

REQUEST FOR AN ADVISORY OPINION SUBMITTED TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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

I. INTRODUCTION AND PURPOSE

1. The Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission” or “the IACHR”) submits the following request for an Advisory Opinion to the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) pursuant to the provisions of Articles 64(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and 70 of the Court’s Rules of Procedure.

2. Trade union freedom or the rights of trade union¹ 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.² According to the International Labour Organization (ILO), the rights to trade union freedom and to collective bargaining are enabling rights that promote democracy, good governance of the labor market and decent working conditions.³ In particular, they are vitally important for the guarantee and enjoyment of other human rights and the autonomous development of the individual. Meanwhile, development 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.⁴

3. The Court and the Commission have already had occasion to examine matters related to the content of some of these fundamental rights and freedoms in specific contexts. Thus, for example, the Inter-American Court has indicated in an Advisory Opinion that trade unions, as collective entities, may be subjects of rights under the inter-American system and, consequently, claim specific violations of such rights.⁵ Similarly, reference has been made 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.⁶ The IACHR has also had the opportunity to examine these matters under its different mechanisms; for example, between

¹ Trade unions are autonomous and independent entities. Trade union freedom is only one of the rights they are guaranteed to ensure their autonomy and independence.

² Committee on Economic, Social and Cultural Rights. General Comment No. 23 (2016) on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), para. 1.

³ ILO Declaration on Fundamental Principles and Rights at Work adopted in 1998 and its Follow-up procedure.

⁴ Cf. Articles 6(2) of the American Convention on Human Rights and 6(1), and 7(a) and (d) of the Protocol of San Salvador. Committee on Economic, Social and Cultural Rights. General Comment No. 18 (2005) on the right to work (Article 6 of the International Covenant on Economic, Social and Cultural Rights), para. 6.

⁵ I/A Court HR. 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(2), 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, para. 87.

⁶ I/A Court HR. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340.

April 2016 and December 2017, it held five hearings on trade union freedom in the Americas (Peru,⁷ Mexico,⁸ Argentina,⁹ Brazil¹⁰ and the United States¹¹) during which discussions were held on issues such as: retrogression in labor reforms; harassment and criminalization of trade union leaders as mechanisms to prevent the functioning of free and independent trade unions; the intervention of several trade unions, and stigmatization and persecution of labor judges and lawyers defending workers. In October 2018, the IACHR 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.¹²

4. 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.¹³ Furthermore, it notes that, in eight countries of the Americas, such rights are systematically violated, which means that recognized labor rights are jeopardized or suppressed.¹⁴ That scenario has been made more complex by the expansion of new technologies and uncertainty about their impact on the Latin American labor market.¹⁵

5. 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.¹⁶ The IACHR has indicated 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.¹⁷ The IACHR has also identified some issues of concern that affect women in this area, including the wage gap, unpaid work, harassment and occupational segregation.¹⁸

6. 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

⁷ IACHR, Hearing “Human rights situation of labor leaders in Peru,” 157th session, April 8, 2016.

⁸ IACHR, Hearing “Situation of trade union rights in Mexico,” 159th session, December 5, 2016.

⁹ IACHR, Hearing “Situation of labor and labor union rights in Argentina,” 165th session, October 24, 2017

¹⁰ IACHR, Hearing “Labor reform and outsourcing in Brazil,” 165th session, October 23, 2017.

¹¹ IACHR, Hearing “Labor rights in the automotive industry in the United States,” 166th session, December 7, 2017

¹² IACHR, Hearing “Guarantees for freedom of expression, association and peaceful assembly for trade unions in the Americas,” 169th session, October 2, 2018.

¹³ International Trade Union Confederation. ITUC Global Rights Index 2018. July 2018. Available at: <https://www.ituc-csi.org/IMG/pdf/ituc-global-rights-index-2018-en-final-2.pdf>. Accessed Dec. 11, 2018.

¹⁴ Id. *Ibid.*

¹⁵ Inter-American Development Bank; African Development Bank; Asian Development Bank; European Bank for Reconstruction and Development. The future of work: Regional perspectives. May, 2018. Available at: <http://dx.doi.org/10.18235/0001059>. Accessed Jan. 20, 2019

¹⁶ ECLAC. Inclusive social development: The next generation of policies for overcoming poverty and reducing inequality in Latin America and the Caribbean, 2016, p 25. Available at: https://repositorio.cepal.org/bitstream/handle/11362/39101/4/S1600098_en.pdf. Accessed Jan. 2019.

¹⁷ IACHR, The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights, OEA/Ser.L/V/II.143, Doc. 59, November 3, 2011, para. 28.

¹⁸ IACHR, The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights, OEA/Ser.L/V/II.143, Doc. 59, November 3, 2011, para. 82 and 83.

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.

7. Consequently, 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.

8. The Commission reserves the right to formulate its own considerations on the questions presented, when the Inter-American Court orders the processing of this request for an advisory opinion and within the time frame established for receiving contributions from OAS organs, Member States, civil society, trade unions, academia, and other interested parties.

9. The Commission designates Commissioner Margarette May Macaulay, and the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (ESCER), Soledad García Muñoz, as Delegates. Also, Christian González Chacón, Executive Secretariat lawyer, together with Luis Carlos Buob Concha, lawyer, and Renan Bernardi Kalil, attached to the ESCER Rapporteurship, will act as legal advisers.

II. GENERAL CONSIDERATION AND RULINGS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON TRADE UNION FREEDOM AND LABOR RIGHTS

10. Trade union freedom is a pillar of the collective right to work and relates to the existence of entities that represent workers and employers. In general, the organization of workers did not take place peacefully in modern States, including those of the Americas. Three stages can be identified in this regard: (i) prohibition: in which the creation of trade unions was not accepted and was a crime; (ii) tolerance: in which the establishment of trade union entities was not a right, but nor was it a crime, and (iii) legal recognition: in which collective organization and action were recognized as a right.¹⁹

11. Trade union freedom also constitutes a point of convergence between civil and political rights and economic, social and cultural rights.²⁰ It is essential for the exercise of individual and collective rights, and also to achieve social justice.²¹ It includes a positive perspective, which is the self-regulation of collective interests, and a negative one, which is the prohibition of external interference in trade unions.²²

12. Trade union freedom is extremely important to ensure that collective interests are defended adequately and so that workers have a means to act in order to balance the inequality in the employment relationship. Collective organization and action are important mechanisms for ensuring that workers can propose better working conditions to their

¹⁹ Nascimento, Amauri Mascaro. *Compêndio de direito sindical*. São Paulo: LTr, 2008, p. 40; Ríos, Alfredo Villavicencio. *La Libertad Sindical en el Perú: Fundamentos, alcances y regulación*. Lima: Plades, 2010, pp. 21-26.

