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LEX/JSV 30 January 2015

Request for Advisory Opinion by the Government of Panama

President of the Court,

On 8 April 2014, the Government of the Republic of Panama (the "GOP") requested an Advisory Opinion of the Inter-American Court of Human Rights (the "Court") concerning the scope of the term "person", as defined in Article 1(2) of the American Convention on Human Rights (the "Convention") as "every human being". In general, the GOP seeks guidance as to whether the rights of legal persons are protected under the instruments of the Inter-American System and, if so, the scope of that protection. The GOP also inquires whether legal persons may lodge complaints with the bodies of the Inter-American System on behalf of themselves or their members. In particular, and the matter to be addressed directly in these comments, is whether the right to freedom of association under Article 16 of the Convention extends to trade unions, as well as trade unionists.

The International Trade Union Confederation (ITUC) [1] and the Trade Union Confederation of the Americas (TUCA)[2] file these comments as representatives of 53 trade union national centres in 23 countries in the Americas, representing over 50 million workers. In our view, the Intern-American Court must find that trade unions are protected under Inter-American human rights law. First, the Inter-American System has consistently recognized that the right to freedom of association is an individual and collective right which encompasses both individuals as well as their organizations. There is no reason for the Court to abandon well-

[1] The ITUC is a global confederation of trade unions representing 175 million workers in 156 countries and territories and has 315 national affiliates. (www.ituc-csi.org)
[2] TUCA is the regional confederation of the ITUC representing workers in trade unions throughout the Americas. (www.csa-csi.org)

established precedent. Second, the right to freedom of association would be meaningless if the democratic institutions through which workers assert their rights collectively were to be left wholly unprotected. Indeed, in many countries, the core rights derived from freedom of association, such as to bargain collectively or to strike, can only be exercised through a duly registered trade union. Given the double nature of the freedom of association in the context of industrial relations, expressed both individually and collectively (through a trade union), the failure to protect the collective expression would render void the rights of individual workers.

Finally, we argue briefly that recognizing the rights of legal persons such as trade unions should not by analogy vest corporations with the human rights protected under Article 16 or any other article of the Convention.

I. Stare Decisis

a. Inter-American Instruments Recognize that Freedom of Association Requires Legal Protection of Individuals and Trade Unions

The Charter of the Organization of American States (OAS), the constitutional document of the Inter-American System, expressly recognizes that freedom of association implies not only the legal protection of individual workers but also of their organizations. For example, Article 45(c) of the OAS Charter clearly states: "Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws". The Charter recognizes that the right to legal recognition of the union is essential in order for workers to exercise the right to associate and its derivative rights – collective bargaining and the right to strike. Article 45(g) also refers to trade unions and "recogn[izes] the importance of the contribution of organizations such as labour unions… to the life of the society."

It would be contradictory if the OAS Charter exhorted member states to recognize trade unions in law as a means to give effect to the right to freedom of association, and underscored the importance of unions in society, only to then provide unions no legal protection whatsoever if a member state were to refuse to extend or withdraw legal personality of same, or to limit or interfere in the their administration and activities.

Similarly, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol Of San Salvador,"[3] ratified by 16 Member States, recognizes not only that workers have a right to associate but that, "As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely." Again, it would be anomalous if the right to freedom of association were recognized to consist of both an individual and collective aspect but that trade unions would have no standing before the Inter-American System to claim violations of its rights or the associational rights of its individual members.

[3] O.A.S. Treaty Series No. 69 (1988), *entered into force* November 16, 1999, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992).

Finally, Article 44 of the Convention also already expressly provides that any person or group of persons or non-governmental entity (such as a trade union) can present petitions to the Commission regarding violations by a state party.

b. The Jurisprudence of the Inter-American Court Recognizes the Double Nature of Freedom of Association

Trade unions have used the supervisory system of the International Labour Organization (ILO) as the primary means by which to vindicate their international labour rights. As a result, the labour-related jurisprudence of the regional human rights systems, including the Inter-American and European systems, has been underdeveloped. However, important judgments on the issue of freedom have been handed down by the regional human rights courts – including the Inter-American Court.

