freedom of association, and their relationship to trade union rights and the right to collective bargaining and to strike are fundamental rights for workers and their representatives to organize and to express their specific grievances about working conditions and thus effectively represent their interests to their employer, and even to take part in matters of public interest with a collective voice. The states have the duty to respect and guarantee these rights, which provide a means to level the unequal relationship between workers and employers, and provide access to fair wages and safe working conditions.[206] Similarly, the Court recalls that human rights are interdependent and indivisible, such that the effectiveness of the exercise of certain rights depends on the effectiveness of the exercise of other rights. Civil and political rights and economic, social, cultural, and environmental rights must therefore be understood comprehensively as human rights, all having equal rank and enforceable in all cases before competent authorities.[207]

142. As for the specific concerns to be considered when women exercise the rights to organize, this Court has held that Article 1(1) of the Convention is a rule general in scope which applies to all the provisions of the treaty,[208] and therefore, it includes Article 26 of the Convention. There is no question, in this sense, that any type of conduct that could be considered discriminatory regarding the exercise of trade union rights by women is expressly prohibited. The Court cautions, nonetheless, that the states must adopt whatever positive measures are necessary to reverse or change discriminatory situations, and the states are therefore bound to progress toward a situation of true equality between men and women in the exercise of trade union rights (*infra* par. 157). This is justified by the continuing presence of gender roles and stereotypes,[209] both in the public arena and in the private sector, that stand as a barrier to the full exercise of these rights. Moreover, given that collective bargaining and strikes are the mechanisms that empower women to overcome structural discrimination in the workplace, respect for and guarantee of these rights is essential to improve their living and working conditions. Because this issue is so complex, and in view of the questions that have been brought by the Inter-American Commission, the Court will address the implications of the right to equality and non-discrimination in a separate section of this advisory opinion (*infra* par. 151).

G. The possibility that protections established by law could be abrogated *in peius* through collective bargaining

143. The Inter-American Commission has asked whether it is "possible to allow the protections established by law to be derogated 'in peius' by collective bargaining." The Court will reply to this

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204 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 203. *Cf.* Committee on Freedom of Association, 362nd report, case number 2723, paragraph 839; 365th report, case number 2723, paragraph 775; and 378th report, case number 3032, paragraph 393.

205 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 207. *Cf.* Committee on Freedom of Association, 376th report, case number 2988, par. 140.

206 UN. Special Rapporteur on the rights to freedom of peaceful assembly and of association, *supra*, par. 40.

207 *Cf. Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*, *supra*, par. 101, and *Cuscul Pivaral et al. v. Guatemala*, *supra*, par. 85.

208 *Cf.* Advisory Opinion OC-4/84, *supra*, par. 53, and *Case of Flor Freire v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 31, 2016. Series C No. 315, par. 111.

209 *Cf. Case of I.V. v. Bolivia*, *supra*, par. 187. The Court has defined gender stereotypes as "a preconception of the attributes, conducts or characteristics of men and women and the respective roles they play or should play."

question by making reference to the nature of domestic legal provisions as sources of labor law, taking account of the principles of labor law and human rights law that underlie the interpretation of the right to collective bargaining. The Court will begin by recalling that labor legislation is produced primarily by the congress or other government institutions that serve as legislative bodies. By contrast, collective bargaining is the source of an agreement held by workers and their employer, and it is established in a collective labor agreement. So while legislation derives from an act of state through its democratic institutions, the collective agreement is an act of private autonomy that arises from the exercise of freedom of association.

144. Labor laws and provisions, from both international sources and domestic sources, set legal minimum standards for the protection of worker rights, but this does not prevent trade unions from developing agreements to supplement them through collective bargaining. The Committee on Freedom of Association has said in this regard that "it is up to the legislative authority to determine the legal minimum standards for conditions of work or employment which, in its opinion, does not restrict or impede the promotion of bipartite bargaining to fix conditions of work, as foreseen in Article 4 of Convention No. 98."[210] Similarly, the Inter-American Charter of Social Guarantees declared "the fundamental principles that must protect workers of all kinds[and set] forth the minimum rights workers must enjoy in the American states, without prejudice to the fact that the laws of each state may extend such rights or recognize others that are more favorable."[211] One of these recognized principles states that worker rights are inalienable, and another, that the laws recognizing them are binding on and of benefit to the entire population of the territory, nationals and foreigners alike.[212]

145. Labor law is protective in nature, as reflected in a variety of international instruments. The American Declaration states, "Every person has the right to work, under proper conditions" and to "receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family." The OAS Charter states that work is a right that should be performed under a "system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working." The Protocol of San Salvador says, "[e]veryone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence […]." The Court deems it timely here to recall that the right to collective bargaining is intended to protect worker organizations so they can enjoy the conditions for negotiating with employers, primarily to improve their living and working conditions (*supra* par. 94).

146. The Court also cautions that the protective nature of labor law, reflected in the provisions outlined above, arises from the imbalance of power between workers and employers at the time working conditions are negotiated. This is why the Court holds that allowing labor laws to be generally abrogated, *in peius,* by virtue of a collective agreement would place workers at greater disadvantage with respect to the employer, potentially leading to degradation in their working and living conditions and thus breaching the minimum level of protection established under domestic and international law. Nevertheless, collective agreements can improve labor laws if they broaden the sphere of labor rights protection, unless domestic law contains well-founded provisions that constrain this possibility.[213]

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[210] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1312. *Cf.* Committee on Freedom of Association, 365th report, case number 2905, paragraph 1218.

[211] *Cf.* Inter-American Charter of Social Guarantees, *supra*, Article 1.

[212] *Cf.* Inter-American Charter of Social Guarantees, *supra*, Article 2(d).

[213] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 1456. *Cf.* Committee on Freedom of Association, 344th report, case number 2467, paragraph 574; 354th report, case number 2684, paragraph 830; 355th report, case number 2639, paragraph 1011; 357th report, case number 2690, paragraph 944; 364th report, case number 2821, paragraph 379; 365th report, case number 2820, paragraph 990; 367th report, case number 2894, paragraph

147. The Court also points to Articles 1(1) and 2 of the Convention and cautions that the states are under obligation to respect and guarantee the minimum content of the rights protected in the text and to have these rights recognized in their domestic legislation, without restricting them or limiting them except under conditions permitted by the Convention itself. In this sense, the Court views that those labor rights protected by Article 26 of the Convention should be guaranteed by the state and recognized in domestic law, standing as a boundary that blocks any possibility for them to be overridden by agreements developed in the exercise of collective bargaining. The Court also recalls that Article 26 bars the state from regressiveness, meaning that any deliberately regressive measures involving rights require very careful consideration and clear justification concerning the totality of rights and the best possible use of available resources.

148. The state thus has an obligation to guarantee that the adoption of any measures restricting rights recognized by labor laws strictly respect the conditions established in the American Convention, and therefore, it would not be legally acceptable for national laws to authorize the parties negotiating a collective labor agreement to be able to waive protection of rights recognized under domestic law. This would be a breach of the obligations for progressive development, because it would allow workers and employers, through collective bargaining, which is an act of private autonomy, to annul rights recognized in domestic legislation; such an act would lack the kinds of guarantees under which states may fully justify any regression in protection of the particular law involved, in view of the rest of the ESCERs.

149. At the same time, the right to collective bargaining should be understood in terms of its relationship to the ends and purposes of human rights treaties, that is, "the protection of the fundamental rights of human beings," including their labor rights. One of the essential goals of the right to collective bargaining is to promote labor terms and conditions that will make it possible to improve living conditions for workers. In this sense, allowing collective bargaining processes to abrogate *in peius* the rights recognized under labor laws, if it entails regression in protection of recognized rights of workers, should be considered contrary to the principle of free, voluntary negotiation protected by the rights to freedom of association and to collective bargaining, as it could jeopardize other labor rights, such as the right to work and the right to just, equitable, satisfactory conditions.

150. The Court also notes that several of the comments submitted by states in this process are consistent in holding that their legal systems make no provision for legislated labor rights to be overridden by the will of parties to collective bargaining. The Republic of Costa Rica said that the law should take precedence over collective bargaining, because the collective agreement can go into effect only within the framework allowed by the law, and never the reverse.[214] The State of Nicaragua similarly held that regular laws cannot be abrogated by a process of collective bargaining, as these negotiations take place within the framework of the law itself, and their purpose is to improve conditions and the quality of life of workers.[215] The states of Bolivia[216], El Salvador,[217] and Honduras[218] expressed similar views.

343; 368th report, case number 2918, paragraph 362, case number 2990, paragraph 541; and 376th report, case number 3072, paragraph 923.

214 *Cf. Observations by the Republic of Costa Rica* (file of written observations, folio 1057).

215 *Cf. Observations by the Republic of Nicaragua* (file of written observations, folio 13).

216 *Cf. Observations by the Plurinational State of Bolivia* (file of written observations, folio 3).

