The Inter-American Court of Human Rights: A Catalyst for International Labour Standards

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Abstract
Although the International Labour Organization remains the most important regulator at the international level and despite the post-1998 International Labour Organization Declaration momentum, the slowdown of its legislative activity and the questioning of the effectiveness of its supervisory bodies, particularly in the aftermath of the 2012 crisis, has entailed the reassessment of both the purpose and method of international labour law. These crises have begotten the development of international labour standards beyond Geneva, particularly by establishing a social clause or chapter in free trade agreements. It has also been argued that an openness of international labour standards to regional systems, such as the Council of Europe and the Organization of the American States, may result in a strengthening of their scope and protective potential. This chapter aims to unpack the recent Inter-American Court of Human Rights workers' rights case law as a method to develop and strengthen international labour standards. The recent development of the Inter-American Court of Human Rights case law, which recognizes the direct and autonomous justiciability of labour rights enshrined in the Inter-American System of Human Rights, has not only reaffirmed the relevance of international labour standards as developed by the International Labour Organization, but has also reinforced their development and implementation by considering the distinctive features and challenges of the Latin American workforce. This 'adapted' application of the international labour standards, rather than a one-size-fits-all approach, may result in the strengthening of labour standards at the domestic level.

Keywords: International Labour Standards – Inter-American System of Human Rights – Labour Rights – Inter-American Court of Human Rights – International Labour Law Method

1. <A> INTRODUCTION: INTERNATIONAL LABOUR STANDARDS BEYOND GENEVA

International labour standards have been traditionally associated with the International Labour Organization (ILO). 'The ILO's primary method to promote basic human rights, as enshrined in its 1919 constitution and the 1944 Declaration of Philadelphia, is the adoption of international labour standards in the form of conventions and recommendations.'[1] In a context in which labour laws were traditionally developed domestically, the ILO was historically

[1] Francis Wolf, 'Human Rights and the International Labour Organisation' in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Oxford University Press 1984) 296.

considered the legitimate actor to create and promote international labour standards. It does not come as a surprise that the traditional 'international labour standards method' has been characterized by the voluntary nature of the ILO system, which relies upon Member States' willingness to ratify and implement ILO conventions as well as to follow ILO recommendations domestically.[2]

Another crucial feature has been the lack of an international labour court, which through its judgments, could provide definitive interpretations of the ILO conventions. Instead, the ILO has developed two main supervisory mechanisms, which aim to monitor the effective implementation of the ILO standards: one which consists of regular and special reporting obligations done by the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts); and the International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations related to the application in law and practice of the international labour standards. Furthermore, it has established three special complaints-based procedures, which address complaints, among other things, regarding freedom of association by the Committee on Freedom of Association.[3]

These two main features have been under crisis and have been challenged in the recent decades. Although the ILO remains the most important regulator at the international level and despite the post-1998 ILO Declaration momentum, the slowdown of its legislative activity has entailed the questioning of both the purpose and method of international labour law.[4] It has been argued that the goal of international labour law should be to 'persuade states to pursue their own broadly conceived self-interest and then to assist them in advancing it'.[5] This would result in the preference of soft law over hard law instruments to develop international labour standards. Furthermore, the ILO supervisory bodies have developed a considerable number of decisions, which have been a guidance for all the relevant actors of the world of work. Nonetheless, these bodies' lack of power to impose binding sanctions means that States which do not respect the ratified ILO conventions may 'merely' receive a moral sanction.[6] The supervisory system has been further criticized in the aftermath of the 2012 crisis.[7]

This has raised questions regarding the role of the ILO as the 'sole' agency legitimated to promote international labour standards. These crises have begotten the development of

[2] Francis Maupain, 'A Second Century for What?: The ILO at a Regulatory Crossroad' (2020) 17 International Organizations Law Review 291, 301.
[3] For further analysis, see Claire La Hovary, 'The ILO's Mandate and Capacity: Creating, Proliferating and Supervising Labour Standards for a Globalized Economy' in Henner Gött (ed), *Labour Standards in International Economic Law* (Springer 2018).
[4] Manfred Weiss, 'International Labour Standards: A Complex Public-Private Policy Mix' (2013) 29 International Journal of Comparative Labour Law and Industrial Relations 7, 9.
[5] Brian Langille, '"Hard Law Makes Bad Cases": The International Labour Organization (Nervously) Confronts New Governance Institutions' (2016) 32 International Journal of Comparative Labour Law and Industrial Relations 407, 411.
[6] Arturo Bronstein, *International and Comparative Labour Law: Current Challenges* (Palgrave Macmillan and International Labour Organization 2009) 92.
[7] For a detailed analysis, see Claire La Hovary, 'Showdown at the ILO?: A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike' (2013) 42 Industrial Law Journal 338.

international labour standards beyond Geneva.[8] The most widespread new method of international labour law has been the inclusion of 'social' clauses and/or chapters in free trade agreements since the early 2000s.[9] Although it goes beyond the scope of this chapter, it is safe to say that this approach has had lukewarm success.[10]

