

CORTE CONSTITUCIONAL DEL ECUADOR
CASO NO. 1760-21-EP
ACCION EXTRAORDINARIA DE PROTECCION

AMICUS CURIAE
ROBERT F. KENNEDY HUMAN RIGHTS

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AMICUS CURIAE BRIEF

I. INTRODUCTION

Robert F. Kennedy Human Rights submits this Amicus Curiae brief for the consideration of the Constitutional Court (hereinafter, the “Court”), in case No. 1760-21EP, Extraordinary Protection Action. In essence, the case refers to the fundamental right to work and to freedom of association, particularly as applied to agricultural, plantation, and rural workers in Ecuador.

Robert F. Kennedy Human Rights (RFKHR) is a non-governmental organization founded in 1968 by the family and friends of former United States Attorney General Robert F. Kennedy to continue his legacy of fighting for a more just and peaceful world. The international advocacy and litigation team works to protect human rights across Africa, the Americas, and Asia, with a particular emphasis on protecting civic space. RFKHR participates directly in strategic litigation of emblematic cases at the international and regional level. RFKHR has also intervened in various cases before the Inter-American human rights system and national courts as amicus curiae.

II. ABOUT THE CASE

On May 25, 2021, the Provincial Judicial Court of Pichincha ordered the Ministry of Labor to register the Trade Union Association of Banana Plantation, Agricultural and Rural Workers (hereinafter, “ASTAC”), as a trade union, and the Ministry of Labor presented this Extraordinary Protection Action to contest it.

The Ministry of Labor refused to recognize the establishment of ASTAC as a trade union under a two-fold argument. First, it alleged that Ecuadorian law requires all members of a trade union to be employed by the same employer. Second, given this understanding, it inferred that primary or branch level trade unions, comprising workers from multiple enterprises, are not legal in Ecuador.

Primary or branch level trade unions comprised of workers from multiple enterprises are also referred to as industrial unions, where workers within the same industry regardless of their specific roles or dependence on a single employer can form an industry-wide union. In decisions below, including that of the Provincial Court, industrial unions are referred to as “sindicato de rama,” translated as “branch level unions.” The Court explained the term as follows: “the branch unions are made up of workers who belong to the same branch of work, in this case the workers in the banana agro-industry.”¹ For ease of reference, we will be using the term “branch level unions” throughout this brief.

¹ Corte Provincial de Pichincha, Juicio No. 17981202002407, 26 de mayo de 2021, p. 12.

The Committee on Freedom of Association (CFA)² of the International Labour Organization (ILO) requested Ecuador to register ASTAC. The State of Ecuador (hereinafter “the State”) argued that workers, who had attended ASTAC’s constituent assembly, were not employed by one employer.³ The CFA and the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR)⁴ repeatedly ruled that the State’s actions were contrary to the principle of freedom of association and asked the Government to register ASTAC without delay.

In March 2017, and October 2019, the CFA issued two different reports on the case.⁵ In both cases, the CFA recommendations were approved by CEACR, who later issued an Observation on Ecuador’s compliance with Convention No. 87 in 2020.⁶

The CFA concluded that even though the Labor Code stipulates that the leaders of workers’ associations must be employees of the pertinent enterprise; it does not directly prohibit the establishment of trade unions made up of workers from multiple enterprises, and that other provisions broadly recognize the right of workers to establish organizations of their choosing.

More importantly, the CFA emphasized that the right to establish and join trade unions implies free determination of the structure and membership of those trade unions and that workers must be able to decide whether they prefer to establish, at the primary level, a worker’s union or another form of basic organization, such as an industry or craft union. It also highlighted the importance of setting up primary-level trade unions comprising workers from multiple enterprises in the context of Ecuador, where there are a large number of small firms, and the context and special needs of rural workers, normally with a low level of education.⁷

Finally, the CFA requested the Government to take the necessary measures to ensure that national legislation complies with the principles of freedom of association, *including* “the possibility of setting up primary-level trade unions comprising workers from various companies,” and specifically to “enable the registration of ASTAC without delay.” Given that

² The CFA is a tripartite body set up in 1951 by the International Labor Organization Governing Body to examine alleged infringements on the principles of freedom of association and the effective recognition of the right to collective bargaining.

³ Case No. 3148 involves other instances of serious limitations to the right of freedom of association, but we will limit our discussion to the specific issues that are more relevant to Case No. 1760-21-EP.

⁴ The Committee of Experts (CEACR) was established in 1926 to examine government reports on ratified Conventions. The role of the Committee of Experts is to provide an impartial and technical evaluation of the application of international labor standards in ILO member States. When examining the application of international labor standards, the CEACR makes two kinds of comments: observations and direct requests. Observations contain comments on fundamental questions raised by a state’s application of a particular Convention.

⁵ ILO, CFA, Interim Report No. 381, Case No. 3148 (Ecuador), March 2017, https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3327395; ILO, CFA, Interim Report No. 391, Case No. 3148 (Ecuador), October 2019, https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:4017595

⁶ CEACR Observation, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), adopted 2020, published 109th ILC Session, https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4060421,102616,Ecuador,2020.

⁷ CFA Interim Report No. 381, par. 434.

the State did not comply with these recommendations, the CFA reiterate its recommendation to Ecuador in 2019.⁸

It is important to note that, from December 16-20, 2019, the International Labour Organization carried out a technical assistance mission to Ecuador to help the authorities to address ILO's comments and recommendations. In this Observation, the CEACR **regretted** that the government failed to fulfill its commitment to this mission, and stated that Ecuador must enable the establishment of primary-level unions comprising workers from multiple enterprises.

In response to the decision of the Provincial Court of Pichincha, which is being appealed in this action, the Ministry of Labor finally registered ASTAC as a union on January 11, 2022. The same decision, in addition to ordering ASTAC's registration, directed the Ministry of Labor to ensure clarity of the regulations to guarantee that other branch-level unions with members from multiple enterprises do not face the same hardship in registration. Nonetheless, in their letter to ASTAC informing them of the registration, the Ministry of Labor explicitly stated that ASTAC's registration was a unique one-off situation that would not lead to the registration of additional branch-level unions comprised of workers from multiple enterprises, implying that the Ministry would not take steps to promulgate regulations to facilitate operation of branch-level unions and their recognition by employers for collective bargaining purposes. As such, despite the formal registration of ASTAC, the refusal of the Ecuadorian authorities to comply with the additional obligations in the decision raises important questions on the nature and scope of the right to work, and particularly on the right to freedom of association, and the State's duties to protect and guarantee it under international and national law in Ecuador.

Also, neither the Labor Code nor any other national law include any provision that requires a single employer or prohibits branch-level associations – despite the government's contrary assertion.

This amicus brief will provide this Court with relevant international jurisprudence regarding the rights under discussion, and will closely examine whether the restrictions and limitations presented by the Ministry of Labor are acceptable under the international *corpus juri*.

