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Re: Request for Advisory Opinion by the Government of Panama

Introduction

1. The International Trade Union Confederation (ITUC), the Trade Union Confederation of the Americas and the International Commission for Labor Rights (ICLR) respectfully submit these joint additional observations in response to the questions posed by members of the Inter-American Court of Human Rights at the conclusion of the oral hearing held on June 25, 2015. The ITUC and the ICLR focus their additional observations as to the proper interpretive approach (in particular on the impact of these approaches on the interpretation of Article 16 of the Convention as it relates to the rights of trade unions) that support a clarification by this Court that trade unions have human rights protected by the Inter-American instruments and have standing as victims to defend those rights, as well as the rights of its members before the Commission and the Court.

2. There is long-held international consensus that labor rights are fundamental human rights and that trade unions are an integral component of freedom of association in the labor context. This has been expressed in every major international human rights instrument, including the International Declaration of Human Rights, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and in this hemisphere the OAS Charter and the Additional Protocol to

the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. The American Convention of Human Rights, Article 16, has been interpreted to support this position as we discuss in paragraph 46. Article 16 should likewise be interpreted to extend to trade unions the right to access the Inter-American system of human rights before the Commission and the Court to redress violations breaches of freedom of association that affect their member and/or the union itself. There is extensive support for this position, which we address in this submission.

3. The three closely related principles support interpreting Article 16 of the *American Convention* consistent with more general norms of international law: 1) the plain language of Article 29 of the Convention; 2) Articles 31-32 of the *Vienna Convention on the Law of Treaties* (and related customary international law); and 3) the doctrine of dynamic interpretation of human rights instruments.

Interpretive Principle No. 1 – Article 29 of the *American Convention on Human Rights*

4. The *American Convention* contains a special set of interpretive provisions internally in Article 29. These provisions provide that nothing in the *Convention* itself may be interpreted to restrict the enjoyment or exercise of any right or freedom under the laws of a state or under another convention to which a state is a party (Art. 29(b)) or excluding or limiting the effects of the *American Declaration of the Rights and Duties of Man* or “other international acts of the same nature” (Art. 29(d)).

5. The Inter-American Court has held that Article 29 operates to ensure that the protection of human rights are not restricted based on the sources of obligations. Rather,

the Article supports a general approach that integrates human rights protections across multiple systems and sources.¹

6. The Inter-American Court, in its contentious jurisdiction, has relied on Article 29 to justify resort to treaties that exist wholly outside of the Inter-American system to interpret and inform the content of human rights protections set out within the *American Convention*. Thus, while the Court has held that it had no jurisdiction to adjudicate whether states had violated provisions of the 1949 Geneva Conventions as such,² the Court has also held that Article 29 *requires* the Court to consider the Geneva Conventions and the Protocols Additional in determining state responsibility under the *Convention* in circumstances of armed conflict.³ As such, Article 29 compels the Court to consider other relevant international instruments when interpreting the substantive provisions of the *American Convention*.

Interpretive Principle No. 2 – The Vienna Convention, Art. 31(3)(c)

7. The Inter-American Court has held that the provisions of the *American Convention* should be interpreted in accordance with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.⁴

8. Article 31(1) provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

¹ “*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, Ser. A, No. 1 (IACtHR) at para. 41[“*Other Treaties Advisory Opinion*”].

² *Case of Las Palmeras v. Columbia*, Judgment of February 4, 2000 (Preliminary Objections), Ser. C, No. 67 (IACtHR) at para. 33.

³ *Case of the “Mapiripán Massacre” v. Columbia*, Judgment of September 15, 2005 (Merits, Reparations, and Costs), Ser. C, No. 134 (IACtHR) at paras. 114-115.

⁴ 1155 U.N.T.S. 332. See *Other Treaties Advisory Opinion, supra* at para. 33.

9. This provision does not mandate a restrictive or literalist interpretation of Article 2(1) of the *American Convention on Human Rights*, but rather requires a reading in which the context, objective and purpose of the *Convention* is given proper weight.