217 *Cf. Observations by the Republic of El Salvador* (file of written observations, folio 32).

218 *Cf. Observations by the State of Honduras* (file of written observations, folio 221).

VI.
THE RIGHT OF WOMEN TO BE FREE OF ALL FORMS OF DISCRIMINATION AND VIOLENCE IN THE EXERCISE OF THEIR RIGHT TO FREEDOM OF ASSOCIATION, RIGHT TO COLLECTIVE BARGAINING, AND RIGHT TO STRIKE

151. The Inter-American Commission asked this Court to speak to the specific considerations at play when women exercise their right to freedom of association, the right to collective bargaining, and the right to strike, and how the right of women to be free of all forms of discrimination and violence applies to these other rights, in the framework of the protections offered by the American Convention, the Protocol of San Salvador, Convention of Belém Do Pará, and the American Declaration. To address this matter, and building on the core right to equality and non-discrimination, the Court must conduct its analysis based on Articles 1(1), 2, 24 and 26 of the Convention, Article 3 of the Protocol of San Salvador, Articles 3, 4, 5 and 6 of the Convention of Belém Do Pará, and Article III of the American Declaration, as well as relevant *corpus juris* on the right to equality and freedom from discrimination against women in the workplace.

A. The right to equality and freedom from discrimination

152. The Court has held that the notion of equality springs directly from the oneness of humankind family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.[219] States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination.[220] The Court's case law also asserts that, at the present juncture in the evolution of international law, the fundamental principle of equality before the law and freedom from discrimination has now entered the realm of *jus cogens*. The whole legal scaffolding of national and international public order rests on it, and it is woven through the entire legal system.[221]

153. This Court has upheld the definition of discrimination as any distinction, exclusion, restriction, or preference based on certain motives, such as race, color, gender, language, religion, a political or any other opinion, the national or social origin, property, birth or any other social condition, that seeks to annul or diminish the acknowledgment, enjoyment, or exercise, in conditions of equality, of the human rights and fundamental freedoms to which every person is entitled.[222]

154. The Court has deemed, in this regard, that Article 1(1) of the Convention, a rule general in scope which encompasses all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein "without any discrimination." In other words, regardless of its origin or the form it may assume, any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is *per se* incompatible with that instrument.[223] A state that fails to comply with the general obligation to respect and guarantee human rights by extending any discriminatory treatment that is not based on legitimate ends or is unnecessary or disproportionate,

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219 *Cf.* Advisory Opinion OC-4/84, *supra*, par. 55, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations and Costs.* Judgment of March 9, 2018. Series C No. 351, par. 270.

220 *Cf.* Advisory Opinion OC-18/03, *supra*, par. 103, and *Case of Ramírez Escobar et al. v. Guatemala*, *supra*, par. 270.

221 *Cf.* Advisory Opinion OC-18/03, *supra*, par. 101, and *Case of Ramírez Escobar et al. v. Guatemala*, *supra*, par. 270.

222 *Case of Atala Riffo and daughters v. Chile, supra*, par. 81, and *Case of Ramírez Escobar et al. v. Guatemala*, *supra*, par. 269.

223 *Cf.* Advisory Opinion OC-4/84, *supra*, par. 53, and *Case of Ramírez Escobar et al. v. Guatemala*, *supra*, par. 271.

incurs international responsibility. This is why there is an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination.[224]

155. While the Inter-American Commission submitted this consultation to request interpretation of a body of standards with a focus on gender, primarily involving the situation of women, this Court cautions that the same perspective may also extend to other vulnerable groups, such as LGBTI individuals. Thus, taking into account the general obligation of respect and guarantee established in Article 1(1) of the American Convention and the interpretation criteria established in Article 29 of this Convention, this Court has held that sexual orientation and gender identity, as well as gender expression, are categories protected by the Convention. Accordingly, the Convention proscribes any discriminatory law, action or practice based on the sexual orientation, gender identity or gender expression of the individual. Consequently, no provision, decision or practice under domestic law, either by state authorities or by private individuals, can reduce or restrict in any way the rights of a person on the grounds of their sexual orientation, their gender identity and/or their gender expression.[225]

156. Furthermore, while the general obligations given in Article 1(1) apply to the state's duty to respect and guarantee the rights set forth in the American Convention "without any discrimination," Article 24 protects the right to "equal protection of the law."[226] Article 24 of the American Convention prohibits discrimination de jure, not only in terms of the rights enshrined in the treaty itself, but also regarding the content and enforcement of all laws enacted by the state.[227] If a state discriminates, failing to respect or guarantee a Convention-based right, it is in breach of the obligations contained in Article 1(1) and the substantive right in question. If, instead, the discrimination involves unequal protection under a domestic law or in the enforcement of a domestic law, the matter should be examined in light of Article 24 of the American Convention regarding the categories protected under Article 1(1).[228] The Court has also found that Article 24 of the Convention entails a mandate to guarantee material equality.[229]

157. The right to equality guaranteed by Article 24 of the Convention has two dimensions. The first is a formal dimension that establishes equality before the law; the second is a material or substantial dimension that requires the adoption of positive measures of promotion in favor of groups that have historically been discriminated against or marginalized due to the factors referred to in Article 1(1) of the American Convention. This means that the right to equality entails the obligation to adopt measures that ensure that the equality is real and effective; in other words, to correct existing inequalities, to promote the inclusion and participation of historically marginalized groups, and to guarantee to disadvantaged individuals or groups the effective enjoyment of their rights and, in short, to provide individuals with the real possibility of achieving material equality. In short, it

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224 *Cf.* Advisory Opinion OC-18/03, *supra*, par. 85, and *Case of Ramírez Escobar et al. v. Guatemala*, *supra*, par. 271.

225 *Cf.* Advisory Opinion OC-24/17, *supra*, par. 78.

226 *Cf.* Advisory Opinion OC-4/84, *supra*, par. 53 and 54, and *Case of Ramírez Escobar et al. v. Guatemala*, *supra*, par. 272.

227 *Cf. Case of Yatama v. Nicaragua.Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 23, 2005. Series C No. 127**,** par. 186, and *Case of Ramírez Escobar et al. v. Guatemala*, *supra*, par. 272.

228 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 5, 2008. Series C No. 182, par. 209, and *Case of Ramírez Escobar et al. v. Guatemala*, *supra*, par. 272.

229 *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil, supra*, par. 199.

provides people with concrete possibilities to experience material equality in their own lives. To this end, states must actively combat situations of exclusion and marginalization.[230]

158. Thus, the right to equality and non-discrimination has two facets: one related to the prohibition of arbitrary differences in treatment, another related to the state obligation to create conditions of real equality for groups that have historically been excluded or that are at greater risk of being discriminated against.[231]

159. Regarding the first facet, the Court cautions that that not every difference in treatment will be considered discriminatory, but only those that are based on criteria that cannot rationally be considered objective and reasonable,[232] in other words, they do not have a legitimate purpose and there is no reasonable relationship of proportionality between the methods used and the end pursued.[233] Moreover, in cases of prejudicial differential treatment, that is, when the differentiating criteria correspond to one of the categories protected by Article 1(1) of the Convention which relate to: (i) permanent personal traits that an individual cannot dispose of without losing his or her identity; (ii) groups that are traditionally marginalized, excluded or subordinated, and (iii) irrelevant criteria for the equitable distribution of property, rights or social benefits, the Court considers that there is evidence that the state has acted arbitrarily.[234]

160. As for the second facet, states are obliged to adopt positive measures to reverse or to change discriminatory situations existing within their society that prejudice a specific group of persons. This entails the special obligation of protection that the state must exercise with regard to the actions and practices of third parties, who with its acquiescence or tolerance, create, maintain or facilitate discriminatory situations.[235] This Court points to the Sustainable Development Goals, which state, "Gender equality is not only a fundamental human right, but a necessary foundation for a peaceful, prosperous and sustainable world."[236]

161. Similarly, this Court has held that although poverty is not considered a special category of protection according to the literal sense of Article 1(1) of the American Convention, this is not an obstacle to consider that discrimination for this reason is prohibited by the Convention. This is true for two reasons. First, because the list contained in Article 1(1) of the Convention is not exhaustive but merely illustrative and, second, because poverty may well be understood to fall within the category of "economic status" to which the said Article expressly refers, or in relation to other categories of protection such as "social origin" or "any other social condition,"[237] in view of its multidimensional nature.

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230 *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil, supra*, par. 199.

231 *Cf.* Advisory Opinion OC-18/03, *supra*, par. 92, and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, par. 130.

232 *Cf. Case of I.V. v. Bolivia*, *supra*, par. 240, and Advisory Opinion OC-24/17, *supra*, par. 66.

233 *Cf. Case of Norín Catrimán et al. (Leaders, Members and Activist of the Indigenous Mapuche People) v. Chile. Merits, Reparations and Costs.* Judgment of May 19, 2014. Series C No. 279, par. 200, and *Case of López Soto et al. v. Venezuela. Merits, Reparations and Costs.* Judgment of September 26, 2018. Series C No. 362, par. 231.