Another important framework under which international labour standards have been protected and developed are regional human rights systems. Although they were established in the 1950s and 1970s, it was not until the 1990s that regional human rights courts, particularly the European Court of Human Rights, began considering labour standards.[11] It has been argued that an openness of international labour standards to regional systems, such as the Council of Europe and the Organization of the American States (OAS), may result in a strengthening of their scope and protective potential.[12]

This chapter aims to unpack the recent Inter-American Court of Human Rights (IACtHR or Court) workers' rights case law as a method to protect and strengthen international labour standards. To do so, after briefly introducing the relationship between human rights and labour rights in the Inter-American System of Human Rights (IASHR) (section 2), this chapter explores those cases in which the IACtHR has closely followed the scope of international labour standards as developed within the ILO framework (section 3). It then examines those judgments in which the Court has used those standards as a starting point, and has strengthened their protection by considering the distinctive features of Latin American labour markets (section 4). Further, this chapter touches upon those areas where the Court could further develop those labour standards (section 5).

This chapter concludes that although the ILO – through its conventions, recommendations and its supervisory bodies – remains the most important actor in the field of international labour standards, regional human rights systems – particularly the IASHR – constitute new institutions from which international labour standards can be developed and implemented. The recent development of the IACtHR case law, which recognizes the direct and autonomous justiciability of labour rights enshrined in the IASHR, has not only reaffirmed the relevance of

[8] Maupain (n 2) 304, 306.

[9] Thomas Payne, 'Retooling the ILO: How a New Enforcement Wing Can Help the ILO Reach its Goal through Regional Free Trade Agreements' (2017) 24 Indiana Journal of Global Legal Studies 597; Gabrielle Marceau, Rebecca Walker and Andreas Oeschger, 'The Evolution of Labour Provisions in Regional Trade Agreements' (2023) 57 Journal of World Trade 361.

[10] See Marceau, Walker and Oeschger (n 9) 361–411.

[11] For the European Court of Human Rights, see Filip Dorssemont, 'The European Convention on Human Rights as a Fountain of Labour Rights' in Janice R Bellace and Beryl ter Haar (eds), *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar Publishing 2019); Tzehainesh Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' (2020) 49 Industrial Law Journal 86.

[12] Claire La Hovary, 'The ILO's Supervisory Bodies' "Soft Law Jurisprudence"' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015); SJ Rombouts, 'The International Diffusion of Fundamental Labour Standards: Contemporary Content, Scope, Supervision and Proliferation of Core Workers' Rights Under Public, Private, Binding, and Voluntary Regulatory Regimes' (2019) 59 Columbia Human Rights Law Review 78, 85.

international labour standards as developed by the ILO, but has also reinforced their development and implementation by considering the distinctive features and challenges of the Latin American workforce. This 'adapted' application of the international labour standards, rather than a one-size-fits-all approach, may result in the strengthening of labour standards at the domestic level.

2. <A> HUMAN RIGHTS AND LABOUR RIGHTS IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

The OAS – an international organization founded on 30 April 1948 to promote cooperation among its member states within the Americas – established the IASHR. The IASHR has two main bodies: the Inter-American Commission on Human Rights (the Commission), established in 1959, which is responsible for ensuring the promotion and protection of human rights in the Americas; and the Court, established in 1979, which was created by the 1969 American Convention on Human Rights (American Convention) – the most important IASHR instrument. This is a judicial body made up of seven judges, which has an adjudicative function. It interprets the provisions of the American Convention on contentious cases. The Court's jurisdiction to interpret other IASHR instruments was originally subject to debate. It is worth noting that only States Parties which have ratified the American Convention and have accepted the competence of the Court are subject to its jurisdiction. The Court also delivers advisory opinions at the request of the Commission or any State Party on the interpretation of the American Convention and the other IASHR instruments.

Despite its original focus on civil and political rights, labour rights have been enshrined in several IASHR instruments, particularly the 1948 OAS Charter – revised by the 1967 Protocol of Buenos Aires, the 1948 American Declaration on the Rights and Duties of Man (American Declaration), and the 1988 Protocol of San Salvador. Nonetheless, the 1969 American Convention, which entered into force on 18 July 1978, is mainly a political and civil rights instrument. Article 6 (the right to freedom from slavery and forced labour), article 16 (the right to freedom of association) and article 26 (the progressive development clause), constitute some of the few exceptions to the political and civil nature of the American Convention. The latter is a rather vague provision, which sets out that States should adopt measures to achieve 'the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards' as recognized in the Charter of the Organization of American States, and, arguably, other Inter-American instruments.