⁸ CFA Interim Report No. 391, pars. 244, 245, 252. “The Committee recalls that in its previous examination of the case, it requested the Government to take the necessary measures to allow the registration of ASTAC. The Committee notes with regret that because its members do not work for the same employer, ASTAC has still not been recognized as a trade union organization. While pointing out once again that branch-level trade unions have been recognized in other sectors in the country, the Committee recalls that, in its previous examination of the case, it noted with concern that many agricultural workers in Ecuador not only find it impossible to set up company unions owing to the minimum membership requirement which is conflicting with the structure of a sector where most production units are small, but that they were also seeing their efforts to overcome that obstacle by grouping together in sectoral organizations being frustrated. The Committee invites the Governing Body to approve the following recommendations:

(a) The Committee once again requests the Government to take the necessary measures to ensure that ASTAC is registered as a trade union organization if the organization so requests it again and to ensure that, in the meantime, the necessary guarantees and protections are provided to its members.”

III. THE OBLIGATION TO RESPECT THE RIGHT TO FREEDOM OF ASSOCIATION UNDER NATIONAL AND INTERNATIONAL LAW

In this section, we will analyze the State's obligations to respect and guarantee the right to freedom of association as defined by national and international law, and its application to the case at hand.

The Constitution of Ecuador (Art. 426) incorporates international human rights instruments, including ILO conventions, into the Ecuadorian constitutional block. It further specifies that judges and other domestic authorities have a duty to directly apply and enforce said international norms if they are more favorable to those established in the Constitution.⁹

Also, under the *pacta sunt servanda* principle, States must comply with their international treaty obligations in good faith. As established in Article 27 of the 1969 Vienna Convention on the Law of Treaties, a party may not invoke the provisions of its internal law as justification for its failure to comply with a treaty.¹⁰ As stressed by the Inter-American Court, the obligation of *pacta sunt servanda* extends to the reparations ordered by the Court and requires that states take the necessary measures to ensure that the treaty rights are protected in practice.¹¹

⁹ “Art. 426.- All people, authorities and institutions are subject to the Constitution. The judges, administrative authorities and public servants will directly apply the constitutional norms and international human rights instruments, provided that they are more favorable to those established in the Constitution, even if the parties do not expressly invoke them. The rights enshrined in the Constitution and international human rights instruments will be of immediate compliance and enforcement. A lack of law or ignorance of the rules may not be alleged to justify the violation of the rights and guarantees established in the Constitution, to reject the action filed in their defense, or to deny the recognition of such rights.”

¹⁰ Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

¹¹ Inter-American Court of Human Rights. *Bulacio v. Argentina*. Judgment of September 18, 2003. Series C No. 100, para. 117, 142; *see also Las Palmeras v. Colombia*. Reparations (Art. 63(1) of the American Convention on Human Rights). Judgment of November 26, 2002. Series C No. 96, paras. 68 and 69; *El Caracazo v. Venezuela*. Reparations (Art. 63(1) of the American Convention on Human Rights). Judgment of August 29, 2002. Series C No. 95, para. 119; *Trujillo Oroza v. Bolivia*. Reparations (Art. 63(1) of the American Convention on Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 106; *Barrios Altos v. Peru*. Interpretation of the judgment on merits. (Art. 67 of the American Convention on Human Rights). Judgment of September 3, 2001. Series C No. 83, para. 15; *Barrios Altos v. Peru*. Judgment of March 14, 2001. Series C No. 75, para. 41; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC- 16/99 of October 1, 1999. Series A No. 16, para. 128; *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 35; *Barrios Altos v. Peru*. Compliance with judgment. Order of the Inter-American Court of Human Rights of November 28, 2003, sixth considering paragraph; *Suárez Rosero v. Ecuador*. Compliance with judgment. Order of the Inter- American Court of Human Rights of November 27, 2003, fourth considering paragraph; *Caballero Delgado and Santana v. Colombia*. Compliance with judgment. Order of the Inter-American Court of Human Rights of November 27, 2003, fourth considering paragraph; *Garrido and Baigorria v. Argentina*. Compliance with judgment. Order of the Inter-American Court of Human Rights of November 27, 2003, fourth considering paragraph; *Blake v. Guatemala*. Compliance with judgment. Order of the Inter-American Court of Human Rights of November 27, 2003, fifth considering paragraph; *Benavides Cevallos v. Ecuador*. Compliance with judgment. Order of the Inter-American Court of Human Rights of November 27, 2003, sixth considering paragraph; *The “Street Children” case (Villagrán Morales et al. v. Guatemala)*. Compliance with judgment. Order of the Inter-American Court of Human Rights of November 27,

Concretely, this Constitutional Court has embraced these provisions, stating that Ecuadorian authorities must directly and immediately comply with its international obligations on human rights issues: “The Government of Ecuador is directly and immediately obligated to comply with its international obligations on human right issues, without the need by the victims to initiate any jurisdictional process or administrative recourse.”¹²

Similarly, the State of Ecuador has several obligations as an ILO Member State *and it is bound* to respect the principles established in ILO conventions,¹³ and to modify any national legislation as necessary to remain in compliance with these instruments and principles, including the principle of freedom of association.¹⁴

Also, State authorities should respect trade union rights, like other basic human rights, no matter what the level of development of the country concerned,¹⁵ and it is their responsibility to ensure the application of international labor conventions concerning freedom of association that have been freely ratified and which must be respected by all state authorities, including the judicial authorities.¹⁶

Specifically, this Constitutional Court has explicitly recognized that the Ecuadorian government has “the international obligation to adopt measures leading toward the implementation of the recommendations published by the Governing Bodies of the ILO.”¹⁷ It observed further that, although the decisions issued by the ILO are called “recommendations,” they are mandatory for the States based on their conventional commitments.¹⁸ Similarly, this Constitutional Court has also indicated that “(...) the rights and guarantees that derive from the authentic interpretation of the Inter-American Court to the ACHR, that are included in the advisory opinions, are part of the Ecuadorian legal system, and they have to be followed in Ecuador by all public authorities within the scope of their competence.”¹⁹

2003, fifth considering paragraph; *Loayza Tamayo v. Peru*. Compliance with judgment. Order of the Inter-American Court of Human Rights of November 27, 2003, fifth considering paragraph; et al.

¹² Constitutional Court of Ecuador, Judgment 28-19-CN/21 September 29, 2021. Para.62

¹³ Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva, International Labour Office, Sixth (revised) edition, 2018. Para. 44. (See the 2006 Digest, para. 15; 340th Report, Cases Nos. 2166, 2173, 2180 and 2196, para. 49; 343rd Report, Case No. 2265, para. 1135; 344th Report, Case No. 2437, para. 1312; 349th Report, Case No. 2524, para. 847; 350th Report, Case No. 2433, para. 29; 351st Report, Case No. 2591, para. 150; 353rd Report, Case No. 2441, para. 118; 354th Report, Case No. 2591, para. 167; 355th Report, Case No. 2602, para. 672; 356th Report, Case No. 2591, para. 103; 359th Report, Case No. 2512, para. 86, Case No. 2602, para. 368; 360th Report, Case No. 2301, para. 69; 365th Report, Case No. 2637, para. 104; and 371st Report, Case No. 2988, para. 837.)

¹⁴ *Id.* par. 45. (See the 2006 Digest, para. 16; 344th Report, Case No. 2364, para. 91, Case No. 2242, para. 144; 359th Report, Case No. 2474, para. 158; 362nd Report, Case No. 2812, para. 390; and 371st Report, Case No. 2508, para. 565.)