234 *Cf. Case of I.V. v. Bolivia, supra*, par. 240, and Advisory Opinion OC-24/17, *supra*, par. 66.

235 *Cf*. Advisory Opinion OC-18/03, *supra*, par. 104, and Advisory Opinion OC-24/17, *supra*, par. 65.

236 United Nations. Resolution 70/01. Transforming Our World: The 2030 Agenda for Sustainable Development, adopted by the General Assembly on 25 September 2015, Goal 5.

237 *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, par. 185; and Committee on Economic, Social and Cultural Rights *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, July 2, 2009, par. 15 and 27.

162. In this regard, the Court recalls that states are obliged to adopt positive measures to reverse or modify any discriminatory situations that exist in their societies that affect a specific group of persons. This entails the special obligation of protection that the state must exercise with regard to the actions and practices of third parties that, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations, and also, that states are obliged to adopt positive measures, to be determined based on the particular needs for protection of the subjects of law, due either to their personal condition or to the specific situation in which they find themselves, such as extreme poverty or marginalization.[238]

B. Application of the principle of equality and freedom from discrimination for women in the exercise of their rights to freedom of association

163. Article 26 of the Convention, interpreted in the context of the whole American Convention, should be understood in terms of Articles 1(1) and 24 thereof, such that economic, social, cultural and environmental rights derived from the OAS Charter should be respected and guaranteed on the basis of the principle of equality and freedom from discrimination. Other international instruments reinforce this same protection. Article 3 of the Protocol of San Salvador sustains that the "State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition,"[239] and Article II of the American Declaration states, "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."[240] The Convention of Belem Do Para is an instrument adopted specifically to guarantee special protection from discrimination for women and to prevent, punish and eradicate violence against them.[241]

164. The Court recalls, in this regard, the words of the Convention of Belem do Para, that every women has the right "to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments," which include the right to "equal protection before the law and of the law." The same instrument recognizes women's right to a life free from violence, which includes the right of women " to be free from all forms of discrimination." Article 2 states that violence shall be understood to include any act "that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace[…]." Article 3 asserts that every woman has the right "to be free from violence in both the public and private spheres," and Article 5 says, "[e]very woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights."[242]

165. Furthermore, Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW") defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political,

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238 *Cf. Case of Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, par. 154, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, par. 186.

239 Protocol of San Salvador, *supra*, Article 3.

240 American Declaration *, supra*, Article II.

241 *Cf.* Convention of Belem do Para, *supra*, Preamble.

242 Convention of Belem do Para, *supra*, Articles 4(f), 6(a), 2, 3 and 5.

economic, social, cultural, civil or any other field." Articles 2 and 3 of CEDAW set forth the obligation of the states to adopt all appropriate legislative and other measures for eliminating any discrimination against women and to ensure them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men, which includes the obligation to take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise. Article 7 fixes the obligation to ensure to women the right to participate in non-governmental organizations and associations concerned with the public and political life of the country.[243]

166. Similarly, the Court notes the view of the Committee on ESCERs, namely, that Article 8, paragraph 1 (a) of the ICESCR requires the states to ensure the right of everyone to form and join trade unions of his or her choice. The Committee also held that this article should be read together with Article 3 of the Covenant, which recognizes that "States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." More specifically, the Committee emphasized that "particular attention should be given to domestic workers, rural women, women working in female-dominated industries and women working at home, who are often deprived of this right."[244] This means that men and women have the right to set up trade associations and labor unions to address their specific concerns.

167. The ILO has also addressed the issue in Convention 111 on discrimination (employment and occupation), asserting that the states must pursue "a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." The Convention defines discrimination to include: "(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation[…]."[245] The Committee on Freedom of Association, in turn, has held that Article 2 of ILO Convention 87 enshrines the principle of non-discrimination in trade union matters with the phrase "without distinction whatsoever," which means freedom of association is recognized without discrimination of any kind based on occupation, sex, color, race, beliefs, nationality, political opinion, for workers in both the private sector and the public sector.[246]

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[243] *Cf.* United Nations. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted on December 18, 1979, Articles 1, 2, 3 and 7. The following member states of the OAS are parties to this treaty: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

[244] *Cf.* Committee on Economic, Social and Cultural Rights. *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3),* E/C.12/2005/4, August 11, 2005, par. 25.

[245] *Cf.* International Labour Organisation. Convention on Discrimination (Employment and Occupation), 1958 (number 111), Articles 1 and 2. The following member states of the OAS are parties to this treaty: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

[246] *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 315. *Cf.* Committee on Freedom of Association, 353rd report, case number 2625, paragraph 961, case number 2637, paragraph 1051; 362nd report, case number 2620, paragraph 595; 364th report, case number 2882, paragraph 302; 367th report, case number 2620, paragraph 553; 371st report, case number 2988, paragraph 841; 374th report, case number 2620, paragraph 301; and 378th report, case number 2952, paragraph 69.

168. Within this normative framework, and in view of the history of exclusion that women have experienced in the labor and union environment, this Court sees no question that the states must ensure the right of women, under equal circumstances, not to be subject to acts of discrimination, and to take part in all associations that address public and political life, including trade unions and worker organizations. Women are bearers of the right to freedom of association, the right to collective bargaining, and the right to strike, which also means that women workers must enjoy all the qualities, powers and benefits for exercising these rights in the terms set forth above (*supra* par. 140). This includes the right to found worker organizations or to join them freely, with no discrimination, as they see fit and in accordance with their own interests. The states must respect and guarantee trade union rights and refrain from establishing any type of differential or unjustified treatment among persons merely for their gender. Furthermore, women must have access to effective mechanisms of judicial protection of their rights when they are victims of discrimination in access to, enjoyment of, and exercise of the right to freedom of association, right to collective bargaining and right to strike.

169. Here the Court would recall that the right to equality and non-discrimination has two aspects: a negative one, concerning the prohibition of arbitrary differences in treatment, and a positive one involving the state obligation to create conditions of real equality for groups that have a history of discrimination. In this sense, the Court recalls that states are obliged to adopt positive measures to reverse or modify any discriminatory situations that exist in their societies that affect a specific group of persons. This entails the special obligation of protection that the state must exercise with regard to the actions and practices of third parties that, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations,[247] and also, that states are obliged to adopt measures, to be determined based on the particular needs for protection of the subjects of law, due either to their personal condition or to the specific situation in which they find themselves,[248] such as extreme poverty or marginalization.[249]

170. The Court notes, in this regard, that the Inter-American Commission of Women (hereinafter "CIM"), which submitted comments as part of the process for this advisory opinion, stated, "even though worldwide, regional and local trade union organizations have assumed explicit commitments to gender equality, systemic discrimination on grounds of gender continues to exist in general terms and is also reflected in the union movement itself, whose origins lie in a social construct that sees women in a subordinate position and, in turn, contributes to their long-standing oppression."[250] The CIM pointed out that this situation is evident, for example, in the continuing inequalities for the enjoyment of basic labor rights such as equal pay; in the lack of protection for pregnant working women; in the persistence of gender stereotypes in the public and private arenas that interfere with the full enjoyment of labor and trade union rights; in the underrepresentation of women in union organizations; and in the disproportion between female membership in unions, versus the composition of leadership.[251]

171. The Court cautions, in this sense, that the recognition of formal equality between men and women in the enjoyment of trade union rights does not remove practices that, while appearing to be neutral and having no discriminatory intent, in reality do produce a discriminatory impact. The Court has used the category of indirect discrimination and differential impact, noting that the principle of

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247 *Cf.* Advisory Opinion OC-18/03, *supra*, par. 104, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil,*, *supra*, par. 186.

248 *Cf. Case of the Mapiripán Massacre v. Colombia*, *supra*, par. 111 and 113, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *supra*, par. 186.

249 *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, par. 186.

250 Comments from the Inter-American Commission of Women (file of written observations, folio 1265).

251 Cf. Comments from the Inter-American Commission of Women (file of written observations, folio 1266).

the peremptory right to equal and effective protection of the law and non-discrimination means that the states should refrain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights.[252] This Court has pointed to the case law of the European Court, which has also developed the concept of indirect discrimination, holding that where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group.[253]

172. Moreover, the Committee on the Elimination of Discrimination against Women (hereinafter "CEDAW Committee") has interpreted Article 2 of the CEDAW to mean that the state "must immediately assess the de jure and de facto situation of women and take concrete steps to formulate and implement a policy that is targeted as clearly as possible towards the goal of fully eliminating all forms of discrimination against women and achieving women's substantive equality with men."[254] Along the same lines, it has held that states "should aim to accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field," and that the application of these measures should be considered not as an exception to the norm of non-discrimination, but rather as an emphasis that the measures are necessary to achieve substantive equality of women.[255] It is also worth emphasizing the Committee's view that the duration of temporary measures should be determined by their functional result in response to a concrete problem, and they must be discontinued when their desired results have been achieved.[256] The Committee has called on the states to "[s]et time-bound targets and allocate sufficient resources for the implementation of temporary special measures, such as quotas and other proactive measures, to accelerate women's equal representation in […] trade unions and professional associations..."[257]

173. CEDAW has said that three obligations are central to the states' efforts to eliminate discrimination against women and should be implemented in an integrated fashion: (a) the states must "ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination […] by competent tribunals as well as sanctions and other remedies;" (b) the states must "improve the de facto position of women through concrete and effective policies and programmes;" and (c) states must "address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions."[258] The Committee has said emphatically that "the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results."[259]

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252 *Cf. Case of the Girls Yean and Bosico v. Dominican Republic* Judgment of September 8, 2005. Series C No. 130, par. 141 and *Case of Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica supra*, par. 286.

