Women in the World of Work: After Eighty-Six Years, Has the International Labour Organization Done Enough to Promote Equality

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Women in the World of Work: After Eighty-Six Years, Has the International Labour Organization Done Enough to Promote Equality?

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I. Introduction

Women have struggled with employment for centuries. In many nations and for many years, it has been considered undesirable for women to work outside the home. During periods when families were more likely to be engaged in family-run enterprises such as farming, women working within these enterprises did not pose a problem. However, as agrarian lifestyles have declined and industrialization and poverty have increased, even traditional families have found it necessary to have their women work outside the home in order to supplement the family’s income.

Great strides toward equality in employment have made it more common to see women in the paid labor force working side-by-side with men. Women in the workforce are still plagued by traditional ideas about the role of women in society. As a result,
many women are not treated as equal to their male counterparts, even in the world’s most developed nations. In the developed world, this inequality may manifest itself as differences in pay for similar work performed by men and women. In some developing nations, the inequalities may result not only in pay differentials, but also in severe physical and emotional mistreatment as well as unfair and unlawful termination practices that frequently go unpunished.

This piece explores the role of the International Labor Organization (ILO) and other international organizations in curbing such practices and the efficacy of those attempts to promote equality in the global workforce. Several directives promulgated by the ILO will be considered, including the Maternity Protection Conventions, the Discrimination (Employment and Occupation) Conventions, and the Workers with Family Responsibilities Conventions. The effectiveness of the Convention on the Elimination of All Forms of Discrimination Against Women will also be discussed. The piece will particularly focus on the three Central American countries of Guatemala, Mexico, and El Salvador.

II. The International Labor Organization

A. History of the International Labor Organization

Humanitarian, political, and economic concerns motivated the creation of the ILO in 1919. Politically, there was concern that if the numbers of workers under these conditions increased, the inevitable result would be social unrest. There was also an economic interest in leveling the playing field between employers and countries attempting to promote these goals and those who were not.

The ILO is a special agency of the United Nations, but the

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1 International Labour Organization [ILO], ILO History, http://www.ilo.org/public/english/about/history.htm (“The condition of workers, more and more numerous and exploited with no consideration for their health, their family lives and their advancement, was less and less acceptable.”).

2 Id.

3 Id.

organization has its own constitution and governing body. The organization's role is to formulate international labor standards in the form of Conventions and Recommendations setting minimum standards of basic labor rights: freedom of association, the right to organize, collective bargaining, abolition of forced labor, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues.

When the ILO proposes a Convention or Recommendation, member states can sign on and agree to be bound by its terms, or may opt out of certain provisions. Another important deficiency is that even if a signing member breaches the terms of the Convention, the ILO—like its parent, the United Nations—lacks effective enforcement mechanisms. In many cases, one of the only effective ways of ensuring the compliance of particular countries is to incorporate international mandates into their domestic laws. However, this only helps if the country enforces such domestic laws. In the absence of such domestic laws, the only deterrent effect comes from negative publicity a country may receive as a result of breaching the international mandates. Some scholars posit that the ILO is becoming increasingly irrelevant in certain parts of the world; this sentiment does nothing to improve adherence to the organization's mandates.

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5 Id. ("Within the UN system, the ILO has a unique tripartite structure with workers and employers participating as equal partners with governments in the work of its governing organs.")

6 Id.


8 In fact, the organization's constitution mandates that signing countries attempt this. Id. art. 19, § 5(b).


[In Europe the international organization which has the most domestic impact is the European Union and no business can afford to ignore developments there. Nevertheless, the impact of an organization such as the ILO remains largely ignored by the wider business community. At a time when the ILO is in danger of becoming [ir]relevant, this is not a satisfactory state of affairs.

Id. Other scholars note that "the ILO is harming its credibility by continuing to adopt Conventions that are increasingly less ratified." Id. at 63.
B. Procedures of the ILO

Some posit that the ILO has one of the most sophisticated supervisory systems when compared to other international organizations. It certainly has the most elaborate supervisory system of labor law organizations. The system incorporates two procedures: reporting procedures and complaint procedures.

The reporting ones are based on the Constitution of the Organization. Article 22 of the Constitution obliges Member States to report regularly on measures that have been taken by them to give effect to conventions the States concerned have ratified. 'Regularly' originally meant yearly. In view of the number of Conventions that have been drawn up and consequently the greater number of ratifications over the years, the reporting intervals have been changed.

As a result of this increase, the reporting interval has risen to once every four years. The reporting obligation, however, does not rest only with countries that have ratified a pertinent Convention. Those member states who have not ratified a particular Convention are to supply information about "position of their law and practice in regard to matters dealt with in the specific Conventions as well as on the difficulties preventing or delaying the ratification of such Convention." Reporting requirements accomplish different goals, depending on whether a country has ratified a Convention. For ratifying countries, reporting is supposed to provide a means of supervision regardless of whether the reporting state complies with its obligations as a ratifier. For non-ratifying countries, the goal is for the member to show the position of its law and practices on issues covered by the convention, and to give the member an opportunity to explain why it has not yet ratified the convention.