10. According to the Inter-American Court, the object and purpose of the *Convention* is the “effective protection of human rights”.⁵ When applying the principle of effectiveness, the Court has concluded that “the Convention must... be interpreted so as to give it its full meaning and to enable the system for the protection of human rights entrusted to the Commission and the Court to attain its ‘appropriate effects’” providing “jurisdictional control over the broadest sphere of cases alleging human rights violations.”⁶ Such an approach is not amenable to narrow, technical constructions of the *Convention’s* provisions, but rather a contextual and purposive approach.

11. This general approach is further informed by Article 31(3)(c) of the *Vienna Convention*, which provides that:

There shall be taken into account, together with the context... Any relevant rules of international law applicable in the relations between the parties.

12. Article 31(3)(c) of the *Vienna Convention* has a broad application. It requires a court to consider the full range of relevant rules of international law as applicable between the parties to a treaty when interpreting the treaty. In this way, Article 31(3)(c) serves to

⁵ *Cayara v. Peru*, Judgment of February 3, 1993 (Preliminary Objections), Ser. C, No. 14 (IACtHR), at para. 37.

⁶ *Velásquez Rodríguez v. Honduras*, Judgment of June 26, 1987 (Preliminary Objections), Ser. C, No. 1 (IACtHR) at para. 30; *Fairén Garbi and Solís Corrales v. Honduras*, Judgment of June 26, 1987 (Preliminary Objections), Ser. C, No. 1 (IACtHR) at para. 35; *Godínez Cruz v. Honduras*, Judgment of June 26, 1987 (Preliminary Objections), Ser. C, No. 3 (IACtHR) at para. 33 (quoting the term “appropriate effects” from *Free Zones of Upper Savoy and the District of Gex* (1929), P.C.I.J., Ser. A, No. 22 at 13. See also T. Melish, *The Protection of Economic, Social and Cultural Rights in the Inter-American System of Human Rights: A Handbook for Bringing Cases* (Quito: Yale Law School/CDES, 2003).

ensure coherence between a state's various international legal obligations and promote the unity of international legal rules more generally.⁷

13. This Article is not limited to any particular form of international legal obligation. Rather, it requires a treaty to be interpreted in light of all rules of international law applicable as between the parties, regardless of their source. Thus, in the seminal *Golder* decision, the European Court of Human Rights held that even “general principles of law recognized by civilized nations” – repeating the provision of Article 38(1)(c) of the Statute of the International Court of Justice – fell within the ambit of Article 31(3)(c) of the *Vienna Convention*.⁸

14. This principle is not limited to those obligations that existed at the time states entered into a treaty. The ICJ clearly considers that the rules reflected in Article 31 of the Convention constitute customary international law and applies them irrespective of any limitation against retroactivity under Article 4 VCLT. Under Article 31(3)(c) contemporary legal obligations must be considered when construing the meaning of a treaty. This principle was articulated in the International Court of Justice's 2003 judgment in the *Oil Platforms* case.⁹

15. There, the Court was called upon to determine whether United States military attacks against Iranian oil platforms during the Iran/Iraq war violated the provisions of a 1955 Treaty of Amity between Iran and the United States. The United States attacks were claimed to be made in self-defence in response to Iranian attacks against neutral shipping in the Persian Gulf. One of the provisions of the 1955 Treaty at issue was Article XX, Paragraph 1(d), which provided that “The present Treaty shall not preclude the application

⁷ See generally Campbell McLachlan, “The Principle of Systemic Integration And Article 31(3)(c) of the Vienna Convention” (2005) 54 ICLQ 279.

⁸ *Golder v. United Kingdom* (plen.), No. 4451/70 (21 February, 1975)(ECtHR), at para. 35.

⁹ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, [2003] ICJ Rep. 161.

of measures... necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.” On the basis of this provision, the United States of America argued that even if its attacks otherwise violated the provisions of the Treaty, they were ‘saved’ by this article.

16. The Court, in interpreting the meaning of Article XX(1)(d), resorted to Art. 31(3)(c) of the *Vienna Convention* to incorporate the customary law of the use of force.¹⁰ The Court went on to rely on its 1986 Judgment in *Military and Paramilitary Activities in and Against Nicaragua*¹¹ to define the content of customary international humanitarian law, and to use those rules to determine whether the attacks on the Iranian platforms was “necessary to protect its essential security interests.”