253 *Cf. Case of Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica, supra*, par. 286, citing: ECtHR, *Case of Hoogendijk v. the Netherlands,* No. 58641/00, First Section, 2005; ECtHR, Grand Chamber, *D.H. and Others v. the Czech Republic*, No. 57325/00, November 13, 2007, par. 175, and ECtHR, *Case of Hugh Jordan v. United Kingdom*, No. 24746/94, May 4, 2001, par. 154.

254 CEDAW Committee. *General recommendation No. 28 on the core obligations of states parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, December 16 2010, par. 24.

255 *Cf.* CEDAW Committee. *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, par. 18.

256 *Cf.* CEDAW Committee. *General recommendation No. 25*, *supra*, par. 20.

257 CEDAW Committee. *Concluding observations on the combined fourth to sixth periodic reports of Suriname*, CEDAW/C/SUR/CO/4-6, March 14, 2018, par. 23(b).

258 CEDAW Committee. General recommendation No. 25, *supra*, par. 7.

259 CEDAW Committee. General recommendation No. 25, *supra*, par. 8.

174. For these reasons, and particularly in view of the principles of equality and freedom from discrimination and considering the systemic discrimination that women experience women in the labor and trade union settings (*supra* par. 170), the Court maintains, in the first place, that the states are under obligation to guarantee the right of women to equal pay for equal work. Article 7(a) of the Protocol of San Salvador recognizes the right of persons to "fair and equal wages for equal work, without distinction."[260] CEDAW, in turn, states in Article 11(1)(d) that the states should adopt all appropriate measures to eliminate discrimination against women in the field of employment, in particular the "right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value […]"[261] ILO Convention 100 on equal pay also calls on the states to "ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value."[262] The Court would note, furthermore, that the states are under obligation to ensure the effective exercise of this principle by means of (a) any system established or recognized by law for setting compensation; (b) collective agreements between employers and workers; and (c) adopting joint measures by the various parties in the labor sector to meet this goal. Moreover, they must (d) take measures to promote objective job appraisal processes in both the public and private sectors.[263]

175. The Court cautions, in the second place, that the states must take measures to ensure that women workers enjoy special protection when they are pregnant. Article 9(2) of the Protocol of San Salvador holds that for persons who are employed, the right to social security should cover, in the case of women, "paid maternity leave before and after childbirth."[264] Similarly, the CEDAW states, "[a]doption by States Parties of special measures […] aimed at protecting maternity shall not be considered discriminatory."[265] The ILO body of work includes numerous standards that protect women who are pregnant.[266] This Court also holds that the states must take measures allowing women to: (a) receive prenatal medical care during and after childbirth, including hospitalization when necessary; (b) ensure that pregnant or nursing women not be required to perform tasks that could be harmful to their health or that of their children; (c) receive paid leave in case of complications before or after pregnancy; and (d) be protected from dismissal while pregnant, nursing, or on maternity leave. These views notwithstanding, the Court notes that protection for working women during pregnancy must include measures allowing men to combine work life with family life, which could include such benefits as paternity leave, and incentives for them to take these options.

176. In the third place, the Court notes that gender stereotypes involving domestic chores and caregiving stand as a barrier to the exercise of women's rights, particularly their labor and trade union rights, as they block women from being on an equal footing to participate in the workplace,

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260 Protocol of San Salvador, *supra*, Article 7.

261 CEDAW, *supra*, Article 11(1)(d).

262 International Labour Organisation. Equal Remuneration Convention, 1951 (No. 100), Article 2. The following member states of the OAS are parties to this treaty: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

263 *Cf.* ILO Convention No. 100, *supra*, Articles 2 and 3.

264 Protocol of San Salvador, *supra*, Article 9(2).

265 CEDAW, *supra*, Article 4.

266 *Cf.* International Labour Organisation. Maternity Protection Convention, 1919 (No. 3); Social Security (Minimum Standards) Convention, 1952 (No. 102); Maintenance of Social Security Rights Convention, 1982 (No. 157); Maternity Protection Convention, 2000 (No. 183); Maternity Protection (Agriculture), 1921 (No. 12); Maternity Protection Recommendation, 1952 (No. 95), Maintenance of Social Security Rights Recommendation, 1983 (No. 167); and Maternity Protection Recommendation, 2000 (No. 191).

thus limiting their potential for aspiring to the same employment opportunities or for defending their interests in the trade union. This Court has pointed to gender stereotypes as one of the causes of gender-based violence against women, emphasizing that such stereotypes are associated with preconceived notions about the personal attributes, characteristics or roles that correspond or should correspond to either men or women. For example, it has found that the subordination of women can be associated with practices based on persistent socially dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices, and particularly, in reasoning and language. The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.[267]

177. Turning again to the ILO, the Court also notes that Article 3(1) of Convention 156, on workers with family responsibilities, provides that the states should make it an aim of national policy "to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities."[268] Meanwhile, ILO Recommendation 165 on workers with family responsibilities says that, with a view to creating effective equality of opportunity and treatment for men and women workers, the states are under obligation to "make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities."[269]

178. The Court holds, accordingly, that the states should take measures that will make it possible to balance domestic and caregiving tasks between men and women, which means adopting policies designed to have men take an active, equal role in organizing the home and raising the children. These measures, as CEDAW states, should "encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities."[270] The Court also recalls that the Convention of Belem do Para calls on the states to pursue, by all appropriate means and without delay, policies to amend or repeal existing laws and customary practices which sustain the persistence and tolerance of gender-based violence,[271] including those that justify or require labor responsibilities exclusively for women in domestic chores. If conditions are in place for women to have enough time for their work and for taking part in trade union activities, which could include childcare facilities, equal maternity or paternity leave provisions, or special leave to take care of family matters, women will also be able to demand better working and living conditions by exercising their right to freedom of association.

179. In this regard, the Court points to information from the Economic Commission for Latin America and the Caribbean (ECLAC), reporting that women in the countries of the region devote most of their working time to unpaid activities, which is not true of men. For example, women in Argentina work 15.2 hours per week in remunerated activities and 42.4 in unpaid activities, while men work for compensation 33.2 hours per week, and 17.3 without pay. Women in Colombia work

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267 *Cf. Case of González et al. ("Campo Algodonero") v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 16, 2009. Series C No. 205, par. 401, and *Case of Guzmán Albarracín et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of June 24, 2020. Series C No. 405, par. 188.

268 International Labour Organisation. Workers with Family Responsibilities Convention, (No. 156), 1981, Article 3. The following member states of the OAS are parties to this treaty: Argentina, Belize, Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Paraguay, Peru, Uruguay, and Venezuela.

269 International Labour Organisation. Workers with Family Responsibilities 1981 (No. 165), Article 6.

270 CEDAW, *supra*, Article 11(2).

271 *Cf.* Convention of Belem do Para, *supra*, Article 7(e).

19.8 hours per week in paid activities, and 32.9 without pay, while men work 43.1 hours per week for pay, and 11.4 hours in unremunerated activities. Women in Costa Rica devote 10.8 hours per week to paid work and 39.6 to unpaid work, while men engage in remunerated activities 25.7 hours per week and work without pay 17.7 hours per week. Finally, figures from Mexico show that women work 22.1 hours per week for pay and 42.9 hours in unpaid activities, while men work 44.9 hours per week for pay and 16.6 hours in unremunerated activities.[272]

180. The Court deems, in the fourth place, that in order to achieve balanced, proportional participation by men and women in the workplace, the states must adopt measures to remove the barriers preventing women from participating actively in labor unions or holding positions of leadership, which would give them an active role in decision-making.[273] Such measures could include actions by the state so that more women may avail themselves of their right to organize, whether by creating new unions or by joining those that already exist, and including the obligation of trade unions to adopt the principle of equality and freedom from discrimination in their constitutions and bylaws and in the application of their rules, to ensure gender-balanced representation in their leadership bodies[274] and accordingly, to have women's interests represented in collective bargaining. The Court recalls the words of the ESCR Committee that the states must take deliberate, concrete steps towards the progressive realization of the right to just and favorable conditions of work without discrimination, taking into account the particular vulnerability of persons.[275] These steps should include actions by the state to organize programs or drives targeting trade unions, to counteract gender stereotypes and to eliminate the many barriers women face when exercising their full rights to organize.