11 Id. at 87.
12 Id. at 88.
13 Id.
14 Id.; see also ILO Constitution, supra note 7, art. 19, para. 5(c).
15 Rood, supra note 10, at 88.
16 Id.
17 Id. at 89.
The ILO also uses the complaint procedure, which consists of two different systems: one for employees or organizations representing employees bringing complaints against member states for non-compliance,\(^\text{18}\) and one allowing member states to bring complaints for non-compliance against each other.\(^\text{19}\) The first system is governed by Article 24 of the ILO Constitution, and the second by Article 26.\(^\text{20}\) Article 24 requires that a member have ratified the treaty as a precursor to lodging a complaint.\(^\text{21}\) Article 26 requires ratification of the treaty by both the state bringing the complaint and the state with the claimed breach of the Convention.\(^\text{22}\)

Throughout the history of the ILO, these procedures have been used infrequently. Instead, an extra-constitutionally based method known as the "freedom of association procedure" has generally been adopted as the preferred method for bringing member states into compliance.\(^\text{23}\) This procedure finds its basis in an agreement between the ILO's governing body and the Economic and Social Council of the United Nations.\(^\text{24}\) The mission of the agreement was accomplished through a Fact Finding and Conciliation Committee on Freedom of Association (FFCC).\(^\text{25}\) The FFCC was replaced in 1951 with the Freedom of Association Committee (CFA) after the first met with opposition.\(^\text{26}\) However, the CFA deals only with freedom of association concerns such as formation of unions, and collective bargaining.\(^\text{27}\)

\(^{18}\) Id.
\(^{19}\) Id.
\(^{20}\) Id.
\(^{21}\) ILO Constitution, supra note 7, art. 24.
\(^{22}\) Id. art. 26.
\(^{23}\) See generally ILO Constitution, supra note 7.
\(^{24}\) Rood, supra note 10, at 89.
\(^{25}\) Id.
\(^{26}\) See id.
\(^{27}\) See id. at 90 ("The early history of the FFCC shows that it met with considerable doubt and lack of cooperation on the part of ILO Member States. It also turned out to encounter serious difficulties as it could only operate with the consent of the defendant State and that consensus hardly ever came about.").
\(^{28}\) See id. ("Allegations will be directed against the governments of the member States irrespective of whether the State concerned has or has not ratified the relevant Conventions, No.87 on the Right to Association and Protection of the right to Organize
Unlike the FFCC, the CFA is accountable to the ILO’s governing body and has no accountability to the Economic and Social Council of the United Nations.29

These committees were designed to perform initial investigations of freedom of association complaints.30 After completion of the examination the committees’ job was to make a report to the governing body.31 The governing body would, in turn pass the report on to the FFCC for further review.32 After replacing the FFCC, the CFA began examining complaints in full before presenting them to the full board for approval of their findings and recommendations.33 A complaint may be brought by “governments or organizations of workers or employers, be they national or international.”34

C. Women’s Issues and the ILO

One of the major areas where the ILO seeks to promote change relates to gender discrimination. For as many years as they have found themselves in the workplace, women have been subject to varying levels of discrimination based on their gender.35 Recognizing this problem, conventions concerning maternity protection and night work for women were among the first six of the ILO’s Conventions promulgated in 1919.36

III. Convention on the Elimination of All Forms of
Discrimination Against Women

A second source of protection for women's rights in the international workforce is the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).\textsuperscript{37} CEDAW was adopted in 1979 by the UN General Assembly.\textsuperscript{38} The Convention strives to "[define] what constitutes discrimination against women and sets up an agenda for national action to end such discrimination."\textsuperscript{39}

The definition of discrimination against women outlined in CEDAW is as follows:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political economic, social, cultural, civil or any other field.\textsuperscript{40}

When a country accepts the provisions of the Convention, it commits itself to take certain steps to end discrimination against women. Countries are supposed to incorporate gender equality protections into their legal systems to rid their laws of discriminatory provisions against women, to prohibit further discrimination, and to set up public bodies to promote protecting women against discrimination.\textsuperscript{41} Differentiating itself from other human rights treaties, CEDAW alone recognizes the reproductive rights of women.\textsuperscript{42}

By March 2004, over 175 states were parties to CEDAW.\textsuperscript{43} Signatories to the Convention are obliged to put its provisions into practice and submit reports every four years that explain the steps they have taken to comply with the treaty.\textsuperscript{44} Despite these lofty


\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Text of the Convention, supra note 37.

\textsuperscript{44} Id.
goals, major world powers—like the United States—have not become parties to the CEDAW Convention, while many of the others who have become parties have not made great strides to comply with its terms.

In the area of monitoring and enforcement, the Convention set up a Committee on the Elimination of Discrimination Against Women. It consists of an independent committee of experts representing “different forms of civilization as well as principal legal systems.”

IV. Maternity Protection ILO Conventions

The Maternity Protection Convention was among the first of the conventions promulgated by the ILO related to the protection of women’s rights. It was enacted in 1919 and was ratified by thirty-three countries. The Convention addressed the fate of women working in both public and private industrial and commercial undertakings. Article 3 of the Maternity Protection Convention made it unlawful, for (publicly or privately employed) women, “to work during the six weeks following confinement.” It required that, while on leave, the woman be paid enough to support herself and the child, and that she be given free birthing services. The Convention protected the woman’s rights to these benefits even where her doctor made a mistake in estimating her due date for giving birth. Finally, the Convention

46 See infra Part VI.A-C.
47 Text of the Convention, supra note 37.
48 Id.
50 Id.
51 Id. An industrial undertaking includes “(a) mines, [and] quarries . . .; (b) industries in which articles are manufactured . . .; (c) construction, reconstruction, maintenance, repair, alteration, or demolition . . .; (d) transport of passengers or goods . . . but excluding transport by hand.” Id. A commercial undertaking includes: “any place where articles are sold or where commerce is carried on.” Id.
52 Id.
53 Maternity Protection Convention, supra note 49, art. 3.
54 Id.
added that a woman needing to remain out of work for longer than a period of six weeks for a medically certified reason resulting from the pregnancy—and making her unfit for work—could not be given notice of dismissal during her absence.  

In 1952 the ILO adopted another Maternity Protection Convention carrying the same name. The 1952 version provides a broader definition of commercial undertaking with a view to reaching a broader array of occupations. It also adds a third job classification: "agricultural occupations."  

Moreover, the 1952 Convention strengthened protections in other ways, including lengthening the maternity leave to twelve weeks. It mandates that pregnant women be given no less than six weeks of time off work after giving birth. The other six weeks could be taken before and/or after the mandated six-week minimum. The Convention adds:

(5) In case of illness medically certified arising out of pregnancy, national laws or regulations shall provide for additional leave before confinement, the maximum duration of which may be fixed by the competent authority. (6) In case of illness medically certified arising out of confinement, the woman shall be entitled to an extension of the leave after confinement, the maximum duration of which may be fixed by the competent authority.