Given this institutional and legal architecture, doubts were cast upon the justiciability of labour rights within the IACtHR. Until 2001, the IACtHR had only delivered one judgment related to workers' rights: *Caballero Delgado and Santana v Colombia*, which related to a trade unionist who went missing.[13] Instead of relying upon article 16 of the American Convention, which

[13] *Case of Caballero Delgado and Santana v Colombia* (Merits) Inter-American Court of Human Rights Series C No 22 (8 December 1995).

expressly protects the right to freedom of association, the judgment analysed this case through the lens of civil and political rights, particularly articles 4 and 7 of the American Convention, which recognize the right to life and the right to personal liberty respectively.[14]

The 2001 *Baena Ricardo and others v Panama* judgment ushered in a new period in which the Court decided to rely directly on 'labour' provisions of the American Convention to protect workers' rights. This judgment concluded that the arbitrary dismissal of 270 civil servants who participated in a demonstration constituted a *direct violation* of article 16 of the American Convention by the Panamanian government.[15] In the same vein, in two emblematic cases – *Ituango Masacres v Colombia*[16] and the *Hacienda Brasil Verde Workers v Brazil* – the Court used article 6 of the American Convention to judge that both countries had violated the right to freedom from slavery in particular.[17] In this period, the IACtHR also protected labour rights indirectly through the principle of equality and non-discrimination, and through the lens of procedural rights such as the right to a fair trial and the right to judicial protection, particularly in cases where workers had been unfairly dismissed.[18] The 2001–17 period constituted a step forward in the protection of labour rights. Nonetheless, this approach had an inherent limitation since the American Convention only expressly enshrines a limited amount of labour rights. This meant that social, economic, cultural and environmental rights protected in other Inter-American legal instruments would not be, in principle, justiciable.

This institutional hurdle was overcome in the landmark 2017 *Lagos del Campo v Peru* judgment. Relying upon article 26 of the American Convention, which had been considered an aspirational provision until then, the IACtHR adopted a systemic approach and recognized the autonomous justiciability of social, economic, cultural and environmental rights protected in every IASHR instrument.[19] Given the rather vague wording of article 26 of the American

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[14] Gerson Moscoso-Becerra, 'La Justiciabilidad Directa de los Derechos Laborales en la Corte Interamericana de Derechos Humanos' (2019) 28 Dikaion 385, 390.

[15] *Case of Baena Ricardo and others v Panama* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 72 (2 February 2001).

[16] *Case of the Ituango Massacres v Colombia* (Preliminary Objection, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 148 (1 July 2006).

[17] *Case of the Hacienda Brasil Verde Workers v Brazil* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 318 (20 October 2016).

[18] *Case of Acevedo Jaramillo and others v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 144 (7 February 2006); *Case of Dismissed Congressional Employees (Aguado Alfaro and others) v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 158 (24 November 2006); *Case of Canales Huapaya and others v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 296 (24 June 2015). See Miguel F Canessa Montejo, 'Labor Human Rights and the Jurisprudence of the Inter-American Court of Human Rights' in Janice R Bellace and Beryl ter Haar (eds), *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar 2019) 350–355.

[19] *Case of Lagos del Campo v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 340 (31 August 2017). For further analysis, see Miguel F Canessa Montejo, 'La Protección Interamericana de la Libertad Sindical y de la Estabilidad Laboral: El Caso Lagos del Campo vs. Perú' (2017) 16 Revista Chilena de Derecho del Trabajo y de la Seguridad Social 143; Franz Christian Ebert, 'Strengthening Labor Rights in the Inter-American Human Rights System' (2018) 4 International Labor Rights Case Law 179; Eduardo Ferrer Mac-Gregor, 'Social Rights in the Jurisprudence of the Inter-American Court of

Convention, the Court has judged that those labour rights enshrined in articles 34, 46 and particularly 45 of the OAS Charter are now directly protected. This marked the beginning of a new era where the IACtHR has developed a rich case law with a special focus on job stability[20] and the right to fair and satisfactory working conditions.[21] It has also further strengthened the protection of the principle of equality and non-discrimination at work,[22] and of the freedom of association and the right to strike.[23]

Since the IASHR is not, strictly speaking, a labour rights instrument, determining the scope of these rights has been one of the challenges faced by the Court. Relying upon article 29 of the American Convention, which establishes the interpretation rules and recognizes the pro personae principle, no interpretation can limit the enjoyment of the rights protected in the American Declaration and other international instruments. In this regard, the recent IACtHR case law has been largely inspired by ILO labour standards, as developed in conventions and recommendations as well as decisions and resolutions of the ILO's supervisory mechanism bodies, particularly the Committee of Experts and the Committee on Freedom of Association.[24]

3. <A> THE INTER-AMERICAN COURT OF HUMAN RIGHTS CASE LAW: MIRRORING THE ILO STANDARDS

3.1.<b> Right to Work

Human Rights' in Christina Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar 2020).

[20] *Lagos del Campo* (n 19); *Case of Dismissed Employees of Petroperú and others v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 344 (23 November 2017); *Case of San Miguel Sosa and others v Venezuela* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 348 (8 February 2018).

