The Protection of Fundamental Rights at Work: a study of Venezuela and the Andean Community

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Masters in Laws (LL.M.)

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Canada
Dedicatory

I would like to dedicate this thesis to my parents, Fanny Lugo and Emeterio Gómez, whose infinite love and constant support have been invaluable for me. This thesis is dedicated to my two very spiritual brothers, one marvellous sister, always a fighter, one cute very smart nephew and one tall beautiful fifteen-year-old volleyball player, Estivaliz. This thesis is also a ‘thank you’ note to the one person who had to closely deal with me in this long journey, and who didn’t get tired of hearing ‘I can’t Oscar, I gotta do the thesis’. Thank you all for that tremendous capacity for loving and giving.

And to all the thousand of Venezuelan workers who have recently lost their jobs in both private and public sectors due to political reasons, I have to say that I will address you sooner or later.

Thank you all for not giving up on me.
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Abstract

The adoption of a new constitution, the changes in legislation, and the well-known shift in policies and State practices introduced by the Chávez administration, are some of the factors that persuaded me to examine not only the legal protection but the actual exercise of internationally recognized core labour standards in Venezuela, notably freedom of association and the right to collective bargaining, the elimination of forced labour, the abolition of child labour and the elimination of discrimination at work.

Given the structure and nature of the ILO, its mechanisms of enforcement are limited. Despite the successful ILO objective of promoting compliance with workers’ rights, certain Member States like the Government of Venezuela, continue to violate labour rights. This situation requires the search for alternatives.

The idea that inspired this paper was an attempt to look for alternatives in regionalism. The hypothesis is that a sub-regional approach through the Andean Community, comprising Andean countries, offers a more effective means to protect labour rights in Venezuela than an international approach through the ILO. However, the solution points more to a joint international-regional approach to better ensure workers’ rights in Venezuela and the Andean region.

Résumé

L'adoption d'une nouvelle constitution, les changements en législation et le bien connu virage dans les politiques et les pratiques de l'État introduites par l'Administration Chávez, sont quelques-uns des facteurs m'ayant persuadé d'examiner non seulement la protection légale mais aussi l'exercice présent des droits fondamentaux des travailleurs au Vénézuéla, notamment la liberté d'association et la reconnaissance efficace du droit de négociation collective, l'élimination de toute forme de travail forcé, l'abolition du travail des enfants, l'élimination de la discrimination en matière d'emploi et de profession.

L'application des normes de l'OIT est limitée étant donné la structure et la raison d'être de l'OIT. Malgré le succès de l'OIT a promouvoir la conformité des droits fondamentaux du travail, certains Pays comme le gouvernement du Vénézuéla continue d'enfreindre les droits du travail. Cette situation exige de trouver des alternatives.

L'inspiration de ce travail était d'essayer au régionalisme. L'hypothèse est qu'une approche sous-régionale par la Communauté des Pays Andéens offre des moyens plus efficaces pour protéger les droits fondamentaux du travail au Vénézuéla qu'une approche internationale par l'OIT. Cependant, la solution réside plus dans une approche fusionnelle internationale-régionale pour mieux protéger les droits des travailleurs du Vénézuéla et des régions andéennes.
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<td>ACHR</td>
<td>Andean Charter for the Protection and Promotion of Human Rights</td>
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<td>ACTRAV</td>
<td>ILO Office for the organisation of activities for workers</td>
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<td>AFL-CIO</td>
<td>American Federation of Labor - Congress of Industrial Organisations</td>
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<td>AI</td>
<td>Amnesty International</td>
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<td>AIS</td>
<td>Andean Integration System</td>
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<td>ALO</td>
<td>Andean Labour Observatory</td>
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<td>AN</td>
<td>National Assembly (of Venezuela)</td>
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<td>ASC</td>
<td>Andean Social Charter</td>
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<tr>
<td>CADS</td>
<td>Andean Council of Social Development Ministers</td>
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<td>CAF</td>
<td>Andean Development Corporation</td>
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<td>CAJ</td>
<td>Andean Commission of Jurists</td>
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<tr>
<td>CAMT</td>
<td>Advisory Council of Ministers of Labour</td>
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<tr>
<td>CAN</td>
<td>Andean Community</td>
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<tr>
<td>CCEA</td>
<td>Andean Business Advisory Council</td>
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<td>CCLA</td>
<td>Andean Labour Advisory Council</td>
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<tr>
<td>CCSCS</td>
<td>Coordinating Committee of Trade Unions of the South Region</td>
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<td>CEACR</td>
<td>ILO Committee of Experts on the Application of Conventions and Recommendations</td>
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<td>CECODAP</td>
<td>Centre for Communitarian Learning</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>CEJIL</td>
<td>Center for Justice and International Law</td>
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<td>CET</td>
<td>Common External Tariff</td>
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<td>CFA</td>
<td>Committee on Freedom of Association</td>
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<td>CGT</td>
<td>General Confederation of Workers</td>
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<td>CLAT</td>
<td>Latin American Office of Workers</td>
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<td>CNDNA</td>
<td>National Council for the Rights of the Child and the Adolescent</td>
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<td>CNE</td>
<td>National Electoral Council</td>
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<td>CODESA</td>
<td>Venezuelan Confederation of Independent Labour Unions</td>
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<td>COMUANDE</td>
<td>Coordinating Committee of Andean Working Women</td>
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<td>CONINDUSTRIA</td>
<td>Venezuelan Industrial Council</td>
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<td>CONSECOMERCIO</td>
<td>National Council of Trade and Service</td>
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<td>CTV</td>
<td>Venezuelan Confederation of Workers</td>
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<td>CUTV</td>
<td>Joint Office of Venezuelan Workers</td>
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<td>Acronym</td>
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<tr>
<td>ECTU</td>
<td>European Confederation of Trade Unions</td>
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<td>EU</td>
<td>European Union</td>
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<td>FEDEAGRO</td>
<td>National Federation of Agricultural Producers Associations</td>
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<td>FEDECAMARAS</td>
<td>Venezuelan Federation of Chambers and Associations of Commerce and Production</td>
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<td>FEDEUNEP</td>
<td>National Single Federation of Public Employees</td>
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<td>FENATEV</td>
<td>Federation of Workers of Venezuelan Education</td>
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<td>FENTRASEP</td>
<td>National Federation of Public Sector Workers</td>
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<td>FETRAENSEÑANZA</td>
<td>National Federation of Teaching Workers</td>
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<td>FVM</td>
<td>National Federation of Teachers</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>GPAT</td>
<td>Global Programme against Trafficking in Human Beings</td>
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<td>HRW</td>
<td>Human Rights Watch</td>
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<td>IAHRC</td>
<td>Inter American Human Rights Commission</td>
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<td>IAHRCourt</td>
<td>Inter American Human Rights Court</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICFTU</td>
<td>International Confederation of Free Trade Unions</td>
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<td>IIHR</td>
<td>Inter American Institute of Human Rights</td>
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<td>ILA</td>
<td>Andean Labour Institute</td>
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<td>ILC</td>
<td>International Labour Conference</td>
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<td>ILCCR</td>
<td>International Labour Conference Committee on the Application of Conventions and Recommendations</td>
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<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>ILOLEX</td>
<td>ILO’s database on International Labour Standards</td>
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<td>ILO OSRA</td>
<td>ILO Sub Regional Office for the Andean Region</td>
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<td>ILO ROLAC</td>
<td>ILO Regional office for Latin America and the Caribbean</td>
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<tr>
<td>INAM</td>
<td>National Institute for the Protection of Minors</td>
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<tr>
<td>INE</td>
<td>National Institute of Statistics</td>
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<td>INPARQUES</td>
<td>National Institute of National Parks</td>
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<td>Inpsasel</td>
<td>National Institute of Labour Prevention, Safety and Health</td>
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<td>IOE</td>
<td>International Organisation of Employers</td>
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<td>IOM</td>
<td>International Organisation for Migration</td>
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<td>IPEC</td>
<td>International Programme on the Elimination of Child Labour</td>
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<td>MERCOSUR</td>
<td>Southern Common Market</td>
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<td>MOU</td>
<td>Memorandum of Understanding</td>
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<td>NGO</td>
<td>Non Governmental Organisation</td>
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<td>OAS</td>
<td>Organisation of American States</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-Operation and Development</td>
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<td>PIDS</td>
<td>Social Development Integrated Plan</td>
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<td>PLADES</td>
<td>Labour Program for Development</td>
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<td>Pronat</td>
<td>National Program for Working Children and Adolescents</td>
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<td>Provea</td>
<td>Programa Venezolano de Educación-Acción en Derechos Humanos</td>
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<td>SAARC</td>
<td>South Asian Association for Regional Cooperation</td>
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<td>SIMPOC</td>
<td>Statistical Information and Monitoring Programme on Child Labour</td>
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<td>UCAB</td>
<td>Andrés Bello Catholic University</td>
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<tr>
<td>UCV</td>
<td>Central University of Venezuela</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNAPETROL</td>
<td>National Union of Oil, Gas, Petrochemical and Refinery Workers</td>
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<td>UNCRC</td>
<td>UN Convention on the Rights of the Child</td>
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<td>UNCTAD</td>
<td>UN Conference on Trade and Development</td>
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<td>UNDP</td>
<td>UN Development Programme</td>
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<td>UNESCO</td>
<td>UN Educational, Scientific and Cultural Organisation</td>
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<td>UNHCR</td>
<td>UN High Commission for Refugees</td>
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<td>UNICEF</td>
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<td>UNICRI</td>
<td>UN Interregional Crime and Justice Research Institute</td>
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<td>UN Industrial Development Organisation</td>
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<tr>
<td>UNODC</td>
<td>UN Office on Drugs and Crime</td>
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<td>UNT</td>
<td>National Union of Workers</td>
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<td>WHO</td>
<td>World Health Organisation</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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<td>WWII</td>
<td>World War II</td>
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Introduction

Labour rights have their foundation in human rights law, and have been widely recognized as pertaining to fundamental human rights. The UDHR, the ICCPR and the ICESCR recognize the right to work, the freedom of peaceful assembly and association, the right to form and join trade unions, the right to free choice of employment, the prohibition against slavery, the general principle of non-discrimination and the right to equal pay for work of equal value. Furthermore, these instruments guarantee the right to just and favourable conditions of work, the right to rest and leisure, including reasonable limitation of working hours and holidays with pay, and a standard of living adequate for the health and well-being of workers and their families.

In the last decade there has been great discussion over the need to improve working conditions around the world. The main objective is to make governments, especially in developing countries, comply with minimum international labour standards. There has also been great debate over what mechanisms would be the most effective to achieve this goal. Different alternatives have been put forward, some of which have created great controversy, namely the proposal of linking the enforcement of international labour standards to the international trading system. Other more realistic proposals have been drafted in the sense of including labour clauses in regional trade agreements.

Focusing on the discussion on whether to include labour claims in the WTO or social clauses in the GATT has not led to any real improvement in the field. However, the proposal of studying the regional mechanisms for the advancement of labour rights seems...
promising. Additionally, this approach could also serve for the purpose of decentralizing the never-ending debate over the trade-labour rights link at the multilateral level.

The hypothesis of this thesis is that the gaps existent in the Venezuelan protection of labour rights can be more effectively addressed through a regional approach (Andean Community), than through an international one (ILO). After an examination of the limitations of the international system for the protection of workers' rights and taking into consideration the lack of significant progress made by the Venezuelan Government to guarantee the exercise of fundamental labour rights and its non compliance with ILO recommendations, the strengths of a subregional approach suggest a promising alternative worth looking into: the Andean system might offer a stronger and more effective approach to the protection of workers in Venezuela than the ILO system. Following a deep analysis of the labour dimension in the Andean Community, however, the conclusion could be that given the flaws also present in this subregional system, in order to guarantee a strong protection of Venezuelan workers, we must aim at a joint international-regional approach.

This thesis is divided in three chapters. Chapter one analyses the international protection of labour rights and the functioning of the ILO as the most relevant organisation in the field. In 1998, the ILO produced the most important instrument for the protection of workers' rights: a declaration that defined international 'core' labour rights. For present purposes, the analyses developed in this thesis of the strengths and weaknesses of the international, domestic and regional protection of workers' rights will be carried out based on this ILO's definition of what labour rights are fundamental. Most importantly, this declaration constitutes a follow-up that is useful to determine countries' compliance with these labour standards. Another important issue discussed in this chapter is the ILO's effective compliance mechanisms versus its not-so-effective enforcement machinery.

Chapter two examines the protection of labour rights in Venezuela along with the functioning of some domestic institutions in the field. Moreover, given the recent changes introduced by the current administration in Venezuelan legislation, including the adoption of a new constitution, the objective is to analyse whether this has effectively translated into better working conditions for workers, raising labour standards in the
country. In this respect, it is important to remember that “the status of workers’ rights in a
country are a bellwether for the status of human rights in general.”

Chapter three studies the protection of labour rights through the Andean Community, given the lack of enforcement mechanisms of the ILO, the current violation by the Venezuelan Government of workers’ rights and its reluctance to comply with the recommendations made by several supervisory bodies of the ILO. The CAN is a subregional organisation with legal status, comprising the Governments of Bolivia, Colombia, Ecuador, Peru and Venezuela. The initial objective of Member States to the CAN was and still is, despite many obstacles for its materialization, to achieve the level of integration of a customs union, following the example of the EU. Hence, the treaty establishing the CAN called for the progressive social integration of Member States, for which the process of harmonization plays an extremely important role. Currently, the different bodies in the Andean Community are taking many decisions and declarations on human and labour rights, given their objective of strengthening the labour and social aspects of the subregional integration process. Despite these progresses, however, there are some areas where there is much improvement needed if there was to be a serious commitment to protect workers in the region.

It is with the most profound hope that I expect that this thesis will contribute to the understanding of several issues concerning the protection of labour rights, the most important being: (i) the importance of the ILO in the improvement of workers’ conditions, given the numerous critiques made to its mechanisms and structure as a result of a comparison with the WTO enforcement machinery, (ii) the recent accomplishments and current drawbacks of the Venezuelan protection of its workers and a review of what is the current administration doing and not doing for respecting labour rights and (iii) how the subregional integration system of the Andean Community can be improved to more effectively guarantee the exercise by Andean workers of their most fundamental rights.

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Chapter One: The International Protection of Labour Rights

This first chapter seeks to provide an idea of what fundamental labour rights are and the structure and functioning of the ILO, as the most important international organisation protecting workers. An examination of the evolution of the ILO is essential for studying the background that led to the materialization of labour rights and their inclusion into binding treaty law, also known as ILO conventions. Following this analysis, I examine the functioning of the organisation, thereby providing, inter alia, an understanding of the role of the CFA, for example, which will be a useful resource in chapter two. A general introduction to the definitions and characteristics of the four core labour standards will serve as the basis for the analysis of whether there has been progress in the area of labour rights from the domestic and regional perspectives, which will be the focus of study in the second and third chapter, respectively.

1.1. The International Labour Organisation

1.1.1. Evolution and objective

Workers' rights and labour standards have been of concern to the international community since the 1815 Congress of Vienna. Subsequently, there were several social waves that called for the adoption of international treaties to protect workers both at domestic and international levels. However, it was not until 1919 that the ILO was created as an independent organ of the League of Nations, and its constitution

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14 Boutelle Ellsworth Lowe, A.M., Ph.D. The International Protection of Labor: International Labor Organisation, History and Law. (New York: The Macmillan Company, 1935) at 37. (At the second plenary session of the Paris Peace Conference, a commission was created to analyse and study international labour law. This Commission submitted a report to the Peace Conference, recommending the creation of an international labour organisation in conjunction with the League of Nations and its inclusion in the Peace Treaty. The recommendation was adopted and labour clauses where incorporated to the Peace Treaty in what is commonly known as the “Labor Charter”).

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included in Part XIII of the Treaty of Versailles.\textsuperscript{17} Today, it remains the only UN tripartite agency, providing a forum for workers' and employers' representatives to participate as equal partners with governments.\textsuperscript{18} Since its inception in the UN system, the ILO has vigorously emphasized, without specifically expressing it that way,\textsuperscript{19} the relationship between labour rights, human rights and social justice.\textsuperscript{20}

Following WWII, the scope of the ILO was expanded. The 1944 Declaration of Philadelphia\textsuperscript{21} included several new objectives, thereby substituting the “general principles” envisaged in the original 1919 Constitution.\textsuperscript{22} Among these new goals included in the ILO were the achievement of full employment which substituted the assistance to the unemployed, the inclusion of the concept of social security which replaced the protection of workers against sickness, and the coupling of the right to collective bargaining to the right of association.\textsuperscript{23} Some other issues, such as workers'...

\textsuperscript{17} Murray \textit{supra} note 15 at 36; The ILO was included in the Treaty of Versailles, which created the League of Nations at the end of World War I in the efforts of seeking peace and avoiding the outbreak of another war (\textit{ibid.} at 35).

\textsuperscript{18} Robert J. Flanagan, “Labor Standards and International Competitive Advantage” in Robert J. Flanagan and William B. Gould IV, eds., \textit{International Labour Standards: Globalization, Trade and Public Policy} (Stanford, California: Stanford University Press, 2003) 15 [Flanagan, “International Competitive Advantage”] at 17; see also Virginia Leary, “The Paradox of Workers’ Rights as Human Rights” in Lance A. Compa & Stephen F. Diamond, eds., \textit{Human Rights, Labor Rights, and International Trade} (Philadelphia: University of Pennsylvania Press, 1996) 22 [Leary, “The Paradox”] (“Non-governmental organisations do not participate on an equal footing with governments in any other UN agency. NGOs with consultative status in ECOSOC may speak at many UN meetings and may present reports and comments for consideration by governments, but they remain secondary members participating by permission and not by right” at 39); compare Virginia Leary, “Form Follows Function: Formulations of International Labour Standards –Treaties, Codes, Soft Law, Trade Agreements” in Flanagan and Gould IV, \textit{ibid.}, 179 [Leary, “Form Follows Function”] (“Ironically, however, the participation of these organisations [employers’ and workers’ organisations] in the activities of the ILO has also resulted in much less interest in and following of ILO activities by the currently most dynamic social movements, such as human rights and consumer organisations” at 187).

\textsuperscript{19} ILO Constitution, \textit{supra} note 16, at preamble. (The preamble of the ILO constitution states that “universal and lasting peace can be established only if it is based upon social justice”).


\textsuperscript{23} Donoso, \textit{ibid.} at 200; Cordova, \textit{ibid.} at 140.
training, transfer of labour, safety and health, comprehensive medical care, maternity protection, were also incorporated.\textsuperscript{24}

Other aspects, also alien to the ILO original mandate, but falling out of the organisation’s general competence on labour matters,\textsuperscript{25} were included. Thus, the Declaration of Philadelphia brought to the “labour table”, issues concerning international trade, economic and financial measures, expansion of production and development, child welfare, nutrition, housing and recreation facilities.\textsuperscript{26}

Despite several criticisms addressed to the ILO extended objective as proposed in the Declaration of Philadelphia;\textsuperscript{27} I agree with other scholars when arguing that the Declaration is a noteworthy instrument because it envisaged a unified approach for the protection of economic, social and cultural rights (including labour rights) and civil and political rights.\textsuperscript{28} Moreover, the Declaration of Philadelphia led to the adoption of two of the most important international texts promoting the right of workers both to organise and to engage in collective bargaining, which correspond to conventions 87 and 98, respectively.\textsuperscript{29}

Today, the ILO has the general mandate of promoting social justice and internationally recognized human and labour rights. Its role in the international promotion of respect toward labour rights is essential, since not only it formulates conventions and recommendations setting minimum standards of labour rights, but as will be illustrated below, the ILO also issues general and individual observations to countries and governments for their lack of compliance with labour rights. This represents the very first

\textsuperscript{24} Donoso, \textit{ibid.}; Cordova, \textit{ibid.}
\textsuperscript{25} Cordova, \textit{ibid.} ("The authors of the Declaration of Philadelphia apparently visualized the ILO as an all-purpose organisation capable of dealing with a diversity of subjects and more attuned to social and economic policy than to the sphere of labor").
\textsuperscript{26} Cordova, \textit{ibid.}; However, as the ILO predates the UN, these issues were later assigned to other UN agencies, such as UNICEF, UNESCO, WHO, UNIDO, UNCTAD, and the Economic and Social Council and the Bretton Woods institutions. The Bretton Woods institutions were constituted by: the International Monetary Fund and the International Bank for Reconstruction and Development, which is now denominated the World Bank (\textit{ibid.} at 141, n. 8).
\textsuperscript{27} See e.g. Cordova, \textit{supra} note 22.
\textsuperscript{28} Donoso, \textit{supra} note 22 at 201, n. 42. (Indeed, since 1944, the ILO has espoused ambitious social policies, such as promoting social and economic development, and addressing the problems of poverty and unemployment. In this trend, in the decades following 1946, the ILO adopted several conventions and recommendations concerning diverse social matters. These conventions led to the development of a specialized supervision mechanism for examining violations of freedom of association).
step for holding governments accountable for labour rights violations. Additionally, the ILO provides technical assistance to countries in various areas, and promotes the development of employers' and workers' organisations, providing training and advisory services.

1.1.2. Functioning of the ILO

1.1.2.1. Methodology and supervisory activities

The International Labour Conference, the Governing Body and the International Labour Office are the working organs of the ILO. One hundred seventy seven (177) Member States meet at the International Labour Conference in Geneva each year. Given the tripartite structure of the organisation, Member States are represented by two government delegates, an employer representative and a worker delegate.

The ILO adopts labour standards through the ratification of instruments in the form of conventions and recommendations, while protecting these standards by monitoring Member States’ compliance with those conventions. Currently, the ILO is responsible for the adoption of more than 185 conventions and 195 recommendations, which together form the International Labour Code.

ILO’s objective on setting international standards has permitted the adoption of, inter alia, the Declaration on Fundamental Principles and Rights at Work, which calls for the universal application of the four ‘core’ labour rights, regardless of the different stages of economic development of countries. This Declaration is neither a treaty nor a recommendation, and Member States are obliged there-to to the respect of core labour

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30 These areas include, inter alia, vocational training and rehabilitation, employment, labour administration, labour law and industrial relations, working conditions, management development, cooperatives, social security, and labour statistics and occupational safety and health.

31 For example, in the 92nd Session of the International Labour Conference, held in Geneva June 1-17, 2004, there were two Government delegates (M.R. Dorado, Vice minister of Labour and R.D. Molina, Director of the Office of International Relations and Connection with the ILO of the Minister of Labour Office), one employers' representative (B. De Arbeloa, FEDECAMARAS) and one workers' delegate (C. Infante, President of CODESA).

32 Out of these 185 Conventions, the Government of Venezuela as of November 2004 had ratified a total of 53, including the eight core conventions.

33 Leary, “Form Follows Function”, supra note 18; Cordova, supra note 22. (“It should be noted that what the ILO calls the International Labor Code, in the strict sense, encompasses not only Conventions and Recommendations, but also resolutions passed by the International Labor Conference and conclusions adopted by the Industrial Committees” at 8).

34 Leary, ibid. at 179.
standards, by virtue of their membership, regardless of their individual ratification of the relevant conventions. Universal standards are necessary and important because adopting less than international labour standards would be detrimental for workers, severely threatening their protection. It would imply in fact, “as tantamount to adopting ‘substandards for subhumans’”.35

The ILO supervises compliance with labour rights through several means, such as the review of workers’ conditions in Member States, the reception and process of complaints regarding labour practices, and the recent follow up procedure to the 1998 ILO Declaration.36 The examination of workers’ conditions in Member States is carried out through diverse channels, such as the analysis of state reports by ILO officials thorough questioning of states’ representatives at the annual ILO conference, commissions of inquiry, personal visits to countries by ILO officials, and the “mobilization of shame” in the case of non-compliance.37

The ILO ‘special’ system of supervision allows Member States to lodge complaints through three different channels. Firstly, article 24 allows any workers’ or employers’ organisation38 to make a ‘representation’ to the International Labour Office, accusing a Member State of failing to secure the effective observance of the conventions that it has ratified.39 In the specific case of Venezuela, for example, a representation was filed against the Government by IOE and FEDECAMARAS in 1993, alleging non-observance of conventions 87 and 98 –freedom of association, the right to organise and

35 Donoso supra note 22 at 211, n. 91.
36 See Murray supra note 15 at 101 (When discussing the monitoring activities of the ILO, the author distinguishes the “traditional program of supervision” from the new “promotional” follow-up to the 1998 Declaration on Fundamental Principles at Work. The traditional program, he explains, consists on a “regular” system, based on periodical reports on the conditions of workers and a “special” system, based on complaints about labour practices in individual member countries).
37 Leary, “The Paradox” supra note 18 at 41.
38 In this respect, Moran specifies that these workers’ or employers’ organisations are not restricted to the organisations serving as ILO delegates. See Theodore H. Moran, Beyond Sweatshops: Foreign Direct Investment and Globalization in Developing Countries. (Washington: Brookings Institution Press, 2002) at 102.
39 Concerning the right of freedom of association, Moran recalls that a representation may be brought regardless of ratification. Ibid. at 102.

Additionally, article 26 allows ILO delegates to file a complaint against a Member State, when they are not satisfied with the governments’ implementation of the convention.\footnote{If it is the case of a government’s delegate who is filing the complaint, Moran explains that there is a prerequisite in the sense that a government must have had ratified the convention that is subject of the complaint. (Moran, supra note 38 at 102).} Additionally, any workers’ or employers’ organisation can lodge complaints to the CFA, regardless of the ratification of conventions 87 and 98 by the Member State that is allegedly non-compliant.\footnote{Ibid. at 103.}

Since 1998, the ILO has started a new promotional supervisory system requiring Member States to submit annual reports describing the steps that they have taken to promote workers’ rights. Moreover, workers’ and employers’ organisations can review these reports and address comments.\footnote{Ibid. at 105.} Additionally, this follow-up allows for the identification of areas where ILO’s technical cooperation is most needed, which is useful for helping with the domestic implementation of the fundamental principles and rights at work.\footnote{For a discussion on the positive results of technical cooperation see Cleveland infra note 54 and accompanying text and see Donoso infra note 54 and accompanying text.}

The second course of action adopted by the ILO in its follow-up to the 1998 Declaration is the issuing of a global report for the examination of the implementation of and compliance with each fundamental principle and right at work.\footnote{The report examines a different category of fundamental principle and right at work each year. The first report was issued in 2000, which examined the global status of freedom of association and the right to collective bargaining. In 2001, the ILO issued the global report on the elimination of all forms of forced or compulsory labour; in 2002 the report was on the effective abolition of child labour and in 2003 the ILO was reporting on the status of the elimination of discrimination in respect of employment and occupation.} Additionally, the global report constitutes an opportunity to assess the effectiveness of the cooperation given by the ILO and for determining future priorities in respect to technical assistance.

1.1.2.2. ILO’s effectiveness: compliance versus enforceability
The ILO has been widely criticised of lacking channels for the effective enforcement of international labour conventions in Member States, thus failing to raise labour standards. When evaluating the effectiveness of the ILO in improving workers’ conditions globally, it is necessary to make a distinction between the concepts of ‘enforcement’ on the one hand, and ‘compliance’ on the other. The fact that the ILO system lacks enforcement mechanisms, as conceived for example in the multilateral trading system, does not imply that the ILO has not improved workers’ conditions. The ILO has been successful in this task, through other means as explained in the previous section, such as technical assistance and cooperation, the monitoring processes through representations and complaints, the issuing of reports on labour conditions globally, among others.