²⁰ Silva, Walküre Lopes Ribeiro Da; Fioravante, Tamira Maira; Massoni, Tulio de Oliveira. *Liberdade sindical e direitos humanos*. *Revista do Ministério Público do Trabalho*, Brasília, Year XVI, No. 31, March 2006, pp. 64-66.

²¹ Cf. ILO Declaration on Social Justice for a Fair Globalization.

²² Cf. ILO Convention No. 87: Trade Union Freedom, Art. 3(2).

employers and to the State itself.²³ In this regard, the full development and use of voluntary negotiation procedures should be encouraged and promoted by employers and their organizations on the one hand, and by worker organizations on the other, with a view to the regulation of the terms and conditions of employment by means of collective agreements.²⁴

13. The Inter-American Court has ruled on trade union freedom in general terms on several occasions, underlining the international obligation of States not to arbitrarily restrict this freedom, and to protect it from acts of violence that could jeopardize its exercise.

14. It has also indicated that freedom of association, as it applies to trade unions, consists, basically, in the possibility of constituting trade union associations and establishing their internal structure, activities and program of action without any interference by the public authorities that would limit or hinder the exercise of the respective right. Furthermore, this freedom supposes that each individual may decide, without any coercion, whether or not to form part of the association. Thus, this relates to the fundamental right to associate for the common attainment of a lawful end without pressure or interference that could alter or denature its purpose.²⁵ The Court added that freedom of association, as applied to trade unions, was of great importance for defending the legitimate interests of workers and formed part of the human rights *corpus juris*.²⁶

15. In this regard, the Court has indicated that:

"In labour matters, and pursuant to the terms of Article 16 of the American Convention, freedom of association includes a right and a freedom, to wit: the right to form associations without restrictions other than those permitted according to sections 2 and 3 of that conventional precept, and the freedom of all persons not to be compelled or forced to join the association. The November 17, 1988, San Salvador Protocol, in its Article 8(3), contains the same idea, and specifies that, in trade union matters "[n]o one may be obliged to belong to a labour union."²⁷

16. In *Advisory Opinion OC-22/16*, the Court emphasized the importance of protecting the rights of trade unions, federations and confederations so that workers may organize trade unions and join that of their choice. The Court added that "these collective entities seek to be spokespersons through which the interests of their members are protected and promoted. Thus, a failure to protect their rights would have a greater impact on members, because it would impair or limit the workers' effective enjoyment of the right to organize themselves collectively."²⁸

17. Regarding acceptable restrictions, the Inter-American Court has indicated that: "freedom of association shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others."²⁹

²³ International Labour Office. Freedom of association and trade union freedom in practice: Lessons learned. Report I(B) of the International Labour Conference, 97th session, 2008, p. 5.

²⁴ Cf. ILO Convention No. 98: Right to organize and collective bargaining.

²⁵ I/A Court HR. Case of Baena Ricardo *et al. v. Panama*. Merits, reparations and costs. Judgment of February 2, 2001. Series C No. 72, para. 156

²⁶ I/A Court HR. Case of Baena Ricardo *et al. v. Panama*. Merits, reparations and costs. Judgment of February 2, 2001. Series C No. 7, para. 158.

²⁷ I/A Court HR. Case of Baena Ricardo *et al. v. Panama*. Merits, reparations and costs. Judgment of February 2, 2001. Series C No. 72, para. 159.

²⁸ Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 96.

²⁹ I/A Court HR. Case of Baena Ricardo *et al. v. Panama*. Merits, reparations and costs. Judgment of February 2, 2001. Series C No. 72, para. 168.

18. In relation to the obligation to ensure this right, the Court has indicated, and recently reiterated in the case of *Isaza Uribe et al. v. Colombia*, that the State has the obligation to ensure that individuals may freely exercise their trade union freedom in trade unions without fear of being subject to any type of violence because, to the contrary, the ability of groups of workers to associate to protect their interests would be diminished.³⁰ In this regard, the Court has stressed that freedom of association in labor matters “is not exhausted with the theoretical recognition of the right to form [associations], but also includes, inseparably, the respective right to exercise this freedom.”³¹ In Advisory Opinion OC-22/16, the Court indicated that “the general obligation of States to ensure the trade union rights contained in Article 8(1)(a) of the Protocol of San Salvador results in the positive obligation to permit or to encourage the creation of appropriate conditions for such rights to be realized effectively.”³²

19. In the case of *Lagos del Campo v. Peru*, the Court recalled the relevance and special protection of trade union freedom under the inter-American system as follows:

Indeed, trade unions and their representatives enjoy a specific protection for the proper performance of their functions because, as this Court has established in its case law,³³ and as noted in diverse international instruments,³⁴ including Article 8 of the Protocol of San Salvador, freedom of association as regards trade unions is of the greatest importance for the defense of the legitimate interests of workers and forms part of the human rights *corpus juris*.³⁵ Moreover, the importance that States have recognized to trade union rights is reflected in the fact that Article 19 of the Protocol of San Salvador grants this Court competence to rule on violations of the State obligation to permit trade unions, federations and confederations to function freely.³⁶

20. Despite the foregoing, it should be mentioned that in the same case, the Court mentioned that the obligation not to arbitrarily restrict the right to freedom of association was not limited to trade unions, but included other forms of organization of workers for the protection of their rights and interests. In the words of the Court, taking into account the indications of the ILO:

These principles concur with the protection recognized by the ILO, which has defined that the expression “workers’ representatives” means those who are recognized as such under national law or practice, whether they are trade union representatives or “elected representatives, namely representatives who are

³⁰ I/A Court HR. Case of *Isaza Uribe et al. v. Colombia*. Merits, reparations and costs. Judgment of March 3, 2005. Series C No. 121, paras. 66 to 79; and 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, paras. 146 and 147. See also, Case of *Cepeda Vargas v. Colombia*, paras. 172, 176 and 177; and Case of *García and family v. Guatemala*. Merits, reparations and costs. Judgment of November 29, 2012. Series C No. 258, paras. 116 and 117.

³¹ I/A Court HR. Case of *Lagos del Campo v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340, para. 156. Citing *cf.* Case of *Huilca Tecse v. Peru*, para. 70.

³² Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 101.

³³ I/A Court HR. Case of *Lagos del Campo v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340, para. 157. Citing *cf.* Case of *Baena Ricardo et al. v. Panama*. Merits, *supra*, para. 156, and Case of *Cantoral Huamaní and García Santa Cruz v. Peru*, *supra*, paras. 144, 145 and 146.

³⁴ I/A Court HR. Case of *Lagos del Campo v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340, para. 157. Citing *cf.* ILO. Convention No. 87 concerning Trade Union Freedom and Protection of the Right to Organize of June 17, 1948, and Convention No. 98 concerning the Right to Organise and Collective Bargaining of June 8, 1949.