181. The Court would also like to speak of the states' obligations regarding domestic workers. It warns that ILO Convention No. 189 on domestic workers defines this category of workers to include any person, whether male or female, "engaged in domestic work within an employer-employee relationship."[276] The Court would emphasize the obligation of the states to respect and guarantee the labor rights of this group of workers, without discrimination, and specifically regarding the duty to take steps that would allow them to enjoy these rights, particularly, "freedom of association and the effective recognition of the right to collective bargaining."[277] The Court also cautions that domestic workers should be entitled to establish organizations, federations and confederations of their own choosing, under the terms outlined above (*supra* par. 71 to 73).[278]

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272 *Cf.* ECLAC, Gender Equality Observatory, *Total work time,* available at https://oig.cepal.org/en/indicators/total-work-time. ECLAC states, "Total work time is the sum of paid work time and unpaid work time. Paid work refers to work done for the production of goods or services for the market and is calculated as the sum of time devoted to employment, job search and commuting. Unpaid work refers to work done without payment and develops mainly in the private sphere. It is measured by quantifying the time a person spent on self-consumption work, unpaid domestic work and unpaid care for their own home or to support other household work."

273 *Cf.* CEDAW Committee. *General Recommendation No. 23: Political and Public Life*, A752/38, 1997, par. 8-12.

274 *Cf.* CEDAW Committee. *General Recommendation No. 23, supra*, par. 34.

275 *Cf.* Committee on Economic, Social and Cultural Rights. *General Comment No. 23 on the right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/23, 27, April, 2016, par. 50 and 53.

276 International Labour Organisation. Domestic Workers Convention, 2011 (No. 189), Article 1. The following member states of the OAS are parties to this treaty: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Granada, Guyana, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic and Uruguay.

277 ILO Convention No. 189, *supra*, Article 3(a).

278 *Cf.* ILO Convention No. 189, *supra*, Article 3.3.

182. The Court notes that the informal economy stands as an obstacle to the full enjoyment of women workers' rights, including the freedom of association.[279] Informal workers frequently do their jobs in discrete workplaces, making it difficult for them to come together to build a collective identity and coordinate campaigns. Some informal work—such as sex work and waste picking—is stigmatized, which may make these workers reluctant even to identify what they do as work.[280] The Court would also stress that the states should take steps to enable the transition of women workers from the informal to the formal economy, and at the same time, adopt whatever positive measures are necessary for the realization of full rights to freedom of association during the transition.[281]

183. The Court has also addressed violence against women as not only a violation of human rights, but also an offense against human dignity and a manifestation of the historically unequal power relations between women and men, pervading every sector of society regardless of class, race or ethnic group, income, culture, level of education, age or religion and strikes at its very foundations.[282] It has further maintained that gender-based violence, that is, violence directed against a woman because she is a woman or that affects women disproportionately, is a form of discrimination against women, as has been asserted by other international organizations for the protection of human rights, including the European Court of Human Rights and the CEDAW Committee.[283] Thus, once it is shown that the application of a specific rule has a differential impact on men versus women, the state must show that this is the result of objective factors unrelated to any discrimination.[284]

184. The Court emphasizes that these views are significant in consideration of gender-based violence occurring in workplaces and in the trade union environment, especially when it is the result of behaviors or threatened behaviors whose aim or consequence is to cause physical, psychological, sexual or economic harm, including gender-based violence and harassment.[285] ILO Convention 190 on violence and harassment recognizes, in this regard, "the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment."[286] The Court deems, accordingly, that the states must adopt measures to counteract gender-based violence in the workplace and in trade unions, to include: (a) prohibiting in law violence and harassment, and adopting policies designed to prevent them; (b) fostering the use of internal monitoring systems in both the public and private sectors to address violence and labor or sexual harassment; (c) ensuring access to remedies, redress, and support for victims; (d) developing tools, guidance, and education and training activities, and raising awareness, in accessible formats; and (e) ensuring effective means of inspection and investigation to fight violence and harassment.[287] The states must adopt these measures to prevent and contend against violence and sexual harassment in the public sphere and must require private-sector employers to take reasonable, practical measures for the same purpose.

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279 Cf. UN Women. *Progress of the World's Women 2015-2016 . Transforming Economies, Realizing Rights*, 2015, pg. 119.

280 UN Women. *Progress of the World's Women. 2015-2016. Transforming Economies, Realizing Rights*, *supra*, pg. 119.

281 *Cf.* International Labour Organisation. Recommendation 204, Transition from the Informal to the Formal Economy, June 1, 2015, Preamble and Article 16(a).

282 *Cf.* Convention of Belem do Para, *supra*, Preamble.

283 *Cf. Case of González et al. ("Campo Algodonero") v. Mexico, supra,* par. 394 to 402, citing: CEDAW General Recommendation No. 19: Violence against Women, 1992, U.N. Doc. HRI\GEN\1\Rev.1, par. 1 and 6, and ECtHR, Case of Opuz v. Turkey, Judgment of June 9, 2009, par. 180, 191 and 200.

284 *Cf. Case of González et al. ("Campo Algodonero") v. Mexico, supra,* par. 396, and *Case of Espinoza Gonzáles v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2014. Series C No. 289, par. 222.

285 *Cf.* International Labour Organisation. Violence and Harassment Convention, 2019 (No. 190), Article 1.

286 *Cf.* ILO Convention No. 190, *supra*, Preamble.

287 *Cf.* ILO Convention No. 190, *supra*, Article 4.

185. The Court has already ruled on poverty and the prohibition of discrimination for reasons of economic status. It has recognized in several of its decisions that human rights violations had been accompanied by situations of marginalization and exclusion due to the situation of poverty of the victims, and it has identified poverty as a factor of vulnerability that increased the impact of victimization.[288] It has also held that in cases of structural discrimination, it is necessary to consider the degree to which victimization in a specific case reveals the vulnerability of individuals belonging to a group.[289] It has cautioned that the intersection of factors of discrimination heightens the comparative disadvantages of the victims of rights violations, such as those faced by women, the poor, Afro-descendants, or pregnant women or girls.[290]

186. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has set forth the importance of guaranteeing the rights of assembly and association, as without them, "workers have little leverage to change the conditions that entrench poverty, fuel inequality and limit democracy." This vulnerability is heightened in the case of migrant workers, who are often unprotected by labor laws.[291] The Special Rapporteur added that women tend to be concentrated in the bottom levels of the global supply chain, in informal sectors with lower pay and sharply reduced protection of worker rights. This situation undermines their ability to come together and establish organizations to defend their interests, and the situation is worse when other factors come into play such as race, ethnicity, country of origin and age.[292]

187. Similarly, the Court would stress that the duty to respect and guarantee the rights to freedom of association, collective bargaining, and strike are heightened for groups of women who are particularly vulnerable. The convergence of factors that create comparative disadvantages for women in the workplace, and the consequences that these disadvantages can have for the exercise of their human rights, heighten the state's obligation to take positive actions that will reverse the structural factors blocking women from the full realization of their rights. This means the states must take specific steps to reverse the situation of structural poverty and marginalization that, together with gender-based discrimination against women, restrict them from exercising their labor and union rights. Such steps should include appropriate protection of stability in employment, fighting violence and harassment in the workplace, decent health care, and conditions for supporting their families, so they can enjoy the conditions necessary to defend their labor rights by means of collective action.

188. The Court also notes that, according to UN Women, the level of household wealth or income further exacerbates inequality among women who perform caregiving tasks in the different social sectors, as the poorest women make up for services they cannot afford to access by increasing the time they spend in unpaid labor.[293] In the view of the Court, it is essential for the states to carry out progressive actions to fight structural causes and pave the way for substantial equality between men and women, such as: (a) invest in basic infrastructure and services (water and sanitation, health, electricity and clean cook-stoves) to reduce women's unpaid care and domestic work burdens and liberate time for productive activities and leisure; (b) extend coverage of childcare services in line

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288 *Cf. Case of the "Juvenile Reeducation Institute" v. Paraguay*, *supra*, par. 262, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *supra*, par. 187.

289 *Cf. Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *supra*, par. 188.

290 *Cf. Case of the Miguel Castro Castro Prison v. Peru*, supra, par. 292, and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *supra*, par. 191.

291 *Cf.* Advisory Opinion OC-18/03, *supra*, par. 112.