Indeed, when compared to the WTO and the dispute settlement of the multilateral trading system, the ILO guidelines offer no sanction against the transgressing state or employer for the violation of labour standards, except for the case of the referral of complaints to the ICC. However, even in the case of article 33 of the ILO Constitution, some scholars criticise the weakness of its provisions. Additionally, critics argue that

46 Remarks made by Prof. Adelle Blackett in conversations about the thesis proposal.
47 See supra notes 29, 30 ff. and accompanying texts.
48 See e.g. Gould, “The Uneasy Case” supra note 29 (“although it is an exaggeration to characterize the ILO as a debating society, it has at its disposal no meaningful remedies and sanctions beyond the potential for the offending country to be castigated and chastised in the court of international public opinion” at 101); see also Chantal Thomas, “Should the World Trade Organisation Incorporate Labor and Environmental Standards?” (2004) 61 Wash & Lee L. Rev. 347 (“[d]espite one of the oldest pedigrees in international law, however, the ILO’s enforcement record has proven woeful” at 350); see Lisa G. Baltazar, “Government Sanctions and Private Initiatives: Striking a New Balance for U.S. Enforcement of Internationally-Recognized Workers’ Rights” (1998) 29 Colum. Human Rights L. Rev. 687 at 690; but see J. Bhagwati, Free Trade Today 71 (2002) cited in Gould, “The Uneasy Case” supra note 31 (“[s]o the common argument that ILO has no teeth, that is, no trade sanctions, is wrong. I would argue that God gave us just not teeth but also a tongue; and a good tongue-lashing, based on evaluations that are credible, impartial and unbiased, can push a country into better policies through shame, guilt and the activities of NGOs that act on such findings” at 102).
49 Article 33 of the ILO Constitution states the following: “[i]n the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.” (ILO Constitution, supra note 16 at article 33).
50 See Stephen Diamond, “Bridging the Divide: An Alternative Approach to International Labor Rights After the Battle of Seattle” (2001) 29 Pepp. L. Rev. 115 at 128-129, n.50-51, arguing that in the implementation of article 33 against the Burmese Government’s systematic use of forced labour, “the Member State need only fear yet more reviews, recommendations and conference talk”. Moreover, he states, the “article 33 step” had resulted in very little change as denounced by union representatives at the ‘special sitting’ of the International Labour Conference concerning the application by Myanmar of the
even when voluntary ratification of ILO conventions takes place, it does not necessarily imply an amelioration of labour conditions, since the act of ratification remains a purely symbolic one.\textsuperscript{51} Furthermore, ratification does not influence labour rights and workers' conditions in the given country, because it "is instead a function of a country's labor conditions".\textsuperscript{52}

Despite the numerous critiques of the organisation's reliance on techniques of moral persuasion or the "campaign of shame",\textsuperscript{53} I agree with other scholars who acknowledge that the ILO has managed to attain great level of compliance among Member States, especially through its functions of technical assistance.\textsuperscript{54} Moreover, one study shows that in 61 percent of 1003 cases, in which they were discrepancies between ILO conventions and Member States' legislation, ILO's mechanisms led to a full or partial elimination of these discrepancies.\textsuperscript{55}

Additionally, some argue that the 1998 ILO Declaration, albeit not legally enforceable, can render labour standards "enforceable" on a practical level,\textsuperscript{56} since "experience with other international codes demonstrates that unions still use the agreement [that is not legally enforceable] as a "lever" to influence the conduct of employers or to influence the adoption or interpretation of national legislation."\textsuperscript{57}

\textsuperscript{51} Flanagan, "International Competitive Advantage", supra note 18 at 20; contra Baltazar, supra note 48 at 7, n.70 ("studies have demonstrated that many countries that ratify conventions do so with genuine motives to improve working conditions").

\textsuperscript{52} Flanagan, ibid. ("the adoption of international labor standards does not influence labor rights and conditions, but ratification of ILO standards is instead a function of a country's labor conditions" at 16).

\textsuperscript{53} Diamond, supra note 50 (While defining the "campaign of shame" as "the suggestion that the public scrutiny triggered by an ILO investigation can cause such acute embarrassment to a Member State that it may be forced to comply with the Convention", at 128).

\textsuperscript{54} Sara H. Cleveland, "Why International Labor Standards?” in Flanagan & Gould IV, supra note 18, 129 ("[a]lthough actual implementation lags significantly behind state ratifications, the ILO has become more aggressive in providing technical assistance to improve member state compliance with the core conventions, and in denouncing noncompliant members" at 131); see also Donoso supra note 22 ("[t]hrough the development of effective supervisory mechanisms and the provision of technical assistance to less developed countries, the ILO had considerable success in enforcing these standards" at 189).


\textsuperscript{57} Ibid. [footnotes omitted].
Furthermore, it is noteworthy that the ILO, in contrast with other UN specialized agencies, has consistently collaborated with UN human rights activities, with the submission of information on the status of workers' rights to the monitoring committees under the two international covenants, specially the Committee on Economic, Social and Cultural Rights. 58

1.2. International Labour Standards

1.2.1. Why ‘international labour standards’?

Despite the "universal" character of international human rights law, the concept of international labour standards remains controversial, since some argue that these are not "international" but "Western labour standards", and that imposing them on developing countries responds to protectionist purposes. 59 The rise of this controversy and criticism is not worrisome, however. It reflects nothing more than the problem of the universality versus the particularity of human rights which does not escape the sphere of labour standards.

Moreover, the accelerated pace of globalization and international free trade – given its effect on labour rights – have resulted in a widespread and increasing concern for the protection of workers in all countries. Hence, the propagation of labour side agreements to trade agreements and the inclusion of social clauses in other regional trade agreements. With the objective of unifying the criteria for the determination of labour standards, the ILO, not without contention, focused on four labour standards: the ‘core’ labour standards as referred to in its 1998 Declaration. Despite the discrepancies on the definition of ‘international labour standards’, it is generally accepted that a distinction between core labour standards and substantial labour standards is justified. 60 Following this distinction, the focus of this thesis is on core labour rights, because as stated in the 1998 Declaration, "the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned, to claim … their fair share

58 Leary, "The Paradox" supra note 18 at 39.
60 Ahmed, supra note 11 at 150.
of the wealth which they have helped to generate, and to achieve fully their human potential”.

1.2.2. Declaration on Fundamental Principles and Rights at Work

- Freedom of Association and the Right to Collective Bargaining

The principle of freedom of association is established in the preamble of the ILO Constitution, reaffirmed in the Declaration of Philadelphia and set out in article 2 of the 1948 Freedom of Association and the Right to Organise Convention (No. 87). This Convention guarantees that “[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

The right to collective bargaining is recognized in the Declaration of Philadelphia, and further adopted by the 1949 Right to Organise and Collective Bargaining Convention (No. 98). This convention calls for governments to take the appropriate measures in order to “encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”

Freedom of association and the right to collective bargaining, unlike the other three core labour standards and principles, are subject to great controversy for two reasons. Firstly, it is difficult to define its operative terms and secondly, the problem is whether these rights should be labelled as fundamental labour principles at all. The first discrepancy is caused by far-from-universal conceptions of what these rights imply,

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61 ILO Constitution, supra note 16 at preamble.
64 Freedom of Association Convention, ibid. at article 2.
65 Declaration of Philadelphia, supra note 21 at section III.
66 ILO, Right to Organise and Collective Bargaining Convention (No. 98) 1 July 1949, 96 U.N.T.S. 257 (entered into force 18 July 1951) [Right to Organise Convention].
67 Ibid. at article 4.
68 Moran, supra note 38 at 50.
differing from country to country. The second and most critical discrepancy arises among experts in public policy and development, in the sense that while some advocate for workers' unions based on their ability to promote efficiency and stability, others differ and consider unions to create inefficiencies in the local economy, arguing that they should be regulated like other aspects of social policy and not given the status of fundamental rights.

As previously illustrated, the Committee on Freedom of Association is one of the six committees through which the Governing Body operates for the protection and supervision of the implementation of labour rights. As of 2004, the CFA had heard 2316 cases, the majority been brought by workers' organisations, concerning a wide range of issues, from the killing of trade union leaders to matters of conformity of legislation. As of October 2004, the CFA had heard 52 cases against the Government of Venezuela, for non-compliance with the principle of freedom of association and the right to collective bargaining.

The Elimination of All Forms of Forced or Compulsory Labour

In the terms of the 1930 Forced Labour Convention (No. 29) convention, forced or compulsory labour "shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." The ICCPR does not directly define what forced labour is; rather it makes reference to those situations that shall not be considered compulsory labour.

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69 Ibid. at 50, 51. ("Some national labor-relations systems, for example, allow labor organisations at the firm level, others at the industry level, and others at the national level --and there is considerable controversy about which approach best promotes growth, efficiency and equity. Similarly, some systems allow a closed shop, which allots considerable power to a given union, arguably at the expense of more general employee rights, others endorse right-to-work laws, which allow individual workers to enjoy the benefits obtained by union negotiations without having to join the union or pay dues. Some countries ... allow employers to hire permanent replacements for striking workers, a practice that constitutes a considerable limitation on the exercise of collective bargaining. Under various conditions, both developed and developing countries often limit the right to strike." [footnotes omitted]).

70 Ibid. at 50.


73 Ibid. at article 2.

74 See ICCPR, supra note 2 at article 8.
Twenty seven years later, the ILO adopted yet another convention on forced or compulsory labour, this time urged by concerns of the use of forced labour for political coercion in the time following WWII.\(^75\) Accordingly, the 1957 Abolition of Forced Labour Convention (105),\(^76\) calls Member States to “suppress and not to make use of any form of forced or compulsory labour”,\(^77\) for the purposes of political coercion, education, or punishment for political views that ideologically oppose those of the established system; for purposes of economic development; as a means of labour discipline; as a punishment for the participation in strikes or as a means of racial, social, national or religious discrimination.\(^78\) The prohibition of forced labour might seem simple and rather straightforward, at the practical level, however, it becomes a more complex issue, given the diverse cultural definitions of what compulsory labour imply.\(^79\)

Additionally, there is also the notion of ‘prison labour’ that adds another level of complexity to the issue.\(^80\) The Forced Labour Convention makes one reference to the use of ‘prison labour’. Accordingly, ‘prison labour’ is not forced or compulsory when the work or service results “from a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations”.\(^81\)

Given the discrepancies that have arisen amongst Member States in the interpretation of this article, the CEACR has clarified the issue by stating that “the privatization of prisons and/or of prison labour is only compatible with the Convention

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\(^77\) Ibid., at article 1.

\(^78\) Ibid.

\(^79\) See e.g. Moran supra note 38 at 49 when stating that “in some countries, unpaid apprenticeships would be regarded as the equivalent of indentured servitude; in others, they are an established part of the traditional economy. Similarly, it is acceptable in some cultures, but not in others, for employers to provide loans or travel funds that are then repaid through the labor of the recipient.”

\(^80\) Ibid.

\(^81\) Forced Labour Convention, supra note 72 at article 2, para. 2(c).
where it does not involve compulsory labour.” This condition implies the ‘free consent’ by prisoners to work for those private companies, without the threat of penalties, namely the “loss of privileges or an unfavourable assessment of behaviour taken into account for reduction of sentence.”

The forced labour prohibitions are very much akin to antislavery policies. In fact, the 1930 Forced Labour Convention was drafted partially in response to the adoption of the 1926 Slavery Convention. As one scholar points out “[f]ew would dispute the despicableness of slavery and indentured servitude. In no other employment relationship is the worker more completely bereft of any power to improve conditions, to make a living wage (or any wage), or to achieve basic human dignity.” As a fundamental threat to human dignity, ‘slavery’ was, in fact, the first area in which the international involvement in human rights issues took place. The Universal Declaration of Human Rights establishes that “[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”

➢ The Effective Abolition of Child Labour

The ILO, since its inception, has placed child labour at the center of its concerns. It estimated that in 2000, there were 211 million children between the ages of 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

83 Ibid. (As the Committee of Experts noted in the following paragraph, however, the regular notion of “free consent” varies “in the context of a captive labour force”, in which the worker has no access to the free labour market. Thus, “free” consent to a form of employment going prima facie against the letter of the Convention needs to be authenticated by arm’s length conditions of employment approximating a free labour relationship, such as the existence of a labour contract between the prisoner and the private company using his or her labour and free labour market oriented conditions regarding wage levels (leaving room for deductions and attachments), social security and safety and health.”).
84 Ibid.
86 Blackett, “Whither Social Clause” supra note 75 at 17, 18, n. 71.
87 Vossler Champion supra note 59 at 221, 222.
89 UDHR supra note 1 at article 4.
5 and 14 engaging in economic activity of some sort.\textsuperscript{91} Out of that amount it was estimated that 17.4 million were children in Latin America and the Caribbean, which accounts for 16 percent of the children in the region.\textsuperscript{92} The rationale behind the prohibition of child labour is that children should be protected from wage labour, since wage labour interferes with their education and healthy development.\textsuperscript{93}

In the deterrence of child labour, the ILO has adopted two key conventions, namely the 1973 Minimum Age Convention (No. 138)\textsuperscript{94} and the 1999 Worst Forms of Child Labour Convention (No. 182).\textsuperscript{95} In 1992, the ILO launched IPEC\textsuperscript{96} within the framework of the Minimum Age Convention, with the main goal of strengthening the countries’ capacity to deal with the issue.\textsuperscript{97} Afterwards, with the adoption of convention 182, the program was revised and reformulated to pursue the primary objective of the elimination of the worst forms of child labour.\textsuperscript{98}

Concerning the minimum age for employment, in addition to the Minimum Age Convention, the ILO has adopted other instruments, including conventions and recommendations regulating the minimum age for certain working activities such as industrial and non-industrial employment, agricultural work, underground work, and the work at sea. However, the term “child labour” is not intended to encompass all work performed by children under the age of 18, since children can engage in working


\textsuperscript{92} Ibid.


\textsuperscript{95} ILO, Worst Forms of Child Labour Convention (No. 182), 17 June 1999 38 I.L.M. 1207, (entered into force 19 November 2000) [Worst Forms of Child Labour or convention 182]

\textsuperscript{96} By February 1, 2002, there were 75 IPEC participating countries, the majority being countries from the African continent. Venezuela is listed among the countries that have signed a MOU but it is not among the countries directly associated with the IPEC. (ILO, Global Report: A Future without Child Labour, supra note 90).


\textsuperscript{98} Ibid.
activities that are consistent with their education and full physical and mental development. 99 Child labour is not defined solely by the age criterion; but additionally by the type of work the minors are engaged in, the working conditions, the interference with education, among others.

Accordingly, the ILO in its 2002 Global Report identifies three categories of child labour to be abolished, namely (1) labour performed by a child who is under the minimum age allowed by national legislation for that kind of work, (2) labour that jeopardizes the physical, mental or moral well-being of a child, known as hazardous work and (3) the unconditional worst forms of child labour, i.e., slavery, trafficking, debt bondage, forced recruitment for use in armed conflict, prostitution, pornography, and illicit activities. 100

The problem with child labour, as with the other labour standards to some extent, has been attributed to the lack of enforcement of the existent provisions. 101 Even countries with advanced child labour laws, often find it difficult to put them into practice. 102 In this context, the ILO has provided useful channels for a better implementation of child labour laws, namely the implementation of IPEC. IPEC has been collaborating with countries, in stimulating not only the ratification of conventions but most importantly the adoption of subsequent changes in domestic laws and policies and in supporting direct interventions by organisations to assist child labourers and their families. 103

➢ The Elimination of Discrimination in respect of Employment and Occupation

Discrimination at work especially the one based on race and gender has been an acute problem in both developed and developing countries throughout history, continuing

100 Ibid.
101 In this respect, see OECD, “Trade, Employment and Labour Standards: A Study of Core Workers’ Rights and International Trade” 124 (Paris: 1996), when stating that “[it] is unlikely that the ... legal provisions are the main factor behind child labour. Instead it is the lack of enforcement of the existing provisions ... which poses the major problem. Enforcement is typically weak in the informal sector. In several countries, the under-provision of schools makes enforcement of child labour laws problematic... [I]n the face of very low labour standards, child labour provides an important source of income to their families” at 28.
to persist in public and private sectors, and in the formal and informal sectors of the economy. In the efforts of eradicating racial and gender discrimination, the UN has adopted several key instruments, namely the 1965 International Convention on the Elimination of All Forms of Racial Discrimination\(^{104}\) and the 1979 CEDAW\(^{105}\).

The difficulties concerning discrimination in the workplace are directly linked to social discrimination in general and to stereotypes built according to cultural backgrounds,\(^{106}\) becoming often a very tough issue to address. Additionally, discrimination at work can often present itself in a very subtle manner, making it difficult to determine. For the majority of economists, the theory of “statistical discrimination” or “employers’ taste” is the reason why discrimination in the labour market persists.\(^{107}\) “Statistical discrimination” is based on the impossibility of businesses to scrutinize the productivity of individual workers, thereby creating a tendency to rely on merely observable characteristics, namely race or sex, often resulting in the conclusion that workers from certain groups have lower than average productivity.\(^{108}\)

Discrimination at work, which involves both direct and indirect discrimination, is measured by the deprivation or limitation of equal opportunity and treatment, resulting from a difference in treatment and does not have to be the result of intentional acts.\(^{109}\) However, not every differential treatment at work is considered to be discrimination in respect to employment and occupation.\(^{110}\) Differential treatment based on the inherent requirements of a job, individual merit, special measures for protection or assistance\(^{111}\) or


\(^{107}\) Ibid. at 23.

\(^{108}\) Ibid.

\(^{109}\) Ibid. at 30.

\(^{110}\) See ibid.

\(^{111}\) Special measures for protection include the special regime in the workplace to protect pregnancy and maternity. Special measures for assistance encompass, for example, the supply of special software to enable workers with sight impairments to use computers or the provision of language courses in the workplace to assist immigrant workers. (Ibid. at paras. 64, 65).
affirmative action measures are legitimate practices and thus do not constitute discrimination in employment and occupation.\footnote{\textit{Ibid.} at paras. 62-66.}

The elimination of discrimination at work is central to the concept of social justice.\footnote{\textit{Ibid.} at 1.} Accordingly, the Declaration of Philadelphia establishes that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.\footnote{Declaration of Philadelphia, \textit{supra} note 21 at article 2(a).} In this trend, the ILO has adopted two key conventions, i.e., the 1951 Equal Remuneration Convention (No.100)\footnote{ILO, \textit{Equal Remuneration Convention} (No. 100), 29 June 1951,165 U.N.T.S. 303, (entered into force 23 May 1953).} and the 1958 Discrimination (Employment and Occupation) Convention (No. 111).\footnote{ILO, \textit{Discrimination (Employment and Occupation) Convention} (No. 111) 25 June 1958, 362 U.N.T.S. 31, (entered into force 15 June 1960).} Both of these conventions have been widely ratified by Member States.\footnote{ILO, Global Report: \textit{Time for Equality at Work} \textit{supra} note 21 at 2. (By the date of the report, that is, January 1, 2003, 160 countries had ratified Convention No. 100 and 158 countries had done so with Convention No. 111. By October 2004 there were: 161 ratifications of Convention No. 100, with the additional ratification by Antigua and Bermuda and 160 ratifications of Convention No. 111, with the new two ratifications of Grenada and Comoros).}

The Equal Remuneration Convention has a narrower scope of protection than the Discrimination Convention, adopted seven years later. The former calls for the promotion of “equal remuneration for men and women workers for work of equal value”,\footnote{Equal Remuneration Convention, \textit{supra} note 115 at article 2.} and the latter defines ‘discrimination’, by stating that discrimination implies “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.\footnote{Discrimination (Employment and Occupation) Convention, \textit{supra} note 116 at article 1.}

The issue is, however, how to enforce these ‘non-discrimination standards’, considering that it is not sufficient to ensure that domestic laws or constitutions do not have discriminatory clauses. Discrimination at work, as stated, is a consequence of the existence of discrimination in the society as a whole. Additionally, as will be analysed in the following chapter, discrimination based on political grounds is one of the most extended types of discrimination in Venezuelan society today, and thus in the Venezuelan
context of labour relations, even considering that Venezuela's labour legislation have precisely recently been modified so as to include non discrimination based on political grounds.

1.3. Conclusions to the International Protection of Labour Rights

Despite criticism on the lack of enforceability mechanisms of the ILO, its role in the promotion and protection of labour rights has proven effective, in the sense that several countries have modified their domestic laws and policies accordingly, as it is the case with certain laws concerning certain rights in Venezuela.

The observations and recommendations issued by different ILO committees are important in the sense that not only they help bona fide countries determine their flaws in respect to compliance, but they play an important role for the work of NGOs. These observations allow NGOs to measure governments’ compliance with labour rights and to publicize the results accordingly, strengthening the system of the “campaign of shame”.

In the following chapter, I will examine what type of recommendations and individual observations the different ILO committees have addressed to the Venezuelan Government, and what Venezuelan policies have been largely criticised by the ILO. In the last chapter, I will closely examine examples of the technical cooperation activities that the ILO itself and through its regional offices for the Americas and the Andean region has carried out in the specific context of Venezuela.
Chapter Two: the Protection of Labour Rights in Venezuela

This second chapter will discuss the current status of core labour rights in Venezuela, as were defined and discussed in the previous section. Having analysed what these fundamental labour rights imply, and the international efforts carried out by the ILO for increasing protection of these rights among Member States, I will examine the definitions of these core labour rights at the domestic level and the domestic efforts in place, including laws and public policies that have been developed by the previous and current Venezuelan Governments as a means to protect workers.

The objective of this chapter is to examine whether the domestic laws and policies are in line with the international conventions discussed previously, and thus to determine if they comply with international labour standards. In the cases where Venezuelan regulations are not in concordance with ILO standards, it is necessary to determine whether the Venezuelan Government has introduced the adequate changes through the adoption of the recommendations and observations addressed by the ILO. As a result, the chapter will conclude whether progress has been made by Venezuela in the protection workers in ‘theory’ (legislation) and in ‘practice’ (actual exercise of these rights by workers).

Firstly, this examination of the status of core labour rights will be carried out through the analysis of the domestic legislation and the changes that have been introduced. Secondly, through an analysis of various observations issued by the different committees of the ILO, and the reports issued by international NGOs, namely HRW and AI and by two Venezuelan-based human rights NGOs, namely Provea and Cecodap. Provea and Cecodap focus their advocacy primarily on the promotion of respect for second generation human rights and the rights of children and adolescents, respectively. Provea’s main objectives are to research, document and publish human rights abuses in Venezuela, especially violations of economic, social and cultural rights. Although Provea has in occasions received funding from foreign governmental agencies,120 it is a non-

120 Some of the governmental agencies that have, on specific occasions, provided funds to Provea (but never longer than for a period of 5 years) are: the Embassies of Australia, United Kingdom, Finland, and the Netherlands in Venezuela; the European Fund for Human Rights; the Canadian Center for Human Rights; and the Norwegian Fund for Human Rights. Some other agencies that have funded Provea are: the
governmental organisation, which carries out autonomous research, with independence of the source of its financial resources. Provea has gained much recognition domestically as well as internationally for the objectivity through which it conducts its research and efficiency of its communication of results. Cecodap is a non-profit Venezuelan organisation that was founded in 1984 by a group of professionals with the objective to promote the defence of the human rights of children and adolescents in the country.\textsuperscript{121} Prior to the analysis of Venezuela’s adequacy with international labour standards, it is necessary to provide an appropriate background for the reader, by revising some concepts of the Venezuelan legal system.

2.1. An introduction to the Venezuelan labour law system

2.1.1. A history of labour protection

Even though Venezuela has been a member of the ILO since its inception,\textsuperscript{122} labour rights such as freedom of association, the right to organise and the right to collective bargaining were, by 1919, far from being recognized domestically.\textsuperscript{123} Furthermore, the legal protection of labour rights emerged in Venezuela considerably later than compared to other countries in the region, mostly due to the late industrialization of Venezuela and the existence of a long dictatorship lasting until 1935.\textsuperscript{124} In other countries in the region, namely Guatemala, Cuba, and Panama labour acts were in place by the early 1910s.\textsuperscript{125}

In the case of Venezuela, the enactment of the first labour act had to wait until 1928, although Venezuela had previously enacted labour regulations in specific areas,
namely the 1915 Mines Code and the 1925 Mines Act, which contained some provisions regarding working hours and safety at work in mines.\textsuperscript{126} Nonetheless, the 1928 Labour Act did not have effective application, since there was no real political will to protect workers.\textsuperscript{127} The lack of genuine intentions was demonstrated by not appointing the public officials who would oversee the implementation of the act, by not designating the courts of law and by not having established a special procedure for the resolution of labour disputes.\textsuperscript{128} Nonetheless, the following labour act, adopted in 1936 was the result of a real and profound effort to protect workers’ rights. The ILO collaborated in the drafting of the bill, which was inspired by the Mexican and Chilean labour acts.\textsuperscript{129} The importance of this act is not limited to its extraordinary legacy.\textsuperscript{130} Most importantly, it constitutes the first labour act which explicitly recognised the right to organise, the right to collective bargaining and the right to strike.\textsuperscript{131}

At the constitutional level, the 1936 constitution was the first to protect labour rights, establishing freedom of work, weekly rest, annual vacations, and workers’ training.\textsuperscript{132} The 1947 constitution was more protective, adopting for the first time at the constitutional level, the right to organise, the right to collective bargaining and the right to strike.\textsuperscript{133} However, these rights were suppressed by the military constitution of 1953, except for the right to organise, but which could not be exercised anyway given the suppression of freedom of association and the right to collective bargaining.\textsuperscript{134} These

\begin{itemize}
  \item \textsuperscript{126} Ibid. at 19, 20.
  \item \textsuperscript{127} Ibid. Certainly, the enactment of this 1928 Labour Act responded more to efforts aimed at easing the diplomatic pressure that was exerted on the Government (ibid. at 19).
  \item \textsuperscript{128} See Rafael J. Alfonso-Guzmán, Nueva Didactica del Derecho del Trabajo: Adaptada a la Constitución de 1999 y a la Ley Orgánica del Trabajo y su Reglamentación (Caracas: 2000) [Alfonso-Guzmán] at 45.
  \item \textsuperscript{129} Ibid.
  \item \textsuperscript{130} Ibid. Indeed, the 1936 Labour Act, despite partial reforms made in several occasions, remained Venezuela’s Labour Act until is replacement in 1990 by a new labour act (ibid.).
  \item \textsuperscript{131} Ibid.; see also Villasmil, supra note 122 at 19 (it is noteworthy that long before the legal recognition of these labour rights, Venezuelan workers had produced strikes early in the twentieth century, namely the 1905 strike of port workers).
  \item \textsuperscript{132} Villasmil, ibid. at 69.
  \item \textsuperscript{133} Ibid. at 69, 70.
  \item \textsuperscript{134} Ibid. at 70; see also Rómulo Díaz Morón, Derecho Colectivo del Trabajo: la Convención Colectiva como Sistema (Caracas: Mobil-Libros, 2004) [Díaz Morón] at 25 (arguing that in order to exercise the right to organise, workers must exercise other rights such as the right to form trade unions, the right to join trade unions, the right to elect and be elected in trade unions’ positions, the right to collective bargaining, the right to strike and the right not to be suspended for union membership).
\end{itemize}
labour rights were later restored by the 1961 constitution\textsuperscript{135} and further developed by the 1999 constitution.