Nearly 15 years ago, the Inter-American Court issued a landmark ruling in labour law in *Ricardo Baena et. al., v. Panama* (February 2, 2001). In that case, the Court held, "*[i]n labor union matters, freedom of association consists basically of the ability to constitute labor union organizations, and to set into motion their internal structure, activities and action program, without any intervention by the public authorities that could limit or impair the exercise of the respective right.*" The Court explained further that, "freedom of association is of the utmost importance for the defense of the legitimate interests of the workers, and falls under the *corpus juris* of human rights." The Court found that the GOP had violated the Convention when it dismissed 270 workers that had participated in a demonstration called by the State Enterprise Workers Union to protest the government's labour policies. The dismissal was later "legitimized" by the government through the retroactive reform of the law to allow public sector workers to be dismissed summarily for their participation in the demonstration.

More recent decisions of the Court also underscore the individual and collective nature of the right to freedom of association in the industrial relations context. Of note are two cases against the Government of Peru, namely *Huilca-Tecse v. Peru* (March 3, 2005) and *Cantoral-Huamaní and García-Santa Cruz v. Peru* (July 10, 2007). In the former, Pedro Huilca Tecse, General Secretary of the *Confederación General de Trabajadores del Peru*, was extra-judicially executed on 18 December 1992. Earlier that year, the government had enacted a new Collective Labor Relations Law, which curtailed the right to form trade unions and weakened collective bargaining. In July 1992, the national union confederations filed a complaint to the ILO contesting the labour reforms and organized several marches and strikes over the course of that summer. Despite the protests, the government continued with its plans. In October 1992, it issued implementing regulations that were strongly opposed by the trade unions. Then President Alberto Fujimori publicly dismissed the criticism and equated the trade unions with illegal armed groups. Huilca Tecse was then murdered when a group of eight to ten armed individuals approached him and his daughter and shot him several times. The murderers were believed to be members of a death squad linked to military intelligence.

The Court examined the case under Article 16 of the Convention, among others. The Court determined that the killing was motivated by the fact he was a trade union leader who opposed and criticized the policies of the Government. It then explained that Article 16 conferred not only the *individual* right "to associate freely with other persons, without the interference of the public authorities limiting or obstructing the exercise of the respective right," but also the *collective right* "to seek the common achievement of a licit goal, without

pressure or interference that could alter or change their purpose." The execution of a Huilca Tesce not only restricted the freedom of association of an individual, but also the right and freedom of a determined group to associate freely, without fear.

The Court further explained that,

> labor-related freedom of association is not exhausted by the theoretical recognition of the right to form trade unions, but also corresponds, inseparably, to the right to use any appropriate means to exercise this freedom. When the Convention proclaims that freedom of association includes the right to freely associate 'for [… any] other purposes,' it is emphasizing that the freedom to associate and to pursue certain collective goals are indivisible, so that a limitation of the possibilities of association represents directly, and to the same extent, a limitation of the right of the collectivity to achieve its proposed purposes. Hence the importance of adapting to the Convention the legal regime applicable to trade unions and the State's actions, or those that occur with it tolerance, that could render this right inoperative in the practice.

It continued, stating, "freedom of association is a mechanism that allows the members of a labor collectivity or group to achieve certain objectives together and to obtain benefits for themselves."

The latter case against Peru bears similarities to the former. Cantoral-Huamaní was a trade union leader in the mining sector in Peru and promoted and led the national mining strikes in 1988. Consuelo Trinidad García-Santa Cruz was a founding of the "Filomena Tomaira Pacsi" Women's Center, which provided training and advisory services to the wives' committees in the country's mining camps, and to taking care of the needs of the mining families. Both were kidnapped, tortured and murdered on February 13, 1989. Citing *Huilca Tesce*, the Court recalled that "that the sphere of protection of Article 16(1) includes the exercise of the right to organize trade unions ."[4] The Court found that the exercise of the right to freedom of association in relation to trade unions was the motive for the attacks on his personal integrity and life which gave rise to a violation of Article 16 of the American Convention. The Court also found that the execution of Saúl Cantoral-Huamaní and Consuelo García-Santa Cruz had an intimidating effect on the workers of the Peruvian mining trade union movement. The Court ruled that the State was responsible for the violation of the right to freedom of association under Article 16 of the American Convention.

