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*The Inter-American System for the Protection of Human Rights and the Protection of Labor Rights in the Americas*

**I. Introduction**

The Inter-American System for the Protection of Human Rights embodies two important characteristics that render it particularly capable of protecting labor rights in the Americas. First, the System's normative framework – or the series of treaties that form the legal basis for the System – explicitly protects the rights of workers as rights (not merely as standards or aspirations subject to Ministerial Consultations). Second, the System's quasi-judicial and judicial organs – the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights – have begun to actively apply the rights contained in these treaties in a way that vindicates the labor rights of individual workers. Cases resolved by the Commission and the Court end with legal orders declaring States to be in violation of their obligations with respect to workers, as well as legally binding orders to reinstate workers with back-pay who have been wrongly fired – results that are not obtainable through NAFTA's labor side agreement or even through the International Labour Organization (ILO).

My presentation will focus on these two strengths of the System – its normative framework that protects workers rights, as well as a complaint mechanism that produces legally binding orders on behalf of individual workers. I will briefly highlight the rights that are protected in the Inter-American System, and will focus on the System's growing role in defending the rights of workers, by means of the right to freedom of association, the right to due process, and the right to an effective remedy.

**II. Normative Framework**

As part of their membership in the Organization of American States (OAS), many countries in this hemisphere have signed and ratified a series of treaties that include specific provisions protecting the rights of workers. When an individual believes that a State party to one of these treaties has violated his rights, the treaties themselves provide for a mechanism that can establish whether such a violation occurred, and can lead to a judicial order to provide reparations to the person whose rights have been violated.

The 1948 American Declaration protects:<sup>1</sup>

1. the right to work and to fair remuneration (Article 14);
2. the right to social security (Article 16);
3. the right of assembly (Article 21);
4. the right of association (Article 22);

The American Convention entered into force in 1978 and protects:<sup>2</sup>

1. the right of assembly (Article 15);
2. the right of association (Article 16);

The most recent of these treaties is the Protocol of San Salvador protects:<sup>3</sup>

1. the right to work (Article 6);
2. the right to just, equitable and satisfactory conditions of work (Article 7);
3. the right to unionize (Article 8(1)(a));
4. the right to strike (Article 8(1)(b));
5. the right to not be compelled to belong to a trade union (Article 8(3));
6. the right to social security (Article 9).

The jurisdictional clauses of these treaties provide the Inter-American Commission with the competence to receive complaints regarding all of the rights contained in the Declaration and the Convention, as well as the right to unionize as contained in the Protocol of San Salvador. The requirements for presenting a complaint are quite broad – indeed the victim herself need not submit the complaint – it can be done on her behalf by any person, any group of persons, or any NGO may lodge a complaint. If the Commission deems the complaint to be admissible, it transmits a copy of the complaint to the State allegedly responsible for the violation. In making its decision on the merits of the complaint, the Commission can conduct an investigation, on site visits, request further written statements, or call for oral hearings at its headquarters in Washington. The Commission can also serve as a neutral party to bring both the petitioners and the state to a friendly settlement. Based upon the evidence gathered during the process, the Commission issues a report in which it may declare the State involved to be responsible for the alleged violation. If the State does not comply with the Commission's reparations recommendation, the Commission can take case to the Inter-American Court of human rights. While only the Commission can decide to take a case to the Court, the representatives of the victims and the Commission participate as equals in a new trial before the Court. Decisions made by the Court are final and binding on the State found to be responsible of a human rights violation.

### III. Inter-American System and labor rights

With this brief overview of the System in mind, it is important to turn to concrete examples of the ways in which the Commission and the Court have defended the rights of workers, by means of the right to freedom of association, the right to due process, and the right to an effective remedy.

The most developed line of cases protecting the rights of worker in the Inter-American system is in the area of freedom of association.

The Commission has decided a series of cases vindicating the right to freedom of association. In each case, the Commission found that interference, threats or killings by the State or its agents were aimed at limiting or halting a worker's union activities, and therefore violated the right to freedom of association. In 1981, the Commission declared Guatemala responsible for violation of the freedom of association for threatening, abducting, torturing and murdering a series of union leaders who were workers at a Coca-Cola bottling plant.<sup>4</sup> In another very pithy case from 1982, the Commission held Nicaragua responsible for the violation of freedom of association for verbally threatening, coercing, and forcing members of the Nicaraguan Seamen's Union to join the Sandinista Worker's Union.<sup>5</sup> Because the State failed to submit information with regard to the violations alleged in either of these cases, the Commission presumed to be true facts alleged by the petitioners. In another Guatemalan case from 1996, the Commission declared Guatemala responsible for the violation of the freedom of association of the Secretary General of a union after he was repeatedly threatened to stop his union and social activities and eventually shot.<sup>6</sup> These three cases are representative of the Commission's jurisprudence with regard to freedom of association.