The fact that labour rights were constitutionally adopted following—and not preceding—their legal inception, demonstrates the low influence exerted by constitutions in the Venezuelan labour regulatory system.\textsuperscript{136} Indeed, the establishment of labour rights in Venezuelan Constitutions seems to respond merely to an attempt of “constitutionalizing” those rights—given the higher hierarchy and greater relevance of constitutional norms over other norms within the domestic legal system—rather than to a genuine effort for guaranteeing that workers would be able to effectively exercise those rights.

From an international perspective, the ILO has often complained about Venezuela failing to fulfill its reporting obligations.\textsuperscript{137} As analysed in the previous chapter, Member States must send annual reports to the ILO, informing on the domestic efforts made to comply with conventions and to respect workers’ rights, which compose the annual reviews and global reports published by the ILO on the status of fundamental workers’ rights in countries.

The Government of Venezuela has sent only one annual report since the year 2000,\textsuperscript{138} and concerning only one fundamental principle, namely the 2004 annual report regarding child labour.\textsuperscript{139} The weak reporting performance not only renders Venezuela in non-compliance with its international obligations, but also and most importantly imperils a more effective and generous protection of workers rights. In this latter sense, the failing of the Government in providing information on the status of these rights curtails the

\begin{flushleft}
\footnotesize
\textsuperscript{135} Villasmil, \textit{ibid.} at 70.
\textsuperscript{136} Villasmil, \textit{ibid.} at 70, 71.
\textsuperscript{139} \textit{Ibid.} at 143.
\end{flushleft}
examination of critical areas in need of special attention, thereby ultimately hindering international technical cooperation.\(^{140}\)

2.1.2. Preliminary comments on Venezuela’s domestic legislation

2.1.2.1. Legal and Constitutional Reforms

In the past decade, and more specifically in the past five years with the current administration, there have been several legal and political reforms introduced by the Venezuelan Government. Given these legal modifications, and the objective of determining whether the protection of these rights constitutes indeed a step forward or a step back, it is necessary to previously comment on the nature of these changes.

The most prominent legal modification introduced by the current administration was the adoption of a new constitution approved by the Venezuelan people by means of the referendum held on December 15, 1999, which resulted in the fact that the 1961 Constitution of the Republic of Venezuela\(^{141}\) was replaced by the 1999 Constitution of the Bolivarian Republic of Venezuela.\(^{142}\)

I will not undertake the tempting task of commenting on the various legality and legitimacy issues raised by this referendum, since it is out of the scope of the present thesis. However, I consider it relevant to highlight that there are currently at least two different versions of the 1999 Constitution, namely the constitution published in Official Gazette dated December 30, 1999 and the later published in Official Gazette dated March 24, 2000.\(^ {143}\) The latter constitutional text, published in 2000, was, according to the Government, not a new constitution but a ‘reprint’ of the 1999 constitution, due to misprints and other errors in its publication.\(^ {144}\) Nonetheless, when both texts are compared and numerous differences are noted, the conclusion seems clear. There had

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\(^{140}\) In the previous chapter, I highlighted the importance of the technical cooperation activities carried out by the ILO. See supra notes 30, 54 and accompanying texts.


\(^{142}\) Constitución de la República Bolivariana de Venezuela, Official Gazette dated December 30, 1999, No. 36,860 [1999 Venezuelan Constitution or 1999 Constitution].


\(^{144}\) Ibid. at 29.
been a ‘constitution substitution’ and not just a ‘constitution reprint’. Even though the changes introduced are mostly modifications of form and not of content, the issue becomes more severe when considering that the constitution presented for approval through the direct vote from Venezuelan electorate in December 1999 was the 1999 version of the constitution, and not the 2000 version which was introduced after the referendum had already taken place. On a practical level, it is noteworthy that the ‘version’ of the constitution that is analysed in and referred to in this thesis is the constitution published in December 1999.

Furthermore, the 1990 Organic Labour Act was partially amended in 1997, resulting in what today constitutes the 1997 Organic Labour Act. The provisions that were modified, however, referred only to a few articles concerning wages and benefits. Thus, a comparative analysis of the 1990 and 1997 Organic Labour Acts is not deemed necessary, since the changes included do not modify the content of core labour rights.

The 1998 Child and Adolescent Protection Act, which entered into force in the year 2000, constituted a major overhaul in the Venezuelan protection of the rights of children. The previous legislation protecting the rights of the child, the 1980 Minors Protection Act, now voided, was almost twenty years old by the time the new act

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145 Ibid.; see generally Rondón de Sansó, supra note 143, for a detailed comparison of the changes introduced in the 2000 constitution versus the 1999 version of the constitution.
146 Ibid. at 49, 50 (Accordingly, it has been argued that the 2000 constitution should have been submitted to a second referendum for its legitimate approval and not just simply published in Official Gazette).
147 Ley Orgánica del Trabajo, Official Gazette dated December 20, 1990, No. 4.240 [the 1990 Organic Labour Act].
149 See Juan Garay, Legislación Laboral Práctica: Ley del Trabajo, Comentarios y Casos Prácticos (Caracas: Ediciones Juan Garay, 2000) at introduction (the few modifications were made solely in respect to articles 108, 125, 128, 133, 134, 138, 146, 167, 168 and 169).
150 Accordingly, all provisions from the 1990 Organic Labour Act concerning freedom of association and the right to collective bargaining, the right not to be submitted to forced or compulsory labour, prohibition of child labour and the principle of non-discrimination in employment and occupation were not modified and passed unaltered to the 1997 Organic Labour Act.
151 Ley Orgánica para la Protección del Niño y del Adolescente, Official Gazette dated April 1, 2000, No. 37.090. [Child and Adolescent Protection Act].
152 Ley Tutelar de Menores, Official Gazette dated December 30, 1980, No. 2.710. [1980 Minors Protection Act].
153 In Venezuela, it is customary to expressly state at the end of a legislative act or code if previous legislatives acts are being annulled, substituted or derogated by the entry into force of the new act. However, the “nullifying clause” of the Child and Adolescent Protection Act refers to partial and full repeals of other acts and does not expressly state that it derogates the 1980 Minors Protect Act. Nonetheless, not all nullifications of laws are expressly established in the text of the act which partially or
was adopted. Consequently, for example, the Minors Protection Act was not in line with the 1989 UNCRC, ratified by Venezuela on August 20, 1990. The new Child and Adolescent Protection Act not only is in accordance with the UNCRC, but it also constitutes a great step in the Venezuelan protection of human rights and the rights of the child. For example, one of the most celebrated improvements of this new act consists in defining children and adolescents as “individuals subject to the law”, by virtue of which, they are considered “legal persons”, who have duties and are entitled to rights.

fully voids a previous act. Additionally, following a phone conversation held with Prof. Betty Lugo, the conclusion made is that the derogatory indeed takes place in this case, and that the 1980 Minors Protection Act is voided by the 1998 Child and Adolescent Protection Act. Interview of Betty Lugo, Attorney-at-Law (UCV, 1976 Summa Cum Laude), Partner of Lugo, Vivas & Asociados, Professor of several Commercial Law courses at UCV, and Practices Family Law, Civil Law and Commercial Law

154 It is important to highlight that the Child and Adolescent Protection Act derogated some articles of the 1997 Organic Labour Act, namely those referring to the work of children and young persons. Consequently, the provisions of the Organic Labour Act that are voided are articles 247, 248, 254, 263, 264, and first paragraph of article 404. See Child and Adolescent Protection Act supra note 151.


156 See Child and Adolescent Protection Act, supra note 151 at article 2. This article defines “child” as “every person who is twelve years old or less”.

157 Ibid., defining “adolescent” as “every person who is twelve years old or older and is less than eighteen years old”. Additionally, the article stipulates that in case there is doubt when determining if a young person is a child or an adolescent, he or she will be considered a child unless otherwise proved. Concerning adolescents, in case of doubts about whether the young person is an adolescent or an adult, he or she shall be considered an adolescent, unless otherwise proved; compare Worst Forms of Child Labour Convention, supra note 95 at article 2 (The convention defines “child” as every person under the age of 18, i.e., the convention makes no distinction between children and adolescents, unlike the domestic legislation).


159 Ibid.

160 Moreover, the terminology of ‘minors’, previously referring to young persons who were under the legal age of eighteen (18) years old, was eliminated with the substitution of the Minors Protection Act by the Child and Adolescent Protection Act. Such term was considered inadequate to refer to young underage persons and children, since it was perceived as degrading and disrespectful. The terms “child and adolescent” or “children and adolescents” were deemed more appropriate and thus were included in the new Act. Additionally, with the change in law came some modifications in Venezuelan institutions concerning the protection of children and adolescents. For example, the INAM has been eliminated, with the inception of the CNDNA. However, the Child and Adolescent Protection Act establishes in its article 674, that the INAM will continue to operate on a provisional basis as long as its programs and services are fully transferred to the different states and municipalities in Venezuela; Cecodap, “Informe Informe Somos Noticia- Venezuela, Situación De Los Derechos De La Niñez Y Adolescencia, Septiembre 2003- Agosto 2004” (2004), online: Cecodap <http://www.cecodap.org.ve/texto/situacion/Resumen%20Informe%202004.htm> (accessed on November 15, 2004) [Cecodap, 2004] (Nonetheless, Cecodap, has regretted for the fourth consecutive year, since the entry in force of the Child and Adolescent Protection Act, that the Government has still not fully transfer the activities to the states and municipalities, thereby failing to settle the temporal problem of the existence of the INAM).
2.1.2.2. The National Assembly: some notions concerning Venezuelan Acts

The Formation of Laws

Once an act proposal is received and all the requirements met as examined by the Secretary of the National Assembly, the act must be discussed by the members of the National Assembly, in “first” and “second” discussions. Following approval in ‘first discussion’, the proposed act is submitted to the specific commission of the AN in charge of examining the Act, depending on the subject. This specific commission sends the approved project to the plenary of the National Assembly within 30 continuous days following receipt. The members of the National Assembly, gathered in plenary meeting, shall discuss the second draft of the proposed Act, and in case of approval without further modifications, the act is passed and submitted to the Executive branch of the government for signature, promulgation and further publication in the Official Gazette.

The President could also propose changes within ten days of receipt. In the latter case, the National Assembly shall discuss the changes proposed by the President of the Republic and approve the modifications with the vote of majority of its members. Upon approval, the National Assembly shall once again send the Act to the President, who has no prerogative for addressing further observations and must finally sign and promulgate the Act. The Act is then published in Official Gazette, and may enter into force immediately with this publication, or in a subsequent date appointed by the Act.

Acts issued by the Legislative can be proposed, inter alia, by three or more congressmen; other public authorities such as the Executive branch (president and ministries) or the Supreme Court of Justice when the proposed act refers to the judiciary; a minimum of 0.1 % of the people registered in the permanent electoral registry and to the State Legislative Councils when the proposed act refers to States’ laws. See 1999 Venezuelan Constitution supra note 142 at article 204.

In the ‘first discussion’, the National Assembly discusses the travaux preparatoires, the objectives and pertinence of the act. Also, a general examination of the articles of the act is held.

See 1999 Constitution of Venezuela supra note 142 at article 208.

See ibid. at article 209. (However, if the members of the National Assembly consider that some changes are necessary, the Act must be resubmitted to the specific Commission, for it to include the proposed modifications within fifteen continuous days. Once the proposed changes are included and following receipt from the Commission, the majority of the members of the National Assembly shall approve and pass the Act).

In this case, the majority needed for the approval of the modifications proposed by the President of the Republic to the Act is a “simple majority” or “absolute majority”, i.e. half of the members of the National Assembly plus one member, as oppose to the “qualified majority”, a concept of majority that implies the approval by two thirds of the total electorate.

The Domestic Incorporation of International Conventions and Treaties

The National Assembly is the body in charge of approving the international conventions that have been signed by the President of Venezuela, and must do so after reviewing that its provisions do not contravene the Venezuelan domestic legal system. Following approval by the National Assembly, the President of Venezuela ratifies the convention, thereby integrating it into Venezuelan domestic law.

Furthermore, in the case of human rights conventions, they are introduced in the domestic system at the constitutional level. Additionally, when the provisions of these human rights treaties are more favourable than those of the domestic legislation, the former have preferential applicability with respect to the latter, including with respect to the Constitution, and are of immediate and direct application by Venezuelan tribunals and other public authorities.

2.2. Core Labour Rights in Venezuela: a step forward?

2.2.1. Freedom of association and the right to collective bargaining

2.2.1.1. The 1961 and 1999 Venezuelan Constitutions

The right of association for lawful purposes was previously established in article 70 of the 1961 Venezuelan Constitution, which now constitutes, with no significant changes, article 52 of the 1999 Venezuelan Constitution. Concerning the right to organise, article 95 of the 1999 Constitution establishes that workers without distinction and without the need for previous authorisation have the right to organise trade unions and the right to choose to join or not join these trade unions. In order to guarantee the principle of trade union independence, trade unions are not subject to administrative dissolution, suspension or intervention. Additionally, workers are protected against any

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167 Ibid. at articles 154, 187 (18).
168 Ibid. at articles 154, 236 (4).
169 Ibid. at article 23.
170 The format for the structuring of this whole section has been adapted from the structure used in the analysis of Venezuelan legislation in relation to the ILO Declaration on Fundamental Principles and Rights at Work in International Labour Office, Regional Office for the Americas, Regional Integration and Free Trade in the Americas: the Labour Challenge in CAN. (Project: Fundamental Principles and Rights at Work in the context of the XII IACML-OAS. Preliminary Document for Discussion, 2003), online: ILO <http://www.ilo.org/pe/spanish/260ameri/oitreg/activid/proyectos/ciutm/contetospdf/english/FTAAnv oxv091203.pdf> (accessed on October 25, 2004) [ILO, The Labour Challenge in CAN].
act of discrimination or interference, while trade unions' office holders and directors enjoy immunity from dismissal from their employment.\footnote{171}{See 1999 Constitution of Venezuela \textit{supra} note 142 at article 95.}

In respect to article 95, CEACR has consistently criticised the provisions of the second paragraph of this article, according to which "the bylaws and regulations of labour unions, shall establish the alternation of executive officers and representatives through universal, direct and secret vote."\footnote{172}{\textit{Ibid.}} CEACR's criticisms have been drawn in the following sense:

The Committee recalls that, by virtue of Article 3 of the Convention [No. 87\footnote{173}{Article 3 of the Freedom of Association Convention \textit{supra} note 75 states that: "1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes; 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."}}, workers' and employers' organisations shall have the right to draw up their constitutions and rules, and to elect their representatives in full freedom. In this respect, the imposition of the requirement for the alternation of trade union executive officers by legislative means constitutes an important obstacle to the guarantees set forth in the Convention.\footnote{174}{CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Venezuela (ratification: 1982) Published: 2001 [CEACR: Individual Observation concerning Convention No. 87 (2001)].}

In its most recent report concerning the application of Convention No. 187, the CEACR stated that it hoped "that article 95 ... [would] be amended in the near future so that the right of trade union leaders to be re-elected is recognized without ambiguity, if this is so provided in the statutes."\footnote{175}{CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Venezuela (ratification: 1982) Published: 2004 [CEACR: Individual Observation concerning Convention No. 87 (2004)]. However, note that the Government of Venezuela in a report submitted to the ILO and later transcribed in the Individual Observation of the ILCCR concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 and published 2003, stated that "the Government ... indicated that the term "alternation" did not refer to the prohibition of re-election, which in his view did not exist, but to the regular holding of elections by organisations."} Interestingly, these criticisms of inconsistency between the Venezuelan Constitution and the Freedom of Association Convention have arisen in the years following the adoption of the recently approved 1999 Constitution,
since this provision was not established in the previous Venezuelan Constitution of 1961.176

The right to collective bargaining is protected in article 96 of the 1999 Constitution. Accordingly, all workers from the public and private sectors have the right to voluntary collective bargaining and to sign collective bargaining agreements, without further requirements than those established by the law.177 This article is in fact more generous than its corresponding article of the previous Constitution. The favourable change was introduced in the sense of explicitly establishing that collective bargaining agreements shall cover all active workers at the moment of the signing as well as those who start working after the signing of such agreements has taken place.178

Another provision of the 1999 Constitution that has been the focus of disapproval by the CEACR is article 293 and the corresponding eighth transitory provision. Article 293 of the 1999 Constitution authorizes the electoral authority (CNE) to organise the elections of labour unions and the eighth transitory provision empowered the CNE to provisionally convene, organise, direct and supervise the election of labour unions, until the corresponding electoral laws were enacted. On November 2002, the Organic Electoral Act179 was adopted, and with it the eighth transitory provision was rendered “null and void in law”,180 which meant that the CNE had no longer the authority to convene and direct labour union elections.181

Nonetheless, article 33(2) of the Organic Electoral Act established among CNE’s obligations, once again, that of organising trade unions’ elections, in concordance with the aforementioned article 293. It is noteworthy; however, that -possibly due to previous ILO CEACR reports182- the article emphasises that trade union elections must be carried

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176 The corresponding article 95 in the derogated 1961 Constitution is article 91. Article 91 of the 1961 Venezuelan Constitution simply establishes, among other things, that workers’ and employers’ unions will not be subject to other additional requirements –for their existence and functioning- than those set forth by the law.
177 See 1999 Venezuelan Constitution, supra note 142 at article 96.
178 Ibid.
181 Ibid.
182 See e.g. CEACR: Individual Observation concerning Convention No. 87 (2001) supra note 174, when stating the following: “the Committee considers that the rules governing the procedures and arrangements
out respecting union’s autonomy and independence and in observance of international
treaties ratified by Venezuela on the subject matter.\footnote{See Organic Electoral Act, \textit{supra} note 179 at article 33(2).}

Notwithstanding the report by the Government of Venezuela, informing the
changes introduced in the domestic legislation, the CEACR still considered, in 2004, that
article 293 should be amended to remove the power given to the CNE over the
organisation of trade union elections, while expressing its concerns that article 33 of the
Organic Electoral Act was not in conformity with the provisions of Convention No. 87.\footnote{See CEACR: Individual Observation concerning Convention No. 87 (2004) \textit{supra} note 175.}

These criticisms, legitimatly founded on inconsistencies with ILO conventions, might
respond to a long history of Venezuelan Government intervention in labour union’s
affairs and strong tradition of a low demand of autonomy from the trade unions
themselves.\footnote{See Francisco José Iturraspe, “Derecho Colectivo deI Trabajo” in Oscar Hemandez Alvarez, coordinador, \textit{Comentarios a la Ley Orgdnica dei Trabajo y su Reglamento}, 3rd ed. (Barquisimeto, Venezuela: Juridicas Rinc6n, 2004) 440 at 447. (In fact, some trade unions even receive large subsidies from the Government, for the payment of functioning expenses and wages of trade union leaders).}

However, a strong tradition of governmental intervention in trade union’s
independence does not justify violations or threats to the rights of freedom of association
and the right to organise.

Additionally, the issue of the Government’s involvement in trade unions’ affairs
and elections becomes alarmingly dangerous when the interference is motivated by
political factors, especially when exerting a strong influence, by means of direct or
indirect coercion, on workers’ decision to join or not join a given union in either side of
the current political polarization. This interference is not a potential threat but an on
going violation of workers’ rights currently taking place in Venezuela, as will be
illustrated below. We are experiencing a phase of State’s involvement, legislatively and
politically, in trade unions’ affairs and in other areas, which has no precedent in
Venezuelan history at least under democratic governments.

for the election of trade union leaders should be determined in trade union statutes and not by a body
outside workers' organisations. The Committee also considers that the issue of trade union unity and the
status of the members of trade unions should be determined by decision of trade union organisations and in
no event imposed by law, since such an imposition constitutes one of the most serious violations
conceivable of freedom of association. In these conditions, the Committee requests the Government to take
measures to amend the constitutional provisions referred to above \textit{inter alia}, article 293, … , respecting
measures to guarantee freedom of association, and asks it to provide information in its next report on any
measures adopted in this respect”.

\footnote{See Organic Electoral Act, \textit{supra} note 179 at article 33(2).}

\footnote{See CEACR: Individual Observation concerning Convention No. 87 (2004) \textit{supra} note 175.}

\footnote{See Francisco José Iturraspe, “Derecho Colectivo del Trabajo” in Oscar Hernández Álvarez, coordinador, \textit{Comentarios a la Ley Orgánica del Trabajo y su Reglamento}, 3rd ed. (Barquisimeto, Venezuela: Juridicas Rincón, 2004) 440 at 447. (In fact, some trade unions even receive large subsidies from the Government, for the payment of functioning expenses and wages of trade union leaders).}
2.2.1.2. The 1997 Organic Labour Act

This Act contains over one hundred fifty articles, which extensively regulate trade unions and collective bargaining agreements. Some articles reiterate the aforementioned principles set out in the Venezuelan Constitution,\(^\text{186}\) while others protect in more detail the rights of workers.\(^\text{187}\)

The review of the reports issued by the ILO CEACR, the ILCCCR and the CFA allows for an examination of the numerous objections that have been raised about Venezuela’s Organic Labour Act,\(^\text{188}\) namely the requirement that only those foreign workers who have resided in Venezuela for more than ten years are eligible for being elected as trade union leaders is considered excessive;\(^\text{189}\) the authority empowered and tasks given to employers’ as well as to workers’ organisations is perceived as too broad;\(^\text{190}\) the requirement that it is necessary to gather one hundred or more independent workers in order to constitute a labour union is deemed disproportionate;\(^\text{191}\) the requirement that ten employers is the minimum number for the formation of employers’ organisations is also considered excessive;\(^\text{192}\) and the requisite that a trade union must represent the “absolute majority” of workers\(^\text{193}\) in a company for it to be allowed to bargain collectively is regarded as a violation of the right to collective bargaining.\(^\text{194}\)

Accordingly, on June 17, 2003, the National Assembly approved “in first discussion”\(^\text{195}\) a partial reform to the 1997 Organic Labour Act, in order to, as described

\(^{186}\) Namely, article 400 (right to organise and freedom of association), and article 396 (right to collective bargaining and the right to strike).

\(^{187}\) Other fundamental provisions of this act refer to the right of workers not to be constrained or forced, by direct or indirect means, to be union members or non-union members (article 401), with the corresponding obligation of employers of not making employment conditional on non-union membership or membership to a given union (article 443); the right not to be denied access to membership to a trade union if the conditions set by the law have been met by the worker (article 447); the right of trade unions to draw their own bylaws and statutes without interference, freely electing the board of director’s members (article 401); among others. (It is noteworthy that the Organic Electoral Act violates article 401 of the Organic Labour Act).

\(^{188}\) See ILO, The Labour Challenge in CAN\(^\text{ supra}\) note 170.

\(^{189}\) See 1997 Organic Labour Act,\(^\text{ supra}\) note 148 at article 404.

\(^{190}\) Ibid. at articles 408, 409.

\(^{191}\) Ibid. at article 418.

\(^{192}\) Ibid. at article 419.

\(^{193}\) For a definition of what “absolute majority” implies under Venezuelan Law, see\(^\text{ supra}\) note 165.

\(^{194}\) See 1997 Organic Labour Act,\(^\text{ supra}\) note 148 at article 473; the ILO, Labour Challenge in CAN\(^\text{ supra}\) note 170.

\(^{195}\) For an explanation on the procedure for the adoption of laws in Venezuela see\(^\text{ supra}\) notes 162 ff. and accompanying texts.
by the proponents of the reform, adjust the domestic labour law to the provisions of ILO conventions, according to the recommendations issued by the CEACR, ILCCR and CFA.\textsuperscript{196} In fact, the government representative emphasised that “all the observations made by the Committee of Experts had been incorporated in the Bill to amend the Organic Labour Act”.\textsuperscript{197}

When examining the bill of reform, however, one realizes that some but certainly not all of the observations made by the ILO committees were included. Indeed, the reform included, \textit{inter alia}, the reduction of the requirement of article 404 to 5 years; the decrease on the number of workers as per article 418 to 40 workers; and the reduction of the number of employers as per article 419 to 4 employers.\textsuperscript{198} However, there are no changes introduced in respect to article 408, article 409 and the polemic and strongly criticised by the ILO,\textsuperscript{199} article 473 (2).\textsuperscript{200} Additionally, as of December 1, 2004, the reform bill approved in preliminary discussion in June 2003 has not been passed yet, despite the report by the Government that it would be approved by the second semester of 2004.\textsuperscript{201}

2.2.1.3. Other Venezuelan Legislation

Other Acts issued by the AN also regulate the right to organise and bargain collectively in specific working sectors, such as the 1980 Organic Education Act\textsuperscript{202} and

\textsuperscript{199} CEACR: Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Venezuela (ratification: 1968) Published: 2000 [CEACR: Individual Observation concerning Convention No. 98 (2000)] (“The Committee reminds the Government that this provision [article 473(2)] does not promote collective bargaining within the meaning of Article 4. The Committee requests the Government to take the necessary steps to amend this provision so that in cases where no union organisation represents an absolute majority of workers, minority organisations may jointly negotiate a collective agreement applicable to the enterprise or negotiating unit, or at least conclude a collective agreement on behalf of their members”).
\textsuperscript{200} See Draft Bill for Amendment of the 1997 Organic Labour Act supra note 198.
\textsuperscript{201} See ILCCR: Individual Observation concerning Convention 87 (2004), supra note 197.
\textsuperscript{202} Ley Orgánica de la Educación, Official Gazette dated July 28, 1980, No. 2.635. For example, article 84 of this Organic Education Act regulates the right of freedom of association and the right to organise.
the 1998 Child and Adolescent Protection Act. The Child and Adolescent Protection Act protects the right of freedom of association and the right to organise. Moreover, children and adolescents are expressly permitted to be members of the boards of directors of trade unions. This provision nullifies the first part of article 404 of the Organic Labour Act, by which only workers considered adults (eighteen years and older) could hold office in trade unions.

2.2.1.4. Overall analysis: Venezuela, Freedom of Association and the Right to Collective Bargaining

Having analysed Venezuelan legal texts' adequacy with ILO conventions and reports, it is necessary to examine the actual status of these rights in Venezuela. In this context, Provea has repeatedly expressed concern about the political instability in Venezuela over the course of the last years. In its 2003 report, for example, Provea noted that "the right to organise and the right to collective bargaining continued to be imperilled in a context of great social and political polarization".

International organisations have also expressed alarm about the current political and social situation in Venezuela. For example, the ILO has demonstrated its concern about the number of "urgent and serious cases" that have been submitted to the CFA.