17. Significantly, the Court relied on customary norms that were articulated in the 1980s to interpret the provisions of a treaty concluded in the 1950s. When the Treaty of Amity was concluded the Geneva Conventions were only six years old, and the Protocols Additional were decades from being drafted. Yet the ICJ used contemporary international customary law to interpret the Treaty, demonstrating that Article 31(3)(c) may be used to interpret treaties not only in light of the international legal obligations that existed at the time of that the treaty was entered into, but also in light of legal norms that subsequently emerge.

18. This general proposition is also confirmed by other international (regional) courts which have considered that the interpretation rules, in particular Article 31 VCLT have to be considered as ‘international law’.

¹⁰ *Ibid*, at para. 41.

¹¹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits*, [1986] ICJ Rep. 14.

Interpretive Principle No. 3 – The Dynamic Interpretation of Human Rights Treaties

19. The Inter-American Court, and other international courts, have held that human rights instruments such as the *American Convention* are to be read dynamically, as “living instruments,” whose meaning and content must evolve to account for changing context. In this way, developments in both law and society must be taken into account in interpreting human rights instruments.

20. The dynamic interpretation approach to human rights instruments can be traced back to at least the International Court of Justice’s Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.¹² There, in considering the contemporary legal significance of the 1919 South African mandate over the former German South West Africa, the ICJ held that it was required to take into consideration the developments that had occurred in the subsequent 50 years. The Court reasoned that the mandates under the League of Nations were not intended to be static institutions, but rather dynamic ones designed to live up to the “sacred trust of civilization” by evolving with the times. In arriving at this conclusion, the Court held that it could also take into account legal developments that post-dated the creation of the Mandate, including the emerging norms of self-determination of peoples as set out in the United Nations Charter and subsequent instruments.¹³

21. The Inter-American Court has adopted the same dynamic interpretive approach to various human rights instruments within the Inter-American system. In its 1989 Advisory Opinion on the interpretation of the *American Declaration on the Rights and Duties of*

¹² Rosalyn Higgins, in a piece of extra-judicial writing, traces this approach back further to Justice Tanaka’s dissenting opinion in the 1966 *South West Africa Cases*: See Rosalyn Higgins, “Time and the Law: International Perspectives on an Old Problem” (1997) 46 ICLQ 501 at 516.

¹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 16 at paras. 52-53.

Man, the Court held that the declaration needed to be understood in light of the evolution the Inter-American system had undergone since 1948.¹⁴ The Inter-American Court subsequently held in its *Consular Assistance* Advisory Opinion that the same approach should be taken to the *American Convention*. Relying on both the ICJ's *Namibia* Advisory Opinion and the European Court's *Tyrer* decision, the Inter-American Court held that "human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions."¹⁵

22. Since then, the Inter-American Court has consistently invoked dynamic interpretation in contentious cases before it in order to determine the content of the substantive provisions of the *American Convention*.¹⁶ Read as a whole, the Inter-American Court's jurisprudence strongly supports the conclusion that the *American Convention* is a living instrument, and that its content must be construed in light of social and legal developments subsequent to the entry into force of the Convention.

23. The European Court of Human Rights has also acted in similar fashion. In *Tyrer v. The United Kingdom*, the European Court described the *European Convention* as a "living instrument which... must be interpreted in the light of present-day conditions."¹⁷ This principle has been reasserted in several subsequent cases.

¹⁴ *Interpretation of the American Declaration on 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, Ser. A, No. 10 (IACtHR) at para. 37 [*"Interpretation of the American Declaration Advisory Opinion"*].

¹⁵ *The Right to Information on Consular Assistance in the Framework of the Guarantee of the Due Process of Law*, Advisory Opinion OC-16/99 of November 14, 1997, Ser. A, No. 15 (IACtHR) at paras. 113-114 [*"Consular Assistance Advisory Opinion"*].