These two cases are important because they explicitly recognize the double nature of the right to freedom of association in the industrial relations context and that both require protection if a member state is to be in compliance with its obligations under Article 16 of the Convention.

In addition to the decisions above, the issue of trade union rights has been raised in several thematic hearings before the Inter-American Commission without objection as to relevance. Further, the issue of union registration and dissolution has been discussed in country reports of the Commission. Perhaps the clearest example is the 1985 report on the human rights situation in Chile. In that report, the Commission clearly denounced as a violation of freedom of association the dissolution of the CUT and several trade union federations following the 1973 coup, as well as a number of subsequent laws and decrees which drastically limited the

[4] *Case of Huilca-Tecse v. Peru*, para. 77.

rights of workers and their organizations.[5] In its concluding remarks, the Commission stated, at para 120, "[I]t may be concluded that the legislation adopted by the Government of Chile is not consistent with the principles generally recognized in international law as being inherent in labor union freedom, stipulated in world and inter-American instruments, ratified or approved by Chile, that is: the right of every individual to establish labor unions for the purpose of promoting and protecting his economic and social rights; the right of labor unions to operate without impediments and without other limitations than those prescribed by law and necessary in a democratic society; the right to collective bargaining of employment contracts and the right of workers to strike in defense of their occupational interests." Again, it is abundantly clear that the Commission has recognized that trade unions have rights which are recognized and protected by the Inter-American system.

It is important to stress here again that the right to bargain collectively and to strike, which are expressly protected by various Inter-American instruments and case law, simply cannot be exercised except through a legally registered trade union in most countries in the Americas. Thus, regardless how the right is characterized, as either individual or collective right, failure to protect the legal right of the trade union to apply for legal recognition and carry out its activity free of interference means that individual workers would be divested of their right to carry out activities in furtherance of their collective interests. All that would be left in such case would be a bare right to meet, which falls far short of the full extent of the right to freedom of association as it is widely understood.

II. The Inter-American Decisions are Consistent with the Approach of the ILO

Both the Court and the Commission, pursuant to the principles defined in Article 29(b) of the Convention, must look to the observations of the ILO in order to understand the scope of the right to freedom of association protected at Article 16. Indeed, this has been the practice on multiple occasions. The ILO has of course recognized that the right to freedom of association is violated when trade unions are unable to function due to interference from the state.

The view of 'freedom of association' put forward by the ILO Committee on Freedom of Association and the ILO Committee of Experts is specific to the context of the workplace where combination in a trade union may be a function of individual liberty, but this liberty has little meaning if workers are unable to pursue their own interests through such organisations. For example, worker solidarity allows workers to overcome the limitations inherent in entering individual contracts of employment, to achieve fair conditions of employment and to participate in making decisions which affect their own lives and society at large. Further, in the absence of a right to strike, it remains difficult (if not impossible) for workers to achieve these goals. From this premise, stems the view that freedom of association implies not only the right of workers and employers to form freely organisations of their own choosing, but also the right to pursue collective activities for the defence of workers' occupational, social and economic interests.

The ILO Committee on Freedom of Association has explained that "the principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organization, whether the authorization relates directly to the establishment of the trade union itself, or to the need to obtain discretionary approval of its constitution or rules, or has to be granted before the

[5] The Commission based its findings on Articles 26-27of the Inter-American Charter of Social Guarantees

organization can be established."[6] As more succinctly restated in the ILO's publication, Freedom of Association, A User's Guide, "The Committee of Experts considers that the freedom to establish organizations is the foremost among trade union rights and is the prerequisite without which the other guarantees enunciated in Conventions Nos. 87 and 98 would remain a dead letter."[7]