³⁵ I/A Court HR. Case of *Lagos del Campo v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340, para. 157. Citing *cf.* Case of *Baena Ricardo et al. v. Panama*. Merits, *supra*, para. 158.

³⁶ I/A Court HR. Case of *Lagos del Campo v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340, para. 157. Citing *cf.* Protocol of San Salvador, Article 19(6); Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 87, and Case of *Huilca Tecse v. Peru*, *supra*, para. 74.

freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.”³⁷

In this regard, it has been interpreted that workers’ representatives should enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers’ representative.³⁸ Furthermore, the national authorities must ensure that imposing sanctions that may be disproportionate does not have a dissuasive effect on the right of the representatives to express and defend the workers’ interests.³⁹

III. CONTEXT OF THE EXERCISE OF TRADE UNION FREEDOM IN THE AMERICAS

1. The exercise of trade union freedom in the region, its impact on working conditions, and the use of new technologies in the workplace

21. The rate of union membership in the Americas varies in each country. According to the International Labour Organisation database (ILOSTAT),⁴⁰ which contains information on administrative records, worker organizations, income surveys, workforce surveys, official estimates, workplace inspection records, and placement bureau records, among other matters, membership in trade unions may be high, medium and low according to the country examined.

22. The first group, in which an average of more than 20% of workers are unionized, consists of Argentina (27.7%), Bolivia (39.1%), Canada (28.4%) and Uruguay (30.1%). The second group, in which the average membership in trade unions is from 10% to 20%, consists of Brazil (18.9%), Chile (17.7%), Costa Rica (19.4%), El Salvador (19%), United States (10.3%), Mexico (12.5%), Panama (11.9%), Dominican Republic (11%) and Venezuela (13%). And the third group, in which the average membership in trade unions is less than 10%, is composed of Colombia (9.5%), Ecuador (2%), Guatemala (2.6%), Honduras (8%), Nicaragua (5.3%), Paraguay (6.7%) and Peru (5.7%).⁴¹

23. Different countries also have high, medium and low levels of collective bargaining coverage. The first group, with trade unions that cover more than 20% of workers, includes Argentina (51.8%), Brazil (70.5%), Canada (30.3%) and Uruguay (94.6%). The second group, with trade unions that cover from 10% to 20%, consists of Chile (17.9%),

³⁷ I/A Court HR. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340, para. 159. Citing Convention on Workers’ Representatives, *supra*, Article 3(b).

³⁸ I/A Court HR. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340, para. 160. Citing *Cf. Recommendation 143 on Workers’ Representatives, supra*, para 5, and *mutatis mutandi*, ECHR, Case of Csánics v. Hungary, No. 12188/06. Judgment of January 20, 2009; ECHR, Case of Szima v. Hungary, No. 29723/11. Judgment of October 9, 2012, and ECHR, Case of Heinisch v. Germany, No. 28274/08. Judgment of July 21, 2011

³⁹ I/A Court HR. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340, para. 160. Citing. ECHR. Case of Palomo Sánchez and Others v. Spain [GS], *supra*, para. 56.

⁴⁰ International Labour Organisation. ILOSTAT. December 2018. Available at: https://www.ilo.org/ilostat/faces/wcnav_defaultSelection;ILOSTATCOOKIE=shzufSSllhwNgbGM6Z8VOYHLAFvZjsr4DbanrhbpsOuxrgxCtqI!1664393171?_afLoop=1356882520276001&_afWindowMode=0&_afWindowId=sessionblacklist#!%40%40%3F_afWindowId%3Dsessionblacklist%26_afLoop%3D1356882520276001%26_afWindowMode%3D0%26_adf.ctrl-state%3Dlqui7zk95_4. Accessed Dec. 27, 2018.

⁴¹ International Labour Organisation. ILOSTAT: Industrial relations. December 2018. Available at: https://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page3.jspx?MBI_ID=9&_afLoop=1356982544718806&_afWindowMode=0&_afWindowId=lqui7zk95_1#!%40%40%3F_afWindowId%3Dlqui7zk95_1%26_afLoop%3D1356982544718806%26_MBI_ID%3D9%26_afWindowMode%3D0%26_adf.ctrl-state%3Dlqui7zk95_57. Accessed Dec. 27, 2018.

Colombia (15.7%), Costa Rica (10.6%) and United States (11.5%). The third group, with trade unions that cover fewer than 10% of workers is composed of El Salvador (5%), Honduras (5.6%), Mexico (9.9%), Nicaragua (7.6%), Panama (1%), Paraguay (0.7%), Peru (4.8%) and Venezuela (2.5%).⁴²

24. Labor market surveys indicate that, in 75% of cases, large declines in trade union density are followed by an increase in the income of those who earn most. In the five years following the reduction in the rate of trade union density, the income of those with the highest earnings increased by 1.8%, while it remained stable in the years that preceded the decrease in trade union membership.⁴³

25. The same survey suggests that the impact of reductions in the rates of trade union density also affects workers. In the five years following the reduction in the rate of unionization, a significant decline was identified in the labor income share – of around 3% - and a sharp increase in the relative compensation in finance – of about 13%.⁴⁴

26. Some studies indicate that strong trade unions play an important role in the establishment of redistributive policies, because union actions are aimed at introducing fundamental social and labor rights into national law and protecting them.⁴⁵ Other studies use the theory of power resources to suggest that strong unions exert pressure on those who define public policies in order to privilege redistributive measures.⁴⁶

27. For example, in Colombia, based on the public and private sectors in 2005, the monthly salary of unionized workers exceeded that of non-unionized workers by 3% to 5%, and between 15% and 16% in the case of hourly wages. When only the private sector is analyzed, the monthly salary of unionized workers was 33% to 27% more than that of non-unionized workers and 52% to 56% more in the case of hourly wages.⁴⁷

28. In a study on trade unions in Mexico conducted between 1980 and 1990, it was determined that unions negotiated higher salaries for unionized workers and that the differences in favor of their members increased in accordance with trade union density. The wage inequality between unionized workers was significantly less than between non-unionized workers.⁴⁸

29. This study also indicated that trade unions had a positive impact on the benefits of unionized workers, which included private health services, transportation expenses, pension benefits, and the educational expenses of dependents.⁴⁹ It even noted up to 300% higher rates of training for unionized workers.⁵⁰

30. A recent survey, covering 2005 to 2014, revealed that, in Mexico, unionized

⁴² Id. *Ibid.*

⁴³ Jaumotte, Florence; Button, Carolina Osorio. Inequality and labor market institutions. July 2015. Available at: <https://www.imf.org/external/pubs/ft/sdn/2015/sdn1514.pdf>. Accessed Dec. 10, 2018, p. 14.