¹⁶ See, for example, *Case of the "Street Children" (Villagrán Morales et al.)*, Judgment of November 18, 1999, Ser. C, No. 63 (IACtHR) at para. 193; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Merits, Reparations and Costs), Ser. C, No. 79 (IACtHR) at para. 146 [*"Mayagna (Sumo) Awas Tingni Community"*]; *Case of the Gómez Paquiyauri brothers*, Judgment of July 8, 2004, Ser. C, No. 110 (IACtHR), at para. 165; *Case of the Yakya Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005 (Merits, Reparations and Costs), Ser. C, No. 125 (IACtHR) at para. 125 [*"Yakya Axa Indigenous Community"*]; *Case of the "Mapiripán Massacre" v. Colombia*, Judgment of September 15, 2005 (Merits, Reparations and Costs), Ser. C, No. 134 (IACtHR) at para 106.

¹⁷ *Tyrer v. The United Kingdom*, App. No. 5856/72 (25 April 1978)(E.Ct.H.R.) at para. 31.

24. The Grand Chamber's decision in *Demir and Baykara v. Turkey* is particularly instructive here as it concerns the interpretation of Article 11 of the European Convention, the corollary of Article 16 of the American Convention.¹⁸ The case concerned the annulment of a collective agreement in Turkey. The Court held unanimously that there had been a breach of art 11, emphasising that “the Convention is a living instrument which must be interpreted in the light of present-day conditions and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights”.¹⁹

25. In holding that the right to bargain collectively was now an *essential element* of the right to freedom of association, the Court took into account a wide range of international treaties (including ILO Convention 98, the European Social Charter, and the EU Charter of Fundamental Rights), as well as the constitutional and labour law and practice of the Member States of the Council of Europe.²⁰ The finding that collective bargaining was an essential element of freedom of association (whereas it had previously recognized the right to collective bargaining but not as an essential element), the court substantially limited the margin of appreciation of member states to take measures which would affect the right.

26. There is no question that the right to collective bargaining had been protected by various international legal instruments prior to the determination in *Demir* that Art 11 the ECHR, by reference to those same instruments, did the same. The importance of the case was that the ECtHR had finally interpreted its own instrument in light of the international consensus. In the instant case, and as explained further below, the Court should find no difficulty in holding that the right to freedom of association, which is widely recognized to be a dual right enjoyed by both individual members of trade unions as well as trade unions

¹⁸ *Demir and Baykara v. Turkey* [GC], App. No. 34503/97 (12 November 2008)(E.Ct.H.R.) [*“Demir”*].

¹⁹ *Demir*, *supra* at para. 146.

²⁰ *Demir*, *supra* at paras. 147-154.

themselves (as the legally recognized collective embodiment of the membership), should confer rights upon trade unions per se under the convention and which they have standing to defend.

A Holistic Approach

27. While the above discussion about principles of interpretation have been divided into discrete sections, in practice these approaches overlap substantially. Lixinski has noted that Article 29(b), for example, gives rise to rules that are very similar to those found in Article 31(3)(c) of the *Vienna Convention*.²¹

28. The Court has also recognized the inter-relationship between Article 29 of the *American Convention*, Article 31(3)(c) of the *Vienna Convention*, and the general doctrine of dynamic interpretation. Often, when engaged in a process of contextual interpretation of the content of the *American Convention*'s guarantees, the Court has simultaneously invoked several of these doctrines to justify resort to other treaties or sources of law.²²

29. These interpretive rules must therefore be understood as mutually reinforcing norms that support an approach in which provisions of the *American Convention* are interpreted in light of, and consistently with other, contemporary legal instruments and social context. In answering the questions presented in the present Request for an Advisory Opinion, the Court must therefore be cognizant of other, related instruments that address similar issues and rights. In particular, the ITUC and ICLR submit that other legal instruments support its earlier submissions that trade unions enjoy direct protection under

²¹ Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law" (2010) 31 EJIL 585 at 588.