¹⁵ *Id.* para. 53. (See the 2006 Digest, para. 19; 346th Report, Case No. 2528, para. 1446; and 357th Report, Case No. 2516, para. 619.)

¹⁶ *Id.* Para. 49. (See the 2006 Digest, para. 18; 344th Report, Case No. 2242, para. 144; and 356th Report, and Case No. 2663, para. 770.)

¹⁷ Constitutional Court of Ecuador. Judgment No.28-19-AN/21. J.P. Daniela Salazar Marin. Sep. 29, 2021, parr. 82.

¹⁸ *Id.* para 87

¹⁹ Constitutional Court of Ecuador. Judgment 11-18-CN / 19. June 12, 2019.

This provision is consistent with Inter-American Court Advisory Opinion OC-27/21, which indicates that Article 2 of the American Convention on Human Rights considers the general duty of States to align their laws with provisions of the Convention, and that this obligation implicitly calls for the adoption of certain measures in two regards: to suppress any norm or practice that violates rights covered by the Convention; and also to enact norms and develop practices to comply with such rights. Precisely on the adoption of such measures, the Court recognized that “all authorities of a Member State are obligated to exercise conventionality control in such a way that the national interpretation and application is consistent with the international obligations of that State with respect to human rights.”²⁰

Ecuadorian authorities and the judiciary have a constitutional obligation, as stated by this Honorable Court, to directly apply and enforce the norms and standards of freedom of association as recognized in the international instruments and in a manner that is consistent with the interpretation of these instruments issued by the respective authorized international bodies.

Additionally, Ecuador registered a branch-level trade union, SINUTRHE, a trade union of domestic workers who do not work for a single employer, by direct application and to comply with the ILO Domestic Workers Convention, 2011 (No. 189). Therefore, according to the “estoppel” principle, the same obligation exists regarding ILO Conventions 110 and 141, which include specific references to the registration of organizations of rural and plantation workers.

We can conclude that authorities in Ecuador have proven by their own acts that it is possible and legal to register a branch level union by the direct application of an ILO Convention.

IV. APPLICABLE STANDARDS STATED BY THE INTERNATIONAL LABOUR ORGANIZATION

ILO instruments highlight as well that all workers, without distinction, have the right to establish trade unions of their choosing without prior authorization, and that States cannot impose restrictions to this right. The ILO supervisory system has further stressed that the nature of the employment relationship is not relevant to the right of freedom of association and that even self-employed workers enjoy the right to form or join trade unions. As the CLS has declared, both in this case and in others, any restriction limiting the existence of branch-level unions violates the principles of freedom of association protected in multiple ILO conventions that have direct application in both national and international law.

The Conventions approved by the ILO and ratified by Ecuador on Freedom of Association (*Right of Association (Agriculture) Convention*, 1921 (No. 11)²¹; *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87)²²; the *Right to Organise and*

²⁰ Inter-American Court on Human Rights, *Advisory Opinion OC/27/21*, May 5, 2021, Serie A, No. 27, para. 109.

²¹ Ratified by Ecuador in 1969.

²² Ratified by Ecuador in 1967.

Collective Bargaining Convention, 1949 (No. 98)²³; *the Plantation Convention*, 1958 (No. 110)²⁴; and *the Rural Workers 'Organisations Convention*, 1975 (No. 141)²⁵), explicitly recognize the right for all workers and employers, under any type of employment relationship (and/or self-employed), to establish and join organizations of their choosing without previous authorization.²⁶

Convention 11 on the *Right of Association (Agriculture)* in its first article establishes that member states: “undertake[] to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture.”

Convention 110, the *Plantations Convention*, is relevant to this case as most of ASTAC’s members are plantation workers.²⁷ It affords protection to plantation workers in respect of freedom of association issues, including special considerations as to their registration.²⁸

Also relevant to the case, *Convention 141-The Rural Workers’ Organisations Convention* grants all rural workers, whether they are wage earners or self-employed, the right to establish and join

²³ Ratified by Ecuador in 1959. Convention 98 – The Right to Organize and Collective Bargaining. This fundamental convention provides that workers shall enjoy adequate protection against acts of anti-union discrimination. This includes requirements that a worker not join a union or relinquish trade union membership for employment. Similarly, it prohibits the dismissal of a worker because of union membership or participation in union activities. The convention also enshrines the right to collective bargaining.

²⁴ Ratified by Ecuador in 1969.

²⁵ Ratified by Ecuador in 1977.

²⁶ ILO Convention on Freedom of Association and Protection of the Right to Organise (No. 87) “**Article 2.** Workers and employers, **without distinction whatsoever**, shall have the right to establish and, subject only to the rules of the organization concerned, to join organisations of their own choosing **without previous authorization.**

Article 7. The acquisition of legal personality by workers 'and employers 'organisations, federations and confederations **shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.** **Article 10.** In this Convention, the term organization means any organization of workers or of employers for furthering and defending the interests of workers or of employers.

Article 11. Each Member of the International Labour Organisation for which this Convention is in force **undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.**” (emphasis added).

²⁷ ILO Plantations Convention (No. 110). “**Article 1 1.** For the purpose of this Convention, the term plantation includes any agricultural undertaking regularly employing hired workers which is situated in the tropical or subtropical regions and which is mainly concerned with the cultivation or production for commercial purposes of coffee, tea, sugarcane, rubber, **bananas**, cocoa, coconuts, groundnuts, cotton, tobacco, fibers (sisal, jute and hemp), citrus, palm oil, cinchona or pineapple; it does not include family or small-scale holdings producing for local consumption and not regularly employing hired workers.” (emphasis added).

²⁸ *Id.* “**Article 62.** Workers and employers, **without distinction whatsoever**, shall have the right to establish and, subject only to the rules of the organization concerned, to join organisations of their own choosing without previous authorization; ... **Article 67.** **The acquisition of legal personality by workers 'and employers 'organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 62, 63 and 64;** **Article 68.** 1. In exercising the rights provided for in this Part of this Convention workers and employers and their respective organisations, like other persons or organized collectivities, shall respect the law of the land. 2. **The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Part of this Convention;** ... **Article 70.** **Each Member for which this Part of this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.**” (emphasis added).

organizations of their choosing, without prior authorization. So, rural worker organizations must be independent and voluntary in nature; and further, they must remain free from interference, coercion, or repression. National policy must foster the establishment and growth of strong and independent rural worker organizations to effectively ensure such workers are included in economic and social development.

This Convention is complemented by Recommendation No. 149, that sheds further light on best practices to apply the principle of Freedom of Association to rural workers.²⁹

The CFA mentioned above, has interpreted that freedom of association should be guaranteed without discrimination of any kind, and has specifically stated in many cases regarding distinctions based on the nature of the employment relationship,³⁰ that it should not have **any effect** on the enjoyment of this right.