⁴⁴ Jaumotte, Florence; Button, Carolina Osorio. Inequality and labor market institutions. July, 2015. Available at: <https://www.imf.org/external/pubs/ft/sdn/2015/sdn1514.pdf>. Accessed Dec. 10, 2018, pp. 14-15

⁴⁵ Betcherman, Gordon. Labor market institutions: a review of literature. November, 2012. Available at: <https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-6276>. Accessed Dec. 11, 2018.

⁴⁶ Korpi, Walter. Power resources and employer-centered approaches in explanations of welfare states and varieties of capitalism: protagonists, consenters and antagonists. September 2006. Available at: <https://bit.ly/2EiM547>. Accessed Dec. 11, 2018.

⁴⁷ Cuesta, Laura. Impacto de los sindicatos en Colombia: ¿Mayores salarios y más desigualdad? CEDE document 2005-45, August 2005, Universidad de los Andes.

⁴⁸ Fairris, David. ¿Qué hacen los sindicatos en México? *Estudios económicos*, v. 22, No. 2, July-December 2007, pp. 194-196.

⁴⁹ *Ibid.*, pp. 196-198.

⁵⁰ *Ibid.*, pp. 199-200. See also: Campos, Jesús Rubio. Sindicalización y precariedad laboral en México. *Región y sociedad*, Year XXIX, No. 68, 2017, pp. 67-69.

workers have less precarious conditions than non-unionized workers. In the case of unionized workers, women experienced less precarious conditions. However, women who are members of a union are in a more precarious situation than unionized men.⁵¹

31. Meanwhile, in Chile and Argentina, on average, male and female unionized workers receive higher salaries.⁵² In Argentina, it has been determined that collective conventions increase salaries mainly in the lower range of income distribution. The establishment of salaries through collective bargaining has the effect of reducing wage inequality gaps and of promoting greater equality by reducing the variance and ratios between the 10% with the highest salaries and the 50% with the lowest salaries.⁵³ In addition, a lower wage inequality between unionized workers has been identified.⁵⁴

32. In Brazil, a study on the relationship between salaries and unionization rates indicated that unionized workers received 11% more than non-unionized workers in 1992 and 7% more in 1995.⁵⁵

33. Moreover, a report of the Economic Policy Institute (EPI) affirms that, “since the 1970s, declining unionization has fueled rising inequality and stalled economic progress for the broad American middle class.” Research conducted by the Institute shows that: (i) trade unions have strong positive effects on the wages of male and female workers because they set standards for entire industries; (ii) unions make wages among occupations more equal, because they give a larger wage boost to low- and middle-wage occupations; (iii) unions make wages of workers with similar characteristics more equal because of the standards they set; (iv) unions have historically organized middle-wage workers, which decreases inequality, by endeavoring to align their conditions with those of high-wage workers, and (v) the impact of wage increases is greatest for low-wage workers, with lower levels of education, such as black and Hispanic workers.⁵⁶

34. With regard to worker remuneration, the EPI indicates that, in the United States: (i) the wages of workers with a similar level of education, occupation and experience are 13.2% higher when they are covered by a union contract when compared to those who work in a non-unionized workplace in the same sector; (ii) unions increase workers’ wages by helping to ensure that workplace standards are complied with, and (iii) when union density is high, non-union workers benefit from higher wages.⁵⁷

35. The EPI report also mentions that unions actions benefit women and Afro-American workers. Analysis of the labor market data reveals that: (i) “unions help raise women’s pay, and the hourly wages of women represented by unions are 9.2% higher on average than for non-unionized women with comparable characteristics,” and (ii) when unions establish equal parameters for all the workers in a factory, this helps to reduce the wage

⁵¹ Campos, Jesús Rubio. *Sindicalización y precariedad laboral en México. Región y sociedad*, Year XXIX, No. 68, 2017, pp. 67-69.

⁵² Bustos, Francisco Javier Contreras; Martínez, Giancarlo Tranchino. *Impacto de los sindicatos sobre los salarios*. 2009. Available at: <http://repositorio.uchile.cl/handle/2250/112460>. Accessed Dec. 11, 2018; Correa, Julián Martínez; Lombardo, Carlo; Bentivegna, Belén. *Convenio colectivo, sindicatos y dispersión salarial: evidencia de Argentina*. August 2018. Available at: http://www.cedlas.econo.unlp.edu.ar/wp/wpcontent/uploads/doc_cedlas232.pdf. Accessed Dec. 11, 2018.

⁵³ Correa, Julián Martínez; Lombardo, Carlo; Bentivegna, Belén. *Convenio colectivo, sindicatos y dispersión salarial: evidencia de Argentina*. August 2018. Available at: http://www.cedlas.econo.unlp.edu.ar/wp/wpcontent/uploads/doc_cedlas232.pdf. Accessed Dec. 11, 2018.

⁵⁴ Correa, Julián Martínez; Lombardo, Carlo; Bentivegna, Belén. *Convenio colectivo, sindicatos y dispersión salarial: evidencia de Argentina*.

⁵⁵ Arbache, Jorge Saba; Carneiro, Francisco Galrao. *Unions and interindustry wage differentials*. *World Development*, Vol. 27, No. 10, pp. 1875-1883 and 1999.

⁵⁶ Economic Policy Institute. *How today’s unions help working people: giving workers the power to improve their jobs and unrig the economy*. August 2017. Available at: <https://www.epi.org/files/pdf/133275.pdf>. Accessed Dec. 11, 2018.

⁵⁷ *Ibid.*

differential between individuals who are white and those of black or Hispanic origin.⁵⁸

36. Bearing in mind that collective bargaining, as a component of trade union freedom, has a direct impact on the rights of workers as a democratic means of establishing working conditions, its scope and protection play a major role in the context of the changes that are taking place in the labor market at the regional and global levels.

37. The open-ended contract paradigm that formed the basis for the development of labor law has been undermined by the introduction of other types of contracts, generally with a lower level of protection, such as temporary and fixed-term contracts. In Latin America in 2016, several countries had a large number of workers with such contracts; they included Peru (more than 60% of workers had temporary contracts), Ecuador (more than 50%), Chile (37.6% had a fixed-term contract) and El Salvador (28% had temporary contracts). Other countries had fewer contracts of this nature; for example, Argentina (9.8%), Brazil (around 5%) and Mexico (10%).⁵⁹

38. Another aspect that influences the labor market and workers' lives is the quality of the jobs created. Employment quality is associated with formal wage employment, in which there is greater income security and respect for labor rights. Lower quality jobs are associated with informal employment and own-account employment, in which working conditions are insecure.⁶⁰

39. Data on urban employment composition in Latin America and the Caribbean reveals the highest rate of growth in own-account employment and the lowest generation of jobs in the formal wage sector. According to the ILO, jobs in the formal wage sector declined from 65.3% in 2013 to 63.4% in 2016. To the contrary, own-account employment increased from 21.4% in 2012 to 23.6% in 2016.⁶¹ Analysis of employment generation also revealed the rapid growth of own-account employment. In Latin America, between September 2016 and September 2017, there was a positive variation of 0.3% in wage employment and 0.7% in own-account employment.⁶²

40. It should also be underlined that advances in robotics, automation and artificial intelligence in Latin America, although at a slower rhythm than in Europe and the United States, are resulting in profound changes and having a significant impact on the labor market. Nevertheless, the effects on workers' lives of the creation or elimination of jobs, the qualifications required to perform new tasks, and the increase in alternative work arrangements are still uncertain.⁶³

41. In this context, it is worth noting that the ILO has recommended revitalizing collective representation, taking into account social dialogue as a public good, so that the representative legitimacy of workers' and employers' organizations is strengthened through innovative organizing techniques – including the use of digital technology - tailored to those who are involved in new business models. The ILO also noted that these organizations needed

⁵⁸ Ibid.