292 UN. *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, *supra*, par. 11, 24 and 40.

293 Cf. UN Women. *Progress of the World's Women 2019-2020. Families in a changing world*, 2019, pg. 148.

with the needs of working parents; (c) work towards comprehensive paid leave systems, including maternity leave of at least 14 weeks, paternity leave and parental leave that can be shared between parents; and (d) extend coverage of maternity, paternity and parental leave entitlements to informal workers, along with measures to ensure implementation.[294]

189. In short, this Court cautions that achieving equality between men and women in the workplace and in unions requires not only the adoption of formal measures to prohibit discrimination, but also the adoption of positive measures and the necessary change of practices in trade union organizations, to bring about de jure and de facto equality for women in the exercise of the rights to freedom of association, to collective bargaining, and to strike. For these reasons, the states are under obligation to incorporate the gender perspective into policies and regulatory frameworks designed to protect these rights and thus prevent actions that could entail direct or indirect discrimination against women, and instead engender positive measures that will protect women and promote both their labor rights and their union rights, taking into account the factors outlined in this advisory opinion. Given the pervasiveness of gender roles and stereotypes in society, which place a de facto constraint on the participation of women in the workplace and in trade unions, the Court views that it is crucial to adopt concrete measures for bringing about real equality of women in the exercise of their rights to freedom of association.

VII.
TRADE UNION AUTONOMY, PARTICIPATION OF WOMEN AS UNION MEMBERS AND LEADERS, AND PARTICIPATION OF UNIONS IN THE DESIGN, DEVELOPMENT AND EVALUATION OF PUBLIC POLICIES AND STANDARDS FOR WORK IN THE CONTEXT OF LABOR MARKET CHANGES DRIVEN BY THE USE OF NEW TECHNOLOGIES

190. The Inter-American Commission asked the Court a question about the role of the states in protecting the freedom of trade unions to operate and have autonomy and guaranteeing the effective participation of women as union members and leaders, as well as the implications of the division of family responsibilities between men and women in these contexts. It also asked the Court for its view concerning the scope of state obligations on specific guarantees for the effective participation of workers through the exercise of freedom of association, collective bargaining, and the right to strike, in the processes of designing, building and evaluating public labor policies and standards in the midst of changes taking place in labor markets with the use of new technologies. To answer these questions, and considering that some of them were partially addressed in earlier paragraphs and that the Court decided to group the issues together and address them jointly (*supra* par. 33), the Court will conduct an analysis of the issues set before it based on Articles 1(1), 2 and 26 of the Convention, Article 8(1)(a) of the Protocol of San Salvador, Articles 34(g) and 44 subparagraphs (b), (c) and (g) of the OAS Charter, and Articles XIV and XXII of the American Declaration.

A. Union autonomy and the participation of women

191. The Court reiterates that the right to freedom of association protects the freedom of trade unions to operate and to enjoy internal autonomy and independence, including their internal organization in terms of the rights of representation and regulation. Along these same lines, Article 3 of ILO Convention 87 says, "Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes," and "public authorities shall refrain

[294] *Cf.* UN Women, *Progress of the world's women. 2015-2016. Transforming Economies, Realizing Rights*, *supra*, pg. 89.

from any interference which would restrict this right or impede the lawful exercise thereof."[295] The Committee on Freedom of Association has interpreted that trade unions have the right to adopt whatever peaceful goals they believe necessary for the defense of their rights, and that legislative provisions regulating the operation of trade unions should set forth a general framework within which organizations may enjoy the greatest possible autonomy to govern their operation and management. Trade union autonomy thus demands that restrictions may exist only for the purpose of guaranteeing the democratic operation of organizations and safeguarding member interests.[296]

192. The Court holds that the mere existence of union legislation does not constitute, per se, a violation of trade union rights, but as a general rule, such laws should aim at setting formal conditions without undermining the rights of workers in the framework of exercising their freedom of association. Provisions designed to promote democratic principles within trade union organizations are also acceptable,[297] and this does not necessarily impinge on the freedom or autonomy of trade unions. The Court also recalls Article 8 of the Protocol of San Salvador, which holds that the exercise of trade union rights may be subject to limitations and restrictions established by law, provided such restrictions are appropriate to a democratic society.[298] Therefore, trade union autonomy should be understood in terms of its interrelationship with the protection of democratic principles, and the states and the unions need to adopt measures to ensure equality and freedom from discrimination for women in the exercise of their union rights and in their organizations.

193. Accordingly, the Court holds that trade union autonomy cannot be claimed as an excuse for measures that could limit women's exercise of trade union rights in unions, but instead requires the states to adopt measures that would allow women to enjoy formal and material equality in the workplace and in the union (*supra* par. 169). In this regard, the Court deems it relevant to recall Article 3 of the Protocol of San Salvador, recognizing the states' obligation to guarantee the exercise of economic, social and cultural rights without discrimination against women,[299] and Article 5 of the Convention of Belém Do Pará, stating that every woman is entitled to the free exercise of her rights as embodied in regional and international instruments for protection.[300] Likewise, Article 7 of the CEDAW requires the states to take all appropriate measures to ensure to women, on an equal footing, the right to participate in non-governmental organizations and associations concerned with the public and political life of the country.[301]

194. In short, the right to equality and freedom from discrimination prohibits all arbitrary differential treatment in the sphere of union life and requires that measures be adopted to fight gender stereotypes and bring about material equality in trade unions. The CEDAW Committee has held that the states have acquired obligations to take all appropriate measures to eliminate discrimination against women in political and public life and to ensure that they enjoy equality with men, and this should also serve as a parameter for union organizing activities.[302] Thus, as said above (*supra* par. 180), the states are obliged to take measures by which to ensure the principle of equality

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295 ILO Convention No. 87, *supra*, Article 3.

296 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 561-563. Committee on Freedom of Association, 342nd report, case number 2366, paragraph 915; 342nd report, case number case number 2453, paragraph 716; 358th report, case number 2740, paragraph 658; and 363rd report, case number 2740, paragraph 703.

297 *Cf.* Compilation of decisions of the Committee on Freedom of Association, *supra*, par. 572.

298 *Cf.* Protocol of San Salvador, *supra*, Article 8.

299 *Cf.* Protocol of San Salvador, *supra*, Article 3.

300 *Cf.* Convention of Belem do Para, *supra*, Article 5.

301 *Cf.* CEDAW, *supra*, Article 7(c).

302 *Cf.* CEDAW Committee, *General recommendation No. 23, supra,* par. 5.

and non-discrimination in the charters and by-laws of trade unions and in union membership, including balanced gender representation on boards of directors.[303]

195. The Court also holds that the states should ensure there is no direct or indirect discrimination in the workplace or in the trade unions, which means tackling structural factors that underlie the persistence of gender stereotypes and roles and that prevent women from fully enjoying their rights. For this reason, pointing to the above discussion (*supra* par. 178) and in reply to the Commission's question, the Court reiterates the need for states to adopt measures ensuring a balance of domestic and family work so that women can also perform their workplace and trade union activities to satisfaction. Likewise, the Court views that the adoption of legislative and other measures aiming to achieve equality in the workplace, such as steps designed to provide women with maternity protection or reconcile work and family life, are necessary to bring about appropriate participation of women in the labor market and for them to exercise their right to freedom of association without discrimination. Such measures, in this sense, are not incompatible with trade union autonomy.

196. UN Women has spoken on the subject, noting that although the number of women joining trade unions has increased in recent years, and while unions have begun to consider gender issues, women remain under-represented in union leadership. The lack of women in senior positions in trade unions mirrors the fact that these positions continue to be held primarily by men, which in turn is a result of factors such as the culture of trade unions, which remains male-dominated and where men exert strong influence on deciding who can get to the top, or the division of responsibilities for unpaid care and domestic work, which makes it difficult for women to devote time to the networking activities needed to build support for their leadership. Women are often expected to fulfil administrative roles and are less likely to be identified as leadership material or given training and opportunities to develop these skills.[304]

197. The Court concurs with this analysis and with the need for the states to set quotas and reserved positions for women in decision-making roles in unions, as a measure to overcome obstacles to leadership for women and allow them to enjoy greater and better representation of their interests, on a proportional basis, and tending toward gender equality on the boards of trade unions and in collective bargaining. The states should therefore implement measures to meet these goals and oversee true compliance with them. The states should also adopt measures to foster the creation of spaces for women's groups in trade unions to support those who hold decision-making positions.[305]

198. Moreover, the Court recalls that the right to freedom of association, recognized in Article 16(1) of the Convention and in Article XXII of the American Declaration, asserts that everyone who is under the jurisdiction of the States Parties has the right and freedom to associate with others as they wish and to meet together to seek the shared achievement of a lawful purpose without pressure or interference that could alter or distort this purpose (*supra* par. 121). The Court has held that this right includes the right of individuals to set up and participate freely in non-governmental organizations, associations or groups involved in human rights monitoring, reporting and promotion.[306] It also places a positive obligation on the states to create the legal and factual conditions for the exercise of this right,[307] which when applicable, would include the duties to prevent

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303 *Cf.* CEDAW Committee, *General recommendation No. 23, supra,* par. 34.