²⁹ Rural Workers' Organisations Recommendation, 1975 (No. 149) "Article 8. (1) **Member States should ensure that national laws or regulations do not, given the special circumstances of the rural sector, inhibit the establishment and growth of rural workers' organisations.** (2) In particular—(a) the principles of right of association and of collective bargaining... should be made fully effective by the application to the rural sector of general laws or regulations on the subject, or by the adoption of special laws or regulations, full account being taken of the needs of all categories of rural workers. (b) **relevant laws and regulations should be fully adapted to the special needs of rural areas; for instance—(i) requirements regarding minimum membership**, minimum levels of education and minimum funds **should not be permitted** to impede the development of organisations in rural areas where the population is scattered, ill-educated and poor." (emphasis added) ILO Convention 141 – Rural Workers Organisations Convention, 1975. "Article 1. **This Convention applies to all types of organisations of rural workers**, including organisations not restricted to but representative of rural workers. **Article 2.** 1. For the purposes of this Convention, the term **rural workers mean any person engaged in agriculture, handicrafts or a related occupation in a rural area, whether as a wage earner or, subject to the provisions of paragraph 2 of this Article, as a self-employed person such as a tenant, sharecropper or small owner-occupier.** **Article 3.** 1. **All categories of rural workers, whether they are wage earners or self-employed, shall have the right to establish and, subject only to the rules of the organization concerned, to join organisations, of their own choosing without previous authorization.** 2. The principles of freedom of association shall be fully respected; rural workers' organisations shall be independent and voluntary in character and shall remain free from all interference, coercion or repression. 3. **The acquisition of legal personality by organisations of rural workers shall not be made subject to conditions of such a character as to restrict the application of the provisions of the preceding paragraphs of this Article.** 4. In exercising the rights provided for in this Article rural workers and their respective organisations, like other persons or organization collectivities, shall respect the law of the land. 5. **The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Article.** **Article 5.** 1. In order to enable organisations of rural workers to play their role in economic and social development, **each Member which ratifies this Convention shall adopt and carry out a policy of active encouragement to these organisations, particularly with a view to eliminating obstacles to their establishment**, their growth and the pursuit of their lawful activities, as well as such legislative and administrative discrimination against rural workers' organisations and their members as may exist. 2. **Each Member which ratifies this Convention shall ensure that national laws or regulations do not, given the special circumstances of the rural sector, inhibit the establishment and growth of rural workers' organisations.**" (emphasis added).

³⁰ The general principle of non-discrimination enshrined in Art. 2 of Convention No.87 has been endlessly recognized by the CFA: "All workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing." *Cfr.* Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, International Labour Office, Fifth (revised) edition, 2006. Para. 255.

For example, in a case about Colombia's refusal to register a trade union based on the temporary nature of the contracts of some of its members, the CFA stated:

“The Committee recalls in this regard that **the status under which workers are engaged with the employer should not have any effect on their right to join workers' organizations and participate in their activities.** The Committee likewise recalls that all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing [see Digest, op. cit., para. 255]. In these circumstances, the Committee requests the Government to take the necessary measures, without delay, to register UNITRAQUIFA, its statutes and its executive committee.”³¹

In other cases, the CFA has stated that “All workers employed in agri-food enterprises, irrespective of the type of their employment relationship with those enterprises, should have the right to join the trade union organizations representing the interests of the workers in that sector;”³² that the lack of an employment relationship, often nonexistent, is not an acceptable limitation to the right to associate;³³ it also emphasized that “requiring workers to be employees of only one employer as a precondition to establishing a trade union is a violation of the principles of freedom of association,” so, “this requirement is a problem for those workers having multiple employers who, wanting registration as a trade union, fall foul of the Trade Unions Act's requirement that employees have one sole employer. As long as any group of wage-earners having several employers finds its means of action restricted - because of the requirements of the Trade Unions Act - there **is a violation of the principles of freedom of association.**”³⁴

On the other hand, CFA has emphasized that workers should be able to freely choose what type of association they wish to establish or join, and that this should be ensured by law and in

³¹ ILO, CFA, Report in which the committee requests to be kept informed of development, Report No. 349, March 2008, Case No. 2556 (Colombia), para. 754, (emphasis added)
https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2910702.

³² ILO, CFA, Final Report – Report No. 378, June 2016, Case No. 2824 (Colombia), para. 158,
https://www.ilo.org/dyn/normlex/en/f?p=1000:70006:0::NO:70006:P70006_COMPLAINT_TEXT_ID:P70006_PAGRAPHS:3282083,158

³³ Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, International Labour Office, Sixth (revised) edition, 2018. Para. 254. “By virtue of the principles of freedom of association, **all workers** – with the sole exception of members of the armed forces and the police – **should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organize.**” (emphasis added).

³⁴ *Id.* Para. 271; ILO, CFA, Report in which the committee requests to be kept informed of development – Report 284, November 1992, Case No. 1622 (Fiji), para. 691, (emphasis added),
https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2902330.

practice.³⁵ This includes associations at the company level, wherein members are employed by a single employer; or a primary level or branch organization, where workers are employed by different companies and/or are self-employed.

Concretely, in several cases, the CFA stated that the right to create and join unions implies the right to choose its structure and composition, and that workers should be free to decide whether they prefer to establish, at the primary level, a works union or another form of basic organization;³⁶ “workers have the right to establish organizations of their own choosing, including organizations grouping together workers from different workplaces and different cities;”³⁷ and that, “a provision that prohibits the establishment of trade unions on an occupational or workplace basis, is contrary to the principles of freedom of association.”³⁸

The right to freedom of association must be respected by States without discrimination, on the basis of principle of equality and non-discrimination. The ILO Convention above mentioned, also emphasizes that workers should enjoy the right to freedom of association “without distinction whatsoever,”³⁹ or discrimination of any kind, and the CFA has also reiterated that this Convention “calls for impartial treatment of all trade union organizations by the authorities, even if they criticize the social or economic policies of national or regional executives, as well as avoidance of reprisals for pursuing legitimate trade union activities,”⁴⁰ and that any favorable or unfavorable treatment of a particular trade union as compared with others would constitute an act of discrimination, unless it is based on objective pre-established criteria.⁴¹

This Constitutional Court has clarified that, as a Member of the ILO, Ecuador is obligated to adopt any necessary measures to comply with ILO Conventions and recommendations, according to the *pacta sunt servanda* principle and as result of its ratification of the ILO

³⁵ Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO

Geneva, International Labour Office, Sixth (revised) edition, 2018. Para. 309 -310

³⁶ This case against Brazil was filed by the National Association of Higher Education Teachers regarding attempts by private high education operations to obstruct the autonomous organization of teachers into representative bodies. ILO, CFA, Report in which the committee requests to be kept informed of development – Report No. 346, June 2007, Case No. 2523 (Brazil), para. 350,

https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2910424.

³⁷ This case against Guatemala, represents 57 situations in which the Ministry of Labour and Social Welfare refused to register trade unions for several reasons, including the impossibility of forming branch unions. ILO, CFA, Interim Report – Report No. 376, October 2015, Case No. 3042 (Guatemala), para 543,

https://www.ilo.org/dyn/normlex/en/f?p=1000:70006:0::NO:70006:P70006_COMPLAINT_TEXT_ID:P70006_PARAGRAPH_NO:3254212.543.

³⁸ This case against Turkey, is related with the existing legislation that excludes judges and prosecutors from being members of trade unions, and prohibits the establishment of trade unions on an occupational or workplace basis. ILO, CFA, Report in which the committee requests to be kept informed of development – Report No. 371, March 2014, Case No. 2982 (Turkey), para. 933,

https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3171920.