⁵⁹ International Labour Organization. Non-standard employment around the world: Understanding challenges, shaping prospects. Geneva: ILO, 2016, pp. 60-62.

⁶⁰ International Labour Organization. 2017 Labour Overview of Latin America and the Caribbean. Lima. Lima: ILO, 2017, p. 40.

⁶¹ Ibid., pp. 40-41

⁶² Ibid., p. 43

⁶³ Inter-American Development Bank; African Development Bank; Asian Development Bank; European Bank For Reconstruction And Development. The future of work: Regional perspectives. May, 2018. Available at: <http://dx.doi.org/10.18235/0001059>. Accessed Jan. 20, 2019; Bosch, Mariano; Ripani, Laura; Pagés, Carmen. *El futuro del trabajo en América Latina y el Caribe: ¿Una gran oportunidad para la región?* October 2018. Available at: <http://dx.doi.org/10.18235/0001340>. Accessed Jan. 20, 2019.

to use their convening power to bring diverse interests to the table,⁶⁴ and also to emphasize gender equality, recommending that “governments, employers, workers’ organisations and employers’ organisations actively pursue and support greater representation by women.”⁶⁵

2. Restrictions and anti-union actions

42. As previously indicated, the exercise of trade union freedom requires possessing the means to combat actions that prejudice the holders of trade union rights in the exercise of union activities or that unjustly deny the prerogatives required for the normal development of industrial action. This section indicates some of the most representative state and non-state threats to this freedom in order to help the Inter-American Court establish more specific standards in relation to the implications of compliance with the obligations to respect and to ensure the right to trade union freedom in the terms described above.

43. Throughout the Americas there is a great deal of information that corroborates the existence of a widespread practice of anti-union actions by private employers, and by the States themselves. For example, the IACHR condemned the attacks on trade unionists in Honduras in 2015, at the time of the murder of Héctor Orlando Martínez a beneficiary of precautionary measures granted by the IACHR,⁶⁶ and also in 2017.⁶⁷ The Committee of Experts of the Follow-up Mechanism of the Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belem do Pará” (MESECVI) and the IACHR Special Rapporteurship for Freedom of Expression have expressed their concern owing to the risk and insecurity faced by the Secretary General of the Journalists’ Union of Paraguay, Noelia Díaz Esquivel, who received death threats on social networks after referring publicly to a femicide.⁶⁸

44. In addition, the IACHR has been informed of changes in the law that hinder the work of trade unions in protecting and promoting the interests of workers in the countries of the Americas. During its 165th session, labor judges and representatives of trade unions and the Labor Public Prosecution Service of Brazil reported that, in 2017, two major changes were made in Brazilian trade union legislation amending the scope of collective bargaining to the detriment of the workers, and ending the obligatory trade union contribution, without regulating a democratic method for contributions.⁶⁹

45. Information presented to the ILO Governing Body by the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association on monitoring of international labor standards and human rights examined the complaints presented before the Committee on Freedom of Association by regions between 1951 and 2015. According to the information presented, 55% of complaints originated in the Americas (49% from Latin America and 6% from North America). The countries with most complaints were Colombia (187), Argentina (182) and Peru (170).⁷⁰

⁶⁴ International Labour Organisation. Work for a Brighter Future – Global Commission on the Future of Work. Geneva: International Labour Office, 2019, pp. 13; 41-44

⁶⁵ Ibid., p.36.

⁶⁶ IACHR, Press release 73/2015, June 24, 2015. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2015/073.asp (accessed Jan, 17, 2019).

⁶⁷ IACHR, Press release 56/2017, May 1, 2017. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2017/056.asp (accessed Jan, 17, 2019).

⁶⁸ Committee of Experts and SRFE, Press release R228/18, October 30, 2018. Available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=1122&IID=1>. (Accessed Jan, 31, 2019).

⁶⁹ IACHR, Hearing “Labor reform and outsourcing in Brazil,” 16th session, October 23, 2017

⁷⁰ International Labour Office. 326th Session of the Governing Body – third item on the agenda – Standards Initiative: Joint report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Trade Union Freedom. February 2016. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_456466.pdf. Accessed: Dec. 13, 2018.

46. According to the database of the Bureau for Workers' Activities (ACTRAV), the four most frequently reported violations of trade union freedom are: (i) anti-union discrimination, such as the dismissal of union leaders and members, persecution and harassment, violation of trade union rights, and refusal to reinstate workers who had been dismissed; (ii) attacks on the life, safety and integrity of individuals, as well as assassination attempts, threats, detentions and the criminalization of protests; (iii) obstacles to collective bargaining, such as by legal restrictions or, in the practice, by refusal to negotiate, and (iv) interference in trade union freedom, subjecting trade union elections to a public entity or excessive requirements for the elaboration of trade union statutes.⁷¹

47. According to NORMLEX data (the ILO System on International Labour Standards), 19 of the 24 cases filed before the Committee on Freedom of Association in 2018 related to alleged violations of trade union freedom and collective bargaining by States of the Americas.⁷²

48. The EPI report revealed that almost half the workers polled in the United States said that they would vote to create a union in their workplace. However, years of anti-union campaigns organized by employers, together with the establishment of barriers to trade union contributions, had adversely affected the entities that represented workers. Furthermore, in the United States, labor laws do not provide adequate protection for workers' collective bargaining rights. That scenario has contributed to undermining collective bargaining and a decline in the rates of unionization in the country. In the 1950s, 35% of private sector workers belonged to a trade union, 25% in the 1970s, and 6.4% today.⁷³