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55 See id. art. 4.
57 Id. art. 1, § 3. It reads:

For the purpose of this Convention, the term non-industrial occupations includes all occupations which are carried on in or in connection with . . . (a) commercial establishments; (b) postal and telecommunication services; (c) establishments and administrative services in which the persons employed are mainly engaged in clerical work . . . .

Id. (emphasis added).
58 An agricultural occupation is defined as "[any occupation] carried on in agricultural undertakings, including plantations and large-scale industrialized agricultural undertakings." Id. art. 1, § 4.
59 Maternity Protection Convention (Revised), supra note 56.
60 Id.
61 Id.
62 Id. art. 6.
The 1952 Convention also outlines the benefits a woman is to receive while on maternity leave and continues to prevent her employer from dismissing her as an employee while on leave.

The most recent Maternity Protection Convention was promulgated by the ILO in 2000. It differs in several ways from the 1952 Convention. It does not seek to classify forms of work into which women’s employment situations might fall, simply stating, “this Convention applies to all employed women, including those in atypical forms of dependent work.” Additionally, the Convention requires that pregnant and nursing women are not obliged to do types of work that would prove detrimental to their health or their children’s health. It extends the maternity leave mandate to a period of fourteen weeks, and adds a provision which preserves a woman’s right to her job should complications in her pregnancy arise. This means that when she is able to return to work her employer has to provide her with the same or an equivalent position paid at the same rate at the

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63 Id. art. 4, §§ 1-8.

The convention requires that while on maternity leave women should receive certain cash and benefits as income; that they receive pre- and post- natal care; that women who don’t qualify for these benefits be provided benefits from social assistance funds; and that employers not be held individually liable for paying these benefits to the pregnant women he employs.

Id.

64 Maternity Protection Convention (Revised), supra note 56, art. 6.

65 Maternity Protection Convention (2000), June 15, 2000, ILOLEX C183, art. 1, http://www.ilo.org/ilolex/english/convdispl.htm [hereinafter Maternity Protection Convention 2000]. This Convention provides a limited “out” for signatories stating “however, each Member which ratifies this Convention may, after consulting the representative organizations of employers and workers concerned, exclude wholly or partly from the scope of the Convention limited categories of workers when its application to them would raise special problems of a substantial nature.” Id. art. 2, § 2.

66 Id. art. 3.

67 Id. art. 4, § 1 (providing for the fourteen-week maternity leave); id. art. 5 (preserving the right to a job).

On production of a medical certificate, leave shall be provided before or after the maternity leave period in the case of illness, complications or risk of complications arising out of pregnancy or childbirth. The nature and the maximum duration of such leave may be specified in accordance with national law and practice.

Id.
end of her maternity leave.\(^{68}\) This provision, like its predecessors, makes it unlawful for an employer to terminate a woman during her maternity leave\(^{69}\) if the reason for the termination relates to the pregnancy, childbirth, or nursing.\(^{70}\)

While it appears that these conventions, if enforced, would do much to protect pregnant women in the workforce, none of them speak to discriminatory practices that affect women who are applying for jobs, a major concern in many ILO member states.\(^{71}\) There is some evidence that the Committee of Experts of the ILO does not view the existence of such a legal relationship necessary for mounting a claim.\(^{72}\) A problem arises, because there are no precedents on this issue in North or South America.\(^{73}\) Experts at Human Rights Watch note that:

To [their] knowledge, there is as yet no jurisprudence in the Americas that flows from ILO Convention 111, but in Europe, a 1991 case illustrated how this standard can be invoked. The European Court of Justice (ECJ) ruled that pregnancy-based

\(^{68}\) See Maternity Protection Convention 2000, supra note 65, art. 8, § 2.

\(^{69}\) Id.

(1) It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer. (2) A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.

Id.

\(^{70}\) Id.

\(^{71}\) See infra note 107 and accompanying text.


Thus, for example, the ILO Convention 111 on Discrimination in Respect of Employment and Occupation specifically prohibits discrimination based on gender in access to employment. The ILO Committee of Experts has interpreted the scope of Convention 11 to prohibit pregnancy discrimination as a form of sex discrimination.

Id. (emphasis added).

\(^{73}\) Id.
discrimination constitutes impermissible sex discrimination. Although the findings of the ECJ are not binding on the Americas, the court's holding does provide a persuasive interpretation of pregnancy-based discrimination as a form of sex discrimination and recognizes it as obstructing women's equal access to employment opportunities.  

Considering this apparent ambiguity in the jurisprudence on the subject of pregnancy discrimination, and the lack of enforcement in many cases, member states may be unlikely to undertake reforms in this area.

V. Selected Conventions Dealing with Equality of Opportunity

In 1958, the ILO adopted a convention titled "Discrimination (Employment and Occupation) Convention." The Convention defines discrimination as "any distinction, exclusion or preference made on the basis of . . . sex . . . which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation . . . ."  

The Convention requires member states to pursue national policies that promote equality of opportunity and treatment in employment opportunities, with the aim of ending discrimination. One hundred sixty-three countries signed on to this Convention. Since the Discrimination Convention did not speak to discrimination resulting from a worker's family responsibilities, the ILO took action in 1981 by promulgating the "Workers with Family Responsibilities Convention," which incorporates into the 1958 Discrimination Convention protection from discrimination-based on a worker's family responsibilities.