³⁹ ILO, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Art. 2.

⁴⁰ ILO, CFA, Report No. 356, GB 307/7, March 2010, Case No. 2674 (Venezuela), para 1628.

⁴¹ ILO, CFA, Report in which the committee requests to be kept informed of development – Report No. 363, March 2012, Case No. 2850 (Malaysia), para. 872,

https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057187.

Constitution. In this current case, the Ecuadorian authorities are violating the basic principle of freedom of association by limiting the manner and form in which workers, like those in ASTAC, can form branch-level unions. Similarly, the State is violating the principle of non-discrimination because they denied the registration of ASTAC, when, at the same time, the National Union of Remunerated Domestic Workers (SINUTRHE), a primary level union of domestic workers who do not work for the same employer, registered successfully.⁴²

Furthermore, in the report issued by the CEACR after the ILO mission to Ecuador, above mentioned, it asked the State, among other things, to enable the establishment of primary-level unions comprising workers from several enterprises.⁴³

V. RELEVANT INTERNATIONAL STANDARDS IN SUPPORT OF ASTAC'S RIGHT TO BE RECOGNIZED AS A TRADE UNION

In this section, we will support the prior analysis of binding international standards from the ILO with international norms from the United Nations and the Inter-American System of Human Rights that confirm the duty of Ecuador to protect and facilitate the right to form branch-level unions, for ASTAC as well as any other union, as well as the current violation of the fundamental right to freedom of association for the failure to register ASTAC.

a. The right to work and freedom of association as a fundamental right according to international corpus juris

International law has a clear and longstanding position recognizing both the right to work and the right to freedom of association as fundamental human rights. Furthermore, these provisions consistently recognize the States' obligation to refrain from imposing any limitations on these rights that are not prescribed by law, necessary in a democratic society, and proportionate to the legitimate aim pursued.

The Universal Declaration of Human Rights, approved in 1948, is generally agreed to be the foundation of international human rights law, together with the International Covenant on

⁴² Afterwards, the Government register at least one or more branch-level unions.

⁴³ ILO, CEACR Observation – Adopted 2020, Convention on freedom of association and protection of the right to organize, 1948 (No. 87) – Ecuador. “The Committee requests the Government to provide information in that regard and urges the Government, in consultation with the social partners, to take the necessary steps to amend sections 443, 449, 452 and 459 of the Labor Code in such a way as to reduce the minimum number of members required to establish workers' associations and enterprise committees and also to enable the establishment of primary-level unions comprising workers from several enterprises. The Committee notes with regret that, having made available the technical assistance requested, there has been no discernible progress to the present date in respect of measures necessary to bring the legislation into conformity with the Convention. The Committee most particularly regrets that it has received no information from the Government relating to the follow-up given to the Office's December 2019 mission. The Committee urges the Government to intensify its efforts to adopt the necessary measures regarding the points raised in the Committee's comments. In that regard, noting the Government's indication that the Ministry of Labour envisaged holding round-table dialogues with certain employers' and workers' organizations at the end of 2020, the Committee urges the Government to facilitate constructive dialogue with all representative employers' and workers' organizations with a view to obtaining tangible and sustainable results. The Committee requests the Government to inform in that regard.”

Civil and Political Rights (ICCPR) March 02, 1969, and the International Covenant on Economic, Social and Cultural Rights, (ICESCR) January 12, 1982. These three instruments, all ratified by Ecuador,⁴⁴ recognize the right to work and to freedom of association as fundamental human rights in articles 23,⁴⁵ 6 and 8,⁴⁶ and 22,⁴⁷ respectively.

At the regional level, since its foundation, the Inter-American system has recognized the importance of the right to work and the right to freedom of association as fundamental components to advancing the protection of human rights, and as instruments to achieve social justice and economic development. Its main regional political organization, the Organization of American States (OAS), prominently included these rights in its constitutive instrument, as follows: The Charter of the Organization of American States (1948), and the American Declaration of the Rights and Duties of Man (1948), on articles 45,⁴⁸ and XXII,⁴⁹ both acknowledge the right of Freedom of Association.

⁴⁴ The International Covenant on Economic, Social and Cultural Rights was ratified in 1969. The International Covenant on Civil and Political Rights was ratified by Ecuador in 1969.

⁴⁵ The Universal Declaration of Human Rights in its pertinent part reads in Article 23: “1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment... and Everyone has the right to form and to join trade unions for the protection of his interests.”

⁴⁶ The International Covenant on Economic, Social and Cultural Rights provides, in article 6: “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.” Also, in article 8: “1. The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations. (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others”.

⁴⁷ The International Covenant on Civil and Political Rights states, in article 22 that: “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests; 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right; 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”

⁴⁸ The Charter of the Organization of American States (1948), in article 45 includes that: “The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: a)...b)... c) 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”.

⁴⁹ The American Declaration of the Rights and Duties of Man. “Article XXII. Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.”

Specifically, the American Convention on Human Rights (ACHR), ratified by Ecuador,⁵⁰ states the right to freedom association in article 16.⁵¹ Also, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), regulates the restrictive character of its possible limitations,⁵² recognizes the right to work,⁵³ the right to just, equitable, and satisfactory conditions of work,⁵⁴ and the right of workers to create trade unions.⁵⁵

More recently, the Social Charter of the Americas (2012), highlighted the importance of promoting decent work, respect workers' rights, and the observance of ILO Declaration to "foster a quality workforce that drives economic and social progress and provides a basis for sustained and balanced growth and for social justice for the peoples of the Hemisphere."⁵⁶

Thus, the Inter-American System Standards establish freedom of association as a recognized civil and political right, as well as an economic, cultural, and social right. The freedoms inherent to this right involve the ability to establish trade union organizations and to choose their structure without State interference.

⁵⁰ The American Convention on Human Rights (ACHR) was ratified by Ecuador in 1984; the Protocol of San Salvador was ratified in 1993.

⁵¹ ACHR. "Article 16. Freedom of Association: 1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes; 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others; 3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police."

⁵² Protocol of San Salvador. "Article 5. Scope of Restrictions and Limitations. The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights."

⁵³ *Id.* "Article 6. Right to Work 1. Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity. 2. ...

⁵⁴ *Id.* "Article 7. Just, Equitable, and Satisfactory Conditions of Work. The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation"

⁵⁵ *Id.* "Article 8. Trade Union Rights. 1. The States Parties shall ensure: a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. 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."

⁵⁶ OEA/Ser.P AG/doc.5242/12 rev.2, 20 September 2012, Adopted by the 42nd session of the General Assembly of the Organization of American States (OAS) on 4 June 2012. "Article 8. The promotion of decent work, the fight against unemployment and underemployment, as well as addressing the challenges of informal labor are essential elements for achieving economic development with equity.

Respect for workers' rights, equal employment opportunities, and improved working conditions are essential to attaining prosperity. Cooperation and social dialogue among government representatives, workers, employers, and other stakeholders promote good governance and a stable economy."