49. Another mechanism that offers an overview of the dimension of anti-union actions in the Americas is the Global Rights Index, elaborated by the International Trade Union Confederation (ITUC), which contains a list of composite indicators, based on violations of civil liberties in law and in practice (such as the arrest and detention of trade unionists, and also threats and intimidation), the right to establish or join a trade union (such as a trade union monopolies and unreasonable conditions for the registration of unions), trade union activities (such as interference in the electoral process and absence of the right to operate a union freely), right to collective bargaining (such as the exclusion of issues covered by collective bargaining and denial of collective bargaining) and the right to strike (such as restrictions based on the purpose of the strike and sanctions in cases of legitimate strikes).⁷⁴

50. The Index classifies the Americas at level 3.44: between regular violations of rights (classification 3) and repeated violations of rights (classification 4). Two of the ten worst countries for workers are in Latin America owing to the murder of trade union leaders, denial of collective bargaining, and discrimination and absence of procedural guarantees. Five countries in the Americas appear in the category of countries that do not guarantee rights (classification 5). In 2018, four of the nine countries where assassinations were recorded were

⁷¹ Marcos-Sánchez Zegarra, José; Rodríguez Calderón, Eduardo. *Manual para la defensa de la libertad sindical*. 4th edition. Lima: ILO/ILO Office for the Andean Countries, 2013, pp. 84-85.

⁷² International Labour Organisation. Normlex. 2018. Available at: <https://www.ilo.org/dyn/normlex/en/f?p=1000:20060::FIND:NO>. (Accessed Dec. 11, 2018)

⁷³ Economic Policy Institute. op. cit.

⁷⁴ International Trade Union Confederation. Op. cit., pp. 50-53. Regarding the elaboration of the Index, the ITUC has indicated that: "The methodology is grounded in standards of fundamental rights at work, in particular the right to trade union freedom, the right to collective bargaining and the right to strike. Questionnaires are sent to 331 national unions in 163 countries to report violations of workers' rights by indicating relevant details. Regional meetings with human and trade union rights experts are held where the questionnaire is disseminated, explained and completed. The ITUC contacts unions directly by phone and email when it becomes aware of violations to confirm relevant facts. Legal researchers analyse national legislation and identify sections which are not adequately protecting internationally recognised collective labour rights."

in Latin America.⁷⁵

51. According to the ITUC, “the Americas remained plagued by the pervasive climate of extreme violence and repression against workers and union members.”⁷⁶ In 2017, 19 trade unionists were murdered in Colombia and 3 in Brazil. In Guatemala, 87 trade unionists have been assassinated since 2004.⁷⁷

52. In addition to the increase in violence, the ITUC expressed concern owing to the erosion of collective bargaining: “Anti-union practices were still widespread in many Latin American countries. Unions faced repeated denial of registration and severe undermining of collective bargaining rights with the prevalence of protection contracts and the creation of yellow unions to prevent genuine workers’ representation.”⁷⁸ Index data show that 64% of countries of the Americas exclude workers from the labor law and the same percentage violate the rights to collective bargaining and to strike.⁷⁹

III. WOMEN IN THE LABOR MARKET AND IN TRADE UNIONS

53. The Inter-American Court has indicated that the notion of equality is directly derived from the unity of the nature of mankind and is inseparable from the essential dignity of the individual. Consequently, any situation that, considering a specific group superior, leads to treating it preferentially or that, to the contrary, considering it inferior, treats it with hostility or discriminates in any way against its enjoyment of the rights recognized to those who are not considered as such, is incompatible with that notion. The Court’s case law has indicated that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *ius cogens*. The legal structure of national and international public order rests on this and it permeates the whole legal system.⁸⁰

54. The principle of equality and non-discrimination should be understood to incorporate two concepts: “[...] a negative concept related to the prohibition of arbitrary differences in treatment, and a positive concept that relates to the State obligation to create conditions of real equality for groups that have been excluded historically, or that are at greater risk of being subject to discrimination.”⁸¹

55. Regarding the former concept, the Inter-American Court has indicated that not every difference in treatment is discriminatory and that it is necessary to establish whether it is justified, objective and reasonable.⁸² This analysis is especially strict in the case of a difference in treatment based on one of the categories prohibited by Article 1(1) of the Convention, which include sex and gender.

56. Regarding the second concept, international consensus exists on the situation of structural discrimination and historical exclusion to which women have been subjected in relation to men, owing to the preponderant role assigned to men in decision-making both socially and culturally, and the historically unequal relations between men and women. A

⁷⁵ Ibid., pp. 5; 10-13.

⁷⁶ Ibid., p. 18.

⁷⁷ Ibid.

⁷⁸ Ibid., p. 19.

⁷⁹ Ibid.

⁸⁰ I/A Court HR. Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs. Judgment of August 31, 2016. Series C No. 315, para. 109.

⁸¹ I/A Court HR. Case of Furlán and family members v. Argentina. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2012. Series C No. 246, para. 267.

⁸² I/A Court HR. Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paras. 55 and 56.

significant part of this historical exclusion and discrimination is due to deeply rooted gender stereotypes; that is, the preconceptions of attributes, conducts or characteristics possessed by, or roles that are or should be played by, men and women respectively.⁸³

57. Indeed, the situation of historical exclusion and discrimination of one group in particular means that this group may be the victim of differentiated and prejudicial impacts of norms or practices that, even though they appear to be neutral and are not intended to be discriminatory, are discriminatory owing to their effects. The Inter-American Court has referred to the concept of indirect discrimination and differentiated impact as follows:

The Court has indicated that the principle of the preemptory right to equal and effective protection of the law and non-discrimination means that the States must abstain from producing discriminatory regulations or those with discriminatory effects on the different groups of the population when exercising their rights.⁸⁴ The Human Rights Committee,⁸⁵ the Committee on the Elimination of Racial Discrimination,⁸⁶ the Committee on the Elimination of Discrimination against Women⁸⁷ and the Committee on Economic, Social and Cultural Rights⁸⁸ have all recognized the concept of indirect discrimination. This concept implies that a law or practice that appears to be neutral may have particularly negative repercussions on a person or group with specific characteristics.⁸⁹

[...]

For its part, the European Court of Human Rights has also developed the concept of indirect discrimination establishing that, when a general policy or measure has an effect that is disproportionately prejudicial to a particular group, this may be considered discriminatory even if it was not specifically addressed at that group.⁹⁰

⁸³ Cf. Case of González et al. ("Cotton Field") v. Mexico, *supra*, para. 401, and Case of Velásquez Paiz et al. v. Guatemala. Preliminary objections, merits, reparations and costs. Judgment of November 19, 2015. Series C No. 307, para. 180.

⁸⁴ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing *Cf.* Case of the Yean and Bosico Girls v. Dominican Republic, para. 141, and Juridical Status and Rights of Undocumented Migrants. Advisory Opinion OC-18/03, para. 88.