²² For example, see *Consular Assistance Advisory Opinion*, *supra* at paras. 113-114 (simultaneously relying on Art. 31(3) of the *Vienna Convention* and the doctrine of dynamic interpretation of human rights treaties); *Mayagna (Sumo) Awas Tingni Community*, *supra* at para. 146-147 (simultaneously relying on Art. 29(b) of the *American Convention* and the doctrine of dynamic interpretation of human rights treaties); *Yakya Axa Indigenous Community*, *supra* at 125-126 (simultaneously invoking Art 29(b) of the *American Convention*, Art. 31(3) of the *Vienna Convention* and the doctrine of the dynamic interpretation of human rights treaties).

Article 16 of the *American Convention* in addition to derivative protection through their members.

Relevant Other Instruments

30. International instruments relevant to the protection and promotion of human rights – both within and external to the Inter-American system – strongly support the claim that trade unions enjoy certain human rights directly.

31. There is a well-established normative framework in international human rights law that recognizes the significance of trade unions and interprets trade unions as being an integral aspect of freedom of association in the labour context. Recognizing the right of trade unions to access the Inter-American system of human rights in their own right is supported extensively by this body of international human rights law.

32. The most salient OAS instrument is Article 8(1)(a) of the *Protocol of San Salvador*.²³ This article, entitled “Trade Union Rights” guarantees not only the right of persons to organize trade unions, but also the right of 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 provision goes on to require States Parties to “permit trade unions, federations and confederations to function freely.”

33. These rights are ones that can only be understood as vesting in trade unions themselves, not only in their individual members. It is difficult to see how an individual person can claim a personal right to have a trade union affiliate with a national or

²³ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, OAS T.S. No. 69.

international organization. Rather, the right of affiliation can only meaningfully be understood as a right exercisable by the trade union itself.

34. Similarly, the second set of guarantees under Article 8(1)(a) – the requirement of states to permit trade unions, federations and confederations to function freely – is an obligation that on its plain meaning is owed to trade unions directly.

35. As a more specific set of rights that are essentially an extension of the guarantee of freedom of association in Article 16 of the *American Convention*, Article 8 of the *Protocol of San Salvador* demonstrates a contemporary understanding of trade unions as rights bearing entities in their own right. Just as the Inter-American Court has already held that the provisions of the *American Declaration of the Rights and Duties of Man* represents an authoritative refinement of the norms set out in the *OAS Charter* that must be considered when interpreting the latter instrument,²⁴ it is respectfully submitted that the more contemporary norms set out in the *Protocol* must be taken into account when interpreting the provisions of the *American Convention*.

36. Indeed, the Inter-American Court, in its contentious jurisdiction, has already resorted to the provisions of the *Protocol* to aid in the interpretation of the *Convention*. In *Discharged and Retired Employees of the Comptroller*, the Court was called upon to consider the content of the right to property under Article 21 of the *Convention*, including the clause that permits states to subordinate that right in the interest of society. In considering the qualified aspect of the right to property, the Court found it useful to refer to Article 5 of the *Protocol*, which sets out a more robust account for the circumstances

²⁴ *Interpretation of the American Declaration Advisory Opinion*, *supra* at paras. 43-44.

permitting such restrictions.²⁵ In *Albán Cornejo v. Ecuador* the Court relied upon *inter alia* the *Protocol's* right to health (Article 10) to confirm that the *Convention's* provisions respecting the right to life can encompass issues related to healthcare.²⁶ In *The Girls Yean and Bosico* the Court held that Article 19 of the *Convention* “interpreted in light of... the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights” required states to provide free primary education for all children.²⁷

37. Most significantly, in *Huilca-Tecse v. Peru*, the Inter-American Court invoked the provisions of Article 8 of the *Protocol* to interpret the scope and nature of Article 16 of the *Convention*.²⁸ Resort to the *Protocol* is thus a well-established practice of the Court when it comes to interpreting related provisions of the *Convention*.

38. The *Protocol* is particularly salient when it comes to considering the question of the direct protection of trade unions. It is notable that Article 8(1)(a) of the *Protocol*, which contains rights that appear only referable to trade unions and not individual members, is one of only two provisions that are justiciable before the Inter-American Court.²⁹ Thus, their interpretive force with respect to the question of whether trade unions also enjoy the more general rights under Article 16 is even greater.