[21] *Case of Spoltore v Argentina* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 404 (9 June 2020); *Case of Employees of the Fireworks Factory of Santo Antônio de Jesus and their Families v Brazil* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 407 (15 July 2020); *Case of the Buzos Miskitos (Lemoth Morris and others) v Honduras* (Judgment) Inter-American Court of Human Rights Series C No 432 (31 August 2021).

[22] *Case of National Federation of Maritime and Port Workers (FEMAPOR) v Peru* (Preliminary Objections, Merits and Reparations) Inter-American Court of Human Rights Series C No 448 (1 February 2022); *Case of Pavez Pavez v Chile* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 449 (4 February 2022); *Case of Guevara Díaz v Costa Rica* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 453 (22 June 2022).

[23] *Lagos del Campo* (n 19); *The Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and their Relation to Other Rights, with a Gender Perspective*, Advisory Opinion OC-27/21, Inter-American Court of Human Rights Series A No 27 (5 May 2021); *Case of the Former Employees of the Judiciary v Guatemala* (Interpretation of Preliminary Objections, Merits and Reparations Judgment) Inter-American Court of Human Rights Series C No 459 (27 July 2022).

[24] For further analysis, see Bernard Duhaime and Éloïse Décoste, 'From Geneva to San José: The ILO Standards and the Inter-American System for the Protection of Human Rights' (2020) 159 International Labour Review 525; Renan Kalil and Mauro Pucheta, 'Diálogo entre el Sistema Interamericano de Derechos Humanos y la Organización Internacional del Trabajo' in Daniela Méndez Royo and Enrique Díaz Bravo (eds), *Diálogo en el Derecho Internacional Público* (Tirant lo Blanch 2021).

Neither the Commission nor the Court had examined the right to work until 2017. The American Convention is silent in this respect. Nonetheless, article 45(b) of the OAS Charter, which has been one of the main legal bases of the IACtHR judgments, sets out that:

> work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working ...

The right to work is also protected in article 46 of the OAS Charter, article XIV of the American Declaration and articles 6 and 7 of Protocol of San Salvador.

Since the IASHR is not a labour rights organization, drawing upon article 29 of the American Convention, the Court has used the international corpus iuris, such as the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights, to determine the scope of the right to work.[25] The Court, though, has paid particular attention to the 'right to job security/protection against unfair dismissal' defined in the ILO Convention 158 on Termination of Employment and ILO Recommendation 143 on Workers' Representatives. Drawing inspiration from these instruments, the Court has decided that States Parties must protect the right to job security. Although this does not have to necessarily mean the right to an absolute stability, it should at least entail a protection against unfair dismissal. Such protection can be achieved by providing adequate remedies such as reinstatement and/or, if appropriate, by compensation and other social benefits established in domestic law. States Parties must also establish effective grievance mechanisms in cases of unfair dismissal to ensure the effectiveness of the right to access to justice and effective judicial protection.[26]

3.2.<b> Forced Labour

Forced labour is one of the most serious challenges faced by Latin America and the Caribbean, even more so in the aftermath of the pandemic.[27] Article 6(2) of the American Convention enshrines the prohibition of forced labour. However, since this provision does not provide a definition, the Court has mainly relied upon ILO standards and ILO supervisory bodies' decisions to flesh it out. In *Masacres de Ituango v Colombia,*[28] the Court referred to article 2(1) of ILO Convention 29 on Forced Labour to consider that the definition of forced or compulsory labour consists of two elements: first, the work or service is exacted 'under the menace of a

[25] *Lagos del Campo* (n 19) para 145.

[26] ibid para 149.

[27] Comisión Económica para América Latina y el Caribe, 'The COVID-19 Pandemic could Increase Child Labour in Latin America and the Carribbean (Technical Note No 1, 11 June 2020) <https://www.cepal.org/es/publicaciones/45679-la-pandemia-la-covid-19-podria-incrementar-trabajo-infantil-america-latina> accessed 12 June 2023.

[28] *Ituango Massacres* (n 16).

penalty'; and second, the work is performed involuntarily.[29] Furthermore, the IACtHR added a third element, which is the fact that the alleged violation can be attributed to State agents, either due to their direct participation in, or their acquiescence to, the violation.[30]

There was a strengthening of the protection of workers' rights against forced labour in the case of *Hacienda Brasil Verde v Brasil*, which concerned 85 workers, some of them children, who had been working under slavery-like conditions for privately-owned estate 'Hacienda Brasil Verde'– a cattle ranch located in the north of Brazil.[31] The Court considered the ILO findings to determine that the development of forced labour in the region was due to the existence of closed links between landowners and public authorities in Brazil. This judgment constitutes a breakthrough from a normative perspective as well. Relying upon international human rights instruments, particularly the ILO Convention 105 on Abolition of Forced Labour, ILO Convention 138 on Minimum Age and ILO Convention 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, the IACtHR adopted a 'modern' and 'broad' definition of slavery and forced labour, which is not confined to the 'right of ownership' over an individual.[32] Brazil argued that it was necessary to distinguish between servitude as such and debt bondage. Nonetheless, inspired by the Commission's approach, which followed the broad definition of slavery and forced labour adopted by the ILO, the IACtHR recognized the closed link between forced labour and other related abusive practices such as slavery and slavery-like practices, debt bondage, trafficking and labour exploitation.[33] This led the Court to conclude that workers at Hacienda Brasil Verde were not only in a situation of servitude but also in one of slavery, particularly given the degree of control exercised by the employers and the workers' loss of liberty.[34]