In this trend, the Committee noted the following:

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203 See Child and Adolescent Protection Act supra note 151 at article 84.
204 ibid. at article 101.
205 ibid. at article 84(a).
207 See ILCCR: Individual Observation concerning Convention 87 (2004), supra note 197; ILO, CFA, Case No. 2254, 334th Report (Venezuela), Document: Vol. LXXXVII, 2004, Series B, No. 2, complaint against the Government of Venezuela presented by the IOE and FEDECAMARAS, [ILO, CFA Case No. 2254, report No. 334] Indeed, there are at least 10 cases of complaints submitted against the current administration for grave and severe violations of Conventions 87 and 98. Some of the complaints submitted since 2000 constitute cases No. 2058 (2000), No. 2067 (2001), No. 2080 (2001), No. 2088 (2004), No. 2154 (2002), No. 2160 (2002), No. 2161 (2002), No. 2191 (2003), No. 2249 (2004), and No. 2254 (2004). Such complaints have been submitted by organisations in different sectors of Venezuelan society, namely the CTV and FEDECAMARAS, as well as by international organisations, such as the IOE, the ICFTU, and the CLAT. The cases concern a wide range of alleged violations of the right of freedom of association and the right to organise, such as murder of trade unionists; Government interference in detriment of workers' unions; exclusion by the Government of certain workers' organisation from the tripartite dialogue and decision-making process; dismissals and judicial proceedings against trade union officers; and the obstruction of the right to collective bargaining. Other allegations as registered in Case No. 2254 include the "physical, economic and moral harassment, including threats and attacks, of the Venezuelan employers
The Committee expressed its great concern at the growing number of acts of violence against the social partners and once again brought to the attention of the Government that \textit{respect for civil liberties was essential to the exercise of trade union rights}, and it urged the Government to take the necessary measures without further delay so that workers' and employers' organisations could fully exercise the rights recognized by the Convention in a climate of complete security. In view of the fact that the problems raised by the Committee of Experts constituted serious violations of freedom of association, the Committee urged the Government to renew dialogue with the social partners.\footnote{ILCCR: Convention No. 87 (Venezuela) (2004) \textit{supra} note 197. [emphasis added].}

One of the political problems that is most directly affecting the effective recognition and exercise of fundamental labour rights, especially those of freedom of association and the right to collective bargaining is the reluctance of the current administration to acknowledge the executive committee of the CTV as legitimate, following the election held in 2001.\footnote{See \textit{Situació de los Derechos Humanos en Venezuela: Informe Anual Octubre 2001/Septiembre 2002} (Caracas: Provea, 2002) [Provea, 2002] at 115.} According to the CNE, the CTV has not send a proof of affirmative ballots to this electoral entity, thereby failing to comply with the Special Statute for the Renewal of Trade Union Representatives issued by the CNE in April 2001.\footnote{\textit{Ibid.} at 115, 116; see also \textit{Estatuto Especial para la Renovación de la Dirigencia Sindical}, Official Gazette N° 37,181 dated April 20, 2001; In my opinion, the Government arguments for not recognizing the executive committee of the CTV have been weak, based on doubtful accusations, which have been difficult to substantiate and seem rather a disguise for disapproval based on political reasons.} The executive committee of the CTV has denied these allegations, by stating that it has indeed sent the registry to the CNE confirming the votes obtained.\footnote{See Provea, 2003 \textit{supra} note 206 at 116.} Moreover, in a surprising announcement on January 12, 2005, the CNE decided to put an end to the confusion on the legitimacy of the Executive Committee of the CTV, and unilaterally declared the elections held in October 2001 null and void. The decision has not yet been formally released, thus I am unable to examine the arguments substantiating the resolution. However, the arguments are most likely to be that there was and their officials by the authorities or people close to the Government \ldots; the operation of violent paramilitary groups with governmental support, with action against the facilities of an employers' organisation and against demonstration activities by FEDECAMARAS; the creation of an atmosphere hostile to employers in order to allow the authorities (and on occasion to encourage them in) the dispossession and occupation of farms in full production, in violation with the Constitution and legislation and without following legal procedures; the complainant organisations refer to 180 cases of illegal invasions of productive land and indicate that most of these cases have not been resolved by the relevant authorities.\textsuperscript{208}
fraud in the electoral process and thus the CTV has had an illegitimate Executive Committee since 2001. The decision was backed by the CNE’s board of directors, with the exception of Sobella Mejías, who considered “illogical” to void the results of the electoral process considering that the next elections for the CTV’s executive committee were going to be held in March 2005, only two months after the decision was issued.  

In addition to the complaints filed by the CTV to the CFA, concerning the lack of recognition of its executive committee, the CTV has also lodged complaints before the ILO CFA, alleging anti-union legislation, namely the enactment of the Special Statute for the Renewal of Trade Union Representatives, alleging the violation of trade union autonomy. In reference to this statute, the CFA has stated:

... the Committee regrets to note that although in March 2001 it urged the Government to put an end to the functions of the [CNE] in respect of trade union elections, the CNE decided to enact the Special Statute for the renewal of the trade union leadership. ... Moreover, the Committee observes that the Statute to which the CTV objects regulates in an excessively detailed manner the electoral process of trade unions ... The Committee recalls that "the regulation of procedures and methods for the election of trade union officials is primarily to be governed by the trade union’s rules themselves. The fundamental idea of Article 3 of Convention No. 87 is that workers and employers may decide for themselves the rules which should govern the administration of their organisations and the elections which are held therein" (see Digest of decisions and principles of the [CFA], 4th edition, 1996, para. 354) ... In these circumstances, the Committee once again strongly urges the Government to put an end to the functions of the CNE that are established in the National Constitution and to repeal the Special Statute on the renewal of trade union leadership.

This situation was aggravated in 2003 with the installation of a new national workers' confederation that had the support of the current administration: the UNT. Moreover, the constitution of this organisation is “speculated to be the result, not of the will of workers, but of the Government, which is investing in a general union that it can...

214 Ibid. at para. 512. (In this case, the CFA also criticised that such Statute provided for an electoral register to be established in the CNE, that would list trade union members, which “does not respect rights of personality (including privacy rights) ... (since) such a register may be used to compile blacklists of workers”)
In an attempt to gain recognition, the representatives of UNT claim, supported by President Chávez, that it is the UNT, and not the CTV, the currently most representative workers' organisation in Venezuela. Determining which confederation is the most representative of workers is of extreme importance domestically as well as internationally.

While in May 2002, the Electoral Chamber of the Supreme Court of Justice ruled that it was a “notorious fact” that the CTV was the most representative organisation in the country, currently there is no certainty as to which organisation is today, the most representative of Venezuelan workers. According to the ILO, the determination of the most representative organisation is not to be left to the discretion of government. On the contrary, it should be determined through the legal means established, namely a “trade union referendum” (referendum sindical) in order to decide through an election among workers which organisation, either CTV or UNT, has the most amount of

216 ILO, The Labour Challenge in CAN, supra note 170 at 20; see also ILO, CFA, Case No. 2249, 334th Report (Venezuela): Complaints against the Government of Venezuela presented by CTV, ICFTU, UNAPETROL and FEDEUNEP [ILO, CFA, Case No. 2249, Report No. 334] at para. 876(c) (in this sense, the CFA urged the Government to “abstain from promoting the establishment of other trade unions or confederations”).


218 In Venezuela, many decisions concerning workers such as the decision over the amount of the minimum wage are made by a National Tripartite Commission, which includes the most representative employers’ organisation, the most representative workers’ organisation and the Executive branch of government, such as the raise of the minimum wage.

219 This issue is important considering the ILO tripartite structure and the Members’ tripartite representation. In this respect, the ILO Constitution (article 3(5)) establishes that Member States “undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organisations, if such organisations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries.”; Provea, 2003, supra note 206 at 137. (In fact, the CTV did not have any representation at the 2003 International Labour Conference, although it did the following year. In this vein, it is noteworthy that the CTV did not have any representation at the 2002 XV ILO American Regional Meeting either).

220 Provea, 2003, ibid.

221 Ibid. at 137, 138; see also Provea, Situación de los Derechos Humanos en Venezuela: Informe Anual Octubre 2003/Septiembre 2004 (Caracas: Provea, 2004) [Provea, 2004] at 105, 106 (In an effort to seek official recognition of the CTV’s elected Executive Committee and of the organisation as the most representative of Venezuelan workers, the CTV filed a petition and an action of protection against the existence of discriminatory acts in detriment of the CTV and in favour of the UNT. The petition and the action of protection (‘amparo cautelar’) were filed before the Electoral Chamber of the Supreme Court of Justice. The action of protection was dismissed, and months later, after having taking cognizance of the petition, the Electoral Chamber declared itself “legally unqualified or incompetent” to resolve the petition, and referred it to a different chamber in the Supreme Court).

222 See Provea, 2003, supra note 206 at 137.
affiliated workers. The potential risk of holding these elections would be fraud, or most likely the non-recognition of the results, by either of the political fractions, given the abovementioned political polarization, between civil society members and also between workers.

One issue is certain, however, the workers are the ones suffering the most negative effects of this lack of consensus. Thus and in response to this situation of instability, the CEACR, adopted in its 2004 report, the view expressed in a previous CFA report, and requested the Government of Venezuela to immediately recognize the executive committee of the CTV. The ILO has repeatedly declared that it "cannot accept threatening statements (against the CTV) by the authorities of the country", urging the Government of Venezuela to "refrain from making hostile declarations against the CTV" and to "show their neutrality toward the trade unions and refrain from all discriminatory treatment, particularly of the CTV."  

In relation to social dialogue, the Committee noted in 2003 that “the Government does not hold consultations with the main social partners, or at least does not do so in a significant manner or attempt to reach agreed solutions, particularly on matters affecting the interests of those partners.” Thus, the Committee urged the Government to commence “an in-depth dialogue with all the social partners without exclusion”. The Government responded by reaching an agreement, assisted by the Carter Center, the OAS and the UNDP, with other sectors of Venezuelan society, including the opposition

223 Provea, 2004, supra note 221 at 106.
224 CEACR: Convention No. 87 (Venezuela) (2004), supra note 175. (The CEACR appointed to the fact that the CFA has argued in several occasions that “in order to avoid the danger of serious limitation on the right of workers to elect their representatives in full freedom, complaints brought before labour courts by an administrative authority challenging the results of trade union elections should not - pending the final outcome of the judicial proceedings - have the effect of suspending the validity of such elections (see Digest of decisions and principles of the Freedom of Association Committee, 1996, para. 404)).
225 Ibid.; Provea, 2004, supra note 221. (In this respect, it is noteworthy that in its 2004 report, Provea points to the CEACR individual observation concerning the application of Tripartite Consultation (International Labour Standards) Convention, by which the CEACR urges the Government of Venezuela to ensure that the consultations required in convention no. 144 are enabled with “representative organisations” that exercise the right of freedom of association).
226 See ILO, CFA, Case No. 2067, Report No. 326 supra note 213 at 514; see also ILO, CFA, Case No. 2249, Report No. 334, supra note 216 at para. 871.
229 Ibid.
represented by the “Democratic Coordination”, in order “to bring to an end a phase of political instability caused by the failed coup d’état of April 2002”.230

In respect to this accord, the CEACR hoped that “intense dialogue [would] immediately be initiated with all the social partners, without any exclusion whatsoever”.231 However, there has not been much space for social dialogue or tripartism in the past years or even following the signing of the accord, especially with the CTV, which plays a key role in the defence of workers’ rights, due mainly to the Government’s reluctance to recognise the CTV as the legitimate workers’ union in Venezuela.

Concerning additional amendments introduced to the legislation, the CEACR has observed a positive change concerning the repealing of a resolution issued by the Office of the Comptroller of the Republic,232 which had been previously criticised because it required trade union officials to “make a sworn statement of assets” within 30 days of their appointment to office and within 30 days following the end of their mandate.233 A new resolution234 has been issued establishing that the sworn statement of assets will take place when and only if trade union officers voluntarily decide to do so. This modification does not guarantee however, that in case trade union officials voluntarily decide not to make a sworn statement of assets, there will not be any direct or indirect measure of retaliation or discrimination against them.

In relation to the right to collective bargaining, Provea has also denounced severe threats to the full exercise of this right in detriment of Venezuelan workers both in the private and public sectors, given the high polarization based on political grounds.235 Workers from both sides of the conflict have alleged these situations. Workers from the private sector have alleged the existence of obstacles for the signing of collective bargaining agreements with unions suspected to be affiliated to the Government or that support Chávez. Workers from the public sector have encountered difficulties for signing

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230 CEACR: Convention No. 87 (Venezuela) (2004), supra note 175.
231 Ibid.
232 See the repealed Resolution No. 01-00-012, issued by the Audit Office of the Bolivarian Republic of Venezuela, Official Gazette No. 37.179, dated April 17, 2001.
233 See CEACR: Convention 87 (Venezuela) (2004), supra note 175.
235 See Provea, 2004, supra note 221 at 112.
collective bargaining agreements with unions that are considered to be “anti-Chávez” or that favour Venezuela’s political opposition.

Accordingly, almost all collective bargaining agreements signed by workers from the public sector have been questioned by the CTV based on alleged favouritism to unions affiliated with the Government of President Chávez. Moreover, the CTV has denounced that the Executive branch of the government has obstructed the signing of collective bargaining agreements of workers from the public sector with trade unions that are affiliated to the CTV.

In this vein, the CTV declared in 2004 that the Ministry of Labour refused to recognize more than 300 projects of collective bargaining agreements. Previously, in 2003, it denounced that more than one million workers in the public sector had not been included in collective bargaining agreements; while more than 500 agreements at the national, regional and municipal level were paralysed, affecting workers in various public areas such as health, education, electricity, transportation, communications, environment and postal services. In 2002, the CTV declared that the Executive branch of the government was planning to stop the negotiation for the renewal of more than 600 agreements, under arguments of financial deficit.

Lastly, it is important to comment on a recent controversial issue concerning trade union elections, which seems to be starting to become a recurrent problem. FEDEUNEPE has been constituted as the trade union of workers from the public sector for several years. Despite the validation of FEDEUNEPE’s 2002 elections by the CNE, the Executive branch of the government did not recognize either its executive committee or its collective bargaining agreement. As a result, the Government negotiated and signed the Fourth Collective Agreement (IV Convención Colectiva Marco) with a newly created trade union, namely FENTRASEP, thereby contravening a prior decision of the First
Administrative Court that suspended the negotiations for the signing of the collective bargaining agreement.\textsuperscript{242}

According to the Organic Labour Act, the employer must sign one collective bargaining agreement with the trade union that represents the absolute majority\textsuperscript{243} of its employees.\textsuperscript{244} It is noteworthy that prior to the signing of the agreement, both the CNE and the Director of the Ministry of Labour had indeed confirmed that FEDEUNEP was the most representative trade union of workers in the public sector.\textsuperscript{245} The Director of the Ministry of Labour, however, appointed to the fact that FEDEUNEP’s proposed collective bargaining agreement had been turned down by the Labour Inspectorate with observations.\textsuperscript{246} Consequently, FEDEUNEP was excluded from the negotiation of this agreement. In this respect, FEDEUNEP has filed several domestic judicial appeals, and has also proceeded to file a complaint before the ILO.\textsuperscript{247} In response to this complaint, the CFA has requested the Government, albeit unsuccessfully, to reply to the allegations made by FEDEUNEP.\textsuperscript{248} Even if the Government replies to these allegations, it does not necessarily mean that the Government will comply with the recommendations that might eventually be addressed by the ILO CFA. Actually, compliance seems rather unlikely, given the history of disregard of ILO recommendations by the current administration, especially concerning recommendations of refraining from interference in trade union’s affairs, although to a lesser extent recommendations concerning changes to the domestic legislation.

2.2.2. The elimination of all forms of forced or compulsory labour

\textsuperscript{242} See ibid.; see also Provea, 2004, supra note 221 at 113.

\textsuperscript{243} For a definition of what “absolute majority” implies according to Venezuelan law, see supra note 165.

\textsuperscript{244} See 1997 Organic Labour Act supra note 148 at article 154; see also Provea, 2003, supra note 206 at 145.

\textsuperscript{245} Provea, 2003, ibid.

\textsuperscript{246} Ibid.

\textsuperscript{247} See Case No. 2249, Report No. 334, supra note 216.

\textsuperscript{248} In this respect see ILO, CFA, Case No. 2249, 333\textsuperscript{rd} Report (Venezuela), complaints against the Government of Venezuela presented by CTV, ICFTU, UNAPETROL and FEDEUNEP at para. 1140 (j). (Accordingly, the CFA stated: “[a]s regards the alleged obstruction by the labour inspectorate of the draft fourth collective agreement submitted by FEDEUNEP, imposing demands that go beyond the law or are impossible to fulfill in practice within the prescribed deadline and subsequently rejecting the draft, as well as acceptance of a new draft (which was converted into a collective agreement) originating from six of the 17 FEDEUNEP leaders who formed a federation (FENTRASEP) approved by the Government authorities and the Ministry of Labour, the Committee regrets that the Government has not replied to these allegations and urges it to send its observations fully and without delay”).
2.2.2.1. The 1961 and 1999 Venezuelan Constitutions

The right –and duty– to work was protected by the 1961 Constitution but is more broadly stipulated in the 1999 Venezuelan Constitution. The 1999 constitution copied from the previous one, the Government’s obligation to provide for a job that would provide a “dignified and decorous” living, but included provisions referring to employers’ obligation in guaranteeing adequate safety, hygienic and environmental conditions at work. Furthermore, the 1999 Constitution protects the right not to be submitted to slavery or bonded labour, while sanctioning all forms of trafficking, especially in respect to women, children and adolescents. This article represents an innovation in the Venezuelan Constitution, since the previous 1961 Constitution, although generally forbidding the deprivation of freedom, did not specifically prohibited slavery or trafficking practices.

2.2.2.2. Other Venezuelan Legislation

Venezuelan legal provisions forbid forced or indentured labour by establishing that no one shall impede the right of others to work or force others to work against their will. In respect to children, the 1998 Child and Adolescent Protection act prohibits slavery, bonded labour and forced labour. In respect to the punishment, article imposes between one and three years of imprisonment to those who force children and adolescents to work. Concerning the sanctions for adolescents who have been convicted of an illegal act or crime, article regulates community work, which cannot exceed six months or eight hours per week, and must not disrupt their education.

Articles 42 and 44 of the 2001 Organic Code of Criminal Procedure establish that during the course of the trial for minor crimes, the defendant, in certain

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249 See 1961 Venezuelan Constitution, supra note 141 at article 54. This article establishes the all capable persons have the duty to work.
250 Ibid. at article 84.
251 See 1999 Venezuelan Constitution supra note 142 at article 87.
252 Ibid. at article 54.
253 Article 32 of the Organic Labour Act stipulates an exception to this provision: the work of others can be suspended if the rights of others or the rights of society are being violated.
254 See Child and Adolescent Protection Act, supra note 151 at article 38.
255 This provision is in line with the Forced Labour Convention, when regulating that the notion of forced labour excludes the labour performed by a person by virtue of a prior court indictment. See supra note 81 and accompanying text.
circumstances, can request the conditional suspension of the criminal proceeding, by obliging to render services or a labour activity in favour of the State or public institutions. Concerning the work by prisoners in penitentiary institutions, the 1993 Reduction of the Punishment through Work and Study Act,\textsuperscript{258} plays an important role. This act allows prisoners to substitute two days of work or study for each day of imprisonment.\textsuperscript{259} The work is emphasised to be voluntary in article 2, and it can be performed inside or outside the penitentiary.

2.2.2.3. Overall analysis: Venezuela and the elimination of all forms of forced or compulsory labour

On October 14, 1997, the Venezuelan Supreme Court made a great improvement in the field of human rights with a decision that nullified the highly controversial 1956 Vagrants and Rogues Act,\textsuperscript{260} because of its unconstitutionality.\textsuperscript{261} This act stipulated that those defined as vagrants and rogues by a previous administrative decision, had to be interned for a period of up to five years, in a rehabilitation centre or working establishment, an agricultural colony or a labour camp. The objective was to “reform” them and put them out of harm’s way, since they were perceived as a threat to society.

Additionally, the act had been widely criticised by the ILO, since compulsion to work was inconsistent with the Forced Labour Convention (no. 29).\textsuperscript{262} It was also severely objected by international NGOs,\textsuperscript{263} given the flagrant violations of human rights, namely the violation of the right not to be subjected to arbitrary arrest or detention (right

\textsuperscript{257} Minor crimes are defined as those with a punishment of imprisonment up to three years.

\textsuperscript{258} See \textit{Ley de Redención Judicial de la Pena por el Trabajo y el Estudio}, Official Gazette dated October 3, 1993, No. 4.623.

\textsuperscript{259} See \textit{ibid.} at article 3.

\textsuperscript{260} See \textit{Ley sobre Vagos y Maleantes}, Official Gazette dated August 16, 1956, No. 25.129.

\textsuperscript{261} See \textit{Abogado José Fernando Nuñez contra la "Ley sobre Vagos y Maleantes" (José Fernando Nuñez v. the Vagrants and Rogues Act)}, [1997] Sala Plena, Supreme Court of Justice, exp. 251 [\textit{Nuñez}]

\textsuperscript{262} The ILO criticised this Act in several occasions, for example, in its CEACR’s Individual Observations concerning Convention No. 29, published in 1990, 1992, 1994, and 1997.

\textsuperscript{263} See e.g., HRW, “Castigados sin Condena: Condiciones de las Prisiones en Venezuela” (New York: HRW, 1998) at para. 75, online: HRW
to liberty); the violation of the minimum guarantees of due process, including the right to a “fair and public hearing” by an impartial tribunal; and the contravention of the “principle of legality”.

In relation to prison labour, as previously examined, Venezuelan legislation allows for the reduction of the penalty through working activities or educational programs. Without the intention of seeming negative, however, I cannot help but regarding this act as naïve and not very realistically adapted to Venezuelan penitentiary system. The severe situation in Venezuelan prisons, given the high rates of overcrowding and the precarious sanitary settings, resulting in the degradation of prisoners’ living conditions, have induced Provea to conclude that those punishments should be considered inhumane and degrading as per the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Moreover, Provea has denounced that the Government does not invest in the penitentiary system, and even in 2004, when the Government invested more than in the previous year, the conditions did not significantly improve. Taking all this into consideration, it is not surprising to read reports from foreign NGOs, namely HRW, declare that Venezuelan prisons and penitentiary centres offer very few opportunities for employment. Hence, acts such as the Reduction of the Punishment Act are of nearly impossible application.

264 See ICCPR, supra note 2 at article 9(1); see also 1999 Venezuelan Constitution, supra note 142 at article 44(1).
265 See Ibid., at article 14; see also 1999 Venezuelan Constitution, Ibid. at article 49.
266 See ICCPR, ibid. at article 14(1); see also 1999 Venezuelan Constitution ibid. at article 49(3).
267 Also denominated nullum crimen, nulla poena sine lege previa, the principle of legality refers to the principle of law that states that no one shall be punished for acts or omissions, which have not previously been defined as crimes or infractions by the law. See 1999 Venezuelan Constitution ibid at article 49(6).
268 For a complete review of the constitutional rights that were being violated by the Vagrants and Rogues Act, see Nuñez, supra note 261.
269 See e.g. Provea, 2003 supra note 206 at 403, 404. (In the prison commonly denominated “La Planta” in Caracas, the capacity is of 400 prisoners, while there are reportedly, 1,022; the prison in San Juan de los Morros, in Guarico State has a capacity for 275 prisoners while it currently accommodates 931; and in the Carupano Prison in Sucre State, there is a capacity for 80 prisoners and there are currently 366 prisoners living there. In this sense, Provea reminds us that the number of prisoners living in Venezuelan prisons is always far above the figures publicized by the Government).
270 Ibid.
271 Provea, 2004, supra note 221 at 412.
272 See generally HRW, supra note 262.
Concerning slavery, it is accepted that, today, the most slavery-like condition consists in the trafficking of human beings, especially women and children who are more vulnerable of being submitted to those practices. In its last individual observation on Venezuela, the CEACR, based partly on reports made by the UN Committee on Economic, Social and Cultural Rights and on comments made by the ICFTU, expressed its concerns on the existence of alarming numbers of trafficked women and children for the purposes of prostitution in the country.

Moreover, the UN Committee on Human Rights has expressed that it is deeply concerned about the lack of information on the trafficking problem in Venezuela and the actions taken to combat it. In this respect, the ILO CEACR stated the following:

The Committee hopes that the Government will provide fuller information on human trafficking, particularly trafficking in children, in Venezuela and on the measures taken to prevent and combat it. Noting that the Government has not responded to the general observation of 2000, the Committee invites it to provide the information requested therein... The Committee notes that a number of provisions have recently been promulgated to allow human trafficking to be punished ... The Committee asks the Government to provide information on the effect given in practice to the abovementioned provisions and on the number of prosecutions for trafficking and the penalties imposed.

2.2.3. The Effective Abolition of Child Labour

2.2.3.1. The 1961 and 1999 Venezuelan Constitutions

The 1999 Constitution provides a more complete and broader framework for the protection of the rights of children and adolescents than its predecessor. As examined above, the new constitution is in line with the UNCRC. Moreover, the new Constitution establishes that the principles for the protection of children and adolescents that have been developed in the terms of the Convention on the Rights of the Child and

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277 See 1961 Venezuelan Constitution, supra note 141 at article 74.
278 See supra note 155 and accompanying text.
other international treaties ratified by Venezuela, shall be respected, guaranteed and developed by national institutions and special tribunals.\textsuperscript{279}

2.2.3.2. The 1997 Organic Labour Act\textsuperscript{280}

As pointed out in the previous chapter, not all work performed by children is considered to be child labour, in the terms of ILO conventions. Only those working activities that would imperil the normal and healthy physical and moral development of children are subject to repudiation, seeking to be eradicated.\textsuperscript{281} Accordingly, articles 249 and 250, for example prohibit "minors"\textsuperscript{282} to engage in working activities that would: (i) put their lives or health at risk;\textsuperscript{283} (ii) imply the usage of strength beyond their own; (iii) impede their physical and normal development;\textsuperscript{284} or (iv) imperil their intellectual\textsuperscript{285} and moral formation.\textsuperscript{286}

It is important to highlight that the law prohibits discrimination in respect to wages in detriment of children and adolescents, when their work is carried out in the same circumstances as those of an adult.\textsuperscript{287} Other important provisions are those concerning domestic work,\textsuperscript{288} the work that is essentially intermittent or that requires the

\textsuperscript{279} See 1999 Venezuelan Constitution, supra note 142 at article 78.
\textsuperscript{280} Some articles of the Organic Labour Act regulating the work of children and young persons are still in force, despite the partial derogation by the Child and Adolescent Protection Act. See supra note 153 and accompanying text.
\textsuperscript{281} See supra notes 99 ff. and accompanying texts.
\textsuperscript{282} This term is used in the Organic Labour Act, and thus reproduced in this section commenting the provisions of such Act. However, the currently appropriate term for young persons under the age of 18 is "children and adolescents".
\textsuperscript{283} See e.g. articles 252 and 253 of the Organic Labour Act referring to the medical examinations young persons must submit themselves as a means to provide certification of their physical adaptability and suitability for the tasks that they will be expected to performed (medical certificate prior to engaging in labour) or for the job that they are undertaking (medical examinations provided by the employer on a regular basis).
\textsuperscript{284} See e.g. ibid. at article 257, regulating that the work of young persons under the age of eighteen years old must only be carried out during the day, i.e. between 6 am and 7 pm, except when otherwise authorised.
\textsuperscript{285} See e.g. ibid. at article 261. This article establishes that employers have the obligation to provide for jobs that are compatible with their education.
\textsuperscript{286} Other more specific provisions for the employment in certain industries, such as the entertainment business are also regulated by the Organic Labour Act. Article 251 prohibits the persons who are below the age of 16 to work in public shows, films, theatres, radio or television shows, commercials or other publications of any kind, unless duly authorized by their legal representative and INAM. The INAM has now been substituted by CNDNA, see supra note 160 and accompanying text.
\textsuperscript{287} See the 1997 Organic Labour Act, supra note 148 at article 258.
\textsuperscript{288} See articles 256 and 262 of the Organic Labour Act, establishing that young persons engaged in domestic work must rest during twelve continuing hours during the day; and that everyone who hires a young person to perform domestic work must notify it to the INAM (now CNDNA, see supra note 160)
sole presence, the provision of vacations, and the mandatory ‘book of registry’ that all businesses shall have with the data of their underage employees.