304 *Cf. Progress of the World's Women. 2015-2016. Transforming Economies, Realizing Rights*, *supra*, pg. 118.

305 *Cf.* CEDAW Committee. *General recommendation No. 25, supra*, par. 22 and 23.

306 *Cf. Case of Nogueira de Carvalho et al. v. Brazil. Preliminary objections and Merits.* Judgment of November 28, 2006. Series C No. 161, par. 74, and *Case of Yarce et al. v. Colombia. Preliminary Objection, Merits, Reparations and Costs.* **Judgment of November 22, 2016, Series C No. 325, par 271.**

307 *Cf. Case of Kawas Fernández v. Honduras.* ***Merits, Reparations and Costs.*** **Judgment of April 3, 2009.** Series C No. 196, par. 146, and *Case of Yarce et al. v. Colombia*, *supra*, par. 271.

blows against freedom of association, protect those who exercise this freedom, and investigate any violations of it. These obligations hold even in the sphere of relations between individuals, should the case merit it.[308]

199. In the same vein, this Court maintains that the states must protect women union leaders from acts of violence and any other form of discrimination that may occur inside or outside of trade union life. Women union leaders defend the working rights and interests of all workers, and as such, they are doing the work of human rights defenders.[309] This means they could face dangers and threats from agents of the state and non-state actors, all of which can be exacerbated by social norms and stereotypes. The states must therefore adopt measures that allow women leaders to discharge their duties in an environment free of violence. The Court emphasizes that the states are required to guarantee the effective exercise of the rights to freedom of association, freedom of assembly, and freedom of expression in the context of public demonstrations or protest actions by women trade union leaders and the people who work for women's rights and gender issues.[310]

200. This Court has held that the right of women to live a life free of violence and the other specific rights recognized in the Convention of Belém do Pará result in the correlative obligations of the state to respect and to ensure those rights. The state obligations stipulated in Article 7 of the Convention of Belém do Pará should encompass all the state's spheres of action, transversally and vertically; that is, all the public powers (legislative, executive and judicial), at both the federal and the state or local level, as well as the private spheres. This calls for the enactment of laws and the design of public policies, institutions and mechanisms aimed at combatting all forms of violence against women, and also requires the adoption and implementation of measures to eradicate prejudices, stereotypes and practices that constitute the fundamental causes of gender-based violence against women.[311]

B. Participation of trade unions in processes to design, develop and evaluate public policies on work in contexts of labor market changes driven by the use of new technologies

201. The Court recalls that the states, when they comply with obligations for the progressive development of labor rights under the terms of Article 26 of the American Convention in conjunction with Articles 1(1) and 2 thereof, must be mindful of the provisions of Article 34 of the OAS Charter, under which the states agreed that "equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions

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308 *Cf. Case of Huilca Tecse v. Peru*, *supra*, par. 76, and *Case of Yarce et al. v. Colombia*, *supra*, par. 271.

309 *Cf. Case of Human Rights Defender et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 28, 2014. Series C No. 283, par. 129. This Court has held that the status as a human rights defender is defined by the work carried out, regardless of whether the person is a private citizen or a public servant. In this regard, the Court has referred to the monitoring, reporting and education activities carried out by human rights defenders, emphasizing that the defense of rights not only applies to civil and political rights, but also necessarily covers economic, social and cultural rights, according to the principles of universality, indivisibility and interdependence. Furthermore, this Court recognizes that international consensus exists that, among other activities, human rights defenders are involved in the promotion and protection of human rights.

310 *Cf.* United Nations High Commissioner. *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 2011, pg. 82, and UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, March 8, 1999, A/RES/53/144, Articles 4 and 5.

311 The CEDAW Committee has held a similar position concerning general obligations under CEDAW. *Cf.* CEDAW Committee. *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/CG/35, July 26, 2017, par. 26, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, *supra*, par. 215.

relating to their own development are, among others, basic objectives of integral development," and more particularly, agreed to respect the right of persons to "fair wages, employment opportunities, and acceptable working conditions," as stated in subparagraph (g) of the article.[312] It should also be emphasized that Article 45, subparagraphs (b), (c) and (g), in that order, assert that work should include "a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family," and that employers and workers have "the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike;" it also recognizes the importance of the contribution of organizations such as labor unions to the life of the society and to the development process.[313]

202. The Court therefore reiterates that the states are under obligation to respect and guarantee the rights of works, including the right to freedom of association, right to collective bargaining and right to strike. Furthermore, measures to recognize these rights should also include sufficient guarantees for protecting them. Thus, and with respect to the questions raised by the Inter-American Commission, the Court warns that the protection of these rights must be understood in consideration of the fact that labor relations are in constant flux due to a variety of factors, including the use of new digital technologies in the workplace. The Court would thus underscore that the states have the obligation to adapt their laws and practices to new conditions in the labor market, regardless of the type of technological developments that bring about such changes, and in consideration of the obligations to protect worker rights under the terms of international human rights law. It is particularly important to comply with this obligation in a region such as Latin America, where factors including inequality and a poverty rate affecting 30.1% of the population[314] create conditions of vulnerability for people who are sidelined into more precarious ways of working.

203. The Court emphasizes that work using digital media has not been explicitly regulated in the realm of international law. Even so, the ILO has a variety of instruments that could be used to shape the content of minimum obligations that the states should meet for this kind of work.

204. For example, ILO Convention 175 on part-time work obliges the states to adopt measures that will ensure all part-time workers receive the same protections enjoyed by full-time workers under comparable circumstances, including the right to organize, right to safety and health, and to be free from discrimination in employment and occupation.[315] Part-time workers should also receive wages that are proportional, on an hourly, performance-related, or piece-rate basis, to those of full-time workers. Moreover, social security schemes, maternity and paternity protection, conditions for termination of employment, vacation time and maternity and paternity leave should be available under conditions equivalent to those of full-time workers.[316]

205. ILO Home-Work Convention 177 recognizes that national work-from-home policies[317] should promote equal treatment between homeworkers and other wage earners, taking into account

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312 OAS Charter, *supra*, article 34 and 34(g).

313 OAS Charter, *supra*, article 45(b),(c), and (g).

314 *Cf.* Economic Commission for Latin America and the Caribbean, *Social Panorama of Latin America 2019*, December 2019, pg. 93.

315 *Cf.* International Labour Organisation. Part-Time Work Convention, 1994 (No. 175), Article 4. Guatemala is the only OAS Member State that is party to this treaty.

316 ILO Convention No. 175, *supra*, Articles 5-7.

317 *Cf.* International Labour Organisation. Home Work Convention, 1996 (No. 177), Article 1. ILO Convention 177 defines home-based work as follows: "(a) the term *home work* means work carried out by a person, to be referred to as a homeworker: (i) in his or her home or in other premises of his or her choice, other than the workplace of the employer; (ii) for remuneration; (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions; (b) persons with employee status do not become

conditions applicable to the same or a similar type of work carried out in an enterprise. The Convention also states that equality of treatment should be promoted, particularly, in relation to the homeworkers' right to join organizations of their own choosing, protection against discrimination in employment and occupation, protection in the field of occupational safety and health, remuneration, social security protection, access to training, minimum age for access to employment or work, and maternity protection.[318] In line with this rationale, national policy on home work should be implemented by means of laws and regulations, collective agreements, arbitration awards or in any other appropriate manner consistent with national legislation.[319]

206. ILO Recommendation 184 on home work then goes on to state that any restrictions to the exercise of the right of homeworkers to establish organizations or join those of their choice and to join trade union federations or confederations should be identified and eliminated.[320] It adds that measures should be taken to encourage collective bargaining as a means of determining the conditions of work,[321] including remuneration. The recommendation also addresses minimum wages, stating that minimum rates of wages should be fixed in accordance with national law and practice, and that workers should receive compensation for costs incurred in connection with their home-based work.[322] It then addresses occupational health, stating that homeworkers should have daily and weekly rest comparable to that enjoyed by other workers, and should receive social security provisions and maternity protection.[323] Finally, homeworkers should benefit from the same protection as that provided to other workers with respect to termination of employment.[324]

207. The Court notes, along the same lines and for purposes of illustration, that the recent 2020 European framework agreement on telework has addressed the matter of rights and obligations for employees performing telework.[325] In particular, the agreement states, "teleworkers benefit from the same rights, guaranteed by applicable legislation and collective agreements, as comparable workers at the employers premises," although it does not dismiss the possibility that the particularities of the job may call for specific complementary individual or collective agreements.[326] The content of this agreement is relevant for an understanding of the scope of rights for teleworkers in such matters as: (a) data protection, (b) privacy, (c) equipment, (d) health and safety, (e) organization of work, (f) training, and (g) collective rights.[327] All these considerations are particularly critical in view of the

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homeworkers within the meaning of this Convention simply by occasionally performing their work as employees at home, rather than at their usual workplaces; (c) the term *employer* means a person, natural or legal, who, either directly or through an intermediary, whether or not intermediaries are provided for in national legislation, gives out home work in pursuance of his or her business activity. Argentina is the only OAS Member State that is party to this treaty.