39. In addition to instruments internal to the OAS system, other international legal instruments provide further support to the conclusion that trade unions directly enjoy

²⁵ *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller”) v. Perú*, Judgment of July 1, 2009 (Preliminary Objection, Merits, Reparations and Costs), Ser. C, No. 198 (IACtHR) at para. 84, fn. 72.

²⁶ *Case of Albán Cornejo et al. v. Ecuador*, Judgment of November 22, 2007 (Merits, Reparations and Costs), Ser. C, No. 171 (IACtHR), at paras. 117-122.

²⁷ *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgment of September 8, 2005 (Preliminary Objections, Merits, Reparations and Costs), Ser. C, No. 130 (IACtHR) at para. 185.

²⁸ *Case of Huilca-Tecse v. Peru*, Judgment of March 3, 2005 (Merits, Reparations and Costs), Ser. C, No. 121 (IACtHR) at paras. 69-79 [“*Huilca-Tecse*”].

²⁹ *Protocol, supra*, art. 19(6).

associational rights. Examples include Articles 20 and 23(4) of the Universal Declaration of Human Rights,³⁰ Article 22 of the International Covenant on Civil and Political Rights,³¹ and Article 8 of the International Covenant on Economic, Social and Cultural Rights.³²

40. Perhaps the most salient external source relevant to the proper interpretation of Article 16 emerges from the International Labour Organization. As set out in the ITUC's initial observations filed with the Court,³³ both the ILO Committee on Freedom of Expression and the ILO Committee of Experts have consistently emphasized the close connection between freedom of association and the formation and functioning of trade unions.

41. Further, a number of ILO conventions enshrine rights that, like those contained in Article 8 of the *Protocol of San Salvador*, are referable to trade unions directly. Convention No. 84 requires that states parties to take measures to ensure that trade unions that represent workers have the right to conclude collective agreements with employers.³⁴ Convention No. 87 provides that trade unions have the right to draw up their own constitutions and rules, conduct their own elections, and to organize their own administration, activities and programs free from interference from public authorities.³⁵ Convention No. 135 grants protections to trade unions from being undermined by the

³⁰ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. a/810 (1948)

³¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

³² International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 N.N.T.S. 3.

³³ Observations from the International Trade Union Confederation / Trade Union Confederation of the Americas, dated 30 January 2015, at pp. 5-6.

³⁴ *Convention concerning the Right of Association and the Settlement of Labour Disputes in Non-Metropolitan Territories*, ILO Convention No. 84, art. 3.

³⁵ *Convention concerning Freedom of Association and Protection of the Right to Organize*, ILO Convention No. 87, art. 3.

existence of non-union elected worker representatives.³⁶ Convention No. 141 protects the right of rural workers' organisations to obtain legal personality without undue interference.³⁷ Convention No. 151 guarantees the right of public employees' associations to independence from public authorities.³⁸

42. The above listing of relevant ILO conventions is meant to be illustrative, not exhaustive. Taken together with the relevant decisions of the ILO Committees, these conventions provide further support for the fact that trade unions enjoy direct protection under guarantees of freedom of association under international law.

43. In line with the various interpretive principles discussed earlier in these submissions, the Inter-American Court has relied on various ILO materials when interpreting the *American Convention*. In *Huilca-Tecse v. Peru* the Court relied on ILO Convention No. 87 alongside Article 8(1)(a) of the *Protocol of San Salvador* in considering the nature of freedom of association under the *Convention*.³⁹

44. ILO conventions have also been relied upon in other contexts. For example, in *Yaka Axa Indigenous Community v. Paraguay*, the Court was called upon to interpret the right to property under Article 21 of the *Convention* in the context of communal interests of indigenous groups. The Court resorted to ILO Convention No. 169, which directly addressed the question of communal property rights for indigenous groups in order to conclude that such communal interests were protected under Article 21's more general language.⁴⁰

³⁶ *Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking*, ILO Convention No. 135, art. 5.