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74 Id.
76 Id. art. 1, § 1 (emphasis added). The act provides an exception to the classification of discrimination where the "distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof . . . ." Id. art. 1, § 2.
77 Id. art. 2.
78 Id.
80 The preamble to the Convention begins, "Recalling that the Discrimination
The provision applies to all spheres of economic activity and all classes of workers.\textsuperscript{81} It also incorporates by reference the definition of discrimination set forth in the 1958 Discrimination (Employment and Occupation) Convention.\textsuperscript{82} It aims to give such workers—both men and women—the right to “free choice of employment,” and outlaws the termination of employees solely on the basis of their family responsibilities.\textsuperscript{83} Despite these aims, the provision neglects to mention other employment decisions—like hiring—that might be made on the basis of a worker’s family responsibilities, and therefore fails to provide protection in that area. Other problems arise with respect to enforcement of these provisions, since some member states refuse to sign on to the Conventions and remain non-compliant with its terms.\textsuperscript{84}

VI. ILO Reporting and Complaint Procedures

The ILO requires that member states give periodic reports on their compliance with the organization’s conventions.\textsuperscript{85} Article 22 states:

Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.\textsuperscript{86}

Article 24 outlines the complaint procedure.

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the

\textsuperscript{81} Id. art. 2.
\textsuperscript{82} Id. art. 3, §2.
\textsuperscript{83} Id. art. 4.
\textsuperscript{84} Id. art. 8.
\textsuperscript{85} See infra Part II.B.
\textsuperscript{86} ILO Constitution, supra note 7, art. 22.
government against which it is made, and may invite that government to make such statement on the subject as it may think fit.87

However, it has been noted that most member states have preferred not to use these methods to redress grievances.88 On the organization’s website, there appear to be no published documents pertaining to such reports or complaints.89 As discussed in the next section, many ILO members remain in violation of the very principles the organization seeks to promote.90

A. Case Study: Guatemala

Guatemala is an ILO member nation. It signed on to the above-mentioned 1952 Maternity Protection Convention in 1982,91 but did not ratify the 2000 version of the Convention.92 It is also a signatory to the Workers with Family Responsibilities Convention 198193 and the Anti-Discrimination Convention 1958.94 Despite its signatures and agreements to be bound by the terms of the Conventions, Guatemala’s maquila95 industry, as well as many employers in its domestic sector, are in violation of many of the above-mentioned ILO Conventions, as well as CEDAW.96

Guatemalan women are a particularly vulnerable segment of the population because they lack education in comparison to their male counterparts.97 Many of these women, most of whom have

87 Id. art. 24.
88 See supra Part VI (discussing preferred methods for redress of grievances).
90 See infra Part IV.A-C.
91 See Maternity Protection Convention (Revised), supra note 56.
92 Id.
93 Id.
94 Id.
95 Maquila is the short form of the word maquiladora. Originally associated with the milling process, it became associated with another type of process in Mexico—assembling imported component parts for re-export. Maquilas: What is a Maquila?, http://www.maquilasolidarity.org/resources/maquilas/whatis.htm.
97 Id. at 58. Guatemalans with little formal education and lacking in job training have few options for paid employment. As a result many have chosen domestic service,
completed some level of elementary school,\textsuperscript{98} work in either the domestic sector or in the maquiladora (or maquila) industry. In Guatemala, the maquila industry in Guatemala is heavily concentrated with apparel manufacturing.\textsuperscript{99} Employers are drawn to hire these workers for various reasons, one of which is the vulnerability of the workers.

The industry showed a preference for female labor early on for a variety of reasons. First, women are culturally associated with sewing, and are therefore more likely to have had some exposure to this kind of work and be able to operate a sewing machine more adeptly than a man. Second, women—especially younger women—are thought to have nimble hands and are assumed to be more dexterous and faster than men. Third, women are considered more obedient and less combative than men.\textsuperscript{100} These perceived traits result in the exploitation of Guatemalan women in the workplace.

Access to health care, and especially health care related to child bearing, is one of the major areas in which violation of both women working in the maquila industry and as domestic servants occurs.\textsuperscript{101} Employers of both sets of women deny the women access to the national health care system.\textsuperscript{102} The Guatemalan labor code requires all employers with more than three employees to register them with the Guatemalan Institute for Social Security.\textsuperscript{103} However, domestic workers are seldom employed by persons having greater than three employees, so their employers need not garner this health care policy for them.\textsuperscript{104} Ninety-eight percent of the persons employed in the domestic sector are women.\textsuperscript{105} When

\textsuperscript{98} \textit{Id.} at 85 ("Poor women, with little or no education, suffer gender specific abuses when they work as domestic workers or maquiladora line operators.").

\textsuperscript{99} The maquila industry, especially apparel manufacturing, has expanded rapidly since the 1980s. There are at least 250 apparel maquilas in Guatemala, employing some 80,000 workers, approximately eighty percent of whom are women. \textit{Id.} at 3.

\textsuperscript{100} \textit{Id.} at 84.

\textsuperscript{101} FROM THE HOUSEHOLD TO THE FACTORY, supra note 96, at 39.

\textsuperscript{102} \textit{Id.} at 39, 77 & 124.

\textsuperscript{103} The Guatemalan Institute for Social Security is an employee health care system. \textit{Id.} at 76.

\textsuperscript{104} \textit{Id.} at 39, 76.

\textsuperscript{105} \textit{Id.} at 49.
these women become ill outside the home, they are forced to pay for their own health care,\textsuperscript{106} despite their meager salaries.\textsuperscript{107}

Pregnancy, which is logically considered a health care concern contracted outside the home, is also a major issue. Employers who have over three employees—the statutory trigger number for registration compliance—exacerbate the situation by consistently shirking their responsibility to pay the health care costs for their employees.\textsuperscript{108} Since the Guatemalan system is marked by remarkably small monetary penalties, extended judicial proceedings, and problems with enforcing other penalties, these employers act with veritable impunity.\textsuperscript{109}

Women working in the maquila industry face other obstacles to receiving health care, especially lack of access to reproductive care.\textsuperscript{110} While these workers do have the right to make use of the employee health care system, many of them often find that their use is impeded for several reasons. For example, their managers often fail to enroll employees in the system, and even those who are enrolled are denied time off, and necessary certificates needed