3.3.<b> Child Labour

Article 19 of the American Convention and article 7 of the Protocol of San Salvador protect the rights of the child and the prohibition of child labour respectively. In its pre-*Lagos del Campo* case law, the Court had established that the protection of the rights of children, as subjects of law, should consider their intrinsic characteristics and the need to promote their development, to offer them the necessary conditions to live and develop their skills, and to enable them to take full advantage of their potential.[35] To define the content and scope of the obligations assumed by States Parties regarding the protection of children, the IACtHR relied upon the international corpus iuris with a particular emphasis on ILO Convention 138. Its

[29] ibid para 160.

[30] ibid.

[31] *Hacienda Brasil Verde Workers* (n 17).

[32] ibid paras 253–331.

[33] ibid para 231.

[34] ibid paras 342–343.

[35] ibid para 330; *Juridical Condition and Human Rights of the Child*, Advisory Opinion 17/02, Inter-American Court of Human Rights Series A No 17 (28 August 2002) para 61; *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014) para 66.

article 3, which establishes 18 years old as the minimum age for employment, was useful for the Court to establish standards on minimum age, children's protections and hazardous work. It also adopted the notion of 'light work', which is characterized by jobs that are not likely to be harmful to children's health or development and would not prejudice their attendance at school, for which the minimum age could go down to 12 years old.[36]

ILO Convention 182 also inspired the IACtHR to define the content of the worst forms of child labour. Relying upon its article 3, the Court identified the obligations that must be respected by the States Parties.[37] They must prevent the engagement of children in the worst forms of child labour and must provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration. States Parties must also ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour. Finally, they must identify and reach out to children at special risk, and they must take account of the special situation of girls.[38]

This same approach has been followed in the post-*Lagos del Campo* case law, in which ILO Conventions 138 and 182 have been relied upon to define child labour. The Court has also referred to the 1998 ILO Declaration on Fundamental Principles and Rights at Work and ILO 190 Worst Forms of Child Labour Recommendation to fight against child labour in the region.[39]

3.4.<b> Freedom of Association

Freedom of association, recognized in several IASHR instruments,[40] is another crucial area where the Court has developed a rich case law heavily inspired by ILO standards. From the early 2000s, the IACtHR considered freedom of association as a cornerstone of the IASHR. In the 2001 *Baena Ricardo and others v Panama*, considering the Preamble to the ILO Constitution and ILO Conventions 87 on Freedom of Association and Protection of the Right to Organise and 98 on Right to Organise and Collective Bargaining Convention, the Court judged that the right to freedom of association, enshrined in article 16 of the American Convention, constituted a requirement for universal and lasting peace.[41] Furthermore, in the case *Huilca Tesce v Peru,* where a trade union leader had been extrajudicially executed,

[36] *Hacienda Brasil Verde Workers* (n 17) para 331.

[37] ibid.

[38] ibid para 332.

[39] *Employees of the Fireworks Factory of Santo Antônio de Jesus and their Families* (n 21) para 180; *Buzos Miskitos (Lemoth Morris and others)* (n 21) para 71.

[40] Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, art 45(c); American Declaration on the Rights and Duties of Man (adopted 2 May 1948, entered into force 19 July 1978), art XXII; American Convention on Human Rights (opened for signature 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 16.1; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of 'San Salvador' (17 November 1988), art 8.1(a).

[41] *Baena Ricardo and others* (n 15) 157.

drawing upon ILO Convention 87 and resolutions of the ILO Committee on Freedom of Association in cases related to El Salvador (No 1233), Guatemala (No 1176, 1195, 1215 and 1262) and Colombia (No 1429, 1434, 1436, 1457, 1465 and 1761), the Court stressed that States Parties must ensure that workers exercise their freedom of association freely, without being afraid of suffering any kind of violence.[42] In the same vein, inspired by resolution on Case 1569 of the ILO Committee on Freedom of Association and the fundamental nature of freedom of association, the Court affirmed that States Parties cannot interfere with trade union funds,[43] nor can they enter into trade union premises, which are inviolable.[44] This negative dimension has been supplemented by the Advisory Opinion 22/16 which, based – once again – on ILO Convention 87 and article 8.1(a) of the Protocol of San Salvador, reiterated the States Parties' obligation to refrain from taking any legal or political measures that may restrict trade unions' rights. It also highlights the 'positive' obligation of States Parties to foster an adequate legal and political environment in which trade unions can freely exercise their freedom of association.[45]