III. The European Court of Human Rights Also Recognizes the Double Nature of Freedom of Association

The sibling of the Inter-American Court, the European Court of Human Rights ("ECtHR"), has clearly recognized the double nature of freedom of association in the industrial relations context and that both individuals and their organization are protected by Article 11 of the European Convention on Human Rights. For example, in *Wilson v United Kingdom*, [2002] ECHR 552, the ECtHR reviewed the employer's de-recognition of the unions for collective bargaining and incentives to workers to sign individual contracts in lieu of collective bargaining. The ECtHR found that this was both a breach of the workers' individual rights as well as the rights of the trade union under Article 11 of the European Convention.

> The Court reiterates that Article 11§1 presents trade union freedom as one form or a special aspect of freedom of association (see National Union of Belgian Police v. Belgium, judgment of 27 October 1975, Series A no. 19, pp. 17-18, § 38, and Swedish Engine Drivers' Union v. Sweden, judgment of 6 February 1976, Series A no. 20, pp. 14-15, § 39). The words "for the protection of his interests" in Article 11 § 1 are not redundant, and the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard (see National Union of Belgian Police, cited above, p. 18, §§ 39-40, and Swedish Engine Drivers' Union, cited above, pp. 15-16, §§ 40-41)[8]

Subsequent decisions of the ECtHR espouse this view. In the case of *Demir & Baykara v Turkey*, [2008] ECHR 1345, the Court of Cassation of Turkey found that while there was no bar in law, trade unions of civil servants did not have the authority to enter into collective agreements. The ECtHR disagreed, finding:

> The Court reiterates that Article 11 § 1 presents trade-union freedom as one form or a special aspect of freedom of association (see *National Union of Belgian Police v. Belgium*, 27 October 1975, § 38, Series A no. 19, and *Swedish Engine Drivers' Union*, cited above, § 39)…. The Court further reiterates that, although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations on the State to secure the effective enjoyment of such rights. In the specific context of the present case, the responsibility of Turkey would be engaged if the facts complained of by the

[6] See Digest of decisions and principles of the Freedom of Association Committee, fifth (revised) edition, 2006, para. 272

[7] http://ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087990.pdf

[8] *Wilson v. UK*, at § 42.

> applicants – that is to say, principally, the non-recognition of their trade union by the State at the material time – resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention (see *Wilson, National Union of Journalists and Others v. the United Kingdom)*.[9]

In a subsequent case arising from a labour dispute in Turkey, the ECtHR extended the same logic when the right of a union to strike was curtailed. In *Enerji Yapi-Yol Sen v Turkey*, the Court explained,

> In the present case, the Court considered in the light of these principles that the applicant union has been directly affected by the circular and can therefore claim to be a victim of an interference with the exercise of its right to freedom of association. Indeed, the Court notes that Circular No. 1996/21 forbade officials to participate in a nationwide strike organized within the framework of the actions planned by the federation of public sector trade unions for the recognition of the right to collective bargaining for civil servants. Those who participated in this day faced disciplinary sanctions. What the Convention requires is that the law allow unions, according to conditions not at variance with Article 11, to fight to defend the interests of their members (Schmidt and Dahlström v. Sweden, 6 February 1976 , §§ 34 and 36, Series A No. 21, National Union of Belgian Police v Belgium, 27 October 1975, § 39, series A no 19;. Swedish Engine drivers v Sweden, 6 February 1976, § 40. series A No 20). The strike, which allows a union to make its voice heard, is an important aspect for union members in protecting their interests (Schmidt and Dahlström, cited above, § 36). The Court also notes that the right to strike is recognized by the International Labour Organisation's supervisory bodies (ILO) as intrinsic corollary of the right to organize protected by ILO Convention C87 on freedom of association and the protection of the right (for consideration by the Court of elements of international law other than the Convention, see Demir and Baykara, supra).[10]
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> (unofficial translation from the French text)

[9] *Demir & Baykara v Turkey*, *at* §§ 109-10.