³⁷ *Convention concerning Organizations or Rural Workers and Their Role in Economic and Social Development*, ILO Convention No. 141, art. 3(3).

³⁸ *Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service*, ILO Convention No. 151, art. 5.

³⁹ *Huilca-Tecse*, *supra* at para. 74.

⁴⁰ *Yaka Axa Indigenous Community*, *supra* at para. 130.

45. Decisions such as these validate the use of ILO materials as a contextual source of authority that must be taken into consideration when using the interpretive principles outlined in these observations.

46. The Inter-American Court has already interpreted Article 16 of the *Convention* broadly and recognized the crucial role of labour unions in the realization of freedom of association, stating that

In labour union matters, freedom of association consists basically of the ability to constitute labor union organizations, and to set in motion their internal structure, activities and action program, without any intervention by public authorities that could limit or impair the exercise of the respective right.⁴¹

47. The broad range of additional sources of international law, employed through the various interpretive principles canvassed above, add further support to this recognition of the importance of trade union rights. It compels the Court to further clarify that trade unions themselves enjoy protections under Article 16 so that they are fully capable of achieving their crucial human rights objectives and that freedom of association can be more fully realized.

The Legal Consequences of Trade Union Rights under Art. 16

48. The recognition that trade unions enjoy direct protection under Art. 16 of the *Convention* results in two primary legal consequences: first, that trade unions may be considered “victims” within the Inter-American system for the protection of human rights, and secondly, that trade unions may participate in proceedings before the Inter-American Commission and Court as victims.

⁴¹ *Baena-Ricardo et al. v. Panama*, Judgment of February 2, 2001 (Merits, Reparations and Costs), Ser C., No. 72 (IACtHR) at para. 156.

49. There is no question that a trade union has standing to lodge a petition with the Inter-American Commission on Human Rights on behalf of natural persons. Article 44 of the *Convention* provides a broad scope to who may raise complaints that protected rights have been violated by a state party:

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

As the Court noted in *Samaraka People v. Suriname*, “a person or group of persons other than the alleged victims may file [a] petition.”⁴²

50. It is our contention that a trade union may also be the victim of a violation, not only representing the rights of victim/members. Although the *Convention* itself does not define the term “victim”, since 2001 the *Rules of Procedure of the Inter-American Court of Human Rights* have defined victim to mean “a person whose rights have been violated, according to a judgment emitted by the Court.”⁴³ Because trade unions enjoy rights under Article 16 of the *Convention*, by definition it is possible that those rights may be violated. Given the Inter-American Court of Human Rights’ competence to address all questions concerning the interpretation and application of the provisions of the *Convention*, including whether there has been a violation of a right or freedom protected therein,⁴⁴ the Court could in an appropriate case find that a trade union’s rights had been violated. Therefore, trade unions may be considered “victims” as that term is understood in the Inter-American system.

⁴² *Case of Saramaka People v. Suriname*, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs), Ser. C., No. 172 (IACtHR), at para. 22.

⁴³ *Rules of Procedure of the Inter-American Court of Human Rights* (2009), Art. 2(33).

⁴⁴ *American Convention on Human Rights*, Arts. 62(3), 63(1).

51. Where a trade union is an alleged victim of a violation of their rights under the *Convention*, it would have participatory rights before the Inter-American Commission and Court. This would most obviously arise where a state allegedly violated Article 8(1)(a) of the *Protocol of San Salvador*, which, as set out above, provides justiciable rights that can only be understood as being held by trade unions as such. However, the same would be true for any alleged violation of the *Convention* where a trade union is the alleged victim, including alleged violations of Article 16 of the *Convention*.

52. Under the Inter-American Court's *Rules of Procedure*, having the status of alleged victim gives rise to a wide-range of specific participatory rights, the most significant of which are contained in Article 25(1). This provision authorizes victims or their representatives to "act autonomously throughout the proceedings" including by filing "pleadings, motions, and evidence." In cases where it is alleged that a state party has violated the rights of a trade union, the union would be a victim entitled to full participation in proceedings before the Court as well as remedies when deemed appropriate.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'A. R.', written in a cursive style.

General Secretary