More recently, the Court delivered one of its most remarkable opinions: Advisory Opinion 27/21. Relying largely upon ILO instruments, ILO Committee of Freedom Association and ILO Committee of Experts resolutions, the IACtHR has recognized freedom of association, the right to collective bargaining and, more importantly, the *right to strike* as fundamental human rights in the continent.[46] Upon the Commission's request, and following the ILO Conventions 87 and 111 on Discrimination (Employment and Occupation) as well as several decisions of the Committee on Freedom of Association, the Court adopted a 'gendered' approach and judged that States Parties must play an active role in ensuring that women can freely exercise their fundamental labour rights, particularly their trade union rights.[47] In the same vein, the IACtHR delivered a crucial judgment regarding the legal requirements to effectively enjoy the right to strike. It recognized that restrictions can be put in place to exercise the right to strike, particularly in the civil service. Nonetheless, inspired by ILO Convention 87 and, to a large extent, by several resolutions of the ILO Committee on Freedom of Association, the Court has

[42] *Case of Huilca Tecse v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 121 (3 March 2005) paras 74, 75, 77.

[43] *Baena Ricardo and others* (n 15) para 164.

[44] ibid para 165.

[45] *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System*, Advisory Opinion OC-22/16, Inter-American Court of Human Rights Series A No 22 (26 February 2016) paras 101–102.

[46] *The Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and their Relation to Other Rights, with a Gender Perspective* (n 23) paras 52, 63, 82–105, 136–141. For further analysis, see Ricardo José Macedo de Britto Pereira, 'The Interpretation of the Inter-American Court of Human Rights on Labor Collective Rights from a Gender Perspective' (2023) 9 International Labor Rights Case Law 15; Mariela Morales Antoniazzi and Julieta Lobato, 'Un paso al frente: La huelga como derecho humano en el Sistema Interamericano de Derechos Humanos', Max Planck Institute for Comparative Public Law and International Law, Research Paper Series No. 2022-03; Kacey Mordecai, 'The Fundamental Human Rights to Trade Union Freedom, Collective Bargaining and to Strike in the Americas' (2022) 8 International Labor Rights Case Law 163.

[47] *The Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and their Relation to Other Rights, with a Gender Perspective* (n 23) paras 167, 181, 184, 191.

decided that those restrictions must be proportional to ensure the effective exercise of the right to strike.[48]

4. <A> THE INTER-AMERICAN COURT OF HUMAN RIGHTS CASE LAW: THE ILO FRAMEWORK AS A SPRINGBOARD

4.1.<b> Right to Fair and Satisfactory Working Conditions

The recognition of the right to fair and satisfactory working conditions as a human right protected in the Inter-American System has been one of the major breakthroughs of the recent development of the IACtHR case law. Unlike the aforementioned rights, there is no specific reference to this right in the American Convention. Nonetheless, in *Spoltore v Argentina*,[49] the Court recognized for the first time the protection of the right to fair and satisfactory working conditions, enshrined in article 45(b) of the OAS Charter and article XIV of the American Declaration. It asserted that this right is essential to protect workers' health. Drawing inspiration from the ILO Convention 155 on Occupational Safety and Health,[50] the Court has put special emphasis on the prevention of accidents and occupational diseases to ensure the effectiveness of the right to fair and satisfactory working conditions.[51] Consequently, workers have the right to perform their tasks in a safe environment that prevents work accidents or occupational diseases from arising.[52]

The Court provided further clarification regarding the scope and the content of the right to fair and satisfactory working conditions in the landmark judgment *Employees of the Fireworks Factory in Santo Antônio de Jesus and their Families v Brazil*.[53] An explosion in a fireworks factory in the town of Santo Antônio de Jesus resulted in the death of more than sixty people, who were mainly poor Afro-descendant women and children. Brazil was condemned for having failed to regulate and supervise the exceptionally unsafe working conditions under which workers performed their jobs. In this judgment, the IACtHR pointed out that the Preamble to the ILO's constitution highlights the urgency to enhance working conditions to ensure 'the protection of the worker against sickness, disease and injury arising out of his employment'.[54] Further, it relied upon the ILO Convention 81 on Labour Inspection to decide that States Parties must implement effective labour inspectorates that guarantee compliance with fair working conditions.[55] Since States Parties must adopt, to the extent of their available resources, all the

[48] *Former Employees of the Judiciary* (n 23) paras 107, 109, 110, 118, 125.
[49] *Spoltore* (n 21) para 84.
[50] ibid para 95.
[51] ibid para 99.
[52] ibid.
[53] *Employees of the Fireworks Factory of Santo Antônio de Jesus and their Families* (n 21).
[54] ibid para 164.
[55] ibid. This has been confirmed in *Buzos Miskitos (Lemoth Morris and others)* (n 21) para 70.

necessary legislative and administrative measures to ensure the effectiveness of this right,[56] the Court then referred to ILO Convention 155 and the obligation of States Parties to design, implement and periodically revise a consistent national health and safety in the workplace policy, whose main objective should be the prevention of workplace accidents and occupational diseases.[57]