[10] *Enerji Yapi-Yol Sen v Turkey* § 24, En l'espèce, la Cour estime à l'aune de ces principes que le syndicat requérant a subi directement les effets de la circulaire litigieuse et qu'il peut en conséquence se prétendre victime d'une ingérence dans l'exercice de son droit à la liberté syndicale. En effet, la Cour observe que la circulaire no 1996/21 interdisait aux fonctionnaires de participer à une journée nationale de grève organisée dans le cadre des actions programmées par la Fédération des syndicats du secteur public pour la reconnaissance du droit à une convention collective des fonctionnaires. Les personnes ayant participé à cette journée se sont vues infliger des sanctions disciplinaires (paragraphe 9 ci-dessus). Or ce qu'exige la Convention, c'est que la législation permette aux syndicats, selon les modalités non contraires à l'article 11, de lutter pour la défense des intérêts de leurs membres (*Schmidt et Dahlström c. Suède*, 6 février 1976, §§ 34 et 36, série A n° 21 ; *Syndicat national de la police belge c. Belgique*, 27 octobre 1975, § 39, série A n° 19 ; *Syndicat suédois des conducteurs de locomotives c. Suède*, 6 février 1976, § 40, série A n° 20). La grève, qui permet à un syndicat de faire entendre sa voix, constitue un aspect important pour les membres d'un syndicat dans la protection de leurs intérêts (*Schmidt et Dahlström*, précité, § 36). La Cour note également que le droit de grève est reconnu par les organes de contrôle de l'Organisation internationale du travail (OIT) comme le corollaire indissociable du droit d'association syndicale protégé par la Convention C87 de l'OIT sur la liberté syndicale et la protection du droit syndical (pour la prise en compte par la Cour des éléments de droit international autres que la Convention, voir *Demir et Baykara*, précité).

IV. The Decisions of the Courts of Various American States Make Clear that the Right to Freedom of Association Extends to Individuals and their Unions

The most recent case on point was issued by the Supreme Court of Canada. In January 2015, the Supreme Court of Canada decided the case *Mounted Police Association of Ontario v. Canada*, 2015 SCC 1. There, members of the Royal Canadian Mounted Police had not been permitted to unionize or engage in collective bargaining. This was accomplished by excluding the RCMP from the labour relations regime governing the federal public service, which provided for collective bargaining in the federal public service. The RCMP sought a declaration that the combined effect of the exclusion of members from the application of the Public Service Labour Relations Act and the imposition of the Staff Relations Representative Program unjustifiably infringed members' freedom of association. The Supreme Court ruled for the RCMP, finding:

> [62] Section 2 (d), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2 (d) are not merely a bundle of individual rights, but collective rights that inhere in associations. L'Heureux-Dubé J. put it well in Advance Cutting:
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> *In society, there is an element of synergy when individuals interact. The mere addition of individual goals will not suffice. Society is more than the sum of its parts. Put another way, a row of taxis do not a bus make. An arithmetic approach to Charter rights fails to encompass the aspirations imbedded in it. [para. 66]*
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> [63] It has been suggested that collective rights should not be recognized because they are inconsistent with the Charter's emphasis on individual rights, and because this would give groups greater rights than individuals. In our view, neither criticism is well founded.
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> [64] First, the Charter does not exclude collective rights. While it generally speaks of individuals as rights holders, its s. 2 guarantees extend to groups. The right of peaceful assembly is, by definition, a group activity incapable of individual performance. Freedom of expression protects both listeners and speakers: R. v. National Post, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 28. The right to vote is meaningless in the absence of a social context in which voting can advance self-government: Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 31. The Court has also found that freedom of religion is not merely a right to hold religious opinions but also an individual right to establish communities of faith (see Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567). And while this Court has not dealt with the issue, there is support for the view that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection" of freedom of religion (Hutterian Brethren, at para. 131, per Abella J., dissenting, citing Metropolitan Church of Bessarabia v. Moldova, No. 45701/99, ECHR 2001-XII (First Section), at para. 118). See also Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