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\item 106 \textit{Id.}
\item Article 165 of the labor code outlines the rights and obligations of employers in case of illness on the part of the domestic worker. Theses stipulations combine paternalism with serious disregard for these workers’ rights. Where a domestic worker contracts a contagious disease within the household, her employer must assume all medical costs toward recovery and pay the worker’s salary until such time.
\item 107 Human Rights Watch reports that “[w]hile the majority of workers we interviewed appeared to earn approximately Q722 (U.S. $96) per month, Human Rights Watch spoke with one live-in domestic worker who had recently earned as little as Q400 (U.S. $53) per month, as well as to another who at the time of the interview was earning Q1,100 (U.S. $147) per month.” \textit{Id.} at 67.
\item 108 \textit{Id.} at 78.
\item 109 \textit{Id.} at 118.
\item 110 Some would argue that discrimination against pregnant women is not rightly considered discrimination on the basis of gender. Others counter that pregnancy as a condition is inextricably linked and specific to being female. Consequently, when women are treated adversely by their employers or potential employers because they are pregnant or because they may become pregnant, they are being discriminated against on the grounds of sex.
\item \textit{Id.} at 27.
\end{itemize}
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to access health services.\textsuperscript{111} Guatemala’s last published report to CEDAW\textsuperscript{112} acknowledges that expectant and new mothers should not have their employment terminated, and that if they are terminated, the decision should be authorized by a judge. That report goes on to add that in 2001 the Guatemalan labor laws were changed to raise fines for violators.\textsuperscript{113} Although less frequently than in the past, violations still occur despite this mandate.\textsuperscript{114} In Guatemala, the inspectorate was given forty-two reports of terminations in violation of established norms concerning pregnant and breast-feeding women.\textsuperscript{115} These reports were submitted in 1998 and through August of 1999.\textsuperscript{116} Women report having been fired after not informing their employers of their pregnancies.\textsuperscript{117} Some such employers cite as justification that “pregnant employees cannot work extra hours, cannot stand for long periods of time, and do not work as hard as others.”\textsuperscript{118}

Several other violations continue to persist in the maquila sector. The latest Maternity Protection Convention mandates that once a new mother has returned to work from her maternity leave, she should be given breaks so she may breastfeed; alternatively, her daily work hours should be reduced. Whatever option the employer chooses, he is supposed to pay the employee for the time she spends nursing.\textsuperscript{119} Employers are not always willing to comply with this provision, but the Guatemalan legislature has incorporated the provision into its labor code.\textsuperscript{120} However,

\textsuperscript{111} \textit{Id.} at 18.


\textsuperscript{113} \textit{Id.} at 9.

\textsuperscript{114} \textit{FROM THE HOUSEHOLD TO THE FACTORY, supra} note 96, at 106.

\textsuperscript{115} \textit{Id.} at 60.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.} at 31.

\textsuperscript{120} \textit{FROM THE HOUSEHOLD TO THE FACTORY, supra} note 96, at 31-32 ("Article 151 . . . prohibits the firing of pregnant and breastfeeding women, except with just cause and special authorization from a labor judge.").
employers routinely block worker access to these maternity rights. "To enjoy the right of 'immobility,' pregnant women must first advise their employers verbally and then within two months provide a medical certificate confirming their status." It is reported that for even those women who are given accommodations, such accommodations do not always comply with the applicable law.

Another major concern for women working in the maquila industry in Guatemala is blatant violations of their privacy rights. Many women working in the maquila industry are questioned about their reproductive status when they apply for jobs in the factories.

Many Guatemalan maquilas have adopted practices to identify pregnant female job applicants in order to deny them employment. Female applicants for jobs in the maquilas are routinely required to state whether they are pregnant as a condition of employment. The practice is widespread, usually taking the form of a direct question on the application from, or a verbal question in individual or group hiring interviews. Some maquilas go further and require pregnancy exams.

The United Nations Human Rights Committee takes the position that "obliging disclosure information related to prospective workers' pregnancy status, as a condition of employment, invades women's privacy." Additionally, many

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121 Id. at 102.
122 Id. at 32.
123 One woman interviewed by Human Rights Watch reported having been asked to resign before the birth of her child with the promise that she would be rehired once she returned to work. She was rehired, but while out of work was not paid and did not receive any health care benefits. Another interviewee noted that while she was given the breastfeeding concession, her employer began counting the breastfeeding time allotment of ten months from the time she went on maternity leave instead of from the time she returned to work from leave. Id. at 108.
124 Id. at 42. ("The UDHR, the American Convention on Human Rights, and the ICCPR 3 guarantee a right to privacy.")
125 Id. at 88.
126 FROM THE HOUSEHOLD TO THE FACTORY, supra note 96, at 88.
127 Id. at 42.

The International Convention on Civil and Political Rights] guarantee[s] against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this
women are subjected to invasive searches, in plain-view, each day as they enter into and leave their factories.\textsuperscript{128}

Workers consistently objected to the daily pat-down searches they must endure upon entering and leaving most factories. These searches generally take place outside, near the main door, where men and women form parallel separate lines to be searched by same sex guards . . . . Several women . . . [complain] that these searches, in and of themselves often extremely intrusive, provided occasions for inappropriate commentary from male colleagues.\textsuperscript{129}

The vulnerability and lack of education of these employees, much less their lack of knowledge regarding avenues of recourse, likely causes most to not take action against their employers.

Women in the domestic sector endure further forms of discrimination. Like their counterparts in the maquila industry, they face discrimination with respect to their reproductive health and access to health care.\textsuperscript{130} On the other hand, women working in the domestic sector are much more likely to become the victims of sexual harassment.\textsuperscript{131}

Guatemala is a signatory to CEDAW.\textsuperscript{132} Even though that convention does not specifically address sexual harassment the CEDAW committee believes this behavior constitutes gender-

\footnotesize{
\textsuperscript{128} FROM THE HOUSEHOLD TO THE FACTORY, supra note 96, at 86.

\textsuperscript{129} Id.

\textsuperscript{130} FROM THE HOUSEHOLD TO THE FACTORY, supra note 96, at 48 (noting that employers routinely refuse to uphold their obligation to pay health care costs).