The lack of control and inspection by the Brazilian authorities constituted a breach of the right to fair and satisfactory working conditions as protected through the ILO standards. Nonetheless, given the particular vulnerability of the victims, the Court decided that Brazil, as a State Party, 'had an *enhanced obligation* to oversee the operating conditions of the factory and to ensure that real measures were taken to protect the life and health of the workers and to guarantee their right to material equality'.[58] This meant that the State needed to implement a systematic inspection policy in order to guarantee a healthy working environment in the fireworks factory.[59]

It is worth pointing out that no mention has been made, at least for now, to ILO Convention 187 on Promotional Framework for Occupational Safety and Health Convention. This may change since in 2022 the International Labour Conference amended paragraph 2 of the 1998 ILO Declaration on Fundamental Principles and Rights at Work and included 'a safe and healthy working environment' in the fundamental Principles and Rights at Work framework. This means that the ILO Convention 155 and the ILO Convention 187 are now fundamental Conventions. This may contribute to further shaping the future IACtHR case law in a protective way on these matters.

4.2.<b> Principle of Equality and Non-Discrimination

As established in article 1.1 of the American Convention, States Parties must ensure the respect of the principle of equality and non-discrimination vis-à-vis all the provisions therein recognized, particularly on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[60] This principle, inherent to human dignity,[61] is also enshrined in article 24 of the American Convention, articles 45(a) of the OAS Charter, article 2 of the American Declaration, and article 3 of the Protocol of San Salvador.

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[56] *Spoltore* (n 21) para 97.

[57] *Employees of the Fireworks Factory of Santo Antônio de Jesus and their Families* (n 21) para 165.

[58] ibid para 201 (emphasis added).

[59] ibid para 287.

[60] *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 101.

[61] *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-American Court of Human Rights Series A No 4 (19 January 1984) para 55; *Case of Ramírez Escobar and others v Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 351 (9 March 2018) para 270.

In the pre-*Lagos del Campo* case law, the Advisory Opinion 18/03 constitutes the first landmark judgment. The IACtHR made a remarkable recognition and asserted that labour rights belong to the category of human rights within the Inter-American System.[62] It then went on to affirm that 'the *migratory status of a person can never be* a justification for depriving him of *the enjoyment and exercise of his human rights*, including those related to employment'.[63] To reach that conclusion, the Court heavily relied upon ILO instruments, namely: the 1998 ILO Declaration; ILO Convention 97 on Migrant Workers (revised) (article 6); ILO Convention 111 (articles 1 to 3); ILO Convention 143 on Migrant Workers (supplementary provisions) (articles 8 and 10); ILO Convention 168 on the Promotion of Employment and Protection against Unemployment (article 6).[64] This approach has been confirmed subsequently by several reports related to migrant workers adopted by the Commission.[65]

In the aftermath of *Lagos del Campo*, the IACtHR has delivered three judgments in which the principle of equality and non-discrimination has been applied to employment relationships. Firstly, it has stated that work is both a right and a social duty which must be performed in exchange for a 'fair salary'. The Court relies upon, among others, article 1 of ILO Convention 100 on Equal Remuneration to assert that States Parties must ensure that equal pay is respected.[66] Secondly, the Court considered that Chile violated the principle of equality and non-discrimination because the claimant, who was a professor of Catholic religion in a public school, was dismissed because of her sexual orientation. Relying upon ILO Convention 111 and the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the IACtHR asserted that States Parties must ensure that workers are not unfairly discriminated against so they can exercise their right to work freely.[67] Thirdly, drawing upon ILO Convention 111, ILO Convention on 159 Vocational Rehabilitation and Employment (Disabled Persons), and ILO Recommendation 168 on Vocational Rehabilitation and Employment (Disabled Persons), the IACtHR condemned Costa Rica because of the violation of the principle of equality and non-discrimination vis-à-vis a disabled worker, whose civil service application had been refused because of his intellectual disability. More interestingly, the Court decided that Costa Rica had a *positive obligation* to implement public policies to ensure the promotion of training and suitable employment for disabled persons, on an equal footing with other workers.[68]

The *Employees of the Fireworks Factory in Santo Antônio de Jesus and their Families* judgment constitutes an emblematic case in which the IACtHR used international labour standards as a starting point to ensure an effective protection of the principle of equality and non-discrimination in the context of employment relationships. Given the nature of the victims

[62] *Judicial Condition and Rights of the Undocumented Migrants* (n 60) para 134.
[63] ibid (emphasis added).
[64] ibid para 86.
[65] See Kalil and Pucheta (n 24) 182–186.
[66] *National Federation of Maritime and Port Workers (FEMAPOR)* (n 22) para 108.
[67] *Pavez Pavez* (n 22) paras 89–90.
[68] *Guevara Díaz* (n 22) para 67.