> [65] It has also been suggested that recognition of a collective aspect to s. 2 (d) rights will somehow undermine individual rights and the individual aspect of s. 2 (d). We see no basis for this contention. **Recognizing group or collective rights complements rather than undercuts individual rights, as the examples just cited demonstrate. It is not a question of either individual rights or collective rights. Both are essential for full Charter protection.** (emphasis added)

This decision amplifies previous cases of the Supreme Court of Canada, such as *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, (2007) SCC 27*, where the Supreme Court explicitly rejected the idea that freedom of association only protected "those activities performable by an individual." In so doing, the Supreme Court explained,

> [B]ecause trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level…. It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.[11]

Of course, Canada is not the only country in the Americas to have taken this view of the right to freedom of association.

In 2007, the Constitutional Tribunal of Peru considered a trade union leader's request for an amaparo concerning his transfer from his post at the general services department of the Cooperativa de Ahorro y Crédito without cause. In reaching its decision to order the reinstatement of the complainant to his original position, the Court expounded on the nature of freedom of association, stating:

> This Court has held that this right has a twofold dimension: first, an individual dimension or *intuito personae*, which aims to protect the right of workers to form a union, to join or not to join it and participate in union activities, as has been established in Article 1.2 of ILO Convention 98; and, secondly, a plural or collective dimension whereby union autonomy is protected, i.e. the right of workers' organizations to elect their representatives, to organize their

[11] In reviewing the Canadian jurisprudence on freedom of association, Professors Keith Ewing and Alan Bogg posited, "[F]reedom of association is partly concerned with facilitating the associational choices of individuals to join (and to not join) groups. However, the individual right to associate will also be deprived of the necessary context for its full and effective realisation without the existence of valuable groups in civil society such as trade unions. Like freedom of religion, then, it seems very likely that groups should also have their own rights to protect the various communal forms of life that they each embody. In this way, group rights are not an alternative to individual rights. Nor are group rights necessarily in confrontation or contradiction with individual rights. On the contrary, such rights are mutually reinforcing sides of the same coin." See, Ewing and Bogg, A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada, available at http://lawofwork.ca/wp-content/uploads/2012/03/Bogg-and-Ewing-Final.pdf.

> administration and activities and formulate their programs action, as has been established by Article 3.1 of ILO Convention 87.[12]

In Colombia, the high courts have also affirmed that freedom of association has both an individual and collective character. In *Nora Chaparro de Hernández v. el Instituto de Ortopedia Infantil Roosvelt*, the union president filed a tutela alleging that the Institute had violated the right to freedom of association when it pressured workers to abandon their union (Sindicato de Trabajadores del Instituto de Ortopedia Infantil Roosvelt (SINTRAIROOS)) in order to keep their jobs, and subsequently, when the Institute fired certain union activists who refused to abandon the union. The Court recalled that the right to freedom of association was protected by the Protocol of San Salvador and Conventions 87 and 98 of the ILO, ratified by Colombia. Further, it explained:

> This fundamental right has an individual dimension, which translates into the ability to enter, remain in and leave a union and a collective dimension, in the sense that workers organized in a union decide, in accordance with the law and democratic principles, the internal structure and the functioning of same, i.e., a power to self-govern.[13]
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> (unofficial translation from the Spanish text)

In Mexico, the Democratic Federation of Unions of Public Servants filed an amparo against that the Federal Law on Public Sector Workers, which only recognized the possibility of one trade union. The union also requested that the administrative act which denied the union's registration on the basis of a pre-existing union be overturned. Citing ILO Convention 87, the Supreme Court ruled for the union. In so doing, it also explained the nature of the right to freedom of association, stating:

> Thus we have the spirit of the legislator expressed in Section X, Article 123, has been enshrined the right to freedom of association with a full sense of universality, based on the personal right of every worker to associate and recognizing a collective right once the union acquires its own existence and reality, a principle which is respected in the International Convention 87, already cited.[14]