\textsuperscript{131} Id. at 2.

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based violence which is prohibited by the convention. The committee states:

Sexual harassment includes unwelcome sexually determined behavior as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment including recruitment and promotion, or when it creates a hostile working environment.

Guatemalan women report that "it is not uncommon for young men . . . to initiate themselves sexually with the family domestic worker." The country's first labor minister acknowledges that "there are cases of parents who want their son to have his first sexual experiences with the young woman employed as a domestic [in their home]." Many women who experience these conditions in the home leave their jobs soon after such incidents occur. Further complicating this issue, as of January 2002, Guatemala had no law addressing sexual harassment.

Sexual harassment is a violation of the ILO Convention titled Discrimination (Employment and Occupation) Convention, 1958. That provision includes in its prohibitions "any distinction, exclusion or preference made on the basis of . . . sex . . . which has the effect of nullifying or impairing equality of
opportunity or treatment in employment or occupation.”140 Sexual harassment could be considered a violation because women are treated in a distinct manner on the basis of their gender and that action impairs their equal treatment in the workforce. The provision mandates:

each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.141

Guatemala is a signatory to this Convention and is therefore bound by its terms,142 but it is clearly not in compliance with the provisions when one considers that Guatemala has not established any laws prohibiting this employment practice.143

Domestic workers also experience discrimination with respect to the lack of a minimum wage in their sector. The domestic workers “work long, often unpredictable hours performing back-breaking tasks: fetching water, washing clothes (usually by hand), ironing, washing dishes, scrubbing and mopping floors, dusting, shopping, cooking, making beds, washing windows, walking dogs, and caring for children, among other tasks.”144 Adding to this problem, the labor code in Guatemala does not apply workday limitations to domestic workers.145 Most other workers in Guatemala have the right to an eight-hour workday.146 By statute, domestic workers are only required to receive ten hours for resting, eight of which must be consecutive.147

The Guatemalan labor code only requires that the wage of the domestic worker be “decided between the employer and the worker.”148 Because many women lack both education and other

140 See id. art.1.
141 Id. art. 2.
142 CEDAW: State parties, supra note 132.
143 FROM THE HOUSEHOLD TO THE FACTORY, supra note 96, at 33.
144 Id. at 66.
145 Id.
146 Id. at 42.
147 Id.
148 Id. at 43.
job opportunities, they are particularly vulnerable and many feel forced to take jobs that pay poorly and maintain deplorable work conditions. Additionally, domestic servants are not afforded a legal right to be free of work on national holidays or Sundays; the only accommodation they are given for such days is sixteen hours of rest (instead of the normal ten hours). Because the labor code does not adequately encompass or protect women working in the domestic sector, Guatemala stands in violation of several international Conventions.

B. Case Study: Mexico

Mexico is also member nation of the ILO, but it has never signed on to any of the above-mentioned Maternity Protection Conventions, or the Workers with Family Responsibilities Convention of 1981. Mexico signed the Anti-Discrimination Convention of 1958 in 1961 and has also signed the Convention on the Elimination of All Forms of Discrimination against Women. In spite of its lack of signatures on some of the above-mentioned treaties, Mexico’s federal labor laws are more progressive than those in the United States.

Mexico’s domestic law guarantees equality between men and women, prohibits sex discrimination, protects women workers during pregnancy, and guarantees the right to decide freely and responsibly on the number and spacing of one’s children. Article 170(1) of the federal labor code states: ‘During pregnancy, [a woman worker] will not perform work that

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149 For example, women report not being allowed to eat the food that they cook and serve for their employers. "Many domestic workers complained of being given less food or food of lower quality than the family and not being allowed time to eat." One woman reported that "she had to prepare food for the couple she worked for, and was only given what was left over." *Id.*

150 From the Household to the Factory, *supra* note 96, at 70. This means these women still are required to work eight hours on these holidays.

151 Workers with Family Responsibilities Convention, *supra* note 79.

152 *Id.* However, it should be reiterated that just because a member state has not signed onto a particular convention does not mean that the member will not be asked to report on its actions to comply with its mandates.


154 Mexico, No Guarantees, *supra* note 72, at 31.
requires considerable force and signifies a danger for her health in relation to gestation . . . 155

The problem with these progressive Mexican laws is that "in terms of interpretation and enforcement, [Mexico] is centuries behind." 156 Despite its ratification of the Anti-Discrimination Convention and agreements to report on compliance with the terms of the Conventions as a result of being an ILO member state, Mexico's maquila industry—like Guatemala's—is in violation of many of the aforementioned ILO Conventions, as well as CEDAW.

1. Violations in the Maquiladora Sector

Maquiladoras, or export-processing factories, along the U.S.-Mexico border account for over US$29 billion in export earnings for Mexico and employ over 500,000 workers. 157 The presence of the maquila industry in Mexico dates back over forty years having been created in 1965. 158 Today, at least half of the people working in this sector in Mexico are women, and they earn more at maquiladora jobs than they could in any other industry in Northern Mexico. 159

The women working in this industry have few alternatives for gainful employment. Many of the women are poor and under-educated. 160 The majority of them did not finish their primary

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155 *Id.* It is also noted that according to the federal labor code, companies are required to protect pregnant women from executing tasks that would cause danger to their health in relation to the fetus; pay pregnant women maternity leave of six weeks before delivery and six weeks after delivery; allow new mothers two paid extra breaks of half hour each to breast feed their infants; and allow pregnant women to take an extra sixty days off while receiving fifty percent of their salary, if they so desire apart from the twelve weeks of maternity leave, so long as no more than one year after birth has passed.

*Id.*

156 *Id.*

157 *Id.*

158 Industry goals included industrializing the northern boarder area, providing employment to such an under-employed population, and slowing the illegal immigration across the U.S.-Mexico boarder to obtain work. *Id.*

159 *MEXICO, NO GUARANTEES, supra* note 72.