There are several cases, reports and clarifications in the ISHR recognizing the right to work as a human right, and developing the obligation for States to refrain from preventing or otherwise limiting the collective organization of workers seeking to independently defend their interests.

b. Freedom of association without State Interference and on an equal basis

In its jurisprudence, the Inter-American Court of Human Rights has been clear and consistent in its protection of the freedom of association, including the prohibition that the State impose limitations on the existence or creation of any union. In a case against the government of Peru regarding trade union leaders of the mining sector whose trade union activities resulted in their extrajudicial execution, the Court stated that article 16 recognizes “the right to associate freely with other persons, without the intervention of the public authorities limiting or obstructing the exercise of this right. In addition, they have the right and the freedom to associate in order to seek together a lawful purpose, without pressure or interference that can alter or denature this purpose.”⁵⁷

Similarly, in the *Huilca Tecse v. Peru* case the Court noted that, individually:

“...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 the 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 its tolerance, that could render this right inoperative in the practice**”.⁵⁸

In its Advisory Opinion OC-27/21, the Court recalled that the right to unionize includes the workers’ right to establish organizations as they see fit, as well as to affiliate with such organizations, and to administrate such an organization. To that end, workers should enjoy the right to establish and associate with such organizations as they wish, independently from existing organizations already established within the relevant sector. Furthermore, the Court emphasizes that **States should not prohibit creating more than one union per professional or economic sector, or in only one enterprise, because that would violate the freedom of association.**⁵⁹

⁵⁷ *Cantoral Huamani & García Santa Cruz v Peru*. Preliminary Exception, Merits, Reparations and Costs. Sentence of July 10, 2007, para. 144.

⁵⁸ *Huilca Tecse v. Peru*. Judgment of March 3, 2005, Series C, No. 121, para. 69 (quoting *Baena Ricardo et al. v. Panama*, Judgment of February 2, 2001. Series C, No. 72, paras. 156 and 159, which also refers to the extrajudicial execution of a Peruvian trade union leader carried out by members of a death squadron linked to the Peruvian Army’s Intelligence Service).

⁵⁹ *Advisory Opinion OC-27/21*, May 5, 2021, para. 106.

The Inter-American Court of Human Rights has consistently held that equality before the law and non-discrimination are essential elements for the protection of human rights. In the Advisory Opinion referred above OC-27/21, the Court defined discrimination as any distinction, exclusion, restriction, or preference; based on identified qualities such as race, color, gender, language, religion, political opinion or other qualifying disposition, nationality or social origin, ownership of property, birthplace or any other manner of social classification; and that “intends to or results in erasing or undermining the recognition, accessibility or exercise, of human rights and fundamental liberties of all people existing in otherwise equal conditions.”⁶⁰

Also, according to Article 1.1 of the Convention, States must observe and guarantee the free and absolute exercise of those rights and freedoms therein recognized “without any prejudice.” In other words, any treatment that may be considered discriminatory with respect to the exercise of any right promulgated through the Convention is *per se* at odds with the Convention. The State’s failure to fulfill its general duty to observe and guarantee all human rights due to its potentially discriminatory engagements – such as those that pursue illegitimate goals or are unnecessary and or disproportionate – engenders international responsibility. Accordingly, there is an unbreakable link between the duty to observe and guarantee human rights and the principle of equality and nondiscrimination.⁶¹

The right to freedom of association is widely recognized in connection to labor rights in other regions as well. For example, the European Convention on Human Rights (1950),⁶² and the European Social Charter (18 October 1961, as revised in 1996),⁶³ that takes an approach much more similar to that of the ILO standards in its article 5. The African Charter on Human and Peoples’ Rights (*Approved in June 1981*), also recognizes the right to free association.⁶⁴

b. The right to work as a human right that includes the right to create trade unions

Extending beyond the clear protection of the right to unionize as part of article 16 of the American Convention, the Commission and Court have also recognized these rights under article 26. As the Court clarified in a recent decision, as shown, article 16 protects the right of individuals to freely associate and form unions while article 26 protects the exercise of the rights of unions after they have been formed, such as the rights of collective bargaining and striking.

⁶⁰ *Id.* para. 153.

⁶¹ *Id.* para. 154.

⁶² European Convention on Human Rights. “Article 11 : 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

⁶³ European Social Charter: “Part 1... 5. All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.”

⁶⁴ The African Charter on Human and Peoples’ Rights. “Article 10: 1. Every individual shall have the right to free association provided that he abides by the law.

2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.”

The IACHR confirmed that the right to work is one of the economic and social norms mentioned in Article 26 of the Convention and that, in this regard, States "...are under the obligation to seek the progressive development of the right to work, and to respect, guarantee and take the necessary measures to enforce such right,"⁶⁵ and that the right to form a trade union, is a component to the acceptability and quality of the right to work, as stated by the UN Committee on Economic, Social and Cultural Rights (CESCR).⁶⁶ This recognition of the right to unionize and the related rights to collective bargaining and striking, protected under article 26 of the Convention was emphasized as well in a recent decision by the Inter-American Court.⁶⁷ In the case, *Former Employees of the Judiciary vs. Guatemala*, the Inter-American Court established that the right to work and the right to strike are immediately and directly applicable.⁶⁸ In this case, the Court showed how the protection of the right to form a union also requires "a specific protection for the proper performance of its functions" as a union to be able to defend the related human and labor rights of the workers.⁶⁹

In a recent Advisory Opinion issued by the Inter-American Court at the request of the IACHR (OC-27/21), the Court had the opportunity to expand on the relationship between the rights to freedom of association, assembly, freedom of expression, trade union freedom, and collective bargaining, and their consequences over the scope of the right to work in just, equal, and satisfactory conditions. The Court reiterated that article 26 of the ACHR incorporates the rights to freedom of association, collective bargaining and of assembly, which are themselves derived from Article 45 of the OAS Charter. Even though they are autonomous rights, the Court emphasized their interdependence and indivisibility, and that they are subject to the general obligations of Articles 1.1 and 2 of the ACHR, that is, the duty to respect and guarantee without discrimination, and to adopt domestic legal provisions that promulgate such rights and freedoms.⁷⁰

VI. THE PERMISSIBLE LIMITATIONS TEST APPLIED TO THIS CASE

In relation to the application of the protections on the formation and practice of unions under the rights to work and freedom of association, the Inter-American Court has applied what is commonly referred to as "the permissible limitations test," which means that any restriction on the right to freedom of association must comply with the requirements: to be prescribed by law, necessary, and proportionate.

⁶⁵ IACHR, Inter-American Standards on the Right to Work, OEA/Ser.L/V/II Doc.331, Oct. 30, 2020, p.19 https://www.oas.org/en/iachr/reports/pdfs/LaborRights_EN.pdf.

⁶⁶ "Acceptability and quality: **Protection of the right to work has several components**, notably the right of the worker to just and favorable conditions of work, in particular to safe working conditions, **the right to form trade unions** and the right to freely choose and accept work." See UN Committee on Economic, Social and Cultural Rights. General Comment 18. The right to work. November 24, 2005. Para. 12

⁶⁷ Inter-American Court of Human Rights, *Former Employees of the Judiciary vs. Guatemala*. Judgment of November 17, 2021. Preliminary exceptions, merits and reparations. Serie C No. 445, paras. 106-115.

⁶⁸ *Id.* para. 105.

⁶⁹ *Id.* para. 115.

⁷⁰ Inter-American Court of Human Rights, *Advisory Opinion OC-27/21*, May 5, 2021, Series A No. 27, para. 106.