The right to freedom of association has also been developed outside the context of the rights of workers. For example, in 1996 the Commission declared El Salvador in violation of article 16 for threatening, raping, torturing and murdering various members of COMADRES -- The "Monseñor Oscar Arnulfo Romero" Mothers Committee (COMADRES), a nongovernmental organization established in 1977 to support mothers and families of persons who disappeared or were killed for political reasons.<sup>7</sup>

**The 1996 Diana Ortiz case from Guatemala shows the link between the right to freedom of association and the right to freedom of conscience and religion.<sup>8</sup> In its report, the Commission discussed these rights together, declaring that the surveillance, threats, kidnapping, torture and rape which Sister Ortiz experienced were intended to punish and suppress her religious activities as a Church**

**missionary and her work with the indigenous people of Huehuetenango, as well as her association with them. Sister Ortiz returned to the United States to escape her captors and the violence against her in Guatemala and was been unable to return because of her fear. As a result, the Commission determined that she had been denied her right to exercise her right to freedom of conscience and religion by working as a foreign missionary in Guatemala for the Catholic Church, as well as her freedom to associate with the same people. Interestingly, the Commission found that the same acts denied the indigenous people of Huehuetenango and the Church in Guatemala the right to associate with Sister Ortiz. This case is an interesting precedent for pursuing the violation of the right to freedom of association for those forced into exile as a result of their association with labor or other groups.**

The leading freedom of association case decided by the Court is *Baena v. Panama*<sup>9</sup>. In this case, unionized public sector workers took part in a peaceful strike and labor march challenging the privatization of state enterprises, the derogation of reforms to the Labor code, the dismissals of union leaders, and demanding respect for labor laws and labor organizations. The march took place with thousands of workers; the work stoppage did not affect any essential public services. Nonetheless, the executive branch of the government dismissed 270 workers that participated in the work stoppage, accusing them of being a part of an armed uprising that took place on the same day. In addition, the Legislature passed a law with retroactive application to those workers, allowing for their dismissal without cause and severely limiting the ability of the dismissed workers to effectively challenge their dismissals in the administrative system.

In finding a violation of Article 16, the Court noted that the firings of union leaders sanctioned by the new law, the ransacking of union offices and the interference with union bank accounts demonstrated that the intent of such actions was doubtlessly to limit “the possibilities for action of the trade union organisations in the cited sector.”<sup>10</sup>

Expressly relying upon ILO standards, the *Baena* Court gave Article 16 its most explicit definition to date:

“In labour union matters, freedom of association consists basically of the ability to constitute labour union organisations, and to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right.”<sup>11</sup>

The *Baena* case is also important for applying its Article 8 due process jurisprudence in the context of arbitrary dismissals of public workers who exercised their right to freedom of association. The Court found that the workers in that case were not provided with an

administrative proceeding prior to being dismissed. The President of Panama merely determined that there was a connection between the work stoppage and a subversive political movement and that any worker who participated in the work stoppage should be dismissed in presumption of their guilt. The workers were dismissed by letter, with no opportunity to present arguments or evidence in his or her own defense. The right to appeal was non-existent. Taken together, the absence of these procedural protections amounted to a violation of the right to due process.

Finally, the *Baena* case is important because the Court made explicit in its decision the link between due process and Economic, Social and Cultural Rights. It is worth quoting in whole:

“The Court is not oblivious to the fact that the dismissals, made without the guarantees of Article 8 of the Convention, had serious social and economic consequences for the person dismissed and their relatives and dependants, such as the loss of income and a reduction of the living pattern. There is no doubt that, in applying a sanction with such serious consequences, the State should have ensured to the worker a due process with the guarantees provided for in the American Convention.”<sup>12</sup>

Based upon the violation of the freedom of association and the right to due process, the Inter-American Court ordered that the workers be reinstated with back-pay, and awarded an additional sum of money to each worker for moral damages.

Having looked at the System's jurisprudence in the area of freedom of association and right to due process, it is important to turn to Article 25 of the American Convention, which provides another key procedural right that litigants in the Inter-American system may and have used to protect the rights of workers. The article obligates States to ensure the right to simple, prompt, and effective recourse to a competent tribunal for all alleged violations of fundamental rights enshrined in the Convention, their domestic laws and their constitutions. In other words, Article 25 imposes three obligations on States:

- 1) States must legislate or judicially recognize domestic causes of action for all violations of fundamental rights
- 2) They must guarantee an investigation of all alleged violations
- 3) They must ensure that remedies are enforced when granted.