⁸⁵ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing *Cf.* Human Rights Committee, Communication No. 993/2001, Althammer v. Austria, August 8, 2003, para. 10.2. ("that a violation of article 26 [equality before the law] can also result from the discriminatory effect of a rule or measure that is neutral at face value and without intent to discriminate"), and Human Rights Committee, General Comment 18, Non-discrimination.

⁸⁶ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing *Cf.* Committee for the Elimination of Racial Discrimination, No. 31/2003, L.R. and Others v. Slovakia, March 7, 2005, para. 10.4.

⁸⁷ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing *Cf.* Committee for the Elimination of Discrimination against Women. General Recommendation No. 25 n temporary special measures (2004), note 1 ("Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women").

⁸⁸ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing *Cf.* Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights (Article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural rights) July 2, 2009.

⁸⁹ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing Case of Nadege Dorzema *et al.* v. Dominican Republic. Merits, reparations and costs. Judgment of October 24, 2012 Series C No. 251, para. 234.

⁹⁰ I/A Court HR. Case of Artavia Murillo *et al.* (*In vitro* fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 286. Citing ECHR, Case of Hoogendijk v. The Netherlands, No. 58641/00, First Section, 2005; ECHR, Grand Chamber, D. H. and Others. v. Czech Republic, No. 57325/00, November 13, 2007, para. 175, and ECHR, Case of Hugh Jordan v. The United Kingdom, No. 24746/94, May 4, 2001, para. 154.

58. The Inter-American Commission has observed that while women's opportunities for education and training have improved, this has not led to equal job opportunities for women, to promotions, and to women in executive and higher-ranking positions, or to equal pay for work of equal value. The IACHR has indicated that proper respect and guarantee of women's right to work, free of any form of discrimination and on an equal basis, is crucial for the elimination of poverty, and the empowerment and autonomy of women.⁹¹

59. As indicated below, the workplace in general, and the trade union context specifically, mirror this situation of historical exclusion and discrimination to which women have been subjected. Accordingly, within the framework of this request for an advisory opinion, the Inter-American Court is required to rule on the differentiated obligations that the principle of equality and non-discrimination impose on States in order to address this situation of real inequality with a view to eradicating its causes and consequences.

60. Women's participation in the labor market has risen steadily in Latin America and the Caribbean. In 2017, for the first time, women formed more than half the workforce (50.2%).⁹² And, that same year, the unemployment rate for women in Latin America was 10.4%, while the unemployment rate for men was 7.6%.⁹³

61. The average time devoted to paid and unpaid work is also the source of gaps between men and women. Women generally spend most of the week occupied in unpaid activities, while the contrary occurs in the case of men. In Argentina, women work 15.2 hours a week in paid activities and 42.4 in unpaid activities, while men spend 33.2 hours a week on paid work and 17.3 on unpaid work. In Brazil, women work 19.9 hours a week in paid activities and 23.6 in unpaid activities, while men perform paid work for 37.0 hours a week and unpaid work for 5.9 hours. In Colombia, women work 20.3 hours a week in paid activities and 32.2 in non-paid activities, while men devote 44.2 hours to paid work and 9.6 to unpaid work. In Costa Rica, women work 20.1 hours a week in paid activities and 51.5 in unpaid activities, while men perform paid work for 38.6 hours a week and unpaid work for 21.1 hours. In El Salvador, women work 18.7 hours in paid activities and 40.3 in unpaid activities, while men spend 35.7 hours on paid work and 16.2 on unpaid work. In Mexico, women work 20.5 hours a week in paid activities and 53.9 in unpaid activities, while men carry out paid work for 44.9 hours a week and unpaid work for 19.4 hours.⁹⁴

62. The IACHR has noted that the situation of unpaid work by women is based on the discriminatory family model that exists, where the role of caring for the family and performing domestic tasks is mainly assigned to women based on gender stereotyping. A significant number of women are working in unpaid activities the economic value of which is not recognized. Women's unpaid work is associated with the concept of a "care economy" in which the main activity relates to care services.⁹⁵ The IACHR has determined that the proportion of women in the region's workforce dedicated to providing care services is in excess of 75%.⁹⁶

63. According to the ILO, in the Americas, women carry out tasks related to unpaid

⁹¹ IACHR, *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, OEA/Ser.L/V/II.143, Doc. 59, November 3, 2011, para. 30; IACHR, *the Road to Substantive Democracy: Women's Political Participation in the Americas*, OEA/Ser.L/V/II., Doc. 79, April 18, 2011.

⁹² International Labour Organisation. 2017 Labour Overview of Latin America and the Caribbean. Lima: ILO, 2017, p. 15.

⁹³ International Labour Organisation. 2017 Labour Overview of Latin America and the Caribbean. Lima: ILO, 2017, p. 15.

⁹⁴ ECLAC. *Gender Equality Observatory for Latin America and the Caribbean*. Available at: <https://oig.cepal.org/en>. Accessed Dec. 18, 2018.

⁹⁵ IACHR, *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, OEA/Ser.L/V/II.143, Doc. 59, November 3, 2011, para. 141

⁹⁶ *Ibid.*

care work for 268 minutes each day and paid work for 175 minutes each day. In other words, more than 60% of the activities performed by women each day relate to unpaid care work. On the other hand, men perform unpaid care work for 156 minutes each day and paid work for 268 minutes each day. In other words, more than 63% of the activities performed by men each day relate to paid work.⁹⁷

64. The number of children is also a factor that may prejudice a woman's working conditions. According to the ILO, in the Americas, women and men who do not have children work 37.9 hours and 43.3 hours a week, respectively, in paid activities. This represents a gender gap of 5.4 hours. When women and men have one child, they work 37.5 and 43.4 hours a week; in other words, the gender gap increases to 5.9 hours a week. When they have two children, this gap increases to 6.3 hours and, if they have three children or more, the gap increases to 6.8 hours.⁹⁸

65. Another characteristic of labor markets in Latin America is the wage gap. According to the ILO Global Wage Report 2018/19, based on an element that the Organization refers to as the "factor weighted gender pay gap," women's wages are 20.6% lower than those of men.⁹⁹ In the past, the IACHR has expressed its concern about the wage gap in specific countries such as Chile,¹⁰⁰ Bolivia¹⁰¹ and Guatemala.¹⁰²

66. Addressing the wage gap between men and women is essential for building a more egalitarian society. It has been recognized that, when there is equal pay, it is possible to: (i) increase the division of domestic tasks between men and women and, consequently, the distribution of paid and unpaid work; (ii) modify stereotypes relating to the professional aspirations, preferences and capabilities of men and women; (iii) empower women financially so that they have a greater decision-making power in their homes and communities; (iv) make women less vulnerable to the possibility of slipping into poverty, and (v) reduce the probability that households headed by women descend into poverty.¹⁰³

67. In addition, even though more women are present in the labor market, their participation in trade union is lower. For example, data reveals that in Argentina,¹⁰⁴ Chile,¹⁰⁵

⁹⁷ International Labour Organisation. Care work and care jobs for the future of decent work. June 2018. Available at: https://www.ilo.org/global/publications/books/WCMS_633135/lang-en/index.htm. Accessed Dec. 27, 2018.