2.2.3.3. The 1998 Child and Adolescent Protection Act

The minimum age for children and adolescents to engage in working activities is fourteen (14), according to article 96. This act establishes that children and adolescents have the right to, inter alia, physical, mental and moral integrity, protecting them from torture, inhumane, cruel or degrading treatment; the right to be protected from abuse or sexual exploitation of any kind; the right not to be submitted to slavery, bondage and forced labour; the right of obtaining due protection from the State, their family and society, especially protection against economic exploitation and any other labour that might disrupt their education, or could be dangerous or hazardous for their health or development; and the right to an education that is in concordance with their working activity. Furthermore, the working day for children and adolescents is set to be of a maximum of six hours per day that have to be divided in two periods of maximum four hours each, with one hour of rest per day. The total amount of working hours cannot and to the Employment Agency within fifteen days, for these government agencies to make sure that young persons receive proper education and that the job is performed under the right circumstances.

According to article 255 of the Organic Labour Act, there is a maximum of eight (8) working hours per day, with minimum rest of one (1) hour for children and adolescents who are below the age of sixteen (16) years old and engage in such work that is essentially intermittent or that requires their sole presence.

See 1997 Organic Labour Act, supra note 148 at article 260. This article stipulates that employers shall ensure that young persons enjoy their vacation time in the period designated for the school vacations.

See 1997 Organic Labour Act, ibid. at article 265.

However, this minimum age could vary under two circumstances: (i) the Executive branch of the Government, through the issuing of an Executive Decree, could establish minimum ages above the age of 14, for jobs that could be dangerous or hazardous to health; (ii) the Protection Council may authorise adolescents who are below the minimum age of 14 to work, provided that such activity does not imperil the exercise of their right to education; is not dangerous or hazardous to their health or overall development; or such activity is not expressly prohibited by the law. In any case, if the minimum age for employment is infringed or violated, children and adolescents will still enjoy the rights, benefits and remunerations due by virtue of their work.

See Child and Adolescent Protection Act, supra note 151 at article 32.

Ibid. at article 33.

Ibid. at article 38.

Ibid. at article 94.

For the right of every child and adolescent to an education, see ibid. at article 53.

Ibid. at article 95.
It is prohibited for children and adolescents to work overtime.\textsuperscript{299}

In relation to the infringement of its provisions concerning child labour, the Child and Adolescent Protection Act contains penalties consisting of fines ranging from one to fifty months’ income or imprisonment ranging from six months to eight years. The violations accounting for monetary sanctions are, \textit{inter alia}, child pornography performed either in films, plays or television shows;\textsuperscript{300} admission to or profiting from the work carried out by children, who are between the ages of 8 and 12 years old, or, in the case of adolescents, between the ages of 12 and 15 years old, without due authorisation;\textsuperscript{301} and admission to or employment of adolescents who are not registered in the Registry of Working Adolescents.\textsuperscript{302}

Among the more severe violations are those accounting to a penalty of imprisonment, such as the submission of children or adolescents to forced labour,\textsuperscript{303} admission to or profiting from working activities that adolescents are not allowed by virtue of medical examinations;\textsuperscript{304} admission to or profiting from the work carried out by children who are eight years old or younger;\textsuperscript{305} and promotion, management or profit from sexual exploitation practices.\textsuperscript{306}

\section*{2.2.3.4. Overall analysis: Venezuela and the elimination of child labour}

The Committee of Experts on the Application of Conventions and Recommendations noted in its 1998 individual report, that at the time a wide variety of socio-economic measures were adopted in the efforts to eliminate child labour. Accordingly, it commented on the children and adolescents provisions of the IXth National Plan,\textsuperscript{307} the Inter-sectoral Plan of Attention to Childhood and Adolescence,\textsuperscript{308}

\footnotesize
\begin{itemize}
  \item \textsuperscript{299} \textit{Ibid.} at article 102.
  \item \textsuperscript{300} \textit{Ibid.} at article 237.
  \item \textsuperscript{301} \textit{Ibid.} at articles 238 and 239.
  \item \textsuperscript{302} \textit{Ibid.} at article 240.
  \item \textsuperscript{303} \textit{Ibid.} at article 255.
  \item \textsuperscript{304} \textit{Ibid.} at article 256.
  \item \textsuperscript{305} \textit{Ibid.} at article 257.
  \item \textsuperscript{306} \textit{Ibid.} at article 258.
  \item \textsuperscript{307} The IXth National Plan (IX Plan de la Nación) outlined the Government policies and public programs for the 1994-1999 period. The CEACR commented on the IXth National Plan by stating that it included: “provisions on the promotion of participation of civil society in the protection and socialization of
\end{itemize}
the Decree No. 1366 issued on June 12, 1996, and some of the social measures adopted in the framework of the "Agenda Venezuela." 

In its latest individual report of 2004, the CEACR was concerned with the communication of the ICFTU, stating that child labour was "widespread in the informal sector and in unregulated activities", with estimates of children working in agriculture, domestic work and as street vendors rising up to 1.2 million, while other 300,000 children were reported to be working in the formal sector. Given these alarming numbers, the Committee, while noting the Government's response alleging imprecision and lack of substance in the ICFTU's report, requested the Government of Venezuela to provide more information on child labour, especially in the informal sector.

As mentioned previously, the 2004 report on child labour was the only annual report submitted by the Government of Venezuela to the ILO since the year 2000. In relation to this report, the ILO commented on various positive domestic policies but it also informed on some loopholes and shortcomings of Venezuela's position towards the issue.

childhood and adolescence, special programmes aimed at the reinsertion of those who have been excluded from the education system, creation of a Social Network for Protection of Childhood and Adolescence, widening and diversification of services offered by the INAM for children and adolescents in especially difficult circumstances." CEACR: Individual Observation concerning Convention No. 138, Minimum Age, 1973 Venezuela (ratification: 1987) Published: 1998 [CEACR: Convention No. 138 (Venezuela) (1998)].

306 See ibid. (This plan, states the CEACR, included among its objectives "the introduction of a system of registering children and young persons who are working and the eradication in seven years of work by children under 12 years of age.")

309 See ibid. (The Presidential Decree No. 1366 was published in Official Gazette No. 35.981, dated June 14, 1996. I believe there might have been a mistake with the Decree that the CEACR had the intention of referring to. This Decree's objective was to change the name of the food program from "Programa de Beca Alimentaria" ("Food Providing Program" [translation by author]) to that of "Programa de Subsidio Familiar" ("Family Subsidy Program"). Thus, I think that decree the CEACR was referring to was a previous one, i.e., the Decree no. 453 published in Official Gazette No. 35605, dated December 8, 1994, establishing the rules for the "Food Providing Program" and the "Food for School Program" (Programa de Alimentación Escolar). In any case, the CEACR positively commented on the Decree by stating that it established "a programme of family subsidy, beneficiaries of which include families with low income with children receiving basic education (1st to 6th grade)").

310 The "Agenda Venezuela" was a program of macroeconomic adjustment implemented in the year 1996. As a consequence, some social measures, including 14 "Social Programs" were implemented in 1996 to ease the major economic effects of such macroeconomic adjustments. See CEACR: Individual Observation concerning Convention No. 138 (1998), supra note 307.


312 Ibid.

313 See supra notes 138,139 ff. and accompanying texts.
Concerning the type of child labour existent in Venezuela, the Government of Venezuela stated the following:

With respect to the worst forms of child labour, debt bondage, serfdom, forced or compulsory labour, forced recruitment for armed conflict do not exist. However, prostitution, pornography, and sale and/or trafficking exist for both boys and girls although it is not known whether illicit activities, in particular production and trafficking of drugs exist. 314

In this sense, the ILO celebrated, however, the adoption of an “inter-institutional agreement between the Ministry of Labour and the National Council on the Rights of Children and Adolescents”, 315 with the objective of coordinating and implementing policies and programmes for the protection of children and adolescents workers. 316 Nonetheless, the report also pointed to the fact that apart from the ILO, the Government of Venezuela does not work with any other multilateral agency for eradicating child labour. Additionally, the ILO highlights with deep concern, as the greatest obstacle in the elimination of child labour, the fact that the Government of Venezuela “neither compiles any statistics on the extent or nature of child labour, nor does it have data of information on child workers who attend school or sanctions applied to users of child labour”. 317

Finally, the ILO highlighted the top priority areas for the purposes of technical cooperation, namely (i) capacity building of responsible government institutions, (ii) strengthening capacity of employers’ and workers’ organisations and (iii) inter-institutional coordination. Provea has also denounced a lack of institutional coordination as well as the absence of adequate State policies for addressing the issue. 318 In this respect, Cecodap condemns the Government’s delay in drafting and approving the National Plan on Childhood and Adolescence, thereby failing to comply with the recently acquired commitments following the 2002 UN Special Session on Children.

315 In this respect, the ILO made reference to the National Institute’s Plan for the Protection of Children and Adolescents in the areas of Occupational Prevention, Health and Safety and the establishment of the ‘Department for Monitoring the Working Conditions of Adolescents’ in the Directorate of Labour Inspection and Working Conditions within the Ministry of Labour.
317 Ibid.
318 See Provea, 2004, supra note 221 at 118.
Moreover, Provea denounced that in the year 2001 child labour was not even included in the records of the Ministry of Labour and that for 2003, the Ministry of Labour had made very little advances for complying with the obligations established in the Organic Labour Act and the Child and Adolescent Protection Act, concerning the minimum age for employment as well as safety and health regulations for the employment of children and adolescents.\(^{319}\)

Furthermore, among the primary problems concerning child labour in Venezuela, Provea as well as Cecodap, have recurrently identified the absence of an official registry containing official statistics concerning the number of working children and adolescents and their working conditions.\(^{320}\) According to Cecodap, there is an estimate of more than one million working children and adolescents in Venezuela.\(^{321}\)

However, the Inpsasel, an autonomous institution created in 2002 and attached to the Ministry of Labour, adopted the Pronat, with the objective of \textit{inter alia}, establishing a system for controlling and gathering information on the working conditions of children and adolescents, both in the formal and informal sectors. Reportedly, Pronat has already started a program for guaranteeing that 800 working children and adolescents are protected according to the Organic Labour Act in respect to safety and health at work.\(^{322}\) Nonetheless, this information was provided by Pronat’s National Coordinator, Ángel González through an interview given to Provea, and regrettably there is no record of the development of this program, at least in their website.

Finally it is important to note that in its 2003-2004 report, Cecodap regretted that, once again, the importance of protecting children and adolescents was marginalized and left aside by authorities, since the Government was once again focused on the political situation.\(^{323}\)

\(^{319}\) Provea, 2003, \textit{supra} note 206 at 146.

\(^{320}\) See Provea, \textit{Situación de los Derechos Humanos en Venezuela: Informe Anual Octubre 2000/Septiembre 2001} (Caracas: Provea, 2001) [Provea, 2001] at 97; see Provea, 2002, \textit{supra} note 209 at 125, 126; see Provea, 2003, \textit{ibid.}; see Cecodap, 2004, \textit{supra} note 160; Provea, 2004, \textit{supra} note 221 at 120. (Provea also notes that the INE had previously started to gather data on working children and adolescents, but that it had regrettably not continued with such initiative). The discontinuance of such registry might be one of the consequences of the diversion of attention of the Government caused by the severe political division.

\(^{321}\) Provea, 2003, \textit{ibid.} at 146.

\(^{322}\) See Provea, 2004, \textit{supra} note 221 at 120.

2.2.4. The elimination of discrimination in respect of employment and occupation

2.2.4.1. The 1961 and 1999 Venezuelan Constitutions

The 1999 Constitution defines discrimination more extensively than the previous constitution, but in essence it remains the same. Accordingly, both constitutional texts prohibit discrimination founded on race, gender, creed, social condition or those with the objective of nullifying or diminishing the recognition or exercise in equal circumstances of the rights and freedoms of every person. Moreover, the new constitution guarantees the principle of non-discrimination in the workplace based on political beliefs, age, race, sex, creed or any other reason.

Additionally, the 1999 Constitution introduces a new article specifically protecting women and their work, by establishing that the State will recognize housework as an economic activity, which produces added value, wealth and social wellbeing. Furthermore, this article stipulates that “house wives” have the right to social security. The 1999 Constitution, as the previous one, guarantees the principle of “equal pay for equal work”.

Concerning persons with disabilities, the 1999 Constitution introduces a new article guaranteeing that “every person with disabilities or especial needs” has the right to full and autonomous exercise of their abilities and their integration to family and the community. In relation to the work of persons with disabilities, the article establishes that the State, with the participation of society and families, shall guarantee equality of opportunities, satisfactory labour conditions and shall promote their training and access to employment according to their conditions, in conformity with the law.

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324 See 1999 Venezuelan Constitution, supra note 142 at article 21, compare 1961 Constitution, supra note 141 at article 61.
325 The 1961 Venezuelan Constitution although guaranteeing that every person has the right to work (article 84), and establishing that the law will stipulate what is needed to ameliorate the material and intellectual conditions of workers (article 85), it does not specifically establishes the principle of non-discrimination in the workplace, unlike the 1999 Constitution in its article 89(5).
326 In the previous constitution, however, there was not an article in the human rights section specifically referring solely to the protection of women.
327 See 1999 Venezuelan Constitution, supra note 142, at article 88.
328 See ibid. at article 91.
329 See ibid. at article 81, with no corresponding article in the previous constitution.
In relation to the rights of indigenous people, what the previous constitution addressed in only one short article,\textsuperscript{330} the new constitution does in a whole new chapter, containing eight articles.\textsuperscript{331} The Constitution establishes that the State shall guarantee to indigenous workers the exercise of the rights that are set forth in the labour legislation, i.e. the Organic Labour Act -including the principle of non discrimination in the workplace analysed below- and other domestic labour acts.\textsuperscript{332}

2.2.4.2. The 1997 Organic Labour Act

This Act guarantees that no one shall be discriminated against, based on age, sex, race, civil status, religious creed, political filiations or social condition. This provision was included in the partial reform of the Organic Labour Act, which has already been approved in first discussion.\textsuperscript{333} The proposed reform for this article aims at defining discrimination in the workplace more broadly, i.e. by adding the prohibition of discrimination based on sexual preferences, color of the skin or involvement with a given trade union. The reform of the article also establishes that not only there will be sanctions for those who violate the discrimination prohibition, but also that the acts that were issued in violation of this principle are voided.\textsuperscript{334} Another important provision of this Act is the abovementioned constitutional principle of equal pay for work of equal value.\textsuperscript{335}

2.2.4.3. The 1993 Equal Opportunities for Women Act

\textsuperscript{330} See 1961 Venezuelan Constitution, \textit{supra} note 141 at article 77. (Only generally referring to the protection of the rights of indigenous communities and their "progressive incorporation to the life of the Nation").

\textsuperscript{331} These articles stipulate that indigenous people have the right to be recognised by the State (article 119); the guaranty that the use of natural resources in indigenous habitats by the State will be conducted with prior authorisation from indigenous people and without damaging the cultural, social and economic integrity of these habitats (article 120); the right to maintain their own identity and the right to an education which addresses their socio-cultural particularities (article 121); the right to health and the corresponding obligation on the State to recognise their traditional medicine (article 122); the right to maintain and promote their own economic activities (article 123); the guaranty that their inventions and technology will be recognised by the State as "collective intellectual property" (article 124); the right to political participation and the guaranty by the State that they shall be indigenous' representation in the National Assembly (article 125) and the duty to safeguard integrity and national sovereignty (article 126).

\textsuperscript{332} See 1999 Venezuelan Constitution, \textit{supra} note 142 at article 123.

\textsuperscript{333} See \textit{supra} note 198 and accompanying text.

\textsuperscript{334} See 1997 Organic Labour Act, \textit{supra} note 148 at article 26.

\textsuperscript{335} See \textit{ibid.} at article 135.
The Equal Opportunities for Women Act\textsuperscript{336} initially passed in the year 1993, was partially amended in October 1999.\textsuperscript{337} As a partial reform, there were only few articles amended. Overall, these modifications referred mostly to administrative and procedural issues of the National Women’s Institute.\textsuperscript{338} This act regulates the exercise of rights and guaranties needed in order to achieve equality in opportunity for women, based on the CEDAW convention, ratified by Venezuela and thus part of Venezuelan domestic law.\textsuperscript{339}

This Act guarantees that women have the right to the same opportunities than men and the right not to be discriminated against, which implies the elimination of all obstacles or prohibitions based on their feminine condition.\textsuperscript{340} The act further defines “discrimination against women” as (i) all legal provisions or juridical acts that have the intention, content or effects to give advantages or privileges to men over women; (ii) all factual circumstances that impair women’s condition, who although protected by the law, are subject to discrimination as a result from individual or collective traditions or idiosyncrasies; and (iii) the existence of legal loopholes which deny or obstruct women’s rights.

In relation to the principle of non-discrimination, the act guarantees equality for women in accessing all occupations, job positions, opportunities and equal pay for work of equal value.\textsuperscript{341} Furthermore, the act prohibits dismissing, using pressure on women, or impairing their rights because of pregnancy, provided that if there is a violation of these prohibitions, women have recourse to file a constitutional defence for these rights to be restored.\textsuperscript{342} Additionally, the act prohibits the discrimination against women concerning job offers, with the requirement that candidates shall not be rejected based on their sex.\textsuperscript{343}

\textsuperscript{336} Ley de Igualdad de Oportunidades para la Mujer, Official Gazette dated September 28, 1993, No. 4635 [Equal Opportunities for Women Act].

\textsuperscript{337} Decreto con Rango y Fuerza de Ley de Reforma de la Ley de Igualdad de Oportunidades para la Mujer, Official Gazette dated October 26, 1999, No. 5.398.

\textsuperscript{338} The National Women’s Institute is an autonomous entity created by the 1993 Equal Opportunities for Women Act (article 44), and not created by the 1999 partial reform of such act, as erroneously affirmed in the Institute’s website. This Institute is in charge of defining, managing, coordinating, supervising and evaluating the policies and other matters that relate to the situation and condition of women in Venezuela.

\textsuperscript{339} See Equal Opportunities for Women Act supra note 342 at article 1.

\textsuperscript{340} See \textit{ibid.} at article 5.

\textsuperscript{341} See \textit{ibid.} at article 11.

\textsuperscript{342} See \textit{ibid.} at article 15.

\textsuperscript{343} See \textit{ibid.} at article 16.
In this same vein, it is prohibited to post job announcements offering employment and professional training programs that are discriminatory to women.\textsuperscript{344}

Moreover, the act seeks to guarantee equality for women in other aspects such as their involvement in political parties and trade unions,\textsuperscript{345} with the obligation that there will be at least one woman in the board of directors of public institutions or companies in which the State owns more than 50\% of the shares.\textsuperscript{346} Additionally, the act regulates the economic and social rights of women and the protection of women against domestic violence. As part of the Venezuelan system for the protection of women’s rights, two key organisms were created by the previous 1993 Equal Opportunities for Women Act, namely the National Women’s Institute\textsuperscript{347} and the National Attorney for the Defence of Women’s Rights.\textsuperscript{348}

As can be concluded, there has not been major changes or amendments made by the current administration in respect to the treatment of women and women at work, at least in relation to the legislation, given that the aforementioned provisions were equally included in the 1993 Equal Opportunities for Women Act. Furthermore, the current administration has failed to address various issues concerning the protection of women workers, thereby failing to comply with its obligations reaffirmed in the passing of the 1999 reform to the 1993 act, as will be examined below.

\textsuperscript{344}See ibid. at article 17.
\textsuperscript{345}See ibid. at articles 18-20.
\textsuperscript{346}See ibid. at article 21.
\textsuperscript{347}See ibid. at article 48 (The objectives of the National Women’s Institute are \textit{inter alia}, designing public policies for women in health, education, training, employment, income and social security; guaranteeing the availability of juridical services for women; being aware of situations of discrimination against women and formulating administrative or legal recommendations to the competent branches of the public and private sector; and elaborating draft laws that are necessary for the promotion of equality of women and the effective equality in opportunity for women).
\textsuperscript{348}See ibid. at article 54 (The National Attorney for the Defence of Women’s Rights has the goals of, \textit{inter alia}, guaranteeing compliance with laws and conventions relating to the rights of women; examining and proposing reforms to the regulations that assure the defence of women’s rights; guaranteeing the social, political and cultural rights of feminine sectors that are most vulnerable; receiving and distributing the complaints filed by any individual person or organisation concerning the violation of legislation in respect to programming that promotes violence and diminishes women and family; tightening observance of women carrying out housekeeping services, as a means to prevent trafficking in children and the exploitation of women and other forms of slavery-like situations faced by women and providing especial attention to indigenous women).
2.2.4.4. The 1993 Integration of Disabled Persons Act

The Integration of Disabled Persons Act was adopted in 1993, as a means to provide a legal system for the protection of persons with disabilities, aiming to their normal and full personal development. The act establishes the National Council for the Integration of Disabled Persons as the entity in charge of managing, coordinating, supervising, and evaluating all matters related to the integration of persons with disabilities. This Council has the objectives of, inter alia, taking cognisance of discriminatory situations in respect to persons with disabilities, and thus, promoting the proceedings for the criminalisation of these acts and participating in the drafting of public policies addressed to persons with disabilities in areas that are of interest to them, such as employment and social security.

The Integration of Disabled Persons Act addresses in articles 23, 24 and 25, the protection of workers with disabilities. Accordingly, persons with disabilities have the right to work without further limitations than those resulting from their own abilities and capacity at work. Additionally, the State has the obligation to promote the integration of workers with disabilities into the ordinary labour system or their incorporation through special working mechanisms, while always guaranteeing the right of these workers to social security. Furthermore, the act establishes a measure of affirmative action when stipulating that those public or private companies with more than 50 employees must provide work for persons with disabilities that account to no less than 2% of the total number of employees, provided that these persons have the ability and training to carry out the corresponding job.

As with the analysis of the previous section, it is important to note that in the area of the protection of workers with disabilities, the current administration has not introduced changes to the legislation. In this sense, it could be interesting to follow the
development of the UN proposal for the adoption of a convention on the rights of persons with disabilities and the Government of Venezuela’s future approach to that convention.

2.2.4.5. The proposed Indigenous People and Communities Act

On December 5, 2002, the National Assembly approved in ‘first discussion’ the first draft of the Indigenous People and Communities Act. This first draft was revised, modified and approved on August 2004 by the Permanent Commission of Indigenous People. The resulting second draft was later distributed for the corresponding ‘second discussion’ on September 2004. This act guarantees that all indigenous persons have the right to work and are entitled to all labour benefits given to other workers and to the exercise of all labour rights as protected in national and international instruments. Furthermore, the State shall avoid any type of discrimination in respect to indigenous people and shall inform indigenous workers of their labour rights.

Additionally, the act stipulates that indigenous workers shall not be submitted to hazardous or degrading working conditions, forced labour, or any kind of bondage including debt servicing. Moreover, the act prohibits sexual harassment against indigenous workers, the exploitation of indigenous children either when employed in domestic services or industrial or commercial businesses. As can be noted, unlike with the previous two sections, the Government of Venezuela has introduced positive modifications to the protection of indigenous people at work.

2.2.4.6. Overall analysis: Venezuela and the elimination of discrimination in respect of employment and occupation

358 For a brief reference to the process of the adoption of laws in Venezuela, see supra note 162 ff. and accompanying texts.
359 See second draft of the Indigenous People and Communities Act supra note 357 at articles 111, 112.
360 See ibid. at 111.
361 See ibid.
362 See ibid. at 114.
The CEACR, in its 2003 individual observation concerning the Discrimination (Employment and Occupation) Convention (No. 111), regarded as positive steps: the adoption of the Equal Opportunities for Women Act and the inclusion in the Constitution of the principle of non discrimination based on political grounds. However, the CEACR recalled the importance of including the prohibition of discrimination on grounds of national extraction in the domestic legislation in order to fully adjust Venezuelan legislation to convention 111.

In its last individual observation concerning the Equal Remuneration Convention (No. 100), the ILO CEACR recalled the comments of the ICFTU, by stating, “not only are women poorly represented in management posts, but their pay is on average 30 per cent less than that of men”. Following this report by the ICFTU, the CEACR requested the Government of Venezuela to provide statistical information on wages and job posts disaggregated by sex.

In this same vein, Provea noted that as of August 2003, female unemployment accounted for 21.1%, which implied an increase of 2.4% in respect to the previous year, and was superior to male unemployment, which accounted for 15.7%. Furthermore, the situation worsened for women in January 2004, when female unemployment raised to 23.6% and the male unemployment rate diminished to 12.1%. Moreover, a comparison of the unemployment rates since 2001 shows that women lose their job first and are the last to obtain a job. Accordingly, Provea, based on an ILO report, denounced that a
high unemployment rate could be an indicator of disguised discrimination against women.\textsuperscript{370} Provea initiated a judicial proceeding requesting the nullification of article 10 of the Presidential Decree No. 2.387 dated April 29, 2003, according to which domestic workers\textsuperscript{371} are excluded from the resolution of the minimum wage raise.\textsuperscript{372} Moreover, this has not been the first time domestic workers are excluded from salary raises, given the fact that it has been a reiterated practice since at least 1999.\textsuperscript{373} Furthermore, it is rather ironic that as mentioned before, this 1999 constitution is the first one to include an article specifically addressing the importance of "housework" and how it is seen by the State as an economic activity that creates ‘added value, wealth and social wellbeing’. The decree is denounced as violating basic labour rights protected under international and domestic law, including the Constitution, such as the right to equal pay for work of equal value, and the right to a minimum wage sufficient to have a decent standard of living.\textsuperscript{374} Furthermore, when taking into consideration that as of 2002, there were an approximate of 207,993 domestic workers in Venezuela, the large majority being women, Provea denounces that decree given the inherent discrimination against women.\textsuperscript{375}

After having examined the current status of trade unionism in Venezuela, which has been marked by a tense political confrontation, it is not surprising to report that there have been severe violations to the right not to be discriminated against in the workplace. It is interesting to note that with the modification of the Constitution in 1999, a new type of discrimination was introduced so as to include discrimination based on political grounds. Additionally, the provisions relating to discrimination in the 1997 Organic Labour Act are currently being modified so as to include precisely the prohibition of discrimination on the basis of membership to a certain trade union. The legal inclusion of this type of discrimination is carried out particularly under the current administration,

\textsuperscript{370} See Provea, 2003 supra note 206 at 120.
\textsuperscript{371} The term 'domestic workers' is used to refer to the persons, generally women, who work at home. See infra note 429.
\textsuperscript{372} See Provea, 2003 supra note 206 at 127.
\textsuperscript{374} See generally ibid.
\textsuperscript{375} See ibid.
when Venezuelan workers have experienced discrimination to its fullest, for affiliating to a specific trade union, depending on the political inclination of that union.

2.4. Conclusions to the Protection of Labour Rights in Venezuela

Even when workers’ rights are increasingly being protected under Venezuela’s domestic legislation, the actual respect for and compliance with those rights falls short in practice. The lack of correspondence between ‘the law in theory’ and ‘the law in practice’ is often found in developing countries, and has surely been the case for most Latin American countries, including Venezuela.

Indeed, despite the efforts for the adaptation of labour legislation to ILO conventions and actualization of the current constitution with international human rights treaties, this ‘gap’ between law and reality has increasingly been widening. As has been examined, the current political turmoil and high polarization have resulted in the most negative consequences for the labour sector, namely trade union discrimination acts, obstacles in the collective bargaining process and discriminatory behaviour in respect to employment, all of which have obviously implied violations to ILO conventions. Additionally, as criticised by NGOs, the Government’s focus on political issues has diverted the current administration from the essential attention required by human rights abuses, including labour rights.