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[12] *Carlos Telmo Quiroz Rodas*, EXP. N.° 02318-2007-PA/TC, available at http://www.tc.gob.pe/jurisprudencia/2009/02318-2007-AA.html ([E]ste Tribunal ha dejado establecido que este derecho tiene una doble dimensión: por un lado, una dimensión individual o *intuito personae*, que tiene por objeto proteger el derecho del trabajador a constituir un sindicato, a afiliarse o no afiliarse a él y a participar en actividades sindicales, tal como ha sido establecido en el artículo 1.2 del Convenio N.º 98 de la OIT; y, por otro, una dimensión plural o colectiva, en virtud de la cual se protege la autonomía sindical, es decir, el derecho de las organizaciones de trabajadores de elegir libremente a sus representantes, de organizar su administración y sus actividades y formular su programa de acción, conforme ha sido establecido por el artículo 3.1 del Convenio N.º 87 de la OIT.)

[13] "Este derecho fundamental presenta una dimensión individual, que se traduce en la posibilidad de ingresar, permanecer y retirarse de un sindicato y una dimensión colectiva, en el sentido de que de los trabajadores organizados en un sindicato deciden, de conformidad con el orden legal y los principios democráticos, la estructura interna y el funcionamiento del mismo, es decir, una facultad para autogobernarse."

[14] Amparo en Revisión 1878/2004. Federación Democrática de Sindicatos de Servidores Públicos, 4 marzo 2005. (Así, tenemos que el espíritu del legislador plasmado en la fracción X, del artículo 123, ha sido consagrar la libertad sindical con un sentido pleno de universalidad, partiendo del derecho personal de cada trabajador a asociarse y reconociendo un derecho colectivo una vez que el sindicato adquiere una existencia y una realidad propias, principio que es respetado en el Convenio Internacional número 87, ya citado.)

There are many other such examples in the Americas which could be cited and can be provided should the Court so request.

V. To Recognize The Rights Of Trade Unions as a Critical Component of the Right to Freedom of Association Does Not Require Recognizing that Corporations Have Human Rights Protected Under The Convention

While the Inter-American System has recognized, as it should, the rights of trade unions under Inter-American instruments, the Inter-American Commission has already affirmatively rejected the notion that a corporation's rights are protected under the Convention. In a case brought by shareholders of the Banco de Lima, seeking to block the proposed expropriation of the bank by the government, the Commission ruled in *Shareholders of Banco de Lima v Peru*, Case 10.169, that such case was beyond its jurisdiction.

> That in the judgment of the Commission, the named shareholders of the Banco de Lima, although individuals, have presented this action alleging that the Government of Peru has taken actions to affect the rights of the Banco de Lima. The Commission considers that what is at issue here are not the individual property rights of the individual shareholders, but rather the collective property rights of the company, the Banco de Lima, and that this case is not within the jurisdiction of the Inter-American Commission of Human Rights.[15]

There is no inconsistency in the manner in which trade unions and corporations are treated by the Inter-American System. Quite apart from trade unions, corporations are not democratic structures and are not established for the purposes giving expression to the human rights of its shareholders, much less the workers who are employed by the corporation. Indeed, corporations are set up for the purpose of *insulating* its owners from legal liability (except for rare exceptions) in the pursuit of their commercial objectives. This is not to say corporations do not have legal obligations and responsibilities under domestic and international law, as numerous cases have been successfully brought against corporations imposing both civil and criminal liability for violating human rights norms. It is quite another however to assert that corporations can claim human rights under the Convention.

VI. Conclusion

For the reasons set forth above, the Inter-American Court should find that the rights of trade unions are protected under the instruments of the Inter-American System, as well as the rights of their members. Were the Court to depart from its past practice, it would put in grave jeopardy the rights of individual workers, whose right to freedom of association would be sharply curtailed; indeed, in most countries such workers would have no right to bargain collectively or to strike were the rights of their organizations were unprotected. At the same time, we strongly urge the Court not to recognize corporations as vested with human rights, which would signal a radical departure from its own jurisprudence and would be at fundamental odds with human rights law.

[15] REPORT N° 10/91 CASE 10.169 PERU 22 February 1991

Sincerely,

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Victor Baez
General Secretary, TUCA