160 *Id.*
education and have little to no work experience outside this sector besides domestic service, which would provide them much less pay, decreased flexibility, and fewer health benefits.\textsuperscript{161} They live in a society in which the official unemployment rate stands at 6.3%, and because there are so few other job opportunities it would prove inadvisable to protest.\textsuperscript{162} These women also often express their disinclination toward challenging discriminatory actions because of a lack of other suitable job opportunities.\textsuperscript{163} Many of these women move far away from their homes in more central and southern parts of Mexico in order to come to the border to work in the maquiladoras.\textsuperscript{164}

One of the maquiladora sector’s violations of Mexican Federal law, ILO Conventions, and CEDAW concerns the hiring and retention of pregnant women. In terms of money and jobs, production from the maquila industry is worth a great deal.\textsuperscript{165} Women are discriminated against in ways that only women can be: they are required to take pregnancy tests as a condition of employment, they are denied work if they are pregnant, and they are often forced to resign if they become pregnant soon after being hired.\textsuperscript{166} Women are also often required to give blood or urine samples as a part of the interview process.\textsuperscript{167} Once employed, many are asked very private questions about their use of contraceptives, as well as the timeliness of their menstrual cycles.\textsuperscript{168} Women who become pregnant after being hired are frequently forced to resign from their jobs by supervisors who use

\begin{itemize}
  \item \textsuperscript{161} Id. at 1.
  \item \textsuperscript{162} Id. ("Mexico’s official, national unemployment figures are widely acknowledged by the U.S. Commerce Department and other U.S. agencies as being significantly underestimated.").
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Id.
  \item \textsuperscript{165} Id. at 1. ("For the Mexican government, there are economic disincentives to regulating closely the conduct of these companies, given the number of people the maquiladora industry employs and the amount of foreign currency earnings it produces.")
  \item \textsuperscript{166} MEXICO, NO GUARANTEES, supra note 72, at 1.
  \item \textsuperscript{167} Id. at 4.
  \item \textsuperscript{168} Id. In fact, one woman who was being considered for employment and whose menstrual cycle was late was told return when she got her period. She did so, and when she presented to the employer a urine sample containing blood, she was hired. Id. at 23.
\end{itemize}
methods such as reassigning them to more physically demanding work—forcing a pregnant worker to choose between a healthy, full-term pregnancy and her job.\textsuperscript{169}

Despite these blatant infringements "the Mexican government has done little to acknowledge or remedy violations of women's rights to nondiscrimination and to privacy."\textsuperscript{170} These actions run in direct contravention to ILO mandates,\textsuperscript{171} as well as CEDAW.\textsuperscript{172} It has been posited that the government's failure to stop these kinds of discrimination "infringes on women's right to decide freely and responsibly on the number and spacing of their children."\textsuperscript{173} This failure is in direct contravention CEDAW's mandate that countries ensure that women be allowed to decide freely on the number of children they will have and when they will have them.\textsuperscript{174}

The companies involved in the discrimination do so in order to save money.\textsuperscript{175} Maquiladora owners seek out women to work in their facilities "because they view them, as more diligent and hard-working than men and consider women's hands more adept at executing the repetitive motions necessary for rote assembly work."\textsuperscript{176} The women have increased attractiveness as workers because they are among the most vulnerable members of the population.\textsuperscript{177} Most of these women are under-educated, have little job-experience, and have no alternative to working in the

\textsuperscript{169} Id. at 23. It should be noted that not all pregnant women who are detected working in maquilas are forced to resign. The ones who are allowed to stay are generally women who have worked at the maquiladora for more than a year and [who get] along well with [their supervisor]. Women [seem] far more likely to lose their jobs than not when they [have] been working at the maquiladora for less than one year and/or [do] not get along well with their supervisors."

\textsuperscript{170} Id.

\textsuperscript{171} See, e.g., Workers with Family Responsibilities Convention, supra note 79, art. 4.

\textsuperscript{172} See MEXICO, NO GUARANTEES, supra note 72, at 28.

\textsuperscript{173} Id. at 31.

\textsuperscript{174} Id. at 28.

\textsuperscript{175} Id. at 4.

\textsuperscript{176} Id.

\textsuperscript{177} Id.
maquila industry except for domestic work. Employers do not choose men because hiring men to do these jobs "would require higher wages, better working conditions and more flexible work schedules, all of which would increase labor costs and reduce capitalist gains."\(^{178}\) Critics of these practices note that the government of Mexico allows discrimination based on pregnancy status in the private sector, even though such practices violate the country’s international obligations to provide equal protection of the laws as well as ensure the human rights of all its occupants, much less Mexico’s own domestic policies guaranteeing similar protections.\(^{179}\)

2. **Theory by Which These Actions Are Classified as Discrimination**

Undoubtedly, some do not consider preferences based on a potential employee’s status as pregnant or not pregnant as discrimination based on sex. Opponents of this view follow the reasoning that:

[p]regnancy as a condition is inextricably linked and specific to being female. Consequently when women are treated differently by their employers or potential employers because they are pregnant, they are being subjected to requirements for employment to which men are not. Thus pregnancy-based discrimination constitutes a form of sex discrimination by targeting a condition only women experience.\(^{180}\)

C. **Case Study: El Salvador**

El Salvador is a member nation of the ILO; however, it never signed the 1952 Maternity Protection Convention, nor did it ratify the 2000 version of the Convention.\(^{181}\) It did, however, sign the Workers with Family Responsibilities Convention of 1981,\(^{182}\) and the Anti-Discrimination Convention of 1958.\(^{183}\) Despite its

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\(^{178}\) **MEXICO, NO GUARANTEES**, *supra* note 72, at 28.

\(^{179}\) *Id.* at 25.

\(^{180}\) *Id.* at 2.

\(^{181}\) See Maternity Protection Convention (Revised), *supra* note 56; Maternity Protection Convention (2000), *supra* note 65 (listing the ratifying parties).

\(^{182}\) See Workers with Family Responsibilities Convention, *supra* note 79.