It could be argued that modifications have been introduced in the labour legislation and that those have been positive steps. However, the modifications should not remain as mere amendments, since ILO conventions are not drafted with the purposes of ratifying them with no further real intention of abiding by them, nor should those amendments to the domestic legislation be used as “shields” for the Government to create the false appearance of complying with its international obligations.

Moreover, the Government’s interference is not limited to trade union’s affairs or elections, but in causing increased political instability and hence, increased social unrest. HRW has denounced in several occasions the undermining of the principles of democracy and independence of the judiciary through the passing of laws by the current administration. For example, the reform of the Supreme Court Act, increasing the justices from twenty to thirty-two has allowed President Chávez to “pack the Supreme Court”
with its allies, violating the principle of judicial independence and “degrading Venezuelan democracy”.\(^{376}\) Previously, HRW criticised the drafting of an Act, which was recently passed, that would control the content of the media in Venezuela. Accordingly, HRW denounced that the increase by this act of the state control in the broadcasting of the radio and television, threatened to undermine the freedom of expression in the country.\(^{377}\)

In this sense, it is important to recall that both the preamble to the ILO constitution and the Declaration of Philadelphia affirm the close relationship between ‘lasting peace’ and ‘social justice’. In this same vein, social justice holds a close nexus with labour rights. The relationship is reciprocal, in the sense that there is no social justice when the most fundamental labour rights are violated and there cannot be fully compliance with workers’ rights in a country where there is no social justice. One of the fundamental principles for maintaining a more ‘fair’ society is to guarantee social dialogue. It is necessary to promote tolerance for the participation of other political fractions in the social and political life of the society, and in the labour sector, guaranteeing not only a mere ‘social dialogue’, but a dialogue that is transformed in an effective tripartism. Another essential pillar to social justice is the respect for democracy, which is also severely threaten under current circumstances. In this context, it is evident to conclude that social justice is far from being reached in Venezuela.

Taking into consideration the amendments to the Venezuelan legislation, the critiques addressed by the ILO’s committees and by international and national NGOs, I must ask: does the current protection of labour rights in Venezuela really constitute a step forward?


Chapter Three: An Approach to the Protection of Labour Rights through the Andean Community or CAN

Now that we have examined the protection of labour rights from an international and domestic perspective, the objective of this last chapter is twofold. Firstly, to analyse the measures that have been taken at the regional level by the Andean Community for the protection of workers' fundamental rights, and secondly to examine what mechanisms are available within the CAN for improving workers’ conditions in Venezuela, considering that Venezuela is a Member State to the CAN.

As in the previous chapters, an introductory part will include a revision of some notions that are deemed necessary to examine in order to gain a better understanding of the issues to be addressed. Accordingly, this first part will introduce the Andean Community, its structure and functioning. Following this section, there will be an examination of the socio-labour aspects of the subregional integration process in CAN, while analyzing its advances and drawbacks. This section will conclude whether the regional structure for the protection of labour rights has been adequate and has considerably favoured those who are the subject of protection, while addressing some proposals for the strengthening of the labour integration process in CAN. Finally, the chapter will discuss the work of the ILO Subregional Office for the Andean Countries.

Venezuela is a Member State to both the Andean Community and the OAS. Hence, the analysis of the regional advancement of labour rights for present purposes could have been aimed at studying the labour dimension within the OAS. However, there are strong reasons for having chosen an examination of the protection of labour rights in the subregional integration process in CAN.

The Andean Community's structure, unlike the OAS system, is guided by the initial objective of aiming toward a customs union. In this sense, the harmonization of domestic laws is both an important goal and essential mechanism needed for the integration process in CAN. These factors make the CAN a very interesting agreement to analyse in light of what it is currently doing to advance in the dimension of respect of workers' rights in the region and what further steps need to be taken.
The Andean Community has certainly adopted several declarations and plans of action, but as will be discussed in this chapter, they fall short on the measures needed for a strong labour dimension of a regional agreement that has established the improvement of working and living conditions among its main objectives. However, the reason why an analysis of CAN is important is that given the structure of subregional integration systems such as CAN, and the specific characteristics of the Andean subregional integration process, the CAN potentially (or at least in theory) offers an extremely comprehensive and promising alternative for ameliorating workers’ conditions in the region, and hence in Venezuela.

The second criterion for choosing CAN over the OAS has a strong foundation in intellectual curiosity. Currently, there is extensive scholarly material and research on the functioning of the OAS and the bodies that comprise the Inter American human rights system, namely the IAHRC and the IAHRCourt. It could be argued, however, that there is not as much written on the Inter American protection of labour rights. This situation responds to the existence of fewer decisions of the IAHRCourt on economic, social and cultural rights, including workers’ rights. Despite the absence of scholarship on the Inter American human rights system vis-à-vis labour rights, the analysis of the system as a guarantor of human rights in the Americas is extensive, even when it has been considered by human rights specialists, a relatively new protection system.378

The Inter American human rights system is undoubtedly more developed and has been more researched on by scholars than the Andean Community. Thus, we have a greater understanding of its functioning. We are more or less aware of its current and future challenges, and hence, we are able to constructively criticise the aspects that need to be changed or addressed for it to more effectively address human rights violations and labour rights abuses in the region. This paper responds by offering needed analysis of labour rights in the Andean Community.

Lastly, an important and distinctive characteristic of the Andean Community is that the Cartagena Agreement and the Treaty establishing the Andean Court of Justice

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have created a code of laws which directly affect the juridical situation of citizens from the five Member States that compose the CAN.\(^{379}\) This characteristic differentiates the CAN from other agreements. Generally, norms that are part of international treaties simply establish a set of obligations for state parties to the treaty and not direct rights and obligations on the citizens of the countries that are signatories of the treaty.\(^{380}\)

### 3.1. The Subregional Integration in the Andes: the Andean Community

#### 3.1.1. What is the Andean Community?

The CAN is a sub-regional organisation created by the signing of the 1969 Cartagena Agreement\(^{381}\) also known as the ‘Andean Pact’, which was initially signed between the Governments of Bolivia, Chile, Colombia, Ecuador and Peru for the creation of what was once known as the “Andean Group”,\(^{382}\) with the objective of economic integration. Currently, the Andean Community is composed of Bolivia, Colombia, Ecuador, Peru and Venezuela, with the 1973 insertion of Venezuela\(^{383}\) and the 1976 withdrawal of Chile.\(^{384}\) Additionally, Panama in 1996 and most recently, Chile in 2004

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\(^{379}\) Genaro Baldeón Herrera, “La Competencia de Interpretación Prejudicial del Tribunal de Justicia de la Comunidad Andina” in Jornadas sobre Derecho Subregional Andino (Isla de Margarita, Venezuela: Universidad de Margarita, 2003) 245 [Baldeón, “La Competencia”] at 245; see also Luis Henrique Farfás Mata, “Introducción al Derecho Comunitario Andino” in Jornadas sobre Derecho Subregional Andino, ibid. 9 at 13. (“Additionally, qualified scholarship and the jurisprudence of Andean Court of Justice agree ... in stating that one of the fundamental principles of the union law (law of the community as an entity) is its direct effect, in the sense that such law creates rights and obligations directly on the persons –by rule and not by exception, as with classical international law-. Such persons are able to exercise these rights independently and even against the will of State Members”).

\(^{380}\) Baldeón, “La Competencia”, ibid.

\(^{381}\) The CAN has adopted various amendments and reforms to the 1969 Cartagena Agreement. For the current Cartagena Agreement, see CAN, Andean Community Member States, Cartagena Agreement, decision 563, Official Gazette No. 940 dated 1 July 2003, online: <http://www.comunidadandina.org/normativa/tratprot/acuerdo.htm> (accessed on March 28, 2005) [Cartagena Agreement].

\(^{382}\) See Adolfo Ciudad Reynaud, Labour Standards and the Integration Process in the Americas, (Lima: OIT, 2001) [Ciudad Reynaud] at 241; see also Walter Kaune Arteaga “La Necesidad de la Integración y el Orden y Ordenamiento Jurídico Comunitario” in Tribunal de Justicia de la Comunidad Andina, ed., Testimonio Comunitario: Doctrina, Legislación, Jurisprudencia (Quito: Tribunal de Justicia de la Comunidad Andina, 2004) [Kaune] (the CAN has had several denominations since its creation, namely Andean Pact, Andean Group, Andean Community of Nations and currently it is simply referred to as Andean Community).

\(^{383}\) See Kaune, ibid.

\(^{384}\) It is noteworthy that although Chile is no longer a member of the Andean Community it still participates in some institutions of the AIS, namely the Andean Health Organisation/ Hipólito Unanue Convention and the CAF.
are able to attend CAN meetings as observers. The Andean Community or CAN is of great importance for the integration process in South America, since as of 2002, it covered an area of as many as 120 million inhabitants with a GDP of 265 billion dollars.

Article 1 of the Cartagena Agreement establishes the objectives of the Andean Community, as follows:

- to promote the balanced and harmonious development of the Member Countries under equitable conditions, through integration and economic and social cooperation; to accelerate their growth and the rate of creation of employment; and to facilitate their participation in the regional integration process, looking ahead toward the gradual formation of a Latin American Common Market...to reduce external vulnerability and to improve the positioning of the Member Countries within the international economic context; to strengthen subregional solidarity, and to reduce existing differences in levels of development among the Member Countries.

In its last section, this article establishes that these specific objectives are aimed toward the overarching goal of “bringing about an enduring improvement in the standard of living of the subregion’s population.”

The establishment of the CAN as a customs union, as mandated by the 1969 Cartagena Agreement, has been a lengthy and complicated process, which is still not completed. Perhaps the initial twenty years of almost complete inactivity, until the redirection of the process in the 1989 Galapagos Summit, was the principal cause. For example, the Andean Free Trade Area alone, excluding Peru, was not completely in effect but until 1993.

Although there is a Free Trade Area for the Andean countries (with Peru gradually integrating), the ‘customs union’ stage is yet not fully accomplished since there is still no actual CET in effect, despite several decisions regulating the matter. The latest decision being decision 580, whereby the Commission of the Andean Community postponed until May 10, 2005 the entry into force of the CET, and thus declaring void and null decision 535 dated October 14, 2002, which had established that the CET would

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386 See Cartagena Agreement supra note 381, at article 1.
387 Ibid.
entry into force on January 2004.\textsuperscript{388} Most certainly, the Commission will issue a new
decision in 2005, postponing once again the entry into force of the CET, delaying once
again the full conversion of the CAN into a customs union.

Even though the primary objective of the Cartagena Agreement was to create a
customs union by removing trade barriers and promoting investment between
countries,\textsuperscript{389} the agreement did not provide the expected results, and thus a reform was
urgently needed.\textsuperscript{390} The reinforced integration program was re-launched at the 1989
Galápagos Summit with the “Strategic Design for the Orientation of the Andean Group”
and implemented following the 1996 Trujillo Presidential Council.\textsuperscript{391}

In addition to a stronger and more effective economic approach, the reform
included a number of social and labour objectives. A new approach that deepened the
socio-labour dimension included the signing and later establishment of the Andrés Bello,
the Hipólito Unanue and the Simón Rodríguez Conventions,\textsuperscript{392} and set the foundations
for the adoption of the Social Agenda, the ASC and the ACHR,\textsuperscript{393} as well as the
ideological framework for the 2004 proposal of the Andean Labour Charter.\textsuperscript{394}

3.1.2. \textbf{How does the Andean Community work?}

\textsuperscript{388} See CAN, Commission of the Andean Community, decision 580, Official Gazette 1063, dated May 4,
2004 online: CAN <http://www.comunidadandina.org/normativa/dec/D580.htm> (accessed on March 30,
2005). See also CAN, Commission of the Andean Community, decision 535, Official Gazette 854, dated
October 14, 2002, online: <http://www.comunidadandina.org/normativa/dec/D535.htm> (accessed on
March 30, 2005).

\textsuperscript{389} See ILO, The Labour Challenge in CAN, supra note 170 at 4.

\textsuperscript{390} \textit{Ibid.}

\textsuperscript{391} \textit{Ibid.}

\textsuperscript{392} It is noteworthy that these agreements are now intergovernmental institutions that with the exception of
the Andrés Bello Convention, are part of the Andean Integration System. The Simón Rodríguez institution
will officially be in effect after the five countries ratify and send their confirmations of ratifications to the
CAN. While the ratification process is completed, the Secretary General of the CAN will take over the
functions of Technical Secretariat of this Convention.

\textsuperscript{393} See ILO, The Labour Challenge in CAN, supra note 170 at 5.

\textsuperscript{394} See CAN, “In the Andean Community Vice-Ministers and Labor Experts meeting, Wagner proposes a
Release: New Andean Social Agreement]; for the original speech by Ambassador Allan Wagner, see
“Palabras del Secretario General de la Comunidad Andina, Embajador Allan Wagner Tizón, con ocasión de
la XII Reunión de Viceministros y Expertos del Trabajo de la Comunidad Andina Lima” dated August, 26
2004, online: CAN <http://www.comunidadandina.org/prensa/descursos/wagner26-8-04.htm> (accessed on
April 1, 2005) [Speech by Allan Wagner]); see also infra note 406.
The Andean Integration System or AIS\textsuperscript{395} “is the series of bodies and institutions that work closely in pursuing the same objectives: to intensify Andean subregional integration, promote its external projection, and reinforce the actions connected with the process.”\textsuperscript{396} These institutions are described as follows:

A. The Andean Presidential Council as the highest-level body in CAN is composed of the presidents from the five Member States who meet annually. The presidential council is in charge of discussing guidelines and issuing policies in various matters of interest to the subregion, thereby defining subregional integration policy and directing the AIS. Among its follow-up activities, the Council reviews the reports and recommendations made by the other AIS bodies, evaluating the functioning of the CAN and the overall results of the integration process.\textsuperscript{397}

B. The Andean Council of Foreign Ministers -composed of the foreign ministers of the five Member States-, is in charge of designing and guiding CAN’s foreign policy in areas such as cooperation with other countries and with international organisations.\textsuperscript{398} The Andean Council of Foreign Ministers adopts all binding decisions\textsuperscript{399} and non-binding declarations by consensus.\textsuperscript{400} Among its administrative tasks, the Council prepares the meetings of the Presidential Council, evaluates the General Secretariat’s activities, and elects and removes the Secretary General.\textsuperscript{401}

C. The Commission of the Andean Community is the main policy-making body in the CAN, composed by a plenipotentiary representative of each country. As well as the Council of Foreign Ministers, the Commission issues decisions which are part of the legal system of the Andean Community.\textsuperscript{402} The Commission is in charge of, \textit{inter alia}, adopting, executing and supervising the sub-regional integration policies of the CAN, and

\textsuperscript{395} For a better visualization of the institutions composing the AIS, see Appendix: “The Andean Integration System” below at 133.
\textsuperscript{396} See CAN’s website, <http://www.comunidadandina.org> (accessed on July 17, 2005).
\textsuperscript{397} Ibid.
\textsuperscript{398} Ibid.
\textsuperscript{399} The Andean Council of Foreign Ministers’ decisions, as well as those by the General Secretariat, are binding as established in the Treaty creating the Court of Justice of the Cartagena Agreement. See article 3 of the CAN, Andean Community Member States, Treaty creating the Court of Justice of the Cartagena Agreement, May 28, 1996, online: CAN <http://www.comunidadandina.org/ingles/treaties/trea/ande_tric2.htm> (accessed on April 17, 2005).
\textsuperscript{400} See CAN’s website, supra note 396.
\textsuperscript{401} Ibid.
\textsuperscript{402} See ILO, the Labour Challenge in CAN supra note 170 at 6.
implementing the Guidelines of the Andean Presidential Council. Following the Presidential Council’s guidelines, the Commission created the CCLA by decision 441 and the CCEA by decision 442.

D. The General Secretariat is the executive body of the CAN and is under the direction of a Secretary General, who is elected by consensus by the Andean Council of Foreign Affairs Ministers. The Secretariat, with headquarters in Lima, Peru, is empowered to draft decisions and propose them to the Commission and to the Andean Council of Foreign Ministers; to pass on initiatives and suggestions to the Council of Foreign Ministers meeting in enlarged session, in order to ensure compliance with the Cartagena Agreement; to manage the Subregional integration process; to ensure that the Andean Community’s commitments are fulfilled and to maintain on-going connections with Member States and working relations with the executive bodies of other regional integration and cooperation organisations.

E. The Andean Court of Justice is the judicial body of the Andean Community. It is composed of five Judges, representing each Member State. The Andean Court of Justice has territorial jurisdiction in the five countries, with permanent headquarters in Quito, Ecuador. Since its beginnings, the Court has been assigned with three areas of jurisdictional capacity, namely, to ensure the legality of CAN’s provisions (control of legality), exercised through the nullity actions; to ensure the observance of Member

403 See CAN’s website, supra note 396.
406 Allan Wagner Tizón was appointed CAN’s Secretary General by the Andean Council of Foreign Affairs Ministers with decision 568. He was appointed for a five-year term starting January 1st, 2004. Prior to his appointment as Secretary General of the Andean Community, Allan Wagner Tizón was the Minister of Foreign Affairs of the Republic of Peru for the beginning of the presidential period of Peru’s current president Alejandro Toledo. Ambassador Wagner has a long history of both diplomatic and political service. See CAN, Andean Council of Ministers of Foreign Affairs, decision 568 dated November 14, 2003, Official Gazette No. 1012, online: CAN <http://www.comunidadandina.org/ingles/treaties/dec/D568e.htm> (accessed on April 9, 2005).
407 The treating creating the initially named “Tribunal of the Cartagena Agreement” was signed on May 28, 1979.
States of their obligations under Andean subregional law (control of compliance), exercised through *inobservance actions* and to undertake an assessment of CAN laws and regulations, in order to ensure that they are applied uniformly in the territories of the Member States (consistent applicability), exercised through the *preliminary consultation action*. However, since the entry into force in 1999 of the 1996 Protocol of Modification of the Treaty Establishing the Court of Justice of the Andean Community, Member States have assigned new areas of competence to the Andean Court, including appeals for omission or inaction of States in certain matters, arbitration jurisdiction, and most importantly for the purposes of this thesis, the inclusion of labour jurisdiction.

F. The **Andean Parliament** is the deliberative body of the AIS located in Bogotá, Colombia. The Andean Parliament puts forward draft provisions subject to the approval of other bodies of the AIS. It also seeks to promote the harmonization of domestic laws and to enhance cooperation and coordination with the congresses of Andean countries and those of third countries. Although the Parliament was created on October 25, 1979, a very important protocol modifying its composition was approved in 1997. On April 1997, Member States convened that in a five-year period they would change their domestic laws to allow for the direct election of representatives to the Parliament, as opposed to representatives being selected within the Congresses of the five Member States, as it had been done previously. In 2002, the Venezuelan National Assembly approved the corresponding domestic act to allow its citizens to directly elect representatives to the Andean Parliament.

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G. The Andean Business Advisory Council is the means through which civil society pertaining to the business sector participate in the AIS. The CCEA regulations, such as decision 442 and the Business Council by-laws, describe rather shallowly the composition of this business council, by simply stating that the four delegates are elected within the business representative organisation, as defined by the corresponding Member State. This general, rather than specific provision hinders the process of harmonization of laws, which is an important aspect of the Andean sub-regional integration process. Also, the problem becomes again that of the business and labour issues in the subregional integration process being contingent upon decisions made with large discretion by governments, who could be ultimately the ones determining which are the most representative organisations, and hence clearly defining the participation of business’ and workers’ organisations in regional integration processes. The Business Advisory Council is in charge of issuing opinions for the Andean Council of Foreign Ministers, the Commission and the General Secretariat, at these bodies’ requests or on its own initiative, in relation to activities of the Andean sub-regional integration process that are of interest to the business sector.

H. The Andean Labour Advisory Council, with headquarters in Lima, Peru, is composed of four delegates that are chosen by the most representative organisation of workers in each Member State, and later approved by the government of the corresponding Member State. The CCLA submits its opinions on labour issues to the
Andean Council of Foreign Ministers, the Commission and the General Secretariat, voluntarily or at the request of other bodies.

I. The Andean Development Corporation is the Andean Community’s financial branch created in 1968, and hence preceding the birth of the Andean Community. The CAF has its headquarters in Caracas, Venezuela and is composed by CAN Member States, several other Latin American countries, some countries in the Caribbean region and Spain. These countries, coupled with 22 banks are the CAF’s shareholders. The CAF is in charge of supporting sustainable development in its shareholder countries and promoting integration by raising funds and attracting capital resources to provide a wide range of financial services.

J. The Latin American Reserve Fund is the other financial institution of the Andean Community, with headquarters in Bogotá, Colombia. It has the purpose of providing financial assistance to Member States by granting credits or guaranteeing financial loans to third parties. Additionally, it cooperates with the harmonization of countries’ monetary and financial policies and improves the terms of investments of international reserves made by Andean countries.

K. The Simón Bolívar Andean University is the institution in the AIS with the objective of researching, teaching, and providing post-university training and services located in Sucre, Bolivia. The Andean University is also a forum for carrying out high-level scientific research and studies. Since there are several branches of the University throughout the Andean region, regrettably research on labour issues is usually carried out within the domestic sphere of labour relations of Andean countries, rather than comparative studies of labour legislations of the Andes.

L. The intergovernmental institutions that focus on social issues, known as the Andean Social Conventions. These social conventions are the Andrés Bello Convention, which focuses on educational, technological and cultural integration, the

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415 In addition to Member States of the CAN, shareholder countries to the CAF are: Argentina, Brazil, Chile, Costa Rica, Dominican Republic, Jamaica, México, Panama, Paraguay, Trinidad and Tobago and Uruguay.
416 Although the university’s main campus is located in Sucre, Bolivia, it has branches in La Paz, Bolivia; Quito, Ecuador; Cali, Colombia; and Caracas, Venezuela.
417 Despite having been named “conventions”, these are intergovernmental institutions that constitute, with the exception of the Andrés Bello Convention, an important part of the AIS. They have been created in order to supplement the integration process in its social dimension.
Hipólito Unanue Convention that focuses on the improvement of health in the region, and the Simón Rodríguez Convention, which specifically addresses labour issues.

The Simón Rodríguez Convention is the “forum for debate, participation and coordination” of the social and labour issues in CAN. More specifically, the Convention is in charge of recommending proposals and designing cooperation activities on social and labour issues and of defining and coordinating the policies on the issues that have been previously determined as priority areas by the deliberative bodies of the Andean Community. The Simón Rodríguez Convention is composed of the Conference, the Specialized Labour Committees and the Technical Secretariat. The Conference expresses its will through the issuing of recommendations adopted by consensus as the highest authority of the Convention, and is composed of the Ministers of Labour of the Member States and the Coordinators of the National Chapters of the CCLA and the CCEA. The Specialized Labour Committees have a tripartite structure, since they are composed of representatives designated by the Ministers of labour and by the Andean Labour and Business Advisory Councils. As will be analysed in more detail below, the Ministers of Labour of the Simón Rodríguez Convention have taken important steps for the strengthening of the labour integration in the region.

3.2. The CAN and the Protection of Labour Rights

3.2.1. The Strengthening of Social and Labour Issues in CAN

3.2.1.1. The Social Agenda in CAN: the adoption of social and labour initiatives

The social and labour issues in the Andean Community are gradually gaining importance for the integration process. Increasingly, the Presidential Council, the Council of Foreign Ministers and the Andean Commission are adopting new decisions and taking new initiatives for the development of a more profound commitment to aspects beyond the exclusive economic dimension of integration. In this same vein, the CCLA has adopted several opinions regarding the elimination of child labour and addressing other

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419 See *ibid.* at articles 2, 3, 4 and 9.
fundamental rights. Now more than ever before, we are experiencing the development of an adequate framework for the discussion of the labour dimension in CAN, not just limited to the text of the Cartagena Agreement, but translated into newer resolutions for addressing these issues.

In charge of determining the future of the CAN and its integration process, the Presidential Council has taken fundamental initiatives in respect to the labour aspect of the CAN, notably the adoption of the Social Agenda and the issuing of guidelines for the creation of the CCLA and the CCEA.

In this same vein, the Council of Foreign Ministers has also taken several steps to deepen the socio-labour structure of the Andean Community,420 the most important for present purposes being the Council’s approval of the PIDS in 2004, as the result of two years of national workshops that included the participation of various governmental institutions and the participation of civil society.421 Specifically in the labour area, the Council of Foreign Ministers approved the Andean Instrument for Health and Safety at Work,422 the Andean Instrument on Labour Migration423 and the Andean Instrument of Social Security.424

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420 Examples of some of the initiatives taken by the Andean Council of Foreign Ministers to strengthen the social dimension are: the creation of the Andean Council of Education Ministers and Principals in Charge of the Cultural Policies (decision 593) and the Program for the Circulation and Execution of the Andean Charter for the Promotion and Protection of Human Rights (decision 486); see also CAN, Andean Council of Foreign Ministers, decision 586 dated May 7, 2004, Official Gazette 1067, online: <http://www.comunidadandina.org/normativadec/D586.htm> (accessed on June 13, 2005); see CAN, Andean Council of Ministers of Foreign Affairs in conjunction with the Commission of the Andean Community, decision 596 dated July 11, 2004, Official Gazette 1092, online: CAN <http://www.comunidadandina.org/normativadec/D596e.htm> (accessed on June 12, 2005).


The social agenda is a result from the conclusion that an integration process that does not address its social dimension can not last in the long or medium term, especially in the context of a region, like Latin America, where social exclusion, poverty, unemployment and inequality prevail.\footnote{CAN, Social Agenda, “Presidential Guidelines and Declarations on the Social Dimension of Andean Integration”, online: CAN <http://www.comunidadandina.org/ingles/agenda/agenda.htm> (accessed on June 15, 2005).} Despite the importance given to the social and labour dimensions that have been identified, it is regrettable that the social agenda did not specifically tackle core labour standards. However, these labour rights have been addressed, although in a general manner, in other Andean documents, such as the Andean Charter for the Promotion and Protection of Human Rights and the PIDS, as will be examined below.

In May 1999, the Ministers of Labour of the Simón Rodríguez Convention established an action plan on labour matters, with the purpose of developing the proposals set forth in the Declaration of Cartagena of Indies on the Elimination of Child Labour.\footnote{See “Cartagena of Indies Declaration on the Elimination of Child Labour: First Ibero-American Tripartite Meeting at the Ministerial Level on the Elimination of Child Labour”, Cartagena, Colombia, 8-9 May 1997, online: <http://www.ilo.org/public/english/comp/child/standards/resolution/cartagena.htm> (accessed on August 1, 2005) [Declaration of Cartagena of Indies]. The Cartagena of Indies declaration in this sense stated: “To double our efforts to progressively eliminate child labour, by developing strategies to facilitate the participation of different social actors and the development and implementation of National Plans of Action: Create National Committees as the appropriate platform for the coordinated participation of the different social actors to formulate and develop public policies regarding the progressive elimination of child labour.”} The action plan established three working groups for each group to discuss different labour matters, while drafting decisions, agreements and recommendations for the approval of the Labour Ministers. The first working group is in charge of examining the issues of basic rights, free circulation of workers, productive employment and professional education and training. The second working group has been assigned the task of discussing the issues of social security and health and safety at the workplace. The third working group is in charge of updating the Simón Rodríguez Convention.