The Court emphasized that “exercising the right to freely unionize, collective bargaining and assembly may only be subject to such limitations and restrictions prescribed by law that are characteristic of a democratic society, necessary to safeguard public order, protect health or public morality, and the rights and liberties of others. Nevertheless, restrictions to the exercise of aforementioned rights must be interpreted narrowly, applying the principle of pro homine, and must not deprive such rights of their significance and purpose nor reduce them past the point of any practical value [...] This does not preclude that the restrictions, in order to be conventional, must pursue a legitimate purpose, be adequate, and that the means to do so are necessary and proportionate.”⁷¹

This test has been applied consistently in Inter-American jurisprudence as well as by the European Court of Human Rights to assess whether the limitation of a right is permissible under international law. Although they are formulated in slightly different ways, in essence, international standards require that any restriction on human rights must be: (i) provided by “law”; (ii) necessary in a democratic society (that is, it must meet a “pressing social need”) and (iii) proportionate/adequate to the legitimate aim pursued.

In the Case of *Baena Ricardo et al. v. Panama*, concerning the arbitrary dismissal of 270 government employees that participated in a demonstration for labor rights, the Court examined the restrictions to the right to freedom of association that would be permissible according to Art. 16 of the ACHR,⁷² and found that freedom of association is essential for the defense of the legitimate interests of the workers and falls under the *corpus juris* of human rights.⁷³

It stated that under Article 16 of the American Convention, freedom of association includes the right to form associations without restrictions other than those permitted according to Sections 2 and 3 of that conventional precept, concluding that “freedom of association “shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.”⁷⁴

About the meaning of “law”, in its Advisory Opinion OC-6/86, the Court clarified that it does not refer to any kind of government rule, but one that has been approved by the legislative power and promulgated by the executive power.

“Within the framework of the protection of human rights, the word **laws** would not make sense without reference to the concept that such rights cannot be restricted at the sole discretion of governmental authorities. To affirm otherwise

⁷¹ *Id.* para. 114

⁷² American Convention on Human Rights “1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.”

⁷³ *Baena Ricardo et al v. Panamá*. Judgment of February 2, 2001. Merits, Reparations and Costs. Serie C No. 72, Para. 158..

⁷⁴ *Id.* para. 159

would be to recognize in those who govern virtually absolute power over their subjects. On the other hand, the word “laws” acquires all of its logical and historical meaning if it is regarded as a requirement of the necessary restriction of governmental interference in the area of individual rights and freedoms.”⁷⁵

Also, for a restriction of a right to be legitimate, it is necessary “that such laws be enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established,”⁷⁶ and be necessary to safeguard the public order or to otherwise meet the requirement of being “necessary in a democratic society” contained in Article 16(2) of the Convention. Accordingly, it found that the State violated the right to freedom of association enshrined in Article 16 of the American Convention.

In a similar way, the European Court of Human Rights has stated that an interference with the right to freedom of association is justified if “prescribed by law”, pursues one or more legitimate aims and was “necessary in a democratic society,”⁷⁷ and about the quality of the law in question, it required it to be accessible to the persons concerned and foreseeable as to its effects.

That is to say, formulated with sufficient precision to enable the individual to regulate his conduct,⁷⁸ it must afford a measure of legal protection against arbitrary interferences by public authorities and the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise,⁷⁹ and the interference must pursue at least one of the legitimate aims (national security or public safety, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others). Limitations must also be narrowly interpreted.⁸⁰

The Court has further explained that the term “necessary” does not have the flexibility of other expressions such as “useful” or “desirable.” It indicated that this was because any exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom.

Similarly, the Joint Guidelines on Freedom of Association issued by the European Commission for Democracy Through Law (Venice Commission) and the Organization for Security and Cooperation in Europe (OSCE) Office for democratic Institutions and Human Rights (OSCE/ODIHR)⁸¹ refer to the legality and legitimacy of restrictions to the right to freedom of

⁷⁵ The word “laws” in Article 30 of the American Convention on Human Rights, *Advisory Opinion OC- 6/86* of May 9, 1986. Series A N° 6, paras 26 and 27.

⁷⁶ *Id.* Para. 28.

⁷⁷ European Court of Human Rights, Guide on Article 11 of the European Convention on Human Rights: Freedom of assembly and association, dec. 31, 2021, para. 144, https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf Para 144

⁷⁸ Council of Europe, *Case of N.F. v. Italy*, Judgment, 2 August 2001, §§ 26 and 29

⁷⁹ European Court of Human Rights. *Case of Maestri v. Italy*. Application No. 39748/98. Judgment 17 February 2004, § 30

⁸⁰ European Court of Human Rights. *Case of Sidiropoulos and Others v. Greece*, Judgment 10 July 1998, § 38.

⁸¹ European Commission for Democracy Through Law (Venice Commission), OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), Joint Guidelines on Freedom of Association, CDL-AD(2014)046,

association, and conclude that any restriction on the right to freedom of association and on the rights of associations, shall be in strict compliance with international standards.

Specifically: (i) any restriction shall be prescribed by law and must have a legitimate aim; (ii) the law concerned must be precise, certain, and foreseeable; (iii) it shall be adopted through a democratic process that ensures public participation and review, and (iv) it shall be made widely accessible. It further clarified that the only legitimate aims recognized by international standards for restrictions are national security or public safety, public order, the protection of public health or morals, and the protection of the rights and freedoms of others.

In this case the restriction to the right to freedom of assembly is in violation of international law given that: (i) it is not stated by “law,” (ii) it is not necessary in a democratic society or meets a “pressing social need,” and (iii) it is not proportionate to the aim pursued.

a. *The restriction is not established by law*

The State relies on its Ministerial Order 130 for its position that primary level trade unions are limited to workers dependent on a single enterprise. However, the Ministerial Order 130, is not a law approved by the legislature and promulgated by the executive branch, rather it is a decision made by a part of the executive branch – the Ministry for Labor Relations, without any endorsement by the legislature, thus it does not satisfy the “established by law” part of the test. But even if one would consider this provision as a “law,” the order does not require that workers are employed by the same employer to form a trade union. The State’s argument is based on at best ambiguous reference in Article 2 of the Ministerial Agreement 130, where the labor inspector is prescribed to notify “employer” in singular tense.⁸² The order, contrary to the government’s assertion, does not make any explicit requirements that workers are employed by the same employer, to register the trade union. If there was an intention to limit thousands of workers from exercising their freedom of association, it would be expressed explicitly and affirmatively.

The State also relies on the Labor Code Articles 443 and 449. Article 443, in stating the requirement for registration, refers to the number of founding union members as “no less than thirty workers.”⁸³ The Article does not make any reference to whether or not they need to be employed by the same employer.⁸⁴

Adopted by the Venice Commission at its 101 Plenary Session (Venice, 12-13 December 2014)
[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e)

⁸² The provision reads: “Requirements for the Constitution of the Trade Union Organization: For this purpose, the workers must submit the following documentation to the Labor inspector of the jurisdiction of the address of the organization (...) 6. Notification to the Labor Inspector for the notification of the employer”.