When States fail to fulfill any of these three obligations, and a victim's rights are concretely curtailed as a result, a violation of Article 25 can be claimed by the litigant.

This article is of strategic importance for the protection of labor rights and other economic and social rights because it requires States to establish a system of simple rapid

and effective remedies at the domestic level for all rights recognized in domestic and constitutional law, as well as for all incorporated international obligations of the State. The importance of Article 25 derives from the fact that most State parties recognize a wide range of labor rights and other economic and social rights in their domestic laws and constitutions – in fact, the litany of these rights protected at the domestic level is often more extensive than those protected by treaties in the Inter-American system. These rights often include, the right to education, fair wages, satisfactory labor conditions, the right to housing, social security, environmental protection, health care, etc. Article 25 allows the Commission and Court to hear cases of those rights that are exclusively protected at the internal level, and receive no mention at the international level. This fact gains importance in light of the fact that the Protocol of San Salvador does not grant the Commission or the Court competence to hear cases involving most of the rights that the Protocol purports to protect.

Article 25 has played an important role in the case of *Cinco Pensionistas*<sup>13</sup>. This case, decided by the Court in February 2003, involved a group of Peruvian workers whose pensions were cut by 80% by a presidential decree. No chance to contest the arbitrary cut was provided. The decree was then taken up and affirmed by the Peruvian Congress. Over the course of the next several years, various decisions by the highest court in Peru – the Supreme Court of Peru – determined the arbitrary cut in the pensions to be invalid. The Court ordered that the pensioners should receive the full amount originally promised to them. However over ten years, none of these sentences was ever enacted. The pensioners did not receive their money despite the various Court orders. In an important decision, the Inter-American Court used Article 25(2)(c) guarantee of an effectively enforced remedy in deciding on behalf of the pensioners. The Court stated:

“the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.”<sup>14</sup>

These examples of cases involving the freedom of association, the right to due process, and the right to an effective remedy reflect the state of the jurisprudence of the Commission and the Court as developed through its case-law.

However, the Court also has the faculty to issue advisory opinions regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in the American States. In May of 2002, the Government of Mexico requested an advisory opinion from the Inter-American Court of Human Rights with respect to the rights of migrant workers<sup>15</sup>. In its request, Mexico expressed its concern with the incompatibility of the interpretations, practices and enactment of laws by some States in the region with their obligations under the regional human rights protection system. Mexico considered that these interpretations, practices and laws often negated the labor rights of individuals based on the migratory status of the undocumented workers.

While expressing concern over the actions of OAS member states in general, Mexico clearly singled out the actions of the United States in its request. Indeed, in its 24-page request, cites only the United States for examples of discriminatory treatment of workers based upon migratory status – and not to the behavior of any other country in the Americas.

And while the impact of its request may have been stronger if it had cited to examples of discrimination in other countries, Mexico was right to point to these practices within the United States. Especially, in the light of cases like Hoffman Plastic that conditioned the payment of back pay to fired workers based upon their migratory status. Cases like Hoffman Plastics and others demonstrate the ways in which the US and other countries subordinate their international obligations to the purposes of national migratory policy in a way that increases the possibility of exploitation in the workplace and the violation of the rights of this highly vulnerable population.

In short, Mexico asked whether such behavior was in contravention of the principles of equality before the law and equal protection of the law without discrimination.

There Court makes three points that I think are worth highlighting:

First, the Court approvingly observes that migrant workers constitute a vulnerable group for which the State must adopt “special measures” to guarantee the protection of their rights. This is a new development, and in this respect migrant workers join children and women as groups for which the State is obligated to take these special measures, which might include:

- a. delay of deportation proceedings until labor rights have been resolved
- b. translation of State forms into languages spoken by migrant workers
- c. interpretation in Court
- d. special training for those whose work affects the rights of migrant workers

Second, the Court makes clear that a person immediately acquires all of the rights guaranteed to a worker in the Inter-American system the moment that they enter into an employer/employee relationship. These rights are immediately acquired, independent of the status of the worker as a citizen, a non-citizen, or an undocumented worker. And once acquired, a worker can only be deprived of those rights in a judicial or administrative setting in which due process rights are scrupulously observed.

Third, another strength in the opinion is the Court's discussion of the obligations of 3<sup>rd</sup> parties with respect to the obligation not to discriminate on the basis of migratory status. Building on its jurisprudence that began with the case of *Velasquez Rodriguez*,<sup>16</sup> the Court notes that the State can be held internationally responsible for the actions of private employers that violate the rights of workers through the tolerance, acquiescence or negligence of the State with respect to the violations. The Court adds that the State can be held responsible if private employers are backed by a policy or guideline that favors the creation or maintenance of discrimination against migrant workers, or when the stated terms of a private contract violate the minimums established in the System's normative framework. Of course, the State can also be directly responsible when it denies the right to a pension, for example, based upon the worker's migratory status.