In respect to basic rights, the first group must carry out the tasks of promoting the ratification and observance of ILO conventions, especially the eight core ILO conventions; designing strategies and carrying out actions at the subregional level aimed at ensuring the observance of the commitments made in the different declarations for the
eradication of child labour; creating programs and action plans at the national and subregional levels to promote the rights to organise, freedom of association and to bargain collectively; improving the institutional structures of the Ministries of Labour as a means to ensure an effective protection of workers' rights and finally, the tasks of enacting and harmonizing provisions on labour intermediation.

The objective of ameliorating the institutional structures of the Ministries of Labour could also serve for the purposes of addressing the problem of lack of statistical information on wages and job posts differentiated by gender, as well as the issue of the discrimination toward domestic workers, since these two issues have constituted major critiques addressed by the ILO and NGOs to the Government of Venezuela, as examined in the previous chapter.

3.2.1.2. The PIDS and the Harmonization of Laws

On July 2004, the Andean Presidential Council created the CADS. The CADS will be the body of the AIS in charge of executing the PIDS. The PIDS might be the biggest step that the CAN has taken regarding the social and labour dimension of the Andean integration process. This plan constitutes a response to deep concerns on poverty and social inequity existent in the Andean region, through the adoption of community projects and programs in various areas, including in the labour field.

The main objective of PIDS is the promotion of the harmonization of the different laws in the region. As consequences of the Andean subregional integration process, such
as free mobility and residence of the region's workers, the domestic labour laws of Member States shall be gradually harmonized. This harmonization must be carried out in respect to CAN's decisions and international binding instruments, such as the 1998 ILO Declaration on Fundamental Principles and Rights at Work, discussed in the first chapter. The PIDS refers to this declaration by stating that "these fundamental principles and rights constitute a minimum common ground of labour rights on which Member States [Andean countries] will be able to build regional socio-labour norms as adequate responses to demands of economic development and social equity". 435

The interest in the harmonization of labour laws from Member States results from the materialization of one of the main objectives of the Andean Community for the strengthening of the Andean subregional integration process. Accordingly, the first mechanisms mentioned in the Cartagena Agreement are the 'gradually harmonization' of "economic and social policies" and the coordination of "national laws with regard to pertinent matters". 436

The Commission and the Andean Council of Foreign Ministers, as part of the 'legislative branch' of the Andean Community are the bodies of the AIS which have issued the most number of decisions aiming at the harmonization of laws among Member States. However, the harmonization efforts have mostly been made on economic matters. The Andean Parliament, despite being one of the bodies called to harmonise, 437 has yet not exercised this competence. 438

Within the socio-labour aspect, the PIDS provided the adoption of five projects, denominated 'Social Communitarian Projects'. 439 These Communitarian Projects addressed the creation of an Andean Labour Observatory, 440 and the areas of occupational training, 441 employment promotion, 442 child labour 443 and fundamental

435 See ibid. at 17, 18.
436 See Cartagena Agreement supra note 381, article 3(a).
437 See above at 81.
439 See CAN, decision 601, supra note 433 at 17, 18.
440 Given the nature of the Andean Labour Observatory, it will not be discussed under the PIDS section but rather addressed below, in the section referring to the participation of civil society and the CCLA, see below at 98 ff.
441 See 'Program for the Subregional Harmonization of Methodologies, Criteria and Priorities on Occupational Training' in CAN, decision 601, supra note 433 at 20.
labour rights. Given the focus of the present paper on the analysis of the status of core labour rights as were defined by the ILO and discussed in chapter one, I will proceed to examine in detail the latter two projects, i.e., the social communitarian projects on fundamental labour rights and on child labour.

➢ Subregional Andean Program on Fundamental Labour Rights

The initiative to establish a specific program on fundamental labour rights was identified as essential for the Andean integration process in three of the five national workshops held by virtue of the PIDS. In this vein, the Andean System’s objective is the progressive harmonization of laws from the five Member States concerning fundamental labour rights, for which the ILO Declaration on Fundamental Principles and Rights at Work provides the normative framework on the areas to harmonise.

In order to achieve this objective, the program focuses on the gathering of Member States’ labour legislation, recommending proposals for the progressive harmonization of laws and carrying out a follow up on the ratification of the eight core ILO conventions on fundamental labour rights in all five Member States.

As was examined in the first chapter, the ILO is the agency in charge of supervising the ratification by Member States of conventions, with an emphasis on the eight most fundamental labour rights conventions. The fact that the Andean...
Community is also aiming at that objective, reinforces the pressure in the region, for Andean countries to ratify the ILO conventions, especially the eight ‘core conventions’. However, the goal of the Andean integration system of strengthening the ratification promotion efforts, which already pertain to the ILO main objectives, might somewhat divert the attention from the underlying problem in the attempt to ameliorate workers’ conditions, namely to ensure compliance of Andean Governments with already ratified ILO conventions, especially when taking into consideration that all five Member States to the CAN have already ratified all eight fundamental conventions. I cannot deny however, that the ratifications of some of these conventions by Andean countries could have resulted from the lobby and pressure exerted by the Andean Community. Given the ratification of core ILO conventions by Andean Governments, the establishment of follow-up mechanisms is currently, indeed, an essential aspect to address. Nevertheless, the document establishing this subregional program on fundamental rights as part of the PIDS, does not specify in any way the guidelines for implementing this follow-up. Hence, I could assume that they were referring to a similar follow-up system as the one developed by the ILO, but that remains unclear.

→ Subregional Andean Program for the Prevention and Eradication of Child Labour

The Project on Child Labour was the result of discussions on the subject in most of the national workshops that were held by virtue of the PIDS. The project establishes that both ILO conventions referring to child labour, i.e. conventions 138 and 182 should be ratified by all Member States to the CAN. The project was created with the overall objective of promoting the “progressive eradication” of child labour with an emphasis in its worst forms and contributing to the prevention of child labour in general. As a means to achieve this eradication, the program focuses on the promotion of

452 It is important to bear in mind that Andean countries had not ratified some of the eight fundamental ILO conventions until most recently. Some examples are the ratification of convention 29 in 2005 by the Bolivian Government, the ratifications of convention 138 in the years 2000, 2001 and 2002 by Ecuador, Colombia and Peru, respectively. Also, the recent ratifications by Andean countries of convention 182, which albeit fairly recent (1999), was not ratified by the Governments of Venezuela and Colombia but until the years 2004 and 2005, respectively.
453 See CAN decision 601 supra note 433 at 22.
coordination,\textsuperscript{454} gathering of information on the problem and its publication,\textsuperscript{455} development of statistics, and the promotion of processes for the harmonization of Member States’ laws on the issue with the support from the Andean Parliament and the Simón Rodríguez Convention.\textsuperscript{456}

As analysed in the previous chapter, to the eyes of ILO and NGOs, the Government of Venezuela is not making major positive changes for the eradication of child labour. One of the main criticisms addressed to the Government of Venezuela, is the lack of statistics on the issue. The fact that this subregional program, then, focuses on the promotion of statistical research and the gathering and diffusion of information on child labour makes us infer two conclusions. The first one is that there is a widespread lack of statistical information on the issue in the Andean region, which by no means justifies Venezuela’s poor performance in this area. The second preliminary obvious conclusion is that with the adoption of this program, there is a means available at the regional level for addressing the lack of statistical information in Venezuela as well as in the other Andean countries.

Another of the criticisms addressed by the ILO to the Government of Venezuela concerning child labour is its lack of coordination with different multilateral institutions besides the ILO.\textsuperscript{457} The adoption of this plan at the regional level also provides the Government of Venezuela with the opportunity of working in close coordination with Ministers of Labour from other Member States, as well as with delegates appointed by the most representative workers’ and employers’ organisations in other Member States of the CAN. These are not exactly other ‘multilateral agencies’ but are at least other different entities than just the ILO.

\textsuperscript{454} More specifically, this Subregional program calls for a coordination between the CCLA, the CCEA, the Advisory Council of Labour Ministers and the Simón Rodríguez Convention as a means to obtain a joint control of child labour.

\textsuperscript{455} Such objective for the gathering and publication of information on child labour is to be carried out in coordination with the ILO, the CCLA, the CCEA, and the Advisory Council of Labour Ministers.

\textsuperscript{456} See CAN, decision 601 \textit{supra} note 439 at 22.

\textsuperscript{457} In that specific report (see Governing Body, Review of annual reports, 2004 \textit{supra} note 314), the ILO did not specify which other organisations or international agencies, the Venezuelan Government could work with in order to tackle the problem of child labour. However, it should be assumed that the ILO could have been referring to several other international agencies, namely UNICEF, UNESCO, IOM, UNDP, GPAT, UNODC, UNICRI or international NGOs that have the specific mandate of addressing child labour.
Examples could be brought to the Andean Community from the experience of South Asian cooperation activities. The SAARC, a regional organisation of Asian countries with the objective of improving the living standards in the region, signed a memorandum of understanding in December 1993 with UNICEF, with the objective of implementing SAARC’s decisions on children through an agenda that included joint studies, exchange of documentation and the monitoring of implementation.458

Furthermore, increased coordination coupled with the availability of statistical information could easily promote the elaboration and adoption of adequate domestic state policies for addressing the problem of child labour, which could result in more inter-institutional coordination. These subregional measures could serve for effectively tackling the problem of child labour in Venezuela.

3.2.1.3. The Subregional Codification of Labour and Human Rights: the Andean Charters 459

The 1994 ASC guarantees several internationally recognised labour rights as human rights for the Andean region, including the right to employment that is freely chosen; the right to form trade unions, without previous authorization; the right to join those trade unions without more requirements than those established by their own by-laws and the domestic legislation and the right to equality in treatment for men and women.460 Additionally, the ASC establishes that the ILO Convention no. 69 shall be ratified in order to guarantee the protection of the rights of indigenous people.461 The

458 See Monica Ita Darer, “The Absence of a Child Protection Agenda within Regional Pacts: An Asian Example and Existing Need for Action in the Andes” (ECPAT, 2003), online: <http://www.ecpat.net/eng/A4A02-03_online/ENG_A4A/Regional_Absence.pdf> (accessed on August 1, 2005) 28 at 32.

459 These “Andean Charters” are the ASC, the ACHR and the proposal for an “Andean Labour Charter”.

460 See CAN, Andean Parliament, Andean Social Charter, adopted September 30, 1994, online: ILO <http://www.oit.org.pe/spanish/260ameri/oitreg/activid/proyectos/actrav/sindi/general/documentos/socand.html> (accessed on July 1, 2005) [ASC] at article 58. (Additionally, the ASC protects the following rights: the right to professional formation and training; the right to move freely from one country to the other within the Community; the right to occupational health and safety and to establish commissions for promoting compliance with the related laws; the right to the protection of maternity and family and the right of working women to protection and maternity leave; the right to social security; the rights to work and study; the right to professional development of the working students; and the right of persons with disabilities to work, according to their capacity).

461 See ibid. at article 26.
Charter also urges Member States to promote employment, beyond the regular offers of employment generated in the public and private sectors.462

An extremely important characteristic of this charter is that it was the result of a deep analysis of the critical issues specifically affecting the region. Accordingly, the Charter took into account the Andean historical and social background and was not just the product of a “copy and paste” from other international human rights treaties.463 In this sense, the Andean Charter prioritises economic, social and cultural rights, and the right to development, over other rights, due to current socio-economic needs of the subregion.464 Furthermore, the Charter identifies certain groups as being especially vulnerable in the Andean countries, and hence labels them as sectors of the population in need of special protection, namely indigenous people, afro descendants, persons with disabilities, women and children.465 In respect to the rights of children, the legislators wanted to emphasize the rights of the child that were deemed relevant for the Andean region, and not just copy a large list of rights of the child included in international human rights treaties and conventions of the rights of the child.466

As an example of the strengthening of the social dimension in the Andean Community, the Presidential Council adopted on July 2002 the ACHR.467 This Charter of Human Rights establishes that Member States reaffirm their commitment to comply with the ICESCR, including the rights to carry out a “freely chosen or accepted work”, to “enjoy just and satisfactory working conditions”, and to “form and join trade unions and to enjoy other labor rights”, among others.468

In relation to the problem of child labour, the Charter establishes that Member States shall guarantee protection against slavery, trafficking and all forms of exploitation.469 It also stipulates that Member States shall address in their own

462 See ibid. at article 56.
464 See ibid.
465 See ibid.
466 See ibid.
467 See CAN, ACHR, supra note 411.
468 See ibid. at article 24.
469 See ibid. at articles 45(5), 45(7).
jurisdictions as well as in the Andean sphere, the eradication of child labour following the ILO conventions “and applicable national legislations”.  

Concerning the principle of non-discrimination in respect of employment and occupation, the Charter generally establishes that Member States shall guarantee the protection of women against discrimination and shall safeguard the right of women to work. Additionally, that there shall be protection against all forms of sexual and labour exploitation, slavery and trafficking of women and girls. In this trend, the Charter also aims at the protection of persons with disabilities against all forms of discrimination.

As can be concluded, the ASC and the ACHR constitute positive steps in relation to the labour dimension in CAN. As illustrated below, these charters are, however, flawed for the purposes of achieving a strong labour dimension in CAN and hence, fail to effectively protect workers.

3.2.1.4. Civil society and trade union participation in the CAN: the CCLA

Several documents adopted by the CCLA address important issues of fundamental labour rights, in accordance with international labour rights instruments. The latest opinion by the CCLA focused on a series of recommendations made to the draft of the *Socio-labour Declaration of the Andean Community*. The CCLA stated that although it considered the draft to be “in accordance with the fundamental principles and rights at work” it deemed necessary to address some issues that were either not included in the text, or which were addressed through a different approach.

In this opportunity, the CCLA took a positive step with the recommendations it proposed, namely the incorporation of the prohibition of child labour; the adoption of the principle of freedom of association and the right to form social and labour unions at the national, subregional and regional level, without prior authorisation or limitation on the basis of the number of members, in accordance with national laws and international ILO

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470 See *ibid.* at article 45(6).
471 See *ibid.* at article 43(1).
472 See *ibid.* at article 43(4).
473 See *ibid.* at article 49(1).
474 CAN, CCLA, Opinion 025 dated November 21, 2004, was adopted by the CCLA in response to the General Secretariat’s and Council of Labour Minister’s request for reviewing the draft of the *Socio-labour Declaration of the Andean Community*, online: <http://www.comunidadandina.org/guienes/opinion25.htm> (accessed on July 10, 2005).
conventions; and the right for collective bargaining to regulate working conditions, relations between workers and employers and relations between employers’ organisations and workers’ organisations.

The CCLA and the CCEA are two of the most important channels for the actual participation of members from civil society (workers and employers) in the subregional integration process. In the specific case of the CCLA, another positive step has been the cooperation that has been established, at least in the form of joint declarations, between the CCLA, as the representative for workers in the Andean region and other international agencies, which represent workers at different regional levels.

Accordingly, Andean workers, through the CCLA, have reached understandings with workers from the CCSCS, the ECTU, and directly with international agencies like the ILO. The link between the CCLA and the Coordinating Committee of Trade Unions from the South Region represents the very important liaison of trade unions from the Andean Community and Mercosur, thereby linking trade unions in the South American region. In their meeting held in September 2001, the organisations issued a “Plan of Trade Unions CAN-Mercosur”, whereby they commit themselves to form two working groups. The first group is in charge of comparing the ASC with the Socio-labour declaration of Mercosur, with the purpose of the harmonization of both documents so as to include them in the CAN-Mercosur negotiations. The second working group is in charge of studying the commercial negotiations between CAN and Mercosur and drafting a proposal for trade union action. Additionally, the plan included the commitments of, inter alia, implementing the agreements signed between COMUANDE and the Commission of Women of the South Region; strengthening the link between trade unions

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475 See for example the following documents which represent some of the joint declarations and links CAN-Mercosur within the framework of trade unions or labour matters: CAN, Joint Declaration between CCLA and CCSCS, Montevideo, June 1998, online: <http://www.comunidadandina.org/documentos/actas/dec14-12-03.htm> (accessed on July 14, 2005); see also CAN, Declaración del III Encuentro Sindical de la Comunidad Andina – Mercosur Santa Cruz de la Sierra, September 11, 2001, online: <http://www.comunidadandina.org/documentos/actas/dec11-9-01A.htm> (accessed on July 17, 2005); see also CAN, Plan de Trabajo Sindical Unitario CAN – MERCOSUR, Santa Cruz de la Sierra, September 11, 2001, online: <http://www.ccla.org.pe/legislacion/declaraciones/dec_merc_III_encuentro_can_mercosur.php> (accessed on July 15, 2005). [Plan de Trabajo CAN-Mercosur].

476 See CAN, Joint Declaration between CCLA and ECTU, online: <http://www.comunidadandina.org/documentos/actas/dec7-4-03.htm> (accessed on July 17, 2005).

from both regions and exchanging information on action plans in each region for tackling certain issues, including child labour, employment and social security.\textsuperscript{478}

In respect to the freedom of association and the right to collective bargaining, the CCLA has issued several opinions, two of the most important in June 2000. The Labour Council recognized that although Member States had ratified the main international conventions on labour rights, there was no specific norm in the Andean Community system that called for a concrete action of commitment with the most fundamental labour rights.\textsuperscript{479} This criticism is still applicable today. This situation is even more severe if one takes into consideration that as of 2000, when this opinion was issued, Latin American countries accounted for 42\% of all the complaints filed before the ILO CFA for violations of freedom of association, and 39\% of those Latin American countries were Andean countries.\textsuperscript{480} As a consequence, the CCLA considered that the Ministers of Labour had to promote the strengthening of trade unions against acts of discrimination and to guarantee trade unionists’ adequate training.\textsuperscript{481}

With the objective of establishing the Andean Common Market, the CCLA is currently working on the five areas that have been determined as priority areas to the labour dimension of the Andean integration process, namely employment promotion, labour education and training, social security, health and security at work and labour migration.\textsuperscript{482}

In May 2002, the CAN held a conference with the purpose of commencing a process of participation of trade unions in the organisation, and strengthening the social dimension in the subregional integration system,\textsuperscript{483} as part of a long term Project for the Strengthening of the CCLA. Fortunately, Member States and the Andean Community in

\textsuperscript{478} See Plan de Trabajo CAN-Mercosur, \textit{supra} note 475.
\textsuperscript{479} See Opinion 011: Fundamental Human Rights and the defence of freedom of association (Lima, June 9, 2000), online: \texttt{<http://www.comunidadandina.org/quienes/opinion11.htm>} (accessed on June 25, 2005). [CCLA, Opinion 011] (Additionally, the Labour Council comments that it is important to take into consideration that out of the core labour rights, the right of freedom of association, the right to organise, and the right to form and join a trade union are part of the most important rights for the objective of achieving a life with dignity and with real opportunities for development. The CCLA also remarked the international recognition that trade unions are one of the most fundamental pillars in democratic systems).
\textsuperscript{480} \textit{Ibid}.
\textsuperscript{481} \textit{Ibid}.
\textsuperscript{482} CAN’ website, \textit{supra} note 396.
general realized that much more was needed than just the simple issuing of declarations on labour rights. The role that trade unions had to play in this new phase was essential if they wanted CAN to effectively improve workers’ rights.

With respect to the participation of trade unions in the Andean subregional process, the Andean Labour Advisory Council issued an opinion “rejecting the exclusion of the CTV as a member of the CCLA”. As was examined in the previous chapter, the current Venezuelan administration has not recognized the legitimately elected board of directors of the Venezuelan trade union CTV, which has been the most representative trade union of Venezuelan workers for several decades. This lack of recognition is a consequence of the political polarization currently taking place in Venezuela. As it has not been considered the ‘most representative organisation’ of Venezuelan workers, and instead a new workers’ union (UNT) has been created by the Government, the CTV does not have representation in the Andean Labour Council.

Given this discriminatory treatment exerted by the Venezuelan Government, the CCLA agreed in April 2003:

1. To reject the discrimination by the Venezuelan Government toward the CTV, in clear violation of the CCLA norms.
2. To demand from the Ministry of Production and Trade to abide by article 5 of the decision # 441, thereby amending as soon as possible the omission of the CTV and in conformity with the letter sent by the CTV, acknowledge those unionists as permanent and substitute delegates for the CTV before the Andean Labour Advisory Council.
3. In the case that such discrimination continues, to authorize the presidency of the CCLA to file the corresponding actions and claims before the Andean Court of Justice or before international organisations such as the ILO.484

The CCLA had never issued this type of statements, mainly because there has never been the need to do so. This is the first time that a Member State has denied a most representative organisation of workers the right to participate in the CCLA.485 As examined, the CCLA is the means through which workers, as members of civil society,

484 CAN, CCLA, Opinion 019: Rejection toward the exclusion of the CTV as a member of the Andean Labour Advisory Council (Lima, April 8, 2003), online: <http://www.comunidadandina.org/guienes/opinion19.htm> (accessed on July 18, 2005). As of August 2005, the Venezuelan Government had neither implemented any change to this situation, nor authorized the CCLA to file any action before the ILO or the Andean Court.
485 Electronic mail from José Marcos Sánchez, Consultant to the CCLA and member of PLADES (11 August 2005).
actively participate in the Andean subregional integration process. As members of civil society, there is only much they can accomplish. This statement serves for the purposes of raising concern and awareness over the issue and ideally there should be a diplomatic follow up. However, Member States are far more interested on the economic objectives of the CAN, than on its social dimension. In this sense, the CCLA as well as the ILO, could, and most certainly will, continue to exert pressure on the Venezuelan Government on this issue, paying closer attention to the Government’s interaction with trade unions.

➢ *The Andean Labour Observatory*

In December 2002, the CCLA, the CCEA and the CAMT signed a tripartite agreement for establishing the Andean Labour Observatory, following a year of discussions on the issue at several conferences that were held. The ALO was defined in this agreement as “the essential instrument for the analysis, definition and follow-up of the subregional policies taken in the socio-labour dimension of the Andean Community”.\(^{486}\) The ILA,\(^{487}\) in cooperation with PLADES,\(^{488}\) and the Labour Department of the General Secretariat are currently implementing the first phase of the ALO, consisting on the gathering of information and the creation of a database, made available in the form of a webpage, containing legislation, statistics and documentation on the five priority areas defined in the socio-labour dimension of subregional integration, as examined above.

This initiative is also an indicator of the increasing participation of civil society in the Andean integration process, given the active involvement of the ILA in defining.

\(^{486}\) CAN, “Acuerdo Marco Tripartito entre el Consejo Asesor de Ministros de Trabajo de la Comunidad Andina, CCLA y CCEA para la constitución del Observatorio Laboral Andino” (December 11, 2002), online: <http://www.comunidadandina.org/documentos/actas/acu11-12-02.htm> (accessed on August 3, 2005) [Tripartite Agreement on the creation of the ALO] (the tripartite agreement specified in its first article that one of the objectives of the ALO was to make the future tasks of the Simón Rodríguez Convention easier).\(^{487}\) The ILA is a non governmental organisation with the objectives of researching, training, informing and providing counseling to workers in the Andean region. It also serves as a technical body of the CCLA for providing cooperation to the CCLA in the achievement of its goals concerning subregional integration. Its headquarters are currently in Lima, Peru, but the organisation maintains regional offices in the Andean countries.\(^{488}\) PLADES is a Peruvian-based NGO, founded in 1991, with the objective of strengthening trade unions in the Andean countries and promoting compliance with internationally recognized labour standards. PLADES is composed of professionals from civil society who specialize in labour issues and the labour related aspects of the Andean subregional integration.

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structuring and implementing this instrument. The document constituting the Andean Labour Observatory that the CCLA, the CCEA and the CMAT agreed to implement is based on a proposal drafted by the ILA. Additionally, the Andean Community has assigned the ILA the very important task of developing the activities necessary for the implementation of and fundraising for the ALO.\footnote{See Tripartite Agreement on the creation of the ALO, supra note 486.}

Some of the flaws, referred-to above, namely the lack of statistical information on child labour and the absence of specific guidelines for the follow-up of compliance with labour standards,\footnote{See supra notes 312 ff. and accompanying texts.} are addressed in this observatory. Hence, if implemented, this observatory will be extremely helpful for the strengthening of CAN as a subregional organisation protecting workers.

3.2.2. The Weakening of Labour Rights in CAN

3.2.2.1. The Andean Community: mainly economic objectives and overall weak structures

Despite these efforts, however, social and labour issues seem to continue on a secondary level of importance, since they are included in an integration process where economic interests are more important.\footnote{In this respect, see ILO, The Labour Challenge in CAN supra note 170 (“Despite having set themselves the goal of bringing about the development of their peoples under equitable conditions, the integration processes originally limited their area of operation to trade and economic matters. At the most, they adopted the aim of expanding employment, but this objective was considered the necessary outcome of the accomplishment of their aims in the commercial or economic terrains. The development of an autonomous socio-labour dimension (not necessarily associated with the trade initiatives), … is a concern that has emerged only recently in the course of multilateral negotiations and the integration processes”).} As a first reaction, one consequence appears clear: the focus is primarily on freer trade, diverting attention from, for example, the urgent need to adopt a supervisory system for the monitoring of adopted social or labour decisions, for the purposes of ensuring effective compliance of these instruments.

Some scholars have been openly critical of the CAN system and its foundations. For instance, some scholars argue that the CAN, since its beginnings has had “bad luck”,\footnote{Interview of Francisco Iturraspe, Professor at the UCV, Coordinator of the Masters program in Labour Law at UCV and Chair of the Labour Law course at the undergraduate level at UCV (13 August 2005) [Interview of Francisco Iturraspe].} in the sense that the original integration agreements signed between the Andean countries have not been very successful in achieving its goals of economic integration.
Even the CAN is currently in danger of collapsing, to the view of some scholars, due to the likely possibility that the CET will never come into effect given the disparity of economic development of the Andean countries.\textsuperscript{493} The eventual failure of the initial objective of the Andean Common Market, coupled with the current political instability in countries like Ecuador and Bolivia, and the overlap with other regional agreements - such as Bolivia’s agreement and interest with MERCOSUR, Peru’s free trade agreement with the US and Chávez’s proposal for the creation of a Community of South American Nations as well as a Community of Latin American Nations- threaten the stability of the Andean Community\textsuperscript{494} and hence the future of the labour dimension of the Andean subregional integration process.

Another important challenge currently affecting the functioning of the Andean Community is the lack of compliance of Member States with their obligations under Andean Subregional Law.\textsuperscript{495} Presently, the enforcement of the Andean Community decisions and of the obligations assumed by Member States is extremely weak, since there is no sanction system in place.\textsuperscript{496} Unfortunately, it is very unlikely that Member States will be willing to adopt a mechanism of sanctions for non compliance with obligations, even in the case of violation of economic restrictions on tariffs,\textsuperscript{497} let alone the creation of enforcement mechanisms for violation of labour or human rights.