⁹⁸ Ibid.

⁹⁹ International Labour Organization. How big is the gender pay gap in your country? 2018. Available at: https://www.ilo.org/global/about-the-ilo/multimedia/maps-and-charts/enhanced/WCMS_650829/lang-en/index.htm. Accessed Dec. 14, 2018.

¹⁰⁰ IACHR, Report on the rights of women in Chile: Equality in the family, labor and political spheres, OEA/Ser.L/V/I.134, March 27, 2009, para. 149.

¹⁰¹ IACHR, Access to Justice and Social Inclusion. The road towards strengthening democracy in Bolivia, OEA/Ser.L/V/II. Doc. 34, June 28, 2007, para. 360.

¹⁰² IACHR, Justice and Social Inclusion: The challenges of democracy in Guatemala, OEA/Ser.L/V/II.118 Doc. 5 rev. 2, December 29, 2003, para. 305.

¹⁰³ Oelz, Martin; Olney, Shauna; Tomei, Marisa. *Igualdad salarial: una guía introductoria*. International Labour Office: Geneva, 2013, p. 5

¹⁰⁴ Ministerio De Trabajo, Empleo y Seguridad Social. Women in the world of work September, 2017. Available at: https://www.argentina.gob.ar/sites/default/files/informe_ctio_documentodetrabajo.pdf. Accessed Dec. 27, 2018; International Labour Organization. ILOSTAT: Labour force participation rate by sex and age. 2018. Available at: https://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page27.jspx?subject=EAP&indicator=EAP_DWAP_SEX_AGE_RT&datasetCode=A&collectionCode=YI&_afLoop=1359344900740192&_afWindowMode=0&_afWindowId=lqui7zk95_71#!%40%40%3Findicator%3DEAP_DWAP_SEX_AGE_RT%26_afWindowId%3Dlqui7zk95_71%26subject%3DEAP%26_afLoop%3D1359344900740192%26datasetCode%3DA%26collectionCode%3DYI%26_afWindowMode%3D0%26_adf.ctrl-state%3Dlqui7zk95_148. Accessed Dec. 27, 2018.

¹⁰⁵ Dirección Del Trabajo. More women in trade unions: sectors with high female union membership. 2015. Available at: http://www.dt.gob.cl/portal/1629/articles-106799_archivo_01.pdf. Accessed Dec. 27, 2018; International Labour Organization. ILOSTAT: Labour force participation rate by sex and age. 2018. Available at: https://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page27.jspx?subject=EAP&indicator=EAP_DWAP_SEX_AGE_RT&datasetCode=A&collectionCode=YI&_afLoop=1359344900740192&_afWindowMode=0&_afWindowId

Brazil,¹⁰⁶ Panama¹⁰⁷ and El Salvador,¹⁰⁸ although women constitute around 50% of the workforce, only 25% to 40% of trade unions members are women and only 14% to 34% of the trade union leadership is made up of women.

68. The new technologies in the world of work may increase the gender inequalities identified in the workplace. Consequently, the Report of the Global Commission on the Future of Work has recommended the creation of a transformative agenda for gender equality, which includes policies that promote the sharing of care and domestic responsibilities between men and women, and also efforts to ensure accountability for progress on gender equality and to strengthen the voice, representation and leadership of women.¹⁰⁹

V. SPECIFIC QUESTIONS

69. The IACHR considers that, for States to address the challenges to achieving trade union freedom in the regional context and, in particular, with regard to its effects on working conditions, gender equality and the use of new technologies in the workplace, it is opportune to identify and develop the standards that should be complied with and the actions that should be taken under inter-American human rights law. This becomes even more crucial when it is recognized that the exercise of trade union freedom is a right that strengthens and contributes to ensuring fair and equitable working conditions. On this basis, it is also understood that ensuring the active participation of women in the process is crucial for the promotion of gender equality in the workplace. The following questions are formulated within this framework:

- a. Bearing in mind that Article 45(c) and (g) of the OAS Charter and the fundamental principles and rights at work¹¹⁰ 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

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¹⁰⁶ Instituto Brasileiro de Geografia e Estatística. National Household Survey: Table 4.36. 2015. Available at: http://wwwold.ibt.gov.br/pub/pnad/2015/tab4_36.xls. Accessed Dec. 27, 2018; Instituto Brasileiro de Geografia e Estatística. Synthesis of social indicators. 2018. Available at: ftp://ftp.ibge.gov.br/Indicadores_Sociais/Sintese_de_Indicadores_Sociais/Sintese_de_Indicadores_Sociais_2018/xls/1_Trabalho_xls.zip. Accessed Dec. 27, 2017; Leone, Eugenia Troncoso; Teixeira, Marilane Oliveira. As mulheres no mercado de trabalho e na organização sindical. 2016. Available at: <http://www.abep.org.br/publicacoes/index.php/anais/article/view/2289/2243>. Accessed Dec. 27, 2018.

¹⁰⁷ International Labour Organization. ILOSTAT: Labour force participation rate by sex and age. 2018. Available at: https://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page27.jspx?subject=EAP&indicator=EAP_DWAP_SEX_AGE_RT&datasetCode=A&collectionCode=YI&_afLoop=1359344900740192&_afWindowMode=0&_afWindowId=lqui7zk95_71#!%40%40%3Findicator%3DEAP_DWAP_SEX_AGE_RT%26_afrWindowId%3Dlqui7zk95_71%26subject%3DEAP%26_afrLoop%3D1359344900740192%26datasetCode%3DA%26collectionCode%3DYI%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dlqui7zk95_148. Accessed Dec. 27, 2018; Sepulveda, Malbrán, Juan Manuel (Ed.); Olgúin Martínez, Gabriela; Tomei, Manuela. Acciones sindicales para la promoción de un trabajo decente para mujeres. San José: International Labour Office, 2004.

¹⁰⁸ Republic of El Salvador. Report by El Salvador on the application of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador): Second group of rights. March 2017. Available at: http://www.oas.org/es/sadve/inclusion-social/protocolos/docs/INFORME_EL_SALVADOR_SEGUNDO_AGRUPAMIENTO_DERECHOS_PSS_MARZO_2017-2.pdf. Accessed Mar. 27, 2019.

¹⁰⁹ International Labour Organisation. Work for a Brighter Future – Global Commission on the Future of Work. International Labour Office, Geneva, 2019, pp. 12 and 34.

¹¹⁰ According to the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work, these fall into four categories: trade union freedom and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child labor, and the elimination of discrimination in respect of employment and occupation.

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, 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.

July 31, 2019