318 *Cf.* ILO Convention No. 177, *supra*, Articles 3 and 4.

319 *Cf.* ILO Convention No. 177, *supra*, Article 5.

320 *Cf.* International Labour Organisation. Home Work Recommendation, 1996 (No. 184), Article 11. ILO recommendation 184 defines a homeworker as one who carries out work: (i) in his or her home or in other premises of his or her choice, other than the workplace of the employer; (ii) for remuneration; (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used.

321 *Cf.* ILO Recommendation 184, *supra*, par. 12.

322 *Cf.* ILO Recommendation 184, *supra*, par. 13-18.

323 *Cf.* ILO Recommendation 184, *supra*, Articles 25 and 26.

324 *Cf.* ILO Recommendation 184, *supra*, par. 27.

325 *Cf.* European Framework agreement on telework, July 16, 2002, pg. 1. It defines telework as "a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employers premises, is carried out away from those premises on a regular basis."

326 European Framework agreement on telework, *supra*, pg. 2.

327 European Framework agreement on telework, *supra*, pg. 2 and 3.

current worldwide situation resulting from the COVID-19 pandemic, which has spread the use of telework throughout the countries of the Americas.

208. ILO Recommendation 198 on the employment relationship says that the states should "formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship."[328] The Court underscores the view of the ILO that national policy in the states should include measures to: "(b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due."[329]

209. In the view of the Court, labor regulations in the context of new technologies must be consistent with standards that hold labor rights as universal and inalienable, ensuring decent, dignified work. The Court maintains that the states must adopt legislative and other types of measures focused on individuals, and not primarily or exclusively on markets, that respond to the challenges and opportunities brought about by digital transformation of work, including work over digital platforms.[330] Specifically, the states must adopt measures designed to: (a) grant legal status to workers as employees if this is what they are, so they have access to the labor rights to which they are entitled under domestic law; and therefore, (b) recognize rights to freedom of association, collective bargaining and the right to strike. It is worth mentioning, in this regard, that labor rights are universal, and they apply to all persons in all countries as provided in labor agreements.

210. As for state obligations on specific guarantees for effective participation of trade unions at this time of change in the workplace through the use of new technologies, the Court deems, first of all, that the obligation to respect and guarantee the rights to freedom of association, collective bargaining and to strike, in the terms outlined above (*supra* pars. 44 to 105) are a prerequisite for workers to have real participation in shaping public policies through social dialogue on matters that are not necessarily covered by current labor laws or international treaties. It is a fact that labor relations are in constant evolution in response to changing technologies and markets, and this brings new challenges for human rights involving labor. The emerging challenges may take many forms, including, for example, the possibility of speeding up the pace of work and extending the workday beyond limits allowed in the constitution and domestic legislation, greater labor instability and growth in the informal economy, as well as remote monitoring and invasive surveillance of private life. This is why workers must have the real option of setting up trade unions and thus be in a position to effectively negotiate fair, equitable working conditions.

211. Furthermore, and in view of the standards set by the Committee on Freedom of Association and views on the right to collective bargaining discussed earlier (*supra* par. 88 to 94), the Court holds that the states must foster effective participation by worker representatives in the design of employment policies and laws in contexts of labor market changes driven by the use of new technologies. The states must ensure this participation in certain stages of legislative or regulatory processes.[331]

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328 *Cf.* International Labour Organisation. Employment Relationship Recommendation, 2006 (No. 198), par. 1.

329 *Cf.* ILO Recommendation 198, *supra*, par. 4.

330 *Cf.* International Labour Organisation, *Digital labour platforms and the future of work: Towards decent work in the online world*, 2019, pg. 105.

331 *Cf.* Compilation of decisions of the Committee on Freedom of Association, 2018, par. 1532; 367th report, case number 2930, paragraph 732; 368th report, case number 2980, paragraph 320, case number 2945, paragraph 606, case numbers

212. The Court notes that the emergence of digital working platforms marks a major change in the way of working, which also poses serious questions for the labor rights of users. The ILO has stated that the main challenge arising from platform-based labor, especially with the use of *apps* and *crowdwork*, is that activities performed over digital media may not place workers in the category of wage earners, but as independent contractors.[332] This failure to recognize their role could deprive workers of employment benefits, including job stability, minimum wage, and access to decent working conditions, and this makes it more difficult for them to exercise their union rights. The Court would therefore emphasize the importance of three-way dialogue, allowing public policies and labor laws to promote stable, sound, professional employer-employee relationships in a framework where human rights are respected and guaranteed. Respect for the principles of consultation and cooperation needs to be an essential factor in government action to design and implement state policies on labor.

VIII.
OPINION

213. For the reasons explained above in interpretation of Articles 26, 13, 15, 16, 24, 25, 1(1) and 2 of the American Convention on Human Rights, Articles 3, 6, 7 and 8 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," Articles 2, 3, 4, 5 and 6 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém Do Pará," Articles 34, 44, and 45 of the Charter of the Organization of American States, and Articles II, IV, XIV, XXI, and XXII of the American Declaration of the Rights and Duties of Man,

THE COURT

DECIDES

unanimously that:

1. It is competent to issue this advisory opinion in the terms of paragraphs 13 to 37.

AND IS OF THE OPINION

unanimously that:

2. The rights to freedom of association, collective bargaining and to strike are human rights protected in the framework of the inter-American system, and this places the states under obligation to adopt mechanisms for guaranteeing them, including access to effective judicial recourse against actions in violation of these rights, prevention, investigation, and sanction of the perpetrators of violations of trade union rights, and to adopt specific measures for the effective exercise of these rights, in the terms of paragraphs 38 to 120.

3. Freedom of association, the right to collective bargaining and the right to strike are interdependent and indivisible. Respect for and guarantee of these rights is essential to defend labor rights and fair, equitable, satisfactory working conditions, in the terms set form in paragraphs 121 to 131.

2917 and 2968, paragraph 1021; 375th report, case number 3054, paragraph 327; 377th report, case number 3118, paragraph 184; and 378th report, case number 3155, paragraph 104.

[332] *Cf.* ILO. *Digital labour platforms and the future of work: Towards decent work in the online world, supra*, pg. XVIII to XIX.

4. The rights to freedom of assembly and freedom of expression, as they relate to freedom of association, the right to collective bargaining and the right to strike, are fundamental rights for allowing workers and their representatives to organize and express their specific demands concerning working conditions and for them to be able to take part in matters of public interest with a collective voice; and for this reason, the states are obliged to respect and guarantee these rights in the terms discussed in paragraphs 132 a 142.

5. Labor law sets a minimum threshold for the protection of worker rights, and for this reason, worker rights recognized in labor laws cannot be abrogated *in peius* through collective bargaining, under the terms of paragraphs 143 to 150.

6. The states must ensure the right of women, under equal circumstances, not to be subject to acts of discrimination, and to take part in all associations that address public and political life, including trade unions and worker organizations. This means that no type of unjustified differential treatment between individuals may be practiced on the mere basis that the subjects are women, and points to the obligation of the states to create conditions of real equality in the exercise of trade union rights, under the terms of paragraphs 142 and 151 to 189.

7. Union autonomy cannot be used to protect measures that would limit the exercise of women's trade union rights, but to the contrary, obliges the states to adopt positive measures that will allow women to enjoy formal and material equality in the workplace and in the unions, particularly measures to counteract structural factors that underlie the persistence of gender stereotypes and roles and block women from the full exercise of their trade union rights, as discussed in paragraphs 190 to 200.

8. The states are under obligation to adapt their laws and practices to new conditions on the labor market, regardless of the kind of technological developments that produce these changes; and they must understand their obligations to protect worker rights under international human rights law, and for this purpose, foster the real participation of worker representatives and employer representatives in the design of employment policies and laws, as discussed in paragraphs 201 to 212.

Judges L. Patricio Pazmiño Freire, Eduardo Vio Grossi, and Humberto Antonio Sierra Porto informed the Court of their separate opinions.

I/A Court HR. Advisory Opinion OC-27/21 of May 5, 2021. Requested by the Inter-American Commission on Human Rights.

I/A Court HR. Right to freedom of association, right to collective bargaining and right to strike, and their relation to other rights, with a gender perspective. (Interpretation and scope of Articles 13, 15, 16, 24, 25 and 26, in conjunction with Articles 1(1) and 2 of the American Convention on Human Rights, Articles 3, 6, 7 and 8 of the Protocol of San Salvador, Articles 2, 3, 4, 5 and 6 of the Convention of Belem Do Para, Articles 34, 44 and 45 of the Charter of the Organization of American States, and Articles II, IV, XIV, XXI and XXII of the American Declaration of the Rights and Duties of Man). Advisory Opinion OC-27/21 of May 5, 2021.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Registrar

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Registrar