#### IV. Conclusion

**I have highlighted the two characteristics that render the Inter-American System particularly capable of protecting labor rights in the Americas – its normative framework that recognizes workers as bearers of rights, and the judicial bodies that are capable of vindicating those rights. I have covered the bulk of the System's jurisprudence regarding labor rights – clearly, it is not a large body of law. The Court has yet to explicitly recognize the right to strike as a corollary to the right to freedom of association. Not a single case from the Commission or the Court has yet to even mention the right to collective bargaining, though the ILO recognizes these rights to be fundamental. I would like to close by saying that the System is ripe for the participation of labor unions and those who work to defend labor rights.**

<sup>1</sup> *American Declaration on the Rights and Duties of Man*. Organization of American States (OAS). See: Inter-American Commission on Human Rights. OAS/Ser.L/V/I.4 Rev.9, 1948. [www.cidh.oas.org/basic.eng.htm](http://www.cidh.oas.org/basic.eng.htm).

<sup>2</sup> American Convention on Human Rights. See <http://www.cidh.oas.org/basic.eng.htm>

<sup>3</sup> Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights "Protocol of San Salvador". Ibid.

<sup>4</sup> Case 7383 (GUATEMALA), (1981) Inter-American Commission on Human Rights. Annual Report of the Inter-American Commission on Human Rights. RESOLUTION 32/81, OES/Ser.L/V/II.54 Doc.9 rev.1 (1981): [www.cidh.oas.org/annualrep/80.81eng/Guatemala7383.htm](http://www.cidh.oas.org/annualrep/80.81eng/Guatemala7383.htm).

<sup>5</sup> Case 7310 (NICARAGUA), (1982). Inter-American Commission on Human Rights. Annual Report of the Inter-American Commission on Human Rights. RESOLUTION NO. 59/82, November 23, 1982: [www.cidh.oas.org/annualrep/82.83eng/Nicaragua7310.htm](http://www.cidh.oas.org/annualrep/82.83eng/Nicaragua7310.htm).

<sup>6</sup> Inter-American Commission on Human Rights. Annual Report of the Inter-American Commission on Human Rights. *Carlos Ranferí Gómez* REPORT N° 29/96 CASE 11.303(Merits) GUATEMALA, October 16, 1996. [www.cidh.oas.org/annualrep/96eng/Guatemala11303.htm](http://www.cidh.oas.org/annualrep/96eng/Guatemala11303.htm).

<sup>7</sup> Inter-American Commission on Human Rights. Annual Report of the Inter-American Commission on Human Rights REPORT N° 13/96 CASE 10.948 EL SALVADOR March 1, 1996: [www.cidh.oas.org/annualrep/95eng/ElSalvador10948.htm](http://www.cidh.oas.org/annualrep/95eng/ElSalvador10948.htm).

<sup>8</sup> Inter-American Commission on Human Rights. Annual Report of the Inter-American Commission on Human Rights *Diana Ortiz* CASE REPORT N° 31/96 10.526 (Merits) GUATEMALA October 16, 1996: [www.cidh.oas.org/annualrep/96eng/Guatemala10526.htm](http://www.cidh.oas.org/annualrep/96eng/Guatemala10526.htm).

<sup>9</sup> *Baena Ricardo et al.* Case (Panama) (2001). Inter-American Court of Human Rights. Series C No. 72: [www.corteidh.or.cr/seriecing/index\\_serie\\_c\\_ing.html](http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html).

<sup>10</sup> Para. 160.

<sup>11</sup> Para. 156.

<sup>12</sup> Para. 134.

<sup>13</sup> *Cinco Pensionistas Case* (Peru) (2003), Inter-American Court of Human Rights. Serie C No. 98.

<sup>14</sup> Quoting *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-American Court of Human Rights. Serie. A No. 9 (1987), para 24.

<sup>15</sup> *Condicion Juridica y Derechos de los Migrantes Indocumentados*. Inter-American Court of Human Rights, Advisory Opinion Serie A No 18/03 (2003). [www.corteidh.or.cr/serie\\_a/index.html](http://www.corteidh.or.cr/serie_a/index.html).

<sup>16</sup> *Velasquez Rodriguez Case* (Honduras) (1989). Inter-American Court of Human Rights. Series C, No. 4, July 28, 1988: [www.corteidh.or.cr/seriecing/index\\_serie\\_c\\_ing.html](http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html)