3.2.2.2. The Andean Court of Justice and its Limited Labour Jurisdiction

Since 1999 the Andean Court of Justice has had jurisdiction over labour matters. In the 1996 reform, which entered into force in 1999, the first article of the section of the statute adding jurisdictional capacity on labour issues, reads in a formidably inspiring

\textsuperscript{493} Ibid.
\textsuperscript{494} Ibid.
\textsuperscript{495} Interview of Luis Henrique Farías Mata, former justice and president of the Andean Court of Justice (1994-2001), professor at the UCV, UCAB, UNIMAR, Universidad Andina Simón Bolívar in Quito, (10 August 2005).
\textsuperscript{496} See Jorge Luis Suárez M., “La Responsabilidad Patrimonial de los Estados Miembros y de los Órganos Comunitarios por la Infracción del Derecho Andino” in Jornadas sobre Derecho Subregional Andino, supra note 379, 215 at 219.
\textsuperscript{497} The Secretariat of the Andean Community is currently discussing a reform to the statute of the Andean Court of Justice. The issue of creating a system of sanctions within the subregional integration process, albeit initially proposed for inclusion, was dismissed since Member States were not able to reach an agreement on the matter. (Interview of Genaro Baldeón supra note 438).
way "[i]n its rulings, the Andean Court of Justice will apply the general principles of labour law recognized by the International Labour Organisation". 498

This recently assigned jurisdictional capacity, however, is regrettably not a jurisdictional means for protecting fundamental workers’ rights in the Andean countries, but a tool for solving labour controversies at the regional level. Hence, only AIS’ employees and staff members are entitled to file lawsuits and begin jurisdictional proceedings before the Andean Court of Justice and only referring to breach of labour contracts by bodies of the AIS. 499 Unfortunately, the Andean Court of Justice has labour jurisdiction over the organs of the subregional organisation as a regular domestic labour court has jurisdiction over domestic labour matters, and therefore it does not have the capacity to be a court through which individuals could exercise direct actions to make Member States comply with internationally recognized labour rights. This would have been a good opportunity to considerably improve the living standards of workers in the Andean region, given the strengthening of the compliance/enforcement of labour standards that it would have implied.

3.2.2.3. The Andean Charters and How they are Flawed

The ASC is a step forward in the strengthening of the social and labour dimension in CAN. The ASC, however, fails to meet the parameters established by ILO conventions, since it only protects some but certainly not all of the most fundamental rights and principles at work.

Furthermore, the ASC constitutes a drawback in relation to the national constitutions and labour laws of Member States, since it is far less comprehensive and protective of workers than the domestic labour regulatory framework. 500 In the case of Venezuela, for example, as analysed in the previous chapter, the constitution as well as the organic labour act, guarantee the right to collective bargaining, while the ASC and the ACHR fail to specifically do so. Additionally, despite the charters’ reference to the

499 See ibid., at article 136 and 137.
500 Interview of Francisco Iturraspe, supra note 492.
principle of non-discrimination, they fail to specifically address the right of equal pay for work of equal value, notwithstanding its protection by the ICESCR and ILO conventions.

There are other criticisms addressed to the ASC that could be discussed here, such as its silence on child labour, and its silence on the principle of non-discrimination in respect to employment and occupation based on any condition, and not just limited to non-discrimination based on gender. Meanwhile, as was examined in the previous chapter, there is extensive Venezuelan legislation against child labour and on the prohibition of discrimination under any circumstance. However, these loopholes in the ASC, have been tackled by the ACHR, in its very comprehensive sections on the rights of children, women, indigenous people, elderly persons, people with disabilities and people with diverse sexual orientation.

However, as was examined above, the ACHR addresses fundamental labour rights in a rather general way without specifically guaranteeing certain rights. If we analyse for example, article 24 of the Charter, it becomes evident that a simple reference to the right of workers to form and join trade unions and “to exercise other labour rights”, does not specifically emphasize the importance of the right of freedom of association and the right to organise. Furthermore, one must assume that “other labour rights” is used so as to imply the fundamental right of collective bargaining. Additionally, it is important to highlight that even taking into consideration the internationally recognised principle that labour rights are human rights, article 24 is not in any way an article exclusively dedicated to labour rights, but a summary of some of the rights included in the ICESCR.

Even if the ACHR were specifically designated to protect certain human rights that are considered fundamental to the Andean region, it should not be an excuse for not specifically protecting the labour rights that were deemed as the most fundamental by the international organisation with the highest expertise on the subject. Nevertheless, the Charter does establish that Member States “shall promote and protect the rights and

501 The ASC has a general chapter entitled “Childhood and Family”, where it refers to an adequate environment for the complete development of children. Additionally, it establishes that it urges the governments of the region to comply with the obligations set forth by the International Convention on the Rights of the Child and to adopt and ratify international instruments against the exclusion of children due to poverty. Besides these provisions, however, the charter does not address the problem of child labour or forced labour of children, including trafficking.

502 See ACHR supra note 411 at article 24.
guarantees of workers, in accordance with national legislations, International Human Rights Law and labour standards adopted by the International Labour Organisation.”

The adoption of the ASC and the ACHR represents a step forward in the deepening of the social dimension of the integration process of the Andean countries. These charters are however, soft law and non binding in nature. Furthermore, the presidents of Andean countries included in the last article of the ACHR, a clause that practically exempted Member States from complying with its obligations. The last section of article 96 establishes that “the binding nature of this Charter will be decided by the Andean Council of Foreign Ministers at the right time.”

The adoption by Member States of a social and a human rights charter purportedly made non binding in nature (and the eventual adoption of a Andean labour charter which will most likely have the same fate), discredits the commitment of Andean Governments to strengthen and deepen the social and labour dimension of the AIS and to respect and comply with international and Inter American human rights instruments.

A truly serious commitment to ameliorate workers’ conditions in the region would imply for Member States to make these charters binding to ensure compliance. Once Member States assume its provisions as obligations, these charters would become part of the “Andean Communitarian Law” or Andean Subregional Law. Hence, persons whose human rights or labour rights have been violated could file inobservance actions before the Andean Court of Justice against that Member State for non compliance with its human rights obligations under Andean Subregional Law.

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503 See ibid. at article 25.
504 See Ita Darer, supra note 458 at 32.
505 See ACHR supra note 411, at article 96.
506 Mr. Genaro Baldeón, as legal advisor of the General Secretariat in Lima, criticises an eventual modification of the charter so as to make it binding for Member States. Furthermore, he criticises the adoption of the Andean Charter for Human Rights, stating that such charter was not a satisfactory solution to address human rights in the sub regional integration system. In his opinion, the efforts should have been aimed at adopting a subregional treaty or Andean norm that was at the top of the hierarchical system of norms, along with the Andean constituting treaty, the Cartagena Agreement. It should have been a treaty signed as an additional protocol to the Cartagena Agreement, for example. Interview of Genaro Baldeón, supra 438. (The comments made on this interview are Mr. Baldeón’s opinions and do not necessarily reflect the institutional position of the General Secretariat of the Andean Community).
507 “Andean Communitarian Law” or Andean Subregional Law constitutes the set of legal rules and norms that compose CAN’s law.
A similar proposal was adopted in one of the preliminary drafts of the ACHR, for which the Andean Community received technical consultancy from the CAJ. This proposal mentioned the creation of a Specialized Commission on Human Rights within the Andean Court of Justice. The main objective of the Commission was to guarantee compliance by Member States with the ACHR, by deciding over complaints submitted by individuals or groups of individuals against a Member State due to a violation of a human rights obligation.

This proposal was later discarded by the Andean Community, since adopting it implied making a commitment that Member States were not willing to make. One might think that since this proposal was at least discussed, it could be subject to analysis in a prospective additional protocol to the charter or in a reform to the Court of Justice’s statute. However, assuming that Member States will, even in the long term, assign jurisdictional capacity for the Andean Court to take cognizance over human rights violations cases, is somewhat naïve, since a proposal in that sense, is neither in the interest of Member States nor in the future they have envisioned for the Andean Community.

Additionally, the eventual empowerment of the Andean Court with this jurisdictional capacity, coupled with the adoption of a binding Andean human rights treaty, could have posed several problems at the Inter American level. The Andean Court of Justice would have been assigned with the same competence, albeit with jurisdiction over different countries, as the IAHRCourt. When facing a human rights violation perpetrated by one of the five Member States to the OAS and the CAN, thereby infringing the binding Andean Charter of Human Rights as well as the American

508 Interview of Genaro Baldeón, supra note 438.
509 See Proposal for the Andean Charter of Human Rights, online: El Nacional <http://www.el-nacional.com/refencia/documentos/pdf/cartaandina.pdf> (accessed on July 29, 2005) (This proposal is found in the website of the Venezuelan newspaper El Nacional, in its section of ‘documents’. This website does not, however, specify a date or an author of the document. Even after contacting the newspaper offices, I was not able to obtain information on what was the source of this document). Following the interview with Genaro Baldeón (see supra note 385), however, I was able to confirm with him, that the creation of such specialized committee for human rights was indeed among the proposals on the table, when discussing the Charter. He confirmed that such proposal was drafted by the Andean Community with help provided by the CAJ.
510 Interview of Luis Henrique Farias Mata, supra note 495 (The comments made on this interview are Mr. Farias Mata’s opinions and do not necessarily reflect the institutional position of the Andean Court of Justice).
511 Interview of Genaro Baldeón supra note 438.
Convention on Human Rights, where would the individual file the corresponding action? Would individuals have access to both actions? How would a conflict of decisions be addressed?

Concerning the Inter American human rights system, it is important to highlight that since its creation, the IAHRC has accepted and the IAHRCourt has decided cases mostly addressing violations of civil and political rights. Recently, however, the IAHRCourt issued a very important decision concerning the right of freedom of association, in the context of the Fujimori era and the political assassination of a Peruvian trade union leader, Pedro Huilca. With this decision, the Inter American human rights system is opening the door to the strengthening of the protection of economic and social rights, and more specifically of labour rights. This is especially important in the context of labour rights in Venezuela, given the recent ratification by the Venezuelan Government of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights or Protocol of San Salvador. The Venezuelan ratification of this protocol opens the window for the Government of Venezuela to be held accountable for violations of freedom of association, which exercise is essential for the enjoyment of the other three fundamental labour rights.


513 Interview of Aníbal Cabrera, Venezuelan Trade Union Activist, Former Representative of the CTV before the AFL-CIO (7 June 2005).


515 See OAS, General Assembly, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", OR OEA/Ser.L/N/II.82/Doc.6, rev.1 (1988). Despite the adoption of an instrument protecting economic, social and cultural rights in the Inter American context, only the violations of freedom of association (including the right to freely join a trade union of the worker’s choice) and the right to education are justiciable, that is, these rights are the only ones that under the Protocol of San Salvador can eventually give rise to the system of individual petitions before the IAHRC and the IAHRCourt (see article 19.6 of the Protocol of San Salvador).

However, it could be argued that other economic, social and cultural rights, including the other three core labour rights, with exception of the right to collective bargaining, are already directly or indirectly included in the individual petitions system of various Inter American Human Rights instruments. The importance of making freedom of association enforceable, however, is essential. Not only is it essential because of the key role it plays in the exercise of the other fundamental rights or because of the high number of complaints of violations of this right lodged before the ILO CFA against Andean countries and the Government of Venezuela, but also because this right was not specifically protected anywhere else in the Inter American human rights system, let alone made enforceable through the individual petitions system.
It is interesting to note that in the ACHR, the presidents of the five Member States reaffirmed their commitment to comply with judgments made by the IAHRCourt,\textsuperscript{516} recommendations made by the IAHRC,\textsuperscript{517} and recommendations made by non-jurisdictional regional and international bodies,\textsuperscript{518} such as the ILO committees, namely the CFA, CEACR and ILCCR. These committees, as analysed above, have addressed several recommendations to the Government of Venezuela concerning its non compliance with ILO conventions. The Government’s lack of compliance with international labour standards at the domestic level seems somewhat in tune with its labour policies at the regional level, i.e. the adoption of non-binding –as opposed to binding- Andean human rights charters.

At the opening ceremony of the XII Meeting of the Andean Community Vice-Ministers and Labor Experts, the Andean Community Secretary General, Allan Wagner Tizón stated that “one of the results of the Andean Conference on Employment should be the approval of an Andean Labor Charter that would make it possible to guarantee workers’ rights within a context of development and competitiveness”.\textsuperscript{519} As interesting as that idea might have sounded, especially for labour rights’ advocates, it did not have the expected results, since no proposal was put forward in the Conference.\textsuperscript{520} Even the own Ambassador did not make a comment on the subject at his opening speech of the Employment Conference itself.\textsuperscript{521}

It would be interesting to observe the outcome of future Andean employment conferences and whether the Andean Community undertakes the task of adopting the Charter. Given the apparent reluctance of Member States to adopt a binding treaty on human rights for the Andean region, and their unwillingness to assign jurisdictional capacity for human and labour rights violations to the Andean Court of Justice, the

\textsuperscript{516} See ACHR, supra note 411 at articles 5 and 83.  
\textsuperscript{517} See Ibid.  
\textsuperscript{518} See Ibid. at article 5.  
\textsuperscript{519} See Press Release: New Andean Social Agreement supra note 394 and accompanying text; see also Speech by Allan Wagner, supra note 394 and accompanying text.  
\textsuperscript{521} See “Por una iniciativa andina para el empleo, el desarrollo y la competitividad: Hacia un nuevo pacto social andino” Speech by the Andean Community Secretary General, Ambassador Allan Wagner Tizón, at the opening act of the Andean Conference on Employment, Lima, November 22, 2004, online: CAN <http://www.comunidadandina.org/prensa/discursos/wagner22-11-04.htm> (accessed on July 20, 2005).
signing of a comprehensive and effective Andean Labour Charter, could be useful for eliminating the loopholes in the Andean protection of fundamental labour rights.

An effective Andean Labour Charter should at the very least guarantee as the rights of all workers in the region, the rights established in the eight core ILO conventions that all Member States have ratified. Furthermore, it is not only necessary to provide for all core labour rights to be specifically adopted in the Charter, but to ensure that their regional definition and scope is not in any way a limitation of ILO labour standards.

A proposal for an Andean Labour Charter should unequivocally address the adoption of a monitoring system for overseeing the implementation of labour conventions. Establishing a monitoring system within the Andean Community could compensate the lack of enforcement mechanisms at the subregional level for making Member States comply with international labour standards. Indeed, as was examined in the first chapter, a large part of the ILO’s effectiveness in promoting compliance with labour rights has to do with its supervisory and monitoring functions.

Hence, the Andean Labour Charter could reinforce the ILO’s monitoring system, by perhaps establishing subregional committees composed in part by CCLA members. These committees would be in charge of annually supervising efforts carried out by Member States for complying with their international and subregional obligations, in addition to the similar control already exerted by the ILO. Moreover, it could be interesting to assign these committees the task of making recommendations and issuing reports based on the respect by Member States of the symbolical commitments taken with the adoption and signature of the non-binding social and human rights charters that are currently in force.

3.2.2.4. The Restricted and Government-controlled Participation of Civil Society and Trade Unions in the Andean Community

As was discussed earlier, the CCLA is composed of delegates that are chosen by the most representative organisation of workers, and later approved by the Member State in question, since the composition of the CCLA repeats the traditional tripartite ILO structure. In my opinion, however, the composition at the subregional level should be
more flexible than the tripartite representation before an international organisation like the ILO. The essence of the tripartite structure seems rather ironic if we remember that as the delegates appointed to the CCEA, although firstly appointed by the most representative employers’ organisation, must be approved by the Member State. As of March 2005, the CTV was still not recognized as the most representative workers’ organisation in Venezuela. We must then conclude that the CCLA and CCEA could be composed by workers’ and employers’ delegates not necessarily belonging to the most representative organisations in Member States, but to the organisations approved beforehand by the governments of these countries. Hence, the two main channels for the participation of civil society in the Andean subregional integration process for the improvement of the status of workers in the region are limited to governments’ approval which varies depending on their political interests.

3.3. The ILO Subregional Office for the Andean Countries: what is the ILO specifically doing to protect Andean workers?

The main objective of the ILO regional office for the Americas is to provide local support for the consolidation of the notion of ‘decent work’ in the region. With the promotion of decent work as the ultimate objective, the ILO regional office carries out its activities with the purpose of achieving four main goals, i.e. to create employment opportunities, to promote compliance with labour rights in the workplace, to safeguard the social protection for all workers, and to strengthen tripartite relations and social dialogue.522

Within the ILO regional office for the Americas, we find OSRA, located in Lima, Peru. Following a detailed study and comparative analysis, the OSRA identified the main socio-labour issues that specifically affect the Andean region, namely the inequality in the distribution of wealth, as being one of the highest in the world, the high levels of social and political unrest, and the high unemployment rate, which might appear to be decreasing, but only as a result from the increase in the informal sector of the

522 See ILO ROLAC’s website, online: <http://www.oit.org.pe/portal/index.php> (accessed on June 1, 2005).
economy. In the specific case of Colombia, the OSRA identified problems with the high levels of violence against trade union representatives and social leaders and in reference to Venezuela, the OSRA has determined that the socio-labour context is troublesome given the unresolved and ongoing tensions between the Government and social actors, such as workers’ and employers’ representative organisations.

On its website there is a list of some of the specific programs that the OSRA has developed in the region, and despite the mentioning of several specific projects in Ecuador, Peru, Bolivia and Colombia, there is, regrettably no reference to specific programs carried out for the improvement of labour rights in Venezuela. However, some of the programs that have been developed are mentioned without specifying the Andean country, thereby implying that they have been developed throughout the Andean region, including Venezuela. In this sense, the OSRA has developed a program for the promotion of fundamental labour rights; offered assistance and training to the judicial and legislative branches of the government on the international labour norms and regulations; facilitated support for the integration of people working in the informal sector of the economy and provided training.

The ILO office for Andean countries, as well as the ILO, has placed large interest on the promotion of social dialogue. As a means to do so, the OSRA, working in coordination with the ACTRAV, has placed large emphasis on its cooperation activities with trade unions in the region. The OSRA works with trade unions in Andean countries, for the providing of, inter alia, providing capacity building and professional training in order to strengthen trade unions in the region; counselling in matters relating to their participation in the ILO forum and in other matters of interest; exchanging information

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524 Ibid.
525 Ibid. (Some of the other programs include: drafting national plans for decent work in Bolivia, Ecuador and Peru; proposing programs for the promotion of employment and social protection in Bolivia and Ecuador; providing economic support for the small firms in Bolivia and Peru; training poor women in Colombia; investing in labour in Bolivia, Ecuador and Peru in order to create employment opportunities; evaluating and proposing plans for the modernization of the Ministries of Labor in Bolivia, Ecuador and Peru, among others).
526 See ibid.
527 Ibid. (The ILO defines “social dialogue” as the “essential tool for promoting and reinforcing the rights and principles at work, accomplishing the employment promotion goals and improving social protection”).
with trade unions and setting up researches and studies on matters that are of interest to local trade unions.\textsuperscript{528}

In respect to the ILO’s essential task, that of providing technical cooperation to Member States, there might be certain aspects to criticise, at least in its specific work carried out in Andean countries. One of the most important areas in which technical cooperation is provided is in the form of consultancy on labour matters and especially on fundamental workers’ rights. As examined above, neither the ASC nor the ACHR specifically protect the core labour rights and principles as were defined by the ILO. With well-developed cooperation mechanisms and a strong mission of promoting respect to workers’ rights globally, why are not these charters in line with the 1998 Declaration on Fundamental Principles and Rights at Work?

3.4. Conclusions to the protection of labour rights through the Andean Community

After having examined the labour structure in CAN, there are several important conclusions that need to be highlighted. It is important to acknowledge some of the initiatives taken at the regional level, starting with the essential decision of incorporating a social dimension to the integration process. As a result, workers’ and employers’ organisations, jointly with Ministers of Labour have been actively involved in a process of adopting declarations and issuing opinions and decisions that call for the protection of workers in the region.

However, the adoption of non-binding texts does not guarantee, \textit{prima facie}, an improvement in workers’ rights in the region. Besides the well-known difference and gap between the adoption and amendment of legal texts on one hand, and its not much immediate consequence of actually bringing about changes, on the other, there are a couple of characteristics in the CAN system which represent setbacks in the advancements of these rights.

Despite all efforts made by the CCLA for the improvement in the protection of fundamental labour rights, the focus of the Andean Community seems to still be that of employment promotion and other issues such as labour migration and training, which respond more to economic objectives than to the truly commitment of improving

\textsuperscript{528} Ibid.
workers' rights. With the focus in these areas, the examination of core labour rights, and the eventual adoption of binding Andean documents guaranteeing compliance with these rights, has been placed at a secondary level of importance.

It is important to highlight that this labour process has only recently been adopted in the Andean system. This results in rather "weak institutions" that are too dependant on governmental approval. In this sense, I think that too much power is given to the governments of Member States. The advancement of workers' rights in the Andean region seems then ultimately contingent upon governmental approval.

Additionally, limited participation is given to civil society in the subregional integration process. It could be interesting to take into consideration the criticism addressed by international and domestic NGOs to Andean Governments in their treatment of workers, as opposed to simply having civil society participate in the installation of forums for the exchange of ideas on social and labour issues. Furthermore, domestic NGOs specializing on economic, social and cultural rights should be given status in the Andean Community and should be allowed to lobby government officials and cooperate with workers' organisations. In this same vein, it could be useful to take into consideration the criticisms that have been addressed by different committees in the ILO to Andean Governments' compliance with core labour conventions.

In respect to what the CAN is currently doing to advance labour rights in the region, the initiatives that were taken through PIDS are somewhat discouraging, although viewing them as first steps could be promising. The Subregional Program for the eradication of Child Labour was more comprehensive and attempted to tackle the problem better than the Subregional Program of Fundamental Labour Rights. The process of the harmonization of labour laws is a very important one, although extremely lengthy; and without a direct and immediate effect on the improvement of workers' conditions or guaranteeing that workers exercise their rights effectively.

In the specific case of the violation of labour rights by the Government of Venezuela in respect to the CTV, what could the Andean Community do besides issuing a statement 'rejecting' the exclusion of the CTV from the Andean Labour Advisory Council? It was not able to do anything else. However, the declaration made at the time achieved its purpose of publicly declaring a discriminatory position of the Government of
Venezuela with respect to this trade union, which was based solely on political grounds and in strict violation of the CCLA norms. The public embarrassment was not just made by an NGO or the ILO it was made by a body working within the Andean Community, where the Government of Venezuela has great economic and political interest.

In conclusion, we have seen how the regional Andean integration process is taking into consideration workers’ rights. We have also concluded that slowly some progress has been achieved, but we have also learned that there is plenty more to be done. However, there are some places where the regional process cannot go, namely when it clashes with state sovereignty. Nevertheless, we have also concluded that Andean regionalism could be used as a venue not only to criticise (or ‘reject’, even if it is done through non-binding declarations) the violations of labour rights within Andean States, but also to complement the efforts (or omissions) carried out at the domestic level, like the Venezuelan lack of statistical information on the problem of child labour as criticised by the ILO, and domestic NGOs.

Overall, I think labour rights and human rights activists are expecting more from the Andean Community than it can or will effectively achieve, given its structure, functioning, objectives and the direction Member States are taking it to. Member States’ commitment to the improvement of living conditions and to social and labour issues is strong, as long as it does not affect governments’ sovereignty. On the other hand, if we assume that the labour dimension in CAN, given its dependability on Member States’ interests, is a forum for the discussion and exchange of ideas on labour rights, the participation of workers’ and employers’ organisations in the subregional integration process and the harmonization of labour laws, we realize that the Andean Community has indeed taken many steps in the strengthening of labour rights in the region.
Conclusions

The protection of fundamental labour rights has been reinforced by the ILO since its 1998 Declaration on Fundamental Principles and Rights at Work. In light of this 1998 Declaration, the rights of freedom of association and collective bargaining, the eradication of forced labour and child labour and the elimination of discrimination in employment and occupation, have been, not without criticism, internationally recognised as the most important to be guaranteed for all workers in all regions of the world.

The main criticisms addressed to the ILO are in the sense of stating that it has been an organisation unable to engage effectively in the protection of labour rights. The critiques have their foundation in the lack of enforcement mechanisms of the ILO, when compared to other international organisations like the WTO. Nonetheless, as was discussed in the first chapter, the ILO relies on very efficient channels to address the protection of workers, namely technical cooperation activities, compliance promotion tools and supervisory mechanisms.

The current Venezuelan administration has introduced changes to domestic labour laws and policies, and has even adopted a new constitution. Most of these amendments or substitution of laws have contributed to the progressive recognition in Venezuela, at least in the text of these laws, of fundamental labour standards. The changes that have been introduced, however, have not addressed all the concerns and recommendations made by the ILO and its committees. Additionally, among the main concerns of the ILO committees, especially the CFA is the constant violation of trade union rights and other labour rights by the administration of Chávez.

We see then again, this time not just internationally but in the specific context of Venezuela, the problem of lack of compliance with international labour treaties. In the effort to find solutions to this problem, we turned to the analysis of the subregional protection of workers’ rights. The analysis of the Andean Community’s mechanisms for the improvement of labour rights in the region resulted to be somewhat discouraging. Despite the existence of a court that was recently assigned jurisdiction over labour matters, it was not possible to find in CAN a regional channel for the enforcement of labour rights. Additionally, it is important to observe that CAN does not even develop the
ideological framework for including the most fundamental rights and principles at work as part of the Andean Community’s legal system.529

The achievements of CAN in respect to the social and labour areas, although certainly limited, have been regrettably outweighed by its failures. In my opinion, the failures of the Andean subregional integration process for effectively protecting labour rights, if considered alone, have not been so large. The problem is that in comparison to what is currently needed to specifically guarantee the exercise by workers of their most fundamental rights, the Andean Community falls short, failing to meet those challenges.

The hypothesis of this thesis was to identify the Andean Community, as the organization offering a more adequate alternative to address labour rights’ violations in Venezuela. The idea was to determine, after a critical examination of the threats to workers’ rights in Venezuela, that an Andean sub-regional approach was more effective than an international approach, given the well-known weaknesses of the ILO. Following an exhaustive analysis of the ILO mechanisms that are available and the means used by the Andean Community for the protection of workers, and following a study of the advantages, shortcomings and challenges of each system, I have to discard my initial hypothesis. A more adequate answer for effectively addressing labour rights’ violations in Venezuela is going to be the result of a joint international-regional approach. A joint effort compensates the deficiencies of each system, while offering a stronger approach with overlapping objectives. In this sense, the Andean sub-regional integration system can, for example, significantly strengthen the supervisory and compliance promotion mechanisms exerted by the ILO, while the ILO can, for example, provide technical assistance needed in a much less equipped sub-regional Andean system.

For the purposes of improving labour rights in Venezuela, the ILO offers trade union cooperation, training and capacity building of trade unions officials, promotion of

social dialogue, the possibility of filing complaints and reports against the Government for trade union interference and violations of freedom of association and other fundamental rights, while also exerting pressure on the administration to comply with labour standards, through *in loco* visits, the publication of reports on the government’s performance and the direct recommendations for the changing of policies. As was analysed in chapter two, these mechanisms have proved somewhat effective in the Venezuelan context, on several occasions.

The Andean Community offers Venezuelan workers, although also contingent to the government’s approval of the most representative organisation, the opportunity of participating more directly in the labour integration process, which means that they can actively take part in the drafting of proposals for other AIS bodies to approve. Another important role of regionalism is the harmonization of laws and its promising long-term positive effect on workers in the region. The more the Andean Community carries its activities on the harmonization of laws on social and labour issues, the more protective of workers the Andean system will be.

Furthermore, even if the future of CAN might be uncertain, given its weak structure and other examined flaws, one can conclude that although there has not been much progress in the actual exercise of fundamental labour rights by Venezuelan workers under the current administration, the progressive strengthening of workers’ rights in Venezuela and generally around the world seems, at least in the longer term, a sure deal given the effectiveness of current tasks carried out by the ILO and its sub-regional offices. However, a joint CAN-ILO approach, and more generally joint regional-international approaches aiming at governments to comply with the most fundamental labour rights are essential to accelerate and render the process of strengthening workers’ rights more effective.
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