\(^{183}\) *Id.*
agreement to be bound by the terms of these Conventions, El Salvador’s maquila industry is in violation of many of the above-mentioned ILO Conventions, its own domestic labor provisions,\textsuperscript{184} and CEDAW.

The maquila industry in El Salvador employs greater than 60,000 people and produces around fifty-nine percent of all exports.\textsuperscript{185} The women working in this industry are presented with several hurdles to fair treatment. Employers have come to see labor rights standards as optional treating violations as something that can be cured, if need be, with ... small payments [to aggrieved workers], a cost of doing business.”\textsuperscript{186}

Many workers in this industry are denied the right to collectively bargain.\textsuperscript{187} Employers use many tactics to accomplish this goal including firing, suspending, pressuring to leave, and blacklisting union members.\textsuperscript{188} Such violations, gone unchecked, violate several international conventions. It is noted that

by permitting legislative impediments to the right to freedom of association and inadequately enforcing the weak existing laws, El Salvador violated its United Nations (U.N.) and Organization of America States (OAS) treaty obligations and its duty as an International Labour Organization (ILO) member to respect, protect, and promote workers’ right to organize.\textsuperscript{189}

In particular, many women in El Salvador are forced to pay into Social Security while their employers do not turn over the funds to the government to cover their health insurance.\textsuperscript{190} This leaves workers with less take-home pay and without health care coverage. Because they cannot be seen at government-run clinics,

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\item \textsuperscript{184} Human Rights Work, Deliberate Indifference: El Salvador’s Failure to Protect Worker’s Rights 2 (2003), http://www.hrw.org/reports/2003/elsalvador/elsalvador1203pdf [hereinafter Deliberate Indifference] (“Because Labor Laws are weak and government enforcement is often begrudging or nonexistent, employers who flout the law have little worry that they will suffer significant consequences.”).
\item \textsuperscript{185} Id. at 82.
\item \textsuperscript{186} Id. at 2.
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Id. at 4.
\item \textsuperscript{190} Id. 26. “In some cases, employers deduct social security payments from workers but then fail to submit the funds to the Salvadoran Social Security Institute, as required by law.” Id.
many workers go without health insurance.\textsuperscript{191} This is a serious
problem for pregnant women who need prenatal care.

Under Salvadoran law, employers are obliged to make
monthly deposits with the Salvadoran Social Security Institute,
consisting of employer dues and contributions deducted from the
worker’s pay checks, as a form of insurance.\textsuperscript{192} If employers do
not turn the monies over, or delay in doing so, individual
employees will feel the repercussions. When these payments are
delinquent, the workers and their families are faced with two
choices: either go to a private clinic or hospital if they can afford
it, or receive no medical treatment.\textsuperscript{193}

When employers fail to comply with the rules, they may suffer
economic repercussions.\textsuperscript{194} The problem is that this policy is not
strictly enforced. “Even when the Labor Inspectorate has evidence
of employer failure to comply with social security laws, it may fail
to inform the ISSS or take any steps to remedy the situation.”\textsuperscript{195}
Another problem women in maquilas in El Salvador face is that
they are denied time off work to go to doctor’s visits.\textsuperscript{196} This, too,
is of particular importance to pregnant women who must go to
doctors periodically for prenatal care, but are blatantly denied
access to health care. In addition, many employees face
repercussions because of their stances against these unfair labor
practices. Sometimes workers who speak out about unfair
practices are fired while others are subsequently blacklisted from
working in other maquilas.\textsuperscript{197} Such practices are not only

\begin{footnotesize}
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\item \textsuperscript{191} DELIBERATE INDIFFERENCE, \textit{supra} note 184, at 26.
\item \textsuperscript{192} \textit{Id.} at 27.
\item \textsuperscript{193} At this particular maquila “workers also claim that the company failed to pay
required maternity benefits for roughly thirty women.” \textit{Id.} at 49.
\item \textsuperscript{194} \textit{Id.} at 27 (“Employer delay in making social security payments is punishable
with up to [ten] percent surcharge of the total amount due.”).
\item \textsuperscript{195} \textit{Id.} at 28.
\item \textsuperscript{196} “Confecciones Ninos workers began an organizing drive in March 2001, in
response to . . . failure to grant permission for doctors’ visits . . . .” \textit{Id.} at 37.
\item \textsuperscript{197} DELIBERATE INDIFFERENCE, \textit{supra} note 184, at 54.
\end{itemize}
\end{footnotesize}
violations of Salvadoran domestic laws; they are clear violations of CEDAW, a convention to which El Salvador is a signatory.

Many of the domestic labor laws in El Salvador are not enforced. Several reasons exist for such a lack of enforcement, including the desire of the government to cover up—or at least deny the existence of—some employers’ actions and the situation. These laws are overlooked because of the great economic impact the maquilas have on the countries in which they operate. In the eyes of the owners and many governmental officials, their continued economic viability depends on their ability to exploit workers in this manner.198

VII. Conclusion

While the ILO has made efforts at achieving equality of opportunity between women and men in the global workforce, it has failed in many areas of the world to provide sufficient protection. Women working in the domestic sector and maquila industry in some Central American countries are faced with many of the same kinds of discrimination and treatment. The companies prioritize their profit margins far higher than they do compliance with international labor and human rights standards—especially for women—and have little incentive to change. The failure of the ILO is due largely to the fact that the organization lacks sufficient enforcement mechanisms to carry out its mandates. As a result many countries in the world view the organization as irrelevant. In order for women in these countries to receive any relief, the Organization will have to be more diligent about requiring compliance with its mandates, or its reputation will continue to decline in the world community. This would result in more wide ranging forms of discrimination, continued prioritization of profits over people, and slower progression toward gender equality in the world workforce.

—E. Abena Antwi


While El Salvador is not a signatory to these conventions, it is a member nation of the ILO which triggers required reporting on compliance with ILO conventions. See ILOLEX: Conventions, http://www.ilo.org/ilolex/english/convdisp1.htm.