⁸³ “Art. 443.- Requirements for the constitution of professional associations or unions. - For the purposes contemplated in the previous article, the founders, in number not less than thirty when dealing with workers, or three when dealing with employers, must send to the Ministry of Work and Employment, on single copy, the following documents: 1. Copy of the articles of incorporation with the autograph signatures of the persons present. Those who do not know how to sign will leave their fingerprint; 2. Two copies of the act determined in the previous ordinal, authenticated by the secretary of the provisional board; 3. Three copies of the statutes of the union or professional association, also authenticated by the secretary of the provisional board, with determination of the sessions in which they have been discussed and approved; Four. List of the members of the provisional board, in duplicate, indicating

As for the Article 449, without stating explicitly, it, at best, implies that the members of the Board of Director of prospective trade union belong to the same employer:

Art. 449.- Board Membership. - Directing Boards of workers unions of any kind, must be integrated only by workers of the enterprise to which they belong, even for secretary, syndic or any other position which entails governance of the organization.

This provision does not limit the general membership of a primary union to workers of the same enterprise because the very statement that the members of the Board of Directors of a trade union need to belong to the same enterprise implies that not all members necessarily belong to the same enterprise. Otherwise, no such precaution would be necessary with regard to the Board Members, as presumably, the Board Members would be members of the union. As such, the Labor Code stipulates that the leaders of workers' associations must be employees of the pertinent enterprise, but it does not directly prohibit the establishment of trade unions made up of workers from different companies.

Furthermore, we must highlight that both the Constitution of Ecuador and the Labor Code in Ecuador recognize the right of any worker, without distinction, to establish or join trade unions.⁸⁵ The Constitution further provides that “no legal regulation can restrict the contents of rights or constitutional guarantees.”⁸⁶ Additionally, this Court has stated that particularly in relation to labor law, any regulations must be interpreted most favorably to the worker.⁸⁷ These principles of interpretation emphasize that the more favorable provisions establishing the right to unionize

their nationality, sex, profession, trade or specialty, place or center of work and address of each of them; and, 5. List of all those who have joined the union, professional association or enterprise committee, after the general assembly convened to establish them, specifying the place of residence, profession, trade or specialty and the place of work of the members.”

⁸⁴ It should be noted that the ILO CEACR found this minimum number excessive and requested that it revised downward. See Observation (CEACR) - adopted 2020, published 109th ILC session (2021) https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4060421,102616,Ecuador,2020

⁸⁵ Constitution of Ecuador, article 325.7; Labor Code, Art. 440. “Freedom of association. - Workers and employers, without any distinction and without the need for prior authorization, have the right to establish professional associations or unions that they deem appropriate, to join or withdraw from them, with observance of the law and the statutes of the respective associations. Professional associations or unions have the right to form federations, confederations or any other union groups, as well as to join or withdraw from them or from international organizations of workers or employers. Any worker over the age of fourteen can belong to a professional association or union. Workers' organizations may not be suspended or dissolved, but by oral procedure established in this Code. If the suspension or dissolution is proposed by the workers, they must prove their legal status. When an employer or company has several agencies or branches in different provinces, the workers in each of them can form a trade union or professional association. The number and other requirements required by law will be established in relation to each such agency or branch.”

⁸⁶ Constitution of Ecuador, article 11.4.

⁸⁷ “The aim of procedural labor law is to protect to the greatest extent possible the conditions of dignity of the worker ... labor law benefits from a special framework, that translates into a regime of protection reinforced in its procedural and substantive dimensions, on the side of the worker as the weaker party.” Constitutional Court of Ecuador, Case No. 13-17-CN, Sep. 4, 2019, Par. 24.

without distinction cannot be undermined by an ambiguous implication in another article of the labor code, let alone by the mere use of the singular tense in a ministerial order.

Thus, the Ecuadorian law does not limit registration of branch level trade unions comprised of workers from multiple enterprises. To be clear, even if it did, as described above, such limitation would be contrary to international norms, and the requirement by the Constitution of Ecuador to ensure direct implementation of the applicable international law.⁸⁸

b. The requirement of necessity

The single-employer restriction referred above does not pursue any of the legitimate aims recognized under international standards (national security or public safety, public order, the protection of public health or morals, and the protection of the rights and freedoms of others).

In its Protection Action the Government does not refer to any of the acceptable legitimate aims. On the contrary, the Government justifies the need for a single-employer restriction as a way to prevent the alleged “denaturalization” of trade unions, considering that with no employment relationship with a single employer, branch level unions would have the capacity to impose working conditions on every employer in the sector,⁸⁹ but without further explaining how this option would affect national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

Also, ILO provisions and cases unequivocally emphasize that all workers have the right to establish trade unions of their choosing, including primary level or branch level unions comprising workers from multiple enterprises; that the nature of the employment relationship is not relevant to the right to create or join trade unions and that States cannot impose restrictions to its free exercise.

Therefore, the single-employer restriction not only fails to meet the requirement of necessity but also violates the essence of the right to freedom of association, as recognized in the ILO’s instruments and cases.

c. The requirement of proportionality

According to this principle, to be proportionate, the restriction must be the least harmful to the exercise of the right involved. On the contrary, the single-employer requirement causes the most detrimental effect: it denies the very existence of ASTAC as a trade union in violation of the right to Freedom of Association. The right to official recognition through legal registration is an

⁸⁸ To ensure clarity and consistency with the ratified ILO Conventions, CEACR requested that the government of Ecuador revise Articles 443 and 449. See Observation (CEACR) - adopted 2020, published 109th ILC session (2021)

https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:4060421,102616,Ecuador,2020.

⁸⁹ This is an issue of union representation and collective bargaining, which is regulated in many ILO instruments such as Conventions No. 98, 151, and 154.

essential aspect of the right to freedom of association since that is the first step that workers' organizations must take to be able to function as such.

Considering the above, we conclude that the single-employer requirement argued by the government to reject ASTAC's registration as a trade union is not an allowable restriction to the right to freedom of association, because it does not meet **any** of the requirements of the permissible limitations test: (a) it does not meet the requirement of legality because it is not established by law; (b) even if it were established by law, it would not meet the requirement of necessity as it does not pursue any of the legitimate aims recognized by international standards for restrictions; and (c) even if the restriction did have a legitimate aim, it would not meet the requirement of proportionality because it causes ASTAC the most detrimental effect by denying its recognition as a trade union.

VII. CONCLUSIONS

According to the arguments provided in this amicus curiae, to ensure compliance with Ecuador's national and international obligations, the Constitutional Court of Ecuador should recognize the right of workers to form industrial unions - branch level unions comprising of workers from multiple enterprises, and conclude that this denial violates the right to freedom of association, and the right to work, in relation with the principle of non-discrimination. This means that in addition to recognition of ASTAC, the Ministry should recognize qualifying applications for industrial unions and promulgate rules that would ensure their functionality as trade unions, including collective bargaining with employers.

The Constitutional Court must consider all the international standards above mentioned taking into account that they are part of the 'constitutional block' of Ecuador, and that as a State member of the ILO, the recommendations from this organization are also binding to Ecuador, and especially when there is a case at the ILO concerning the specific violations at issue in this case. Thus, as stated by the ILO CEACR, to the extent that Articles 443 and 449 create ambiguity, this Honorable Court should order their revision to ensure consistency with international norms.

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