– women and children, mainly Afro descendants, who lived in extreme poverty,[69] the Court adopted an intersectional approach to address the issue of structural discrimination of those vulnerable groups. It considered how the economic and social disadvantages of the victims pushed them to accept a precarious job that was performed in extremely unsafe working conditions. To effectively protect the principle of equality and non-discrimination, the Court adopted a bold approach regarding remedies. Other than compensations, the Court exhorted Brazil, within two years of notification of the judgment, to design and implement a socio-economic development programme especially for the population of Santo Antônio de Jesus, in coordination with the victims and their representatives, which would focus on vocational training as well as the strengthening of the educational system to guarantee access to decent and less precarious jobs.[70]

Unlike other regions, in Latin America, characterized by profound inequalities and an extremely high percentage of informal work, the enjoyment of social rights is a mere illusion for considerable segments of the population. The use of ILO standards as a starting point and the adoption of an intersectional approach by the Court to consider the special circumstances of Latin American workers may 'improve domestic legal standards, protect the most vulnerable people, and decrease social injustices in the continent'.[71] This constitutes a positive step towards the strengthening of international labour standards in the region.

5. <A> THE INTER-AMERICAN OF COURT OF HUMAN RIGHTS AND THE FUTURE OF WORK

This chapter has illustrated the significant influence of ILO Conventions and Recommendations and of the ILO Committee on Freedom of Association and Committee of Experts' decisions and recommendations on the strengthening of the international labour standards within the IASHR. It is worth noting, though, that this development does not seem to be finished and three areas related to the future of work, which have been hinted at in its case law, may be explored by the Court.

Firstly, the IACtHR recognizes in article 45 of the OAS Charter the right to fair and satisfactory working conditions. It has fleshed out this provision by examining several international instruments, particularly the ILO Convention 155.[72] In the context of the Covid crisis, possible future pandemics/epidemics, the climate crisis, and the inclusion of 'a safe and healthy working environment' as a fundamental principle and right at work in the ILO framework in 2022, the Court may continue to develop case law which emphasizes the preventive and intersectional

[69] *Employees of the Fireworks Factory of Santo Antônio de Jesus and their Families* (n 21). Intersectionality was first considered in a case related to labour rights in the judgment *Hacienda Brasil Verde Workers* (n 17).
[70] *Employees of the Fireworks Factory of Santo Antônio de Jesus and their Families* (n 21) para 289.
[71] Isaac de Paz González, *The Social Rights Jurisprudence in The Inter-American Court of Human Rights: Shadow and Light in International Human Rights* (Edward Elgar 2018) 14.
[72] *Spoltore* (n 21) para 95; *Employees of the Fireworks Factory of Santo Antônio de Jesus and their Families* (n 21) para 155.

nature of this right, particularly in Latin America and the Caribbean, where the workforce is highly vulnerable.[73]

Secondly, platform workers constitute a global phenomenon characterized by their precarity. This is all the more true since informality in Latin America and the Caribbean is extremely high. It is not a surprise that the Court has attempted to address this issue in Advisory Opinion 27/21 on freedom of association where it emphasized the need to protect fundamental trade union rights of platform workers. Although there are no specific ILO instruments on this matter, the IACtHR has relied upon ILO Conventions 175 on Part-time Work and 177 on Home-Work, and ILO Recommendations 184 on Home-Work and 198 on Employment Relationship to conclude that States Parties must ensure the effective participation of workers' representatives when designing and implementing labour regulations related to technology in the workplace. The Court also highlighted that states should grant legal status to workers as employees if they meet the legal criteria, so they can enjoy labour rights to which they are entitled under domestic law.[74]

Thirdly, the climate crisis constitutes an existential challenge, which has had and will continue to have a negative impact on the continent. In January 2023, Chile and Colombia submitted an advisory opinion request to the IACtHR to examine the States Parties' duties and minorities' rights in the context of the climate emergency, with a particular focus on the right to life. It remains to be seen if, taking into account the 2015 ILO Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All, workers' rights in the context of just transition will be considered.

The ILO remains the major actor in terms of setting and developing international labour standards. However, new actors have emerged in the past decades, which have contributed to their recognition and their implementation. The IASHR, particularly through its court, is one of the main examples of the development of international labour standards beyond Geneva. The Court has profusely relied upon ILO conventions, recommendations, and ILO supervisory bodies' decisions to flesh out the labour provisions contained in the Inter-American instruments as explained in section 3. The IACtHR has also gone beyond and has used the ILO standards as a starting point to examine the scope of the right to fair and satisfactory working conditions and the principle of equality and non-discrimination as developed in section 4. It has then explored the distinctive features of the Latin American context, such as informality and the vulnerability of victims, to further develop the meaning of these rights. In a context where the role of international organizations is under constant attack, the development and protection of international labour standards in regional human rights systems, such as IASHR, can only be welcomed.

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[73] *Spoltore* (n 21) para 94; *Employees of the Fireworks Factory of Santo Antônio de Jesus and their Families* (n 21) paras 168, 191, 197, 198, 203.

[74] *The Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and their Relation to Other Rights, with a Gender Perspective* (n 23) paras 206, 208, 